ORNO: 95/12 - Adjn (ST) Commr.
" 163/14 "

केवल भारत शासन सेवा
ON I. G. S.

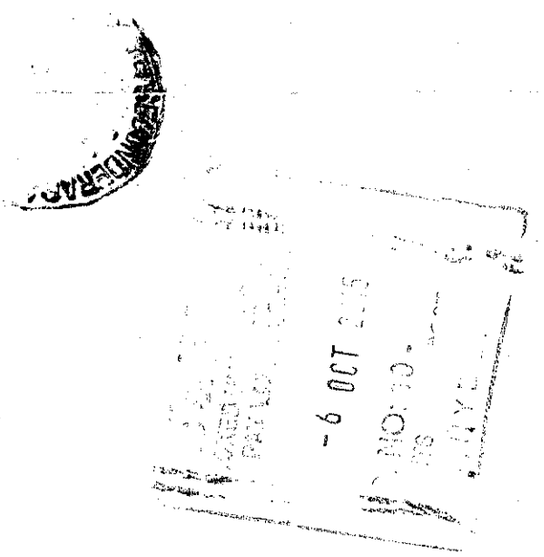
To,

M/s. MODI VENTURES,
5-4-187/3,
2nd floor
SOHAM MANSION,
M. G. ROAD,
SECUNDERABAD - 500003

Apollo
1100

EMS SPEED POST
EX436974265IN

From:
DISPATCHER
Office of the Principal Commissioner
Service Tax Commissionerate,
11-5-423/1/A, Sitaram Prasad Towers,
Red Hills, Hyderabad-500 004.



MODI PROPERTIES & INV. PVT. LTD. SEC'BAD
AWARD No. 592 Date 27/8/15 Sign

सेवाकरप्रिंसिपलआयुक्तकाकार्यालय
OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX
सेवाकरआयुक्तालय :: एल.बी.स्टेडियमरोड
SERVICE TAX COMMISSIONERATE :: L.B.STADIUM ROAD
बशीरबाग :: हैदराबाद- 500 004
BASHEERBAGH :: HYDERABAD-500 004
(दूरभाषPHONE NO: +91-40-2323 1198, फ़ैक्सFAX NO: +91-40-2321 1655)

OR No. 95/2012-Adjn(ST)(COMMR)
OR No.163/2014-Adjn(ST)(COMMR) **दिनांक**Date:31.08.2015

ORDER-IN-ORIGINAL NO. HYD-SVTAX- 000-COM-04&05-15-16
(Passed by Shri SUNIL JAIN, Commissioner of Service Tax, Hyderabad)

प्रस्तावना
PREAMBLE

1. निजीप्रयोगकेलिए इसेजिसव्यक्तिकोजारीकियागया यह प्रतिविनामूल्यकेदीजातीहै

This copy is granted free of charge for the private use of the person to whom it is issued.

2. कोई भीव्यक्तिजोकेन्द्रीय उत्पाद शुल्कअधिनियम, **1944** कीसंशोधितधारा **35** ख (1) केअधीनआदेशसेदुपप्रभावितहोतो इसनिर्ण यकेखिलाफसीमाशुल्क, उत्पाद शुल्कएवंसेवाकरअपीलीयअधिकरणकेदक्षिणीन्यायपीठ, प्रथमतल, विश्वव्यपारकेंद्र भवन, एफ.के.सी.सी.आई कंप्लेक्स, के.जी. रोड, बेंगलूर **560 009** स्थितरजिस्ट्रीकेपत्तेपरअपनाअपीलप्रस्तुतकरसकताहै

Under Sec.35 B (1) of the Central Excise Act, 1944, as amended, any person aggrieved by this order can prefer an appeal to the South Bench of the Customs, Excise and Service Tax Appellate Tribunal having its Registry at 1st floor, WTC Building, FKCCI Complex, K.G. Road, Bangalore – 560 009.

3. इसआदेशकेप्राप्तहोनेकेदिनसेतीनमहीनोंकेअन्दरकेन्द्रीय उत्पाद शुल्क(अपील) नियमावली **2001** केनियम6(1) केअधीननिर्धारितफार्म ई.ए **3** मेंअपीलदर्ज कीजानीचाहिए ।

Appeals must be filed in Form EA3 prescribed under Rule 6(1) of the Central Excise (Appeals) Rules, 2001 within 3 (three) months from the date of communication of this order.

4. हरएकअपीलकाज्ञापन, प्रत्याक्षेप, स्थगितआवेदनयाकोई अन्य आवेदन, फुलस्केपपेपरकेएकओरदुगनास्पेसछोडते हुए स्पष्ट रूप मेंटमकितकियाजाएऔर इसेसमयक रूप सेपृष्टोंको कमवारजमाते हुए सूचकसहितएवंहरएककागजपुस्तककोअलगफोल्डरमेंअधिकमजवूतीकेसाथनत्थीकरनाचाहिए ।

Every memorandum of Appeal, cross-objections, stay application or any other application shall be typed neatly in double spacing on one side of the foolscap paper and the same shall be duly paged, indexed and tagged firmly with each paper book in a separate folder.

5. सीमाशुल्क उत्पाद शुल्कएवंसेवाकरअपीलीयअधिकरण कार्यविधिनियमावली, **1982** केनियम **13** केअधीनयथा अपेक्षित यदि अपीलपर प्राधिकृत प्रतिनिधिद्वारा अपीलकर्ता कीओरसे अपीलएवं हस्ताक्षर करनेके दस्तावेज सहित अधिकरण केदक्षिणीन्यायपीठ केसहायक रजिस्ट्रार केनामसेराष्ट्रीयकृतबैंकसेप्राप्तमूल्यकीरेखितबैंकडाफ्टकेसाथअपीलप्रस्तुतकीजानीचाहिएएवंबैंककीशाखाबेंगलूरमेंस्थितबैंककेअधीनहोनीचाहिए। केन्द्रीय उत्पाद शुल्कअधिनियम, **1944** कीसंशोधित धारा **35F** केअधीन 7.5% कीअनिवार्यपूर्व जमा राशिके साथकियाजानाचाहिए अपील मांगकी हैयाजुर्मानालगायायादोनोंऔरदेयपूर्वजमाकीगईराशि10 करोड़रुपयेकीसीमाकेअध्यधीनहोगा.

The appeal must be accompanied by a crossed Bank Draft for a sum as applicable obtained from a Nationalised Bank drawn in favour of the Assistant Registrar of the Southern Bench of the Tribunal and should be on the branch of bank at Bangalore; and the documents authorizing the representative to sign and appeal on behalf of the appellant if the Appeal is signed by authorized representative, as required under Rule 13 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. Under Section 35 F of Central Excise Act, 1944, the appeal also must be accompanied by mandatory pre-deposit amount of 7.5% of the duty demanded or penalty imposed or both and the amount of pre-deposit payable would be subject to a ceiling of Rs.10 Crore.

****

Subject :Service Tax - Non-Payment of Service Tax on Taxable Services rendered by M/s. Modi Ventures - Issue of Orders - Regarding.

M/s Modi Ventures, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003 [here in after referred to as 'the assessee"] are engaged in providing "Construction of complex service" and "Works Contract service". M/s Modi Ventures is a registered partnership firm and got themselves registered with department on 17.08.2005 under "Construction of Complex service" and on 29.02.2008 under "Works Contract Service" for payment of service tax with STC No. AAJFM0646DST001.

Brief Facts of the Case :

M/s Modi Ventures have under taken one project namely Gulmohar Gardens located at Mallapur village, Uppal Mandal, RR District (total 506 Residential units) in the year 2006 and continued to receive amounts from customers from January 2011 to December 2011 towards sale of land, and agreements for construction. In the said projects, they have entered into sale deed, and agreement for construction with their customers and not discharging the service tax liability on the services provided by them under "Works Contract Service".

2. The subject venture of M/s Modi Ventures, qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like common water supply etc., and the layouts were approved by the concerned authorities. M/s Modi Ventures, received the amounts from the customers, as mentioned in the Sale deeds and agreements of construction. As seen from the records submitted, the assessees have entered into (i) a sale deed and (ii) an agreement for construction, with their customers. On execution of the sale deed, the right on a property got transferred to the customer, hence the construction service rendered by the assesses thereafter to their customers under agreement of construction are taxable, under service tax as there exists service provider and service recipient relationship between them. As transfer of property in goods is involved in the execution of these contracts, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide the sale deeds are taxable services under **"Works Contract Service".**

3. It is clarified in para 3 of the Circular No. 108/02/2009 - ST, dated 29th January 2009that, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction and after such construction the ultimate owner receives such property for his personal use, then such activity is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for a single person for personal use as residence by such person would not be subjected to service tax. Normally, a builder/promoter/developer constructs residential complex consisting of number of residential units and sells those units to different customers. So, in such cases the construction of complex is not meant for one individual entity. Therefore, as the whole complex is not constructed for single person the exclusion provided in Sec 65(91a) of the Finance Act, 1994 does not apply. Further, the builder/promoter/developer normally enters into construction / completion agreements after execution of sale deed, till the execution of sale deed the property remains in the name of

the builder/promoter/developer and the stamp duty is paid on the value consideration shown in the sale deed. As regards the agreements / contracts against which they render services to the customer after execution of sale deeds, there exists service provider and service recipient relationship between the builder/promoter/developer and the customer and such services are leviable to service tax. Thus it appears that the contention and interpretation of the definition of the "Construction of Complex services" and Board Circular dated 29.1.2009 by the assesses appears to be, incorrect.

