ACCOMPANYING DECLARATION TO BE ATTACHED TO ST-5 IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, 1st FLOOR, WTC BUILDING, FKCCI COMPLEX, K.G. Road, BANGLORE - 560 017

Appeal No. Of 2013

Between:
M/s. Mehta & Modi Homes,
5-4-187/3&4, 2nd Floor,
M.G Road,
Secunderabad- 500 003 .... **Appellant**

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-I Commissionerate,
Kendriya Shulk Bhavan,
1st Floor, L.B.Stadium Road,
Hyderabad – 500 004 .... **Respondent**

ISSUE INVOLVED IN APPEAL:			**Taxability of service related to sale of Bungalows**
1.	Designation and address of the authority passing the order appealed against	:	The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I Commissionerate Kendriya Shulk Bhavan, 1st Floor, L. B. Stadium Road, Hyderabad – 500 004
2.	The number and date of order appealed against	:	O-I-O.No.07/2013-Adjn.(ST) (Commr) (O.R. No. 53/2012-Hyd I Adjn) dated 17.01.2013
3.	Date of communication of the order appealed against	:	23.01.2013
4.	State/Union Territory and the Commissionerate in which the order/decision of assessment/ penalty/fine was made	:	Andhra Pradesh, Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I Commissionerate.
5.	Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals).	:	Not Applicable
6.	Address to which notices may be sent to the Appellant	:	1. Hiregange & Associates, Chartered Accountants # 1010, 1st Floor, Above Corporation Bank, 26th Main, 4th T Block, Jayanagar, Bangalore – 560 041. 2. S.B. Gabhawalla & Co.' Chartered Accountants, B-12, "La Bella", Azad Lane, Andheri (East),Mumbai –

			400069 **(Also to Appellant as stated in cause title supra.)**
7.	Address to which notices may be sent to the Respondent	:	The Commissioner of Customs, Central Excise & Service Tax, Kendriya Shulk Bhavan, 1st Floor, L.B. Stadium Road, Hyderabad – 500 004
8.	Whether the decision or order appealed against involves any question having a relation to the value of the taxable service for purposes of assessment; if not difference in tax or tax involved, or amount of interest or penalty involved, as the case may be.	:	Yes
8A(1) (i)	Period of dispute	:	01.04.2006 to 31.05.2007 under Construction of Complex service. 01.06.2007 to 31.12.2010 under Works Contract service.
(ii)	Amount of Tax if any demanded for the period mentioned in Item (i)	:	Rs.22, 72,979/- under Construction of Complex service and Rs.5, 55, 04,153/- under Works Contract service.
(iii)	Amount of refund if any claimed for the period mentioned in Item (i)	:	NA
(iv)	Amount of interest involved	:	Interest under Section 75 of the Finance Act, 1994.
(v)	Amount of penalty imposed	:	Penalty of Rs.5, 77, 77, 132/- under section 78 of the Finance Act, 1994. Penalty of Rs.5, 000 U/s 77(2).
9.	Whether duty or penalty or both is deposited if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	:	An amount of service tax Rs.75, 47,519 is already paid before issuing the show cause notice and show cause notice has appropriated only Rs.59, 57, 473/-. The Stay application for waiver of balance the Service Tax, applicable interest and Penalty under Section 78 & 77 of the Finance Act, 1994 and for the operation of the order has been filed along with this appeal.
9A	Whether the appellant wishes to be heard in person?	:	Yes. At the earliest convenience of this Honorable Tribunal.
10.	Reliefs claimed in appeal	:	To set aside the impugned order and grant the relief claimed.

Mehta & Modi Homes SEC'BAD

FORM ST – 5

Form of appeal to Appellate Tribunal under Section 86 of the Finance Act, 1994
In the Customs, Excise and Service Tax Appellate Tribunal
Appeal No. Of 2013

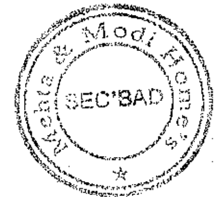
Between:
M/s. Mehta & Modi Homes,
5-4-187/3&4, 2nd Floor,
M.G Road,
Secunderabad- 500 003 .... **Appellant**

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-I Commissionerate,
Kendriya Shulk Bhavan,
1st Floor, L.B.Stadium Road,
Hyderabad – 500 004 .... **Respondent**

ISSUE INVOLVED IN APPEAL:			**Taxability of service related to sale of Villas**
1.	Designation and address of the authority passing the order appealed against	:	The Commissioner of Customs, Central Excise & Service Tax, Central Revenues Building, 1st Floor, L.B. Stadium Road, Hyderabad – 500 004
2.	The number and date of order appealed against	:	O-I-O.No.7/2013-Adjn.(ST) (Commr) (O.R. No. 53/2012-Hyd I Adjn) dated 17.01.2013
3.	Date of communication of the order appealed against	:	23.01.2013
4.	State/Union Territory and the Commissionerate in which the order/decision of assessment/ penalty/fine was made	:	Andhra Pradesh, Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I Commissionerate.
5.	Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals).	:	Not Applicable
6.	Address to which notices may be sent to the Appellant	:	1. Hiregange & Associates, Chartered Accountants # 1010, 1st Floor, Above Corporation Bank, 26th Main, 4th T Block, Jayanagar, Bangalore – 560