4. Board vide Circular No. 128/ 10/2010-ST dated 24.08.2010has clarified as follows:

"w.e.f 01/06/2007*when the new service "Works Contract service" was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service* prior to 01/06/2007**.** *This is because* works contract* *describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date. As regards applicability of composition scheme, the material fact would be whether such a contract satisfies* rule 3(3) of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007.*This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract. Once such an option is made, it is applicable for the entire contract and cannot be altered. Therefore, in case a contract where the provision of service commenced* prior to 01.06.2007*and any payment of service tax was made under the respective taxable service before* 01.06.2007**,** *the said condition under* rule 3(3)*was not satisfied and thus no portion of that contract would be eligible for composition scheme. On the other hand, even if the provision of service commenced* before 01.06.2007*but no payment of service tax was made till the taxpayer opted for the composition scheme after its coming into effect from 01.06.2007, such contracts would be eligible for opting of the composition scheme".*

5. As clarified by the above Board Circular, the services rendered by M/s. Modi Ventures during the period 01.06.2007 to 31.12.2011areclassifiable under "Works Contract Services".

Service tax liability under "Works Contract service" :

5.1 As per Section 65(105)(zzzza)of the Finance Act, 1994 "taxable service" under works contract means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.—*For the purposes of this sub-clause,* "works contract" *means a contract wherein,—*

(i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) Such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical

and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

5.2. An optional Composition Scheme for payment of Service Tax in relation to Works Contract Service is provided by the Notification No.32/2007-ST dated 22-5-2007, effective from 01-6-2007, under the "Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Under the said scheme, an assessee has to pay an amount equivalent to two percent of the gross amount charged for the Works Contract, excluding the Value Added Tax (VAT) or Sales Tax paid on transfer of property of goods involved in the execution of Works Contract, w.e.f. 1-3-2008 onwards, the said rate of 2 % is changed to 4% vide Notification No.7/2008-S.T. dated 1-3-2008

5.3. As per Rule 3(2) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

5.4. As per Rule 2A of Service Tax (Determination of Value) Rules, 2006the value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract and the gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract.

5.5. In terms of Board Circular dated 24.08.2010, the amounts received towards construction services after 0.1.06.2007were classified under "Works Contract Services". The post sale deed construction services rendered by them to various customers after 01.06.2007 are classifiable under the category of "Works Contract Services". The subject venture of M/s. Modi Ventures was started in the year 2006 and was going on after 01.06.2007 also. Hence, the same are Ongoing Works Contracts. As the said project is an ongoing Works Contract and the assesees have paid service tax under Construction of Complex Service before 01.06.2007, the benefit of Composition scheme can not be extended.

6. M/s. Modi Ventures, vide their letter dated 07.02.2012 have furnished the details of amounts received towards Sale deed, Agreements of Construction during the period 01/2011 to 12/2011. Board vide Circular

No. 108/02/2009 - ST, dated 29th January 2009 has clarified that service tax is not chargeable for services provided' upto the stage of Sale deed. Therefore the receipt of amounts from each customer, to the extent of the sale deed value, were excluded from the total receipts of individual customer to arrive at the total taxable value of construction services rendered, post execution of sale deed.

7. From January 2011 to December 2011, M/s Modi Ventures, have collected an amount of Rs. 5,88,68,851/- against Agreements of Construction in respect of ongoing Works contracts. In respect of these contracts, the benefit of Composition Scheme cannot be extended. Further, they have also not furnished the details of material consumed. In the absence of which the deduction of material cost under Rule 2A of Service Tax (Determination of Value) Rules, 2006 cannot be extended. Hence, service tax calculated @ 10.30% on Rs. 5,88,68,851 /- works out to Rs. 60,63,492/- (Service Tax of Rs.58,86,885/-, Education Cess of Rs. Rs.1,17,738/-, Secondary & Higher Education Cess of Rs.58,869/-). However, M/s. Modi Ventures have informed vide their letter dated 08.02.2012 that they have paid an amount of Rs. 10,40,000/- under protest. The amount paid under protest is liable to be appropriated and adjusted against their Service Tax liability as the services rendered by them are taxable under "Works Contract Services".

8. M/s Modi Ventures are well aware of the statutory provisions and the liability of Service tax on receipts against the agreements for Construction and have not assessed and paid service tax properly by misinterpreting the definition of **"Works Contract Service",** thereby contravened the provisions of Section 68of the Finance Act, 1994. Hence, the service tax payable by M/s Modi Ventures appears to be recoverable under Section 73(1) of the Finance Act, 1994. They are also required to pay interest in terms of Section 75 of the Finance Act, 1994.

9. From the foregoing it appears that M/s Modi Ventures, Secunderabad have contravened the provisions of Section 68of the Finance Act, 1994read with Rule 6 of the Service Tax Rules, 1994in as much as they have not paid the appropriate amount of service tax on the value of taxable services and Section 70 of the Finance Act, 1994 read with Rule 7of the Service Tax Rules, 1994in as much as they have not shown the amounts received for the taxable services rendered in the statutory Returns and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details / information. Further, M/s. Modi Ventures have rendered themselves liable for penal action under Section 76 and Section 77 of the Finance Act, 1994.

10. In view of the above, M/s Modi Ventures, 5-4-187/3 & 4, III Floor, MG. Road, Secunderabad - 500 003, were issued a show cause notice vide OR No. 95/2012-Adjn(ST)(Commr) dated 24.04.2012 and were required to show cause to the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad-500 004, within 30 (thirty) days of receipt of this Notice as to why:

(i) an amount of Rs. 60,63,492/- (Rupees Sixty lakhs Sixty Three thousand Four hundred and Ninety Two only) should not be demanded from them towards Service Tax inclusive of Cesses, on the "Works Contract Services" provided by them during the period January 2011 to December 2011, under Section 73(1) of the Finance Act, 1994;

(ii) an amount of Rs. 10,40,000/- already paid by them under protest should not be regularized and adjusted against the Service Tax demand at (i) above;

(iii) interest should not be paid by them on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994

(iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994

(v) Penalty should not be imposed on them under Section 76 of the Finance Act, 1994.

11. Further, M/s Modi Ventures, Hyderabad were also issued another show cause notice vide OR No. 163/2014-Adjn(ST)(Commr) dated 26.09.2014 covering further period from January 2012 to March 2014. This notice was issued on similar allegations made in the notice issued vide OR No. 95/2012-Adjn(ST)(Commr) which is discussed above. In the said notice i.e., OR No. 163/2014-Adjn(ST)(Commr) dated 26.09.2014, the assesses were required to show cause to the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad-500 004, within 30 (thirty) days of receipt of this Notice as to why:

(i) an amount of Rs.74,39,581/-(Rupees Seventy Four Lakhs Thirty Nine Thousand Five Hundred Eighty One only) including Cesses should not be demanded on the "Works Contract" services rendered by them during the period from January, 2012 to March, 2014 under Section 73(1) of Finance Act, 1994 read with proviso thereto; and an amount of Rs. 29,22,154/- already paid should not be adjusted against the above demand;

(ii) Interest on the amount of demand at (i) above should not be recovered under Section 75 of the Finance Act 1994;

(iii) Penalty should not be imposed on them under Section 78 of the Finance Act 1994; and

(iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.

12. They were also required to produce at the time of showing cause, all the evidence upon which they intend to rely in support of their defense. They are also required to state whether they would like to avail of opportunity to be heard in person before the case is adjudicated.

13. Earlier a Show Cause Notice vide O.R.No. 125/2011-ST(Adjn)(Commr.) dated 24.10.2011 was issued for the period from 01.06.2007 to December 2010 for a total amount of Rs. 1,38,13,576/- on similar grounds. The present notices issued cover the subsequent period from January 2011 to December 2011 and January 2012 to March 2014 respectively. The Show cause notice issued vide OR No. 125/2011-ST(Adjn)(Commr.) dated 24.10.2011 was adjudicated vide Order in Original No. 06/2013-Adjn(ST)(Commr) dated 17.01.2013, wherein the demands made in the notice were confirmed.

14. M/s Modi Ventures, Secunderabad, authorized M/s Hiregange & Associates, Chartered Accountants, as their authorized representatives to represent their case before the adjudicating authority. M/s Modi Ventures, vide letter dated 01.03.2015 submitted their reply to the show cause notice in OR No. 163/2014-Adjn(ST)(Commr) dated 26.09.2014. However, no reply was submitted in respect of show cause notice issued in OR No. 95/2012-Adjn(ST)(Commr) dated 24.04.2012.

Written Submissions of the Assessee :

15. The assessee in their reply stated that; they are under bona fide belief that their activity is not liable for Service Tax as they are selling/constructing the flats for the individuals which is used for residential purpose; they have paid service tax under protest in view of the notices being issued by the department; they have deducted certain amounts viz., value of sale deed, payment of VAT, payment of Stamp Duty & Registration charges, receipts towards corpus fund, electricity charges etc to arrive at the taxable value on which tax was calculated and paid under protest; filed ST3 returns.

16. Further, the assessee segregated his contentions under different categories which are as reproduced below.

*In Re: V*alidity of Show Cause Notice:

Issues based on mere assumption

16.1. Noticee submits that the subject SCN is issued based on mere assumption and unwarranted inference without considering the facts, the scope of activities undertaken and the nature of activity involved, creating its own assumptions, presumptions and many other factors discussed in the course of reply. Further, the show cause notice issued on the assumption that the

a. Service tax is computed on entire gross amount received from customer including amounts received towards sale of semi-finished flat, Corpus fund, electricity charges, stamp duty, Maintenance charges received on behalf of the owners association
b. Noticee has not submitted the details of amounts received from flat buyers

16.2. Noticee submits entire SCN seems to have been issued with revenue bias without appreciating the statutory provision and also the objective of the transaction/activity/agreement. Further, the show cause notice has issued without appreciating the fact that Noticee has paid voluntarily entire amount of service tax to the department on the amount towards agreement of construction as intended/alleged on the subject SCN.

Noticee have voluntarily intimated service tax payment details at various dates clearly showing the receipts from each and every customer& explaining how tax liability has been arrived and also submitted the copies of Challans for the impugned period. Further impugned show cause notice alleges that Noticee has not disclosed the said facts to the department and invokes the proviso to section 73(1) of Finance Act, 1994.

16.3. The Noticee submits that the subject show cause notice has issued by relying on the information submitted by the Noticee vide letter dated 17thSeptember 2014. The Noticee submits that in the said letter, they submitted the amount received towards agreement of construction as follows.

Sl. No.	Period	Total Receipts towards agreement of construction
1	Jan'12-Mar'12	Rs.2,48,00,944/-
2	Apr'12-Sep'12	Rs.2,80,09,684/-
3	Oct'12-Mar'13	Rs.1,32,12,277/-
4	Apr'13-Sep'13	Rs. 1,06,47,552/-
5	Oct'13-Mar'14	Rs.11,89,688/-

16.4. However, the annexure to the show cause notice mentioned the details of receipts as follows which is entirely different from the details furnished by the Noticee which are as follows.

Sl. No.	**Period**	**Gross amount received**
1	Jan'12-Mar'12	Rs.4,49,46,992/-
2	Apr'12-Sep'12	Rs.5,93,70,068/-
3	Oct'12-Mar'13	Rs.2,45,03,661/-
4	Apr'13-Sep'13	Rs. 2,37,07,665/-
5	Oct'13-Mar'14	Rs. 1,15,53,396/-

From the above comparison of the information submitted and information considered by the subject show cause notice, it clear that the subject show cause notice is based on wrong understanding of the information submitted by the Noticee. On this ground alone, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

16.5. Noticee submits that Para 2 of show cause notice reads as follows *"it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable under "Works contract service"* thus impugned show cause notice on one hand alleges that the liability of service tax is only on the construction agreement and not on the sale deed portion, and on other hand proposes tax on gross amount without any deduction of amounts received towards the sale deed. Therefore issuance of notice in such unclear direction is not valid.

Noticee relied on the following case law : M/s Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC).

Issued without examination of the relevant provision

16.6. The Noticee submits that the subject show cause notice has proposed service tax for the period January 2012 to March 2014 during which levy of service tax was governed in two different approaches one is taxation of services on selected services which applies till 30.06.2012 and another is taxation of services other than the services covered under the Negative list which applies for the period starting from 01.07.2012.

16.7. Noticee proposes to tax the activity of Noticee under old law (upto 30.06.2012) and also under new law (after 01.07.2012) by merely extracting the provisions of section 65 (105) (zzzzh) of Finance Act, 1994 and Works contract (Composition Scheme for payment of Service Tax) Rules, 2007 and

Rule 2A of Service Tax (Determination of Value) Rules 2006 and sections 65B, 66B, 66D & 66E of Finance Act, 1994 and claiming that the status of service tax liability under new law. However there is no discussion as to how the same is liable for service tax under the said different period and the satisfaction of the levy in such period.

16.8. The Noticee submits that under taxation of services on selected services approach, only services of specified descriptions are subjected to tax whereas under Negative List approach, the services specified in the 'Negative List' shall remain outside the tax net. All other services, except those specifically exempted by way of notification, would thus be chargeable to service tax. Negative list approach to taxation of services was introduced w.e.f 01.07.2012 vide new sections, namely, 65B, 66B, 66C, 66D, 66E and 66F in Chapter V of the Finance Act, 1994.

16.9. Noticee submits that from the above it is clear that there is a substantial changes in the service tax law w.e.f. 01-07-2012 whereas impugned show cause notice alleges that taxability of Noticee activity remains same under new law also without explaining how it has been concluded. Therefore notice issued in such unclear direction is not valid and requires to be set aside.

In this regard Noticee wishes to rely on the case law – M/s Crystic Resins (India) Pvt. Ltd., Vs CCE, 1985 (019) ELT 0285 Tri.-Del.

Burden of proof not discharged

16.10. Noticee submits that impugned show cause notice has not at all explained how and why the total gross amount received which is inclusive of amount received for sale of semi-finished flat, is covered under the ***definition of service*** as provided under section 65B(44) of Finance Act, 1994. As the subject show cause notice has not proved its burden of proof, the proposition of demand of service tax is not sustainable and accordingly, the same requires to be dropped.

16.11. Noticee submits that the subject show cause notice has not made any allegations as to how and why there is a short payment of service tax in spite of detailed submissions made by them through way of correspondence, explaining their method of tax treatment for their activity. Further, the show cause notice merely considered the gross amount shown in the workings submitted by them ignoring the various deductions claimed by them for sale of semi-finished flat, amount received towards VAT, stamp duty, corpus fund, maintenance charges, electricity charges etc. As the subject show cause notice has not made any allegations as to how and why the deductions claimed by the Noticee is not applicable, the same is not sustainable and requires to be dropped.

In this regard to Noticee wishes to rely on the following decisions.

a. M/s Dewsoft Overseas Pvt. Ltd Vs Commr. of Service Tax, New Delhi 2008 (12) S.T.R 730 (Tri-Del).

b. M/s United Telecom Ltd. Vs Commissioner of Service Tax, Bangalore 2008 (9) S.T.R 155 (Tri-Bang).

c. M/s Jetlite (India) Ltd. Vs Commissioner Of C. Ex., New Delhi 2011 (21) S.T.R 119 (Tri-Del).

16.12. In light of the above judgments where the Department alleges that the service is taxable, the burden lies upon the Department to establish the taxability. In the present case, the department failed to discharge the burden as no evidence was placed on record to establish that the service is taxable.

In Re: Exclusion under the definition of Construction of Residential Complex Service upto 01-07-2012:

16.13. Without prejudice to the foregoing, Noticee submits that from the above definition of taxable service given under section 65(105)(zzzzh) of Finance Act, 1994, it is evident that definition excludes construction of complex which is put to personal use by the customers and hence outside the purview of the definition and consequently no service tax is payable.

16.14. Noticee submits that non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from *ab-inito.*

16.15. Without prejudice to the foregoing, Noticee further submits that the board in between had clarified in an indicative manner that the personal use of a residential complex is not liable for service tax in the Circular F. No. 332/35/2006-TRU, dated 1-8-2006.

16.16. Noticee submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Ac, 1994 and accordingly no service tax is payable on such transaction.

In support of their contentions the assessee relied upon the following citations :

a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL–1106-CESTAT–Bang,
b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,
c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)
d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang
e. Mohtisham Complexes Pvt. Ltd. Vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang
f. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

In Re: No Service tax on sale of semi-finished flat and Stamp duty, registration charges

16.17. The Noticee submits that the para 2 of the subject show cause notice reads as follows.

> *"As seen from the records, the Noticee entered into 1) Sale deed for sale of undivided portion of land together with semi-finished portion of the flat and 2) agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the Noticee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there is transfer of property in goods in the execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable service under Works Contract service."*

16.18. From the analysis of the above para i.e. 2 of the subject show cause notice it is clear that the show cause notice admitted the fact that *only services rendered by the Noticee after execution of sale deed against agreements of construction to each of their customers* is liable for service tax under works contract service and the subject show cause notice has accepted the fact that service tax is not applicable for the sale of semi-finished flat. In-spite of this admittance in para 2, the subject show cause notice in annexure while quantifying the demand has considered the total gross receipts which also includes the amount received for sale of semi-finished flat.

Noticee submits that the definition of service provided w.e.f 01-07-2012 reads as follows.

> *(44)"Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
> *(a)an activity which constitutes merely,—*
> ***(i)****a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
> *(ii)such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*
> *(iii)a transaction in money or actionable claim;*
> *(b)a provision of service by an employee to the employer in the course of or in relation to his employment;*
> *(c)fees taken in any Court or tribunal established under any law for the time being in force.*

16.19. Noticee submits that from the above exclusive portion of definition of service it is clear that it specifically excluded the *Sale / transfer of immovable property.* In the present case, the agreement of sale deed is entered for sale / register of semi-finished flat which is an immovable property. Accordingly, the amount received for sale of semi-finished flat, stamp duty and registration charges is excluded from the definition of service.

16.20. Noticee submits that the show cause notice in para 2 admitted the fact that there is a sale of semi-finished flat and construction activity has been done on the land of buyers. It substantiates the fact that the activity of sale of semi-finished flat is covered under exclusive portion of definition of service as provided under section 65B(44) of the Finance Act, 1994. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the sale of immovable property is not sustainable and requires to be dropped.

16.21. The Noticee submits that Article 265 of the Constitution of India is extracted here for ready reference.

"No tax shall be levied or collected except by authority of law"

16.21.1. The Noticee submits that Parliament is empowered to levy the service tax vide Entry No. 97 of List of Seventh Schedule to Constitution of India. The Entry No. 97 is extracted here for ready reference.

> *97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.*

16.21.2. The question is whether the tax on sale of immovable property i.e. is not covered under List III. Relevant entries of the List III is extracted here for ready reference.

> *List III–6.Transfer of property other than agricultural land; registration of deeds and documents.*

16.21.3. From the above it is clear that the tax on transfer of immovable property is covered under entry no.3 and service tax which is levied under entry no.97 is not applicable for the sale / transfer of immovable property.

16.22. Noticee submits that from the analysis of section 67 of the Finance Act, 1994, it is clear that service tax requires to be paid on the value of the *services rendered.* In the present case, the subject show cause notice has gone beyond the valuation provisions and demanding service tax even on the amount received for sale of semi-finished flat. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax beyond the provisions of section 67 is not sustainable and requires to be dropped.

In support of their contentions above, the assessee relied on the following case law : M/s GD Builders VS Union of India 2013 (32) STR 673.

In Re: Sale of Semi-finished flats is not a works contract:

16.23. Noticee submits that Para 2 of show cause notice reads as follows "it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable under "Works contract service" thus impugned show cause notice on one hand alleges that the liability of service tax is only on the construction agreement and not on the sale deed portion, hence without prejudice to the findings of the impugned SCN, Noticee

hereinafter makes the submissions to justify that the value of sale deed is not a works contract.

16.24. Noticee submits that from the definition of works contract as provided under section 65B(54) of the Finance Act, 1994, it is clear that to cover under the definition of works contract,

a. There should be a contract. (*Only a Single Contract)*
b. In such contract, there should be transfer of property in goods and
c. Such contract is for the purposes of carrying out, - specified services.

16.25. Noticee submits that in the present case, their agreement of construction may liable under the definition of works contract as provided under section 65B(54) of the Finance Act, 1994 and they are paying appropriate service tax as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006. In spite of appreciating the voluntarily service tax payment made by the Noticee, the subject show cause notice is demanding service tax on the sale of semi-finished flat under works contract service, which is not beyond the definition of works contract service.

16.26. Noticee submits that the transaction of sale of semi-finished flat is not covered under the definition of works contract due to the following reasons.

a. The Noticee has entered two separate transactions with the customer, whereas the definition requires only one contract.
b. Transaction is for sale of semi-finished flat and not for construction.

16.27. As the present transaction of the Noticee is not covered under the definition of works contract, the proposition of subject show cause notice demanding service tax under works contract service is not sustainable and requires to be dropped.

In Re: No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department

16.28. Noticee submits that the subject show cause notice also demanded service tax on the amount received towards, corpus fund, electricity charges, maintenance charges, which is received on behalf of the owners association or the electricity department. However, the subject show cause notice has not provided any reasons as to how and why the said amounts were liable for service tax under works contract service.

16.29. Noticee submits that in the present case, they have paid applicable service tax on the construction agreement, which may be liable under works contract service. However, the subject show cause notice without appreciating the voluntarily service tax payment made by the Noticee demanding service tax on the amount received towards corpus fund and electricity charges which is not at all covered under the definition of works contract service.

16.30. Noticee submits that in the present case, as they have received the amount towards electricity charges and corpus fund as an agent of the service receiver, the amount received towards to be excluded from the valuation as per Rule 5(2) of Service Tax (Determination of Value) Rules, 2006. As the subject show cause notice has not considered this aspect, the proposition of the subject show cause notice demanding service tax on these items is not sustainable and same requires to be dropped.

16.31. Noticee further submits that the amount received towards corpus fund and electricity charges can also be considered as reimbursement of expenses collected at actuals. In this regard, they wish to rely on the decision of Hon'ble Delhi High Court in the case of Intercontinental Consultants &Technocrafts Pvt. Ltd Vs Union of India 2013(29) STR 9 (Del).

In Re: Quantification of the tax liability:

16.32. Noticee submits that assuming but not admitting they are liable for service tax under works contract service and also as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then Noticee submits that as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then the value of the land involved in the project should be excluded from the determination of service tax liability. Noticee humbly requesttheadjudicating authority to exclude the value of land from determination of service tax liability.

16.33. Further, It is observed that the assessee has tried to bifurcate every aspect of noncompliance regarding tax liability and imposition of subsequent penalties under the Law, and segregated their contentions under different heads. The assessee has further submitted their arguments under different propositions which is detailed as under :

1. *In Re: Benefit of cum-tax;*
2. In Re: Extended period of limitation is not invokable;
3. In Re: Interest under Section 75 of Finance Act, 1994
4. In Re: Penalty under Section 77 & 78 of Finance Act, 1994
5. In Re: *Benefit under section 80*

Finally they requested to be heard in person.

17. In view of the above, a personal hearing was fixed, in consultation with the assessee, for both the notices mentioned above, on 29.07.2015. Sri.V.S.Sudhir, Chartered Accountant (Authorized representative) and Sri M.Jayaprakash, Manager (F&A), M/s Modi Ventures appeared before me. They reiterated the submissions made in their written reply to the show cause notice. Further submitted that occupancy certificate was received on 19.12.2011 and sales thereafter should not be subjected to Service Tax. They requested a week's time to submit statement of re-computation to this effect. ON 04.08.2015 they submitted re-computation statement and stated that they have paid service tax in excess of short paid amount. Considering their written submissions, vide letter dated 01.03.2015, for both the notices, I take up both the issues for adjudication.

Findings and Discussions :

18. I have carefully gone through the show cause notices, viz., O.R.No. 163/2014-Adjn(ST)(Commr.) and O.R.No. 95/2012-Adjn(ST)(Commr.), reply submitted by the assessees and also the case laws cited by them is support of their contentions. The grounds for demand in these two notices are identical, but for different periods, therefore taken up for adjudication vide this common order. The details of the impugned Show Cause notices are as under:-

S. No.	SCN OR No. with date	Period covered	Taxable Service	Service tax demanded (in Rs.)
1.	95/2012-Adjn.(ST) (Commr) dt. 24.04.2012	January,2011 to December, 2011	Works Contract Service	**60,63,492/-**
2.	163/2014-Adjn.(ST) (Commr) dt. 26.09.2014	January,2012 to March, 2014	Works Contract Service	**74,39,581/-**

19. The issues involved can be broadly classified into two categories viz., Whether the service provided by the assessee is rightly classifiable under 'Works Contract" in the light of changes in the provisions of Law concerning construction of Residential Complex, Commercial Construction etc., *vis a vis* Works Contract Service prior and subsequent to 01.07.2012 and whether deductions as claimed by the assessee is eligible for arriving at the taxable value in the light of new provisions/definitions under Works Contract scheme.

20. The notice had undertaken construction activities and during the impugned period, there was sale of residential flats in an ongoing project called "Gulmohar Gardens" Mallapur Village, RR District. The demand of Service Tax was made against them on the provision of service under the category of 'Works Contract Service' during the period from January 2011 to March 2014 in the above two notices, for a total amount Rs.1,35,03,073/-. The assessee *per se* contested their tax liability on various grounds and also questioned the issue of notices in terms of proviso to Section 73(1) of the Finance Act, 1994, as amended. They were earlier served with first notice in O.R.No.125/2011-Adjn. (ST)(Commr.)dated 25.10.2011 raising demand under 'Works Contract Service' covering the period from 01.06.2007 to December, 2010. The assessee had taken Service tax registration on 'Construction of Complex Service' in August 2005 and under 'Works Contract Service' in the year 2008. These being the material facts, I now proceed to examine the submissions made by the assessee.

21. As seen, the assessee referred several case laws, Board's circulars, instructions and represented that their activity neither falls under the category of 'Construction of Complex Service' nor 'Works Contract Service'. The definitions and taxability of the relevant service categories and the statute are reproduced hereunder for a better understanding.

21.1 "Construction of Complex" as perSection 65(30a) of the Finance Act, 1994 means —

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;

21.2. "Residential Complex" as per Section 65(91a) of the Finance Act, 1994 means any complex comprising of—

(i) a building or buildings, having more than twelve residential units;
(ii) a common area; and
(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation: For the removal of doubts, it is hereby declared that for the purposes of this clause,
(a) personal use includes permitting the complex for use as residence by another person on rent or without consideration;
(b) residential unit means a single house or a single apartment intended for use as a place of residence;

21.3. "Taxable Service" in terms of Section 65 (105) (zzzh) of the Finance Act, 1994 means any service provided or to be provided to any person, by any other person, in relation to construction of complex;
Explanation:- For the purposes of this sub–clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;

21.4. Further, in terms of Section 65 (105) (zzzza) of Finance Act, 1994, **"Taxable Service"** means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation: For the purposes of this sub-clause, **"works contract"** means a contract wherein,

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) **construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry**; or

(c) **construction of a new residential complex or a part thereof**; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

22. Thus, it is seen that the construction activity either commercial or residential are individually defined under the provisions of Section 65(30a) and 65(91a) of the Finance Act, 1994 with taxability of 'construction of complex' provided in terms of Section 65(105)(zzzh) and the same activity also forms a part of the 'Works Contract Service' under specific conditions and made taxable in terms of Section 65 (105) (zzzza) of Finance Act, 1994. It is noticed that the 'Construction of Complex Service' was taxable from 16.06.2005 vide Notification No.15/2005-ST, dated 07.06.2005, while the 'Works Contract Service' was introduced w.e.f 01.06.2007 vide Notification No. 23/2007-S.T., dated 22.05.2007, as a composite contract involving transfer of property in goods and rendition of services. Thus, where construction activity taken up is within the precincts of the provisions of Section 65(30a) and 65(91a), the activity defined as 'Construction of Complex Service' and wherever the construction activity involves goods and services in a composite contract, the 'Works Contract Service' prevails. However it is the contention of the assessee that after introduction of 'Works Contract Service', the levy of service tax on 'Construction of Complex Service' had created lot of confusion and many questions were raised about the constitutional validity. There was also a basic doubt about the liability of the service tax itself on the construction activity.

23. In this regard, it is pertinent to mention that the taxability of service element in a transaction of goods and services was prevalent even before the leviability under 'Construction of Complex Service'. Vide Notification No. 12/2003-ST dated 20.6.2003, exemption from payment of Service Tax was provided on the value of goods and materials sold by the service provider to the recipient of service, from the Service Tax leviable thereon under Section 66 of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials. Thus, the service portion was subject to Service Tax even if it involved transfer/sale of goods, but where the supply of goods and services are integrally connected with each other, in such composite contracts, their segregation is futile. In such circumstances, the service category 'Works Contract Service' was

introduced *as an amalgamation of the existing taxable services and also encompassing the 'Construction of Complex Service'.*

23.1. The decision of the Principal Bench of the Hon'ble CESTAT in the case of Larsen and Toubro Ltd. Vs CST, Delhi [2015 (318) E.L.T. 633 (Tri. - LB)], amply clarifies the taxability aspect of construction activity vis-à-vis the 'Construction of Complex Service' and the 'Works Contract Service' as follows:-

"A. Neither Commercial or Industrial Construction Service (CICS), and Construction of Complex Service (COCS) nor Erection, Commissioning or Installation Service (ECIS), as these services are defined in respective clauses of Section 65, read with the charging provisions in Section 66, the valuation provisions in Section 67 of the Act, the 2006 Rules (prior to insertion of Rule 2A therein, w.e.f. 1-6-2007) and exemption Notification Nos. 12/2003-S.T., 15/2004-S.T., 04/2005-S.T. and 1/2006-S.T., authorize a charge of Service Tax on a works contract (which is a distinct contractual arrangement inhering integrated elements of accretion sale of goods and of exertion of labour/rendition of services);

B. Taxable services defined and enumerated as CICS, COCS & ECIS cover only such contracts/transactions which involve pure supply of labour or rendition of service(s), falling within the ambit of the respective definitions;

C. Only since the insertion of sub-clause (zzzza) in clause (105) of Section 65, w.e.f. 1-6-2007, complemented by the amended 2006 Rules (inserting Rule 2A therein) and the 2007 Composition Rules, that the requisite and appropriate statutory framework, for charging, levy, collection and assessment of Service Tax, supported by appropriate computation/valuation machinery on a works contract stands incorporated. This framework defines 'works contract' (in the Act) by clearly enacting the legislative recognition that this distinct species of contractual arrangements inheres components of sale of goods which fall within the (exclusive) taxation domain of States, for levy of sales tax;

D. Rule 2A of the 2006 Rules [applied exclusively to 'works contract' referred to in sub-clause (zzzza)] inserted w.e.f. 1-6-2007, mandates specified exclusions/deductions from the gross amount received on execution of a works contract (in terms of the principles/norms particularized and catalogued in the second Gannon Dunkerley ruling and reiterated in subsequent precedents);

E. The 2007 Composition Rules, also introduced w.e.f. 1-6-2007 (and made explicitly applicable only to WCS), provide an optional composition protocol which enables availment of calibrated deductions, particularly appropriate to situations where proof of the value of sale of goods by accretion/incorporation cannot be furnished or the nature of the transaction is such as to render the necessary accounting process cumbersome, impractical or inadequate;

F. The enactment of a specific legislative provision - sub-clause (zzzza); and the simultaneously introduced supportive and reinforcing provisions of the 2006 and 2007 Rules (all w.e.f. 1-6-

2007) signal (1) the enactment of a charge of Service Tax on a works contract; and (2)incorporation of the requisite computation, valuation and machinery provisions, which facilitate a coherent, fair, rational, stable and legitimate exaction of tax, confined to such components/elements of this composite, facially indivisible transaction as fall within the taxation domain of the Union, under Entry 97, List-I of the Seventh Schedule of the Constitution of India. Only upon introduction of such integrated statutory architecture, w.e.f. 1-6-2007, has uncanalized executive/quasi-judicial discretion been, substantially eliminated; and assessment of service components and associate components/elements involved in the execution of a works contract, by lawful and intra vires valuation, levy and collection of Service Tax, ensured to be non-discriminatory and rational;"

23.2. SIMILARLY, THE GIST OF THE DECISION OF THE HON'BLE CESTAT, PRINCIPAL BENCH, NEW DELHI IN THE CASE OF INSTRUMENTATION LTD VS CCE, JAIPUR-I [2011(23) STR 221(TRI.-DEL)] READS AS FOLLOWS:

"WORK CONTRACT - TAX LIABILITY BEFORE 1-6-2007 - SERVICE IN RELATION TO EXECUTION OF WORK CONTRACT, AS DEFINED IN SECTION 65(105)(ZZZZA) OF FINANCE ACT, 1994, COMING INTO FORCE W.E.F. 1-6-2007 - IT IS DIFFERENT FROM SERVICES DEFINED IN OTHER SUB-CLAUSES OF SECTION 65(105) IBID - READ WITH RULE 2A OF SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006 AND WORK CONTRACT (COMPOSITE SCHEMES FOR PAYMENT OF SERVICE TAX) RULES, 2007, IT ONLY PROVIDES A NEW MACHINERY PROVISION FOR ASSESSMENT OF SERVICE TAX ON CONTRACTS INVOLVING TRANSFER OF PROPERTY IN GOODS ON WHICH SALES TAX/VAT IS CHARGEABLE VIZ. "ERECTION, INSTALLATION OR COMMISSIONING CONTRACTS", "COMMERCIAL OR INDUSTRIAL CONSTRUCTION CONTRACTS", "RESIDENTIAL CONSTRUCTION SERVICE CONTRACTS" AND "EPC CONTRACTS" - HOWEVER, IT DOES NOT MEAN THAT THESE CONTRACTS WERE NOT LIABLE TO SERVICE TAX PRIOR TO 1-6-2007 FOR SERVICES RENDERED UNDER THEM, EVEN IF THEY INVOLVED USE/SUPPLY OF GOODS ON WHICH SALES TAX/VAT WAS PAYABLE. [PARA 5.5.2]"

23.3. From the above discussions and going by the ratio of the judicial pronouncements referred supra, it is evident that with the introduction of works contract service with effect from 01.06.2007, certain services, including 'Construction of Complex Service'/'Residential Construction Services', were brought under the umbrella of 'Works Contract Service' for the purpose of levy of service tax, even in case they were defined and taxable under 'Construction of Complex Service' prior to 01.06.2007. In fact, the decision of the larger bench in the case of Larsen and Toubro Ltd. clarifies the taxability aspect of construction activity in toto.

24. They further contended that *the construction of residential units for individual prospective buyers were intended for personal use and are outside the purview of Service Tax in terms of Section 65(91a)(iii) of the Finance Act, 1994. As seen,* the project "Gulmohar Gardens" comprises of more than 12 residential units, having common area & common facilities like water supply, sewerage, etc which are provided by the Noticee, and the layouts of the same were duly approved by the competent authority. Hence the

argument put forth by the noticee that the conditions mentioned in the definition are not fulfilled is vague and without any basis.

24.1. As regard their contention that the residential unit is intended for personal use, it is clear from the statutory provisions that if a complex is constructed by a person directly engaging any other person for designing or planning and the construction of the said complex is intended for personal use then such service is excluded from the levy of Service Tax. However, the said exclusion is not applicable to the individual residential unit in a project having more than twelve residential units. As rightly contended by the noticee, while interpreting the statutory provisions of the law no words should be added or deleted. Further, when the law is unambiguous, the same needs to be implemented in letter & spirit and without any deviation to it. On a plain reading of the statute, the intent of the legislature is very clear that construction of entire residential complex which is intended for personal use is excluded from levy of Service Tax and not the single residential unit in a complex. In this regard, the following case laws are relied upon;

(i) State Vs. Parmeshwaran Subramani [2009 (242) ELT 162 (SC)]

> *"15. In a plethora of cases, it has been stated that where, the language is clear, the intention of the legislature is to be gathered from the language used. It is not the duty of the court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain. The court cannot rewrite the legislation for the reason that it had no power to legislate. The court cannot add words to a statute or read words into it which are not there. The court cannot, on an assumption that there is a defect or an omission in the words used by the legislature, correct or make up assumed deficiency, when the words are clear and unambiguous. Courts have to decide what the law is and not what it should be. The courts adopt a construction which will carry out the obvious intention of the legislature but cannot set at naught legislative judgment because such course would be subversive of constitutional harmony".*

(ii) UOI Vs. Dharmendra Textile Processors [2008 (231) ELT 3 (SC)]

> *"It is a well-settled principle in law that the* ***court cannot read***

24.3. From the statutory provisions reproduced supra, it is seen that all kinds of residential constructions are not under the ambit of service tax. **Only the services in relations to construction of residential complex are under the tax net.** What constitutes 'residential complex' has also been defined. Certain category of residential complexes which otherwise satisfy the definition have been kept out of the purview of the levy, by way of an exclusion clause which is recaptured as under:-

> *"...but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person."*

24.4. A literal meaning of the same is that if a residential complex is constructed by a person for his self use, then such complex falls under excluded category and service tax is not chargeable. However, this literal interpretation is resulting in making the said exclusion otiose as even otherwise service provided to self does not attract service tax. This is where the Board's clarification 108/02/2009-ST dated 29.01.2009, becomes relevant, wherein it has been clarified as under:-

> *Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'.*

24.5. In view of the above, it is clear that the exclusion is to be applied at the level of residential complex constructed for a person. If a project is meant for personal residential use of a single person, service tax is not chargeable. The exclusion cannot be applied to the residential unit in a residential project, where the individual houses constructed are for use by many different persons. Any different interpretation would render the entire levy as non-existent as the residential units are invariably meant for personal use. Clearly, the submission of the assessee is not tenable.

24.6. To sum up, the argument of 'personal use' is of no avail as the exclusion clause is applicable only when the 'entire residential complex' is constructed for personal use of one person, which is not the case here. The case laws relied upon by them in this regard is distinguishable to the facts of the case. It is inherent that the construction activity of the noticee under the said project rightly comes under the ambit of definition of 'residential complex' and in terms of the decision of the larger bench in the case of Larsen and Toubro Ltd., while the activity prior to 01.06.2007 relates to 'Construction of Complex Service', the activity from 01.06.2007 falls under the purview of 'Works Contract Service'.

25. The noticee is also found contending that their activity relates to sale of immovable property which is not covered under the Act. They further state that in commercial & legal parlance, the essential feature of their transaction is sale of immoveable properties, thereby, the only place where the tax can

be examined is under the Explanation to Section 65(105)(zzzh) as a deemed service and not under Section 65(105)(zzzza).

25.1. Regarding their contention that the sale of immovable property has not been covered under the Finance Act, 1994, it is pertinent to note that in respect of transfer of immovable property, the applicability of levy under the category of 'Works Contract Service' is clarified from the Apex Court decision in the case of Larsen & Toubro Ltd. Vs. State of Karnataka [2014 (303) E.L.T. (S.C.)] which reads:

> *"Works contract resulting in transfer of property in goods - Constitution of India - Article 366(29A)(b) - Transfer of property in goods (whether as goods or in some other form) involved in execution of works contract - "In some other form" has enlarged ordinary understanding of 'goods' by bringing within its fold goods in form other than goods viz. goods which have ceased to be chattels or movables or merchandise and become attached or embedded to earth - Goods which have by incorporation become part of immovable property are deemed as goods - 'Tax on the sale or purchase of goods' includes tax on transfer of property in goods as goods or which have lost their form as goods and have acquired some other form involved in execution of works contract - Hence, transfer of property in goods under Article 366(29A)(b) is deemed to be sale of goods involved in execution of works contract by person making transfer and purchase of those goods by person to whom such transfer is made." [paras 60, 61, 101(ix)]* (emphasis supplied)

25.2. It is not in dispute that 'Works Contract Service' came into being w.e.f 01.6.2007 and included services such as construction of residential complex, erection, commissioning or installation, etc., with a specific condition that there should be transfer of property in goods involved in the execution of such contract and should be liable to sale tax. From the definition of 'Works Contract Service' under Section 65(105)(zzzza) of the Finance Act, 1994 detailed supra, it is clear that contracts for carrying out construction of a new building/ residential complex fall within the definition of Works Contract Service. In the instant case, it is not in dispute that the noticee rendered the services of construction of residential complexes. The contracts being composite inasmuch as the construction involves both services and goods and the constructed residential building/villas are transferred to the buyers, the entire gamut of activities undertaken by the assessee aptly falls under the Works Contract Service.

25.3. In the case of Alstom Projects India Ltd Vs CST, Delhi [2011(23) STR 489(Tri-Del)], the Principal Bench of the Hon'ble CESTAT held as follows:-

> *"6.1 (2) The entry "Service in relation to execution of work contract" as defined in Section 65(105)(zzzza) is different from services defined in other sub-clauses of Section 65(105). In fact, as discussed above, Section 65(105) (zzzza) read with Rule 2A of Service Tax (Determination of Value) Rules, 2006 and Work Contract (Composite Schemes for Payment of Service Tax) Rules, 2007 only provide a new machinery provision for assessment of Service Tax on "Erection, installation or Commissioning Contracts", "Commercial or industrial construction contracts", "Residential Construction Service Contracts" and "EPC Contracts" involving transfer of property in goods on which Sales Tax/VAT is chargeable. But it does not mean that these contracts were*

not liable to Service Tax prior to 1-6-07 as, as discussed above, "erection, installation or commissioning services", "commercial or industrial construction service", Residential constructions services were taxable even prior to 1-6-07, even if the same involved use/supply of goods on which Sales tax/VAT was payable....."

25.4. Similarly, in the case of LCS City Makers Pvt Ltd referred supra, the relevant portion of which is reproduced as hereunder:-

"10.2 .....What we find is that the entry in section 65 (105) (zzzza) of Finance Act, 1994, called as "Works Contract Service" covers certain services which are covered by entries in section 65(105)(zzd), 65 (105) (zzq), 65 (105)(zzt), 65(105) (zzzh), etc of the said Act, before and after the introduction of the new entry for works contract. So this cannot be interpreted as an altogether new entry. It only provides a new method of determining the liability on such services at the option of the service provider. Accepting the argument of the appellants would render all taxes levied and collected on such services prior to 01-06-2007, as without authority of law. A reading of the entry in section 65 (105) (zzzza), Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and Rule 2A of Service Tax (Determination of Value) Rules, 2006, does not warrant such an interpretation.

10.3. We also note the Apex Court has held in BSNL Vs. UOI - 2006 (2) S.T.R. 161 (S.C.) = 2006-TIOL-15-SC-CT-LB held that the nature of a composite contract should be decided with reference to intention of the parties and also with reference to the dominant aspect of the contract. Further it was held that a contract of the nature of composite contract as defined in Article 366 (29A) of the Constitution of India can be spilt into sale and service. In this case the Land Owners parted with partial rights in their land to be paid for in the form of constructed flats. Construction of flat is in the nature of a composite contract specified in Article 366 (29A). So the value of the material supplied and the service provided can be separated and subjected to Service Tax. While levying Service Tax such splitting is done by providing abatements from the total value of contract."

25.5. Further, from the definition of 'Works Contract Service', a service to be classified under this category has to satisfy the following conditions:

(a) There should be a contract.

(b) It should be a contract for the purpose of carrying out the services mentioned in clause (ii).

(c) The transfer of property involved should be leviable to sales Tax.

25.6. In the present case, I find that the assessee are entering into contracts with the service recipients, the contracts were for the purpose of carrying out the services mentioned at clause (ii) (c) of the explanation to the definition of works contract and the assessee are paying Sales Tax on the property involved in the execution of the contract, as they have claimed deduction of VAT.

25.7. The assessee in their reply dated 01.03.2015 mentioned under the Facts of the Case that agreement of sale is entered between the noticee as

the 'Builder' and the purchaser as 'buyer' and involves a gamut of services and transfer of goods. Hence, I find that the services being rendered by the assessee merits to be classified under the category of 'Works Contract Service'.

25.8. Further, Section 65(A) of the Finance Act, 1994 provides that when for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of section 65, the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description. In the present case, the services being rendered by the assessee are classifiable under Section 65(105) (zzzh) as "Construction of Residential Complex Service" and under Section 65(105) (zzzza) as "Works Contract Service." The activity undertaken by the assessee not only involves construction activity but also includes transfer of property involving Sales tax. Therefore, I find that Section 65(105) (zzzza) is more specific than Section 65(105) (zzzh). Hence, I find that the activity undertaken by the assessee since 01.06.2007 is rightly classifiable under "Works Contract Service". In this regard, the Ministry vide letter F.N.334/01/2007-TRU dated 28.02.2007 explained the provisions of newly specified services during the year 2007 which includes Works Contract Service, and specifically clarified as under:

> *"4. In continuation of the policy of widening of the service tax base, the Finance Bill, 2007 proposes to,-*
>
> *• Levy service tax on more services,*
>
> *• Expand or clarify the scope of existing services, and*
>
> *• Carve out separate services from the existing services and specify them as separate taxable services.*
>
> *5. Services of same category are grouped together and defined as a separate taxable service. Newly specified services may contain part or whole of existing individually specified taxable services. The scope and coverage of taxable services should, therefore, be interpreted for classification purposes strictly in accordance with the statutory provisions existing during the material point of time."*

25.9. Further, reference is also drawn to the clarification issued by CBEC vide Circular No. 128/10/2010-S.T., dated 24-8-2010, wherein in respect of classification of Construction; Erection, commissioning or installation; Repair services after the introduction of Works contract Service the board had held that:

> *"The matter has been examined. As regards the classification, with effect from 1-6-2007 when the new service 'Works Contract service' was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 1-6-2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of Section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date."*

25.10. It can be said that while Section 65(105)(zzzza) of the Act would cover the services defined by Section 65(105)(zzzh) of the Act and which involve transfer of property in goods on which tax as sale of goods is leviable, it does not mean that prior to 01.06.2007, the services covered under by Section 65(105)(zzzh) of the Act involving transfer of property or goods were not taxable and giving such interpretation to the services covered by Section 65(105) (zzzza) of the Act will be against the intention of the legislature to tax "Residential Construction Service" prior to 01.06.2007. In this regard, I rely on the decision of the Principal Bench of the Hon'ble CESTAT in the case of Larsen and Toubro Ltd. Vs CST, Delhi [2015 (318) E.L.T. 633 (Tri. - LB)], discussed at Para 44.

> *"Construction of Complex Service (CCS) or Commercial or Industrial Construction Service (CICS), Erection, Commissioning or Installation Service (ECIS) - Part of Works Contracts - Becoming classifiable under Works Contract Service Section 65(105)(zzzza) of Finance Act, 1994 w.e.f. 1-6-2007 - It does not mean that these services, as part of works contracts, were not taxable prior to 1-6-2007 under Sections 65(105)(zzzh), 65(105)(zzq) and 65(105)(zzd) ibid respectively - Classification of a service is to be determined as per definitions prevalent during relevant period - Merely because classification changes with introduction of taxable service under which existing service gets more specifically covered by Section 65A ibid does not mean that said service was not taxable during period prior thereto - When works contracts are divisible under 46th Constitutional Amendment, it was immaterial for charging Service Tax whether taxable service was rendered under pure service contract or as part of works contract. [Per: Shri R.K. Singh, Member (T)]. - Incidentally, it may be mentioned in passing that if it was to be held that works contracts were not taxable under Finance Act, 1994 prior to 1-6-2007, the consequence would be that a works contract (to construct a commercial building) which involved (for the sake of argument) transfer of property in goods in the form of a single ordinary brick (of say value Rs.10) will not be taxable under CICS before 1-6-2007 and taxable service (like photography service) provided as a part of works contract of the type not covered under Works Contracts Service [65(105)(zzzza)] would neither be taxable prior to 1-6-2007, nor with effect from 1-6-2007 even if the transfer of property in goods in such works contract is a tiny fraction of the total value thereof."*

25.11. Thus, the demand of Service Tax under Works Contract Service for the period from 01.06.2007 onwards is in order. Further, in view of the discussions and finding above, I hold that the service of construction of new residential complex is covered by sub-clause (ii) (c) of the Explanation to the definition of "Works contract". Hence, I do not accept the contention of the assessee that service rendered by them is not classifiable under the category of 'Works Contract Service".

26. The Noticee has further contended that the Board Circular dated 29.01.2009 has clarified that Service Tax is not payable when the activity is for personal use and also for service provided until the sale deed has been executed to the ultimate owner.

26.1. They submitted that the clarification is applicable to the facts of their case. In this regard, the Board circular 108/02/2009 – ST dated 29.01.2009 is reproduced here under for better understanding:-

> *"The matter has been examined by the Board. Generally, the initial agreement between the promoters / builders / developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax."*

26.2. It is clear from the reading of the said circular of the Board that service tax is not chargeable up to the stage of sale deed as it is in the nature of self service. However, service tax is chargeable on the construction value which is undertaken after execution of sale deed. I find that the assessee have grossly mis-interpreted the Board's clarification dated 29.01.2009. It is evident from the submissions of the assessee that an 'Agreement of Sale' is executed with the prospective customers, for the full value of the Housing unit. Later on, a sale deed was executed at semi finished stage and stamp duty was paid for the undivided portion of the land along with semi finished construction, on a value which is very much less than the Sale agreement price. It is not in dispute that the Noticee has received the entire amount which is mentioned in the Sale agreement, and the value declared in the sale deed on which VAT and other State Govt Taxes are paid, is less than the Sale agreement value. The Noticee has harped on the fact that they have not entered into any construction agreement with their customers, but failed to explain the purpose/reason for receiving amounts in excess of the sale deed amount. It is very clear that the said difference amount between the sale agreement amount and the sale deed amount is given by the customer for converting the semi finished Housing unit into a full fledged house with all the facilities, both common and individual as per the 'Agreement of Sale'. This conversion of semi finished house belonging to the Customer into a full fledged liveable house having all the common facilities, is nothing but service on which the Service Tax is demanded in the subject Notices.

27. Thus, the major contentions of the noticee in respect of the said project relating to the taxability and references made to the Board's circulars and instructions were discussed with the findings that the activity

undertaken by them is in the role of a developer, under a contract comprising transfer of goods and service, hence rightly taxable to service tax under the category of 'Works Contract Service'.

28. As per the discussions held supra, since the construction activity was undertaken as per the agreement /contract, the taxability of their activity and its classification under 'Works Contract Service' hold ground. In this regard, I rely on the decision of the Apex Court in the case of Larsen & Toubro Ltd. Vs. State of Karnataka [2014 (303) E.L.T. (S.C.)] which reads as follows.

> *"92. It seems to us (and that is the view taken in some of the decisions) that a contract may involve both a contract of work and labour and a contract of sale of goods. In our opinion, the distinction between contract for sale of goods and contract for work (or service) has almost diminished in the matters of composite contract involving both (a contract of work/labour and a contract for sale for the purposes of Article 366(29A)(b). Now by legal fiction under Article 366(29A)(b), it is permissible to make such contract divisible by separating the transfer of property in goods as goods or in some other form from the contract of work and labour. A transfer of property in goods under clause (29A)(b) of Article 366 is deemed to be a sale of goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. For this reason, the traditional decisions which hold that the substance of the contract must be seen have lost their significance. What was viewed traditionally has to be now understood in light of the philosophy of Article 366(29A).*
>
> *93. The question is : Whether taxing sale of goods in an agreement for sale of flat which is to be constructed by the developer/promoter is permissible under the Constitution? When the agreement between the promoter/developer and the flat purchaser is to construct a flat and eventually sell the flat with the fraction of land, it is obvious that such transaction involves the activity of construction inasmuch as it is only when the flat is constructed then it can be conveyed. We, therefore, think that there is no reason why such activity of construction is not covered by the term "works contract". After all, the term "works contract" is nothing but a contract in which one of the parties is obliged to undertake or to execute works. Such activity of construction has all the characteristics or elements of works contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. When the transaction involves the activity of construction, the factors such as, the flat purchaser has no control over the type and standard of the material to be used in the construction of building or he does not get any right to monitor or supervise the construction activity or he has no say in the designing or lay-out of the building, in our view, are not of much significance and in any case these factors do not detract the contract being works contract insofar as construction part is concerned.*
>
> *94. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, in our opinion, three*

conditions must be fulfilled : (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form. In a building contract or any contract to do construction, the above three things are fully met. In a contract to build a flat there will necessarily be a sale of goods element. Works contracts also include building contracts and therefore without any fear of contradiction it can be stated that building contracts are species of the works contract."

29. From the ratio of the above judgement and the discussions, the subject project merits consideration under 'Works Contract Service'. As such, the contention of the noticee on non-receipt of any advances from the customer is to be perceived as put forth under the misconception that their activity falls under 'Construction of Complex Service', whereas no such exclusions find mentioned in the definition of 'Works Contract Service', hence does not hold good in this case.

30. Further, regarding the contention of the noticee that the sale was made after obtaining occupancy certificate, does not hold good for two reasons, (i) the certificate is 'Completion Certificate' and not occupancy certificate and (ii) None of the certificates were furnished to the department. As is evident, the certificate claimed is not produced and also not the completion certificate as is required from the authority competent to issue such certificate within the meaning of the 'explanation' to the Section 65(105)(zzzh) of the Act where the taxable service 'construction of complex' is defined. As such, the statutory provision under Section 66E defines "competent authority" as the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

However, the Noticee/Licensee has not furnished any copy of the certificate issued in the present case and hence the same cannot be held as the valid reason to exclude the value as sale proceeds.

31. In view of the above, I find that the noticee is rightly taxable in respect of the construction of residential complex under the 'Works Contract Service'.

32. Further, the noticee contended that the impugned notices were issued based on mere assumptions, without appreciating statutory provision and without recording any reasons for concluding the liability of service tax on the impugned activities, but these arguments do not hold ground in view of the fact that the impugned notices have rightly demanded service tax on construction activities undertaken by the noticee under the service category

of 'Works Contract' as discussed in detail supra. The case laws relied upon by the noticee in this regard is distinguishable to the facts of the case.

33. It is contended by the noticee that Service Tax was not collected from the customers, and therefore the amounts received should be considered as cum tax and accordingly benefit should be extended to them. However, they have failed to appreciate the fact that in the absence of any conclusive proof that they have not collected any service tax and that the receipts mentioned in the show cause notice are inclusive of Service Tax amount, the contention of the noticee is not acceptable and the case laws relied upon by them in this regard are distinguishable to the facts of the case.

34. The contention of the noticee on the time bar of the notice is examined. The assesses contention that the department was having the knowledge of the methods adopted by them for tax compliance and that provisions of Sub-Section (1) of Section 73 of the Finance Act,1994 are not invokable in such cases. Mere knowledge of the activity performed by the assessee does not prohibit the department from invoking extended period, when the intent to evade has been enumerated in the notice. I place my reliance on the following case laws and hold that the extended period in rightly invokable.

1. M/S Union Quality Plastic ltd & OTHERS VsCCEx& SERVICE TAX,VAPICCEx& SERV ICE TAX, DAMAN----*Extended period of limitation can be legitimately invoked even if Revenue has knowledge of suppression: the issue is no longer res- integra in view of the decision of the jurisdictional, High Court of Gujarat in Commissioner of Central Excise, Surat -I Vs. Neminath Fabrics Pvt Ltd reported in (2011-TIOL-10-HC-AHM-CX.) . The High Court ruled that whenever there is non-levy or short levy of duty with an intention to evade payment of duty, or any of the circumstances enumerated in the Proviso to Section 11A (i) of the Central Excise Act, 1944; such suppression or willful omission is either admitted or demonstrated, invocation of the extended period of limitation would be justified; and that the proviso cannot interpreted to mean that since Revenue has knowledge of suppression, the extended period of limitation cannot be legitimately invoked.*

2. COMMISSIONER OF CENTRAL EXCISE SURAT-I *Vs* NEMINATH FABRICS PVT LTD-----2011-TIOL-10-HC-AHM-CX-----*Central Excise – Limitation under Section 11 A – Show cause notice issued beyond one year from the date of knowledge of the Department - The concept of knowledge by the departmental authority is entirely absent in the provisions of Section 11 A - If one imports such concept in sub-section (1) of section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court – If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal - The reasoning that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of section 11A would be applicable is fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated – The order passed by the Tribunal is quashed.*

35. Bonafide belief as claimed by the assessee is not sustainable. The assessee is not new to the taxation and the provisions relating to Service Tax Law. The assessee has executed several construction projects and is well aware of Law. In spite of having knowledge about valuation under Works Contract Service, the assessee has deliberately attempted to vivisect the composite service into different instances and tried to exploit the illustrative description of service under Law. Such an act cannot be classified as Bonafide in nature. I rely on the following pronouncement by the Hon'ble Tribunal :

> ***TANZEEM SCREENARTS vs COMMISSIONER OF CENTRAL EXCISE, MUMBAI-2006 (196) E.L.T. 209 (Tri. - Mumbai)***- *Belief - Bona fide belief - Blind belief - A blind belief that what one is doing is right does not make it a bona fide belief. [para 7]*

36. With regard to interest and penalty, both the notice has elaborately provided the grounds for invoking penal provisions under Section 75, 76, 77 and 78 of the Finance Act, 1944. As seen from the show cause notice issued under OR No. 95/2012-Adjn(ST)(Commr) dated 24.04.2012the proposal for penalty is under Section 76 of the Act. It is evident from the facts and circumstances of the case that the information in respect of amounts received for the services provided under Works Contract was provided only after the same was called for by the Department and the statutory returns filed periodically do not divulge factual information. In view of the above discussions, the assesses are liable to be penalized under Section 78 of the Act, however, the notice proposes penalty under Section 76 of the Act, only. Hence in respect of notice issued under OR No. 95/2012-Adjn(ST)(Commr) I restrict imposition of penalty under Section 76 of the Act.

37. The acts and omissions discussed above has rendered the assessee liable for penal action. In support of this I place my reliance on the following case law :

1. GORA MAL HARI RAM LTD. Vs COMMISSIONER OF SERVICE TAX, NEW DELHI--2010 (18) S.T.R. 492 (Tri. - Del.)---*Reasonable cause not shown and penalty waiver not grantable - Impugned case being one of abuse of process of law, impugned order sustainable - Sections 75, 76 and 80 of Finance Act, 1994. [para 5].*

38. The assessee has also claimed benefit under Section 80 of the Act. In my opinion when the intent has been discussed, established and concluded in any proceedings and the assessee is well aware of the Law and is legally responsible for his acts and omissions, the provisions of Section 80 of the Act are not attracted. I place my reliance on the following case law :

1. ASSISTANT COMMISSIONER OF CENTRAL EXCISE Vs KRISHNA PODUVAL---2006 (1) S.T.R. 185 (Ker.)---*Penalty (Service tax) - Sections 76 and 78 of Finance Act, 1994 - Incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or arise out of same act, penalty imposable for ingredients of both offences - Person who is guilty of suppression deserve no sympathy under Section 80 ibid - Order of Single Judge withdrawing penalty under Section 76 ibid, set aside.[para 11].*

39. In view of the findings and discussions detailed above, I pass the following order :

O R D E R

In respect of OR No. 95/2012-Adjn(ST)(Commr) dated 24.04.2012 :

(i) I confirm an amount of Rs. 60,63,492/- (Rupees Sixty lakh Sixty Three thousand Four hundred and Ninety Two only) demanded towards Service Tax inclusive of Cesses, on the "Works Contract Services" provided by them during the period January 2011 to December 2011, under Section 73(2) of the Finance Act, 1994;

(ii) I appropriate an amount of Rs. 10,40,000/- already paid by them under protest and adjusted the same against the Service Tax demand at (i) above;

(iii) interest at the appropriate rate is to be paid by them on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994;

(iv) I impose a Penalty of Rs. 10,000/- on them under Section 77 of the Finance Act, 1994;

(v) I impose a penalty of RS.6,06,349/- being 10% of service tax amount demanded at (i) above, under Section 76 of the Finance Act, 1994, provided that where service tax and interest is paid within a period of thirty days of the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of Section 73, the penalty payable shall be RS.1,51,587/- being 25% of the penalty imposed in the order, only if such reduced penalty is also paid within such period.

In respect of OR No. 163/2014-Adjn(ST)(Commr) dated 26.09.2014:

(i) I confirm the demand of Rs.74,39,581/-(Rupees Seventy Four Lakhs Thirty Nine Thousand Five Hundred Eighty One only) including Cesses on the "Works Contract" services rendered by them during the period from January, 2012 to March, 2014 under Section 73(2) of Finance Act, 1994; and appropriate an amount of Rs. 29,22,154/- already paid against the above demand;

(ii) Interest on the amount of demand at (i) is to be paid by them under Section 75 of the Finance Act 1994;

(iii) In terms of Section 78 of the Finance Act 1994, I impose a Penalty equal to RS. 74,39,581/-(Rupees Seventy four lakhs thirty nine thousand five hundred and eighty one only) being the service tax confirmed at (i) above, provided that where service tax and interest is paid within a period of thirty days of the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of Section 73, the penalty payable

shall be Rs.18,59,895/- (Rupees Eighteen lakhs fifty nine thousand eight hundred ninety five only) being 25% of the service tax so determined and provided also that the benefit of reduced penalty under the said proviso shall be available; and

(iv) I impose a Penalty of Rs. 10,000/- on them under Section 77 of the Finance Act, 1994.

31/8/15

(SUNIL JAIN)
COMMISSIONER

To
M/s. Modi Ventures,
5-4-187/3, 2nd Floor, Soham Mansion, (By SPEED POST)
M.G.Road, Secunderabad-500 003.

Copy submitted to the Chief Commissioner, Customs & Central Excise, Hyderabad Zone, Hyderabad.

Copy to:
1. The Assistant Commissioner, Service Tax, Division II, Service Tax Commissionerate, Hyderabad.
2. The Superintendent, Service Tax, Range II A, Service Tax Commissionerate, Hyderabad with a direction to serve the order on the assessee and submit a copy of dated acknowledgement.
3. Master Copy/Spare Copy/File Copy.