			041. 2. S.B. Gabhawalla & Co.' Chartered Accountants, B-12, "La Bella", Azad Lane, Andheri (east),Mumbai – 400069 **(Also to Appellant as stated in cause title supra)**
7.	Address to which notices may be sent to the Respondent	:	The Commissioner of Customs, Central Excise & Service Tax, Central Revenues Building, 1st Floor, L.B.Stadium Road, Hyderabad – 500 004
8.	Whether the decision or order appealed against involves any question having a relation to the value of the taxable service for purposes of assessment; if not difference in tax or tax involved, or amount of interest or penalty involved, as the case may be.	:	Yes
8A(1) (i)	Period of dispute	:	01.04.2006 to 31.05.2007 under Construction of Complex service. 01.06.2007 to 31.12.2010 under Works Contract service
(ii)	Amount of Tax if any demanded for the period mentioned in Item (i)	:	Rs.22, 72,979/- under Construction of Complex service and Rs.5, 55, 04,153/- under Works Contract service.
(iii)	Amount of refund if any claimed for the period mentioned in Item (i)	:	NA
(iv)	Amount of interest involved	:	Interest under Section 75 of the Finance Act, 1994.
(v)	Amount of penalty imposed	:	Penalty of Rs.5, 77, 77,132/- under section 78 of the Finance Act, 1994. Penalty of Rs.5, 000 U/s 77(2).
9.	Whether duty or penalty or both is deposited if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	:	An amount of service tax Rs.75, 47, 519 is already paid before issuing the show cause notice and show cause notice has appropriated only Rs.59, 57, 473/-. The Stay application for waiver of balance the Service Tax, applicable interest and Penalty under Section 78 & 77 of the Finance Act, 1994 and for the operation of the order has been filed along with this appeal.
9A	Whether the appellant wishes	:	Yes. At the earliest convenience of this

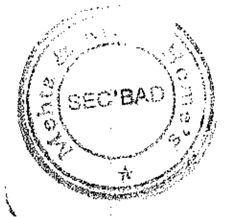


	to be heard in person?		Honorable Tribunal.
10.	Reliefs claimed in appeal	:	To set aside the impugned order and grant the relief claimed.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Authorised Representative

For Mehta & Modi Homes
Partner
Appellant



STATEMENT OF FACTS

A. M/s Mehta & Modi Homes (Hereinafter referred to as 'Appellant') is a Partnership Firm registered under the Partnership Act, 1932 mainly engaged in the sale of residential bungalows to prospective buyers while the units are under construction.

B. The Appellant had voluntarily registered with the Service Tax department under the category of Construction of Complex Service. Later on, based on Additional Commissioner clarifications, it registered itself under the category of "Works Contract Service" also. Further, CBEC Clarifications reinforced the Appellant's belief that they are not liable for payment of service tax and accordingly, they discontinued the payment of service tax. The Appellant has presently under taken **"Residential Project"** namely **"Silver Oak Bungalows"** in Cherlapally village, Ghatkesar Mandal, Hyderabad.

C. The flow of activity involved is as under:

    i. Appellant has out rightly purchased the undivided land it is engaged in development and sale of villas.

    ii. In phase I, II & III land was acquired by the firm, sanctions obtained and development taken up thereafter. The lands in the three phases are disjoint. In phase I & II sanction for development of land into plots was obtained. As per rules of the urban development authority the tentative sanction was given and only after completion of all land development works the final sanction / layout was released. Phase I & II land development works were completed and final layout released on 7.6.2005 and 1.2.2007 respectively. Subsequent to that sanction for individual bungalows were obtained.

Mehta & Modi Homes SEC'BAD

iii. Based on the above approvals, the Appellants have started the activities of development of the said residential villas.

iv. However, in the case of phase – III sanction for comprehensive development for both land and construction of bungalows was obtained simultaneously, on 25.3.08 and 28.06.2010 respectively.

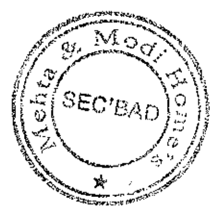
v. The exact modus operandi of the arrangement with the prospective buyers is explained hereunder.

a. Whenever an intending buyer wants to purchase a residential unit, he approaches the Appellant. Based on negotiations, he fills up a booking form. **A copy of the booking form is enclosed and marked as Annexure "III".** The key terms and conditions from the booking form are as under:-

(1) NATURE OF BOOKING:

1.1 This is a provisional booking for a bungalow mentioned overleaf in the project known as Silver Oak Bungalows. The provisional bookings do not convey in favour of purchaser any right, title or interest of whatsoever nature unless and until required documents such as Sale Agreement/ Sale Deed/ Work Order etc., are executed.

1.2 The purchaser shall execute the required documents within a period of 30 days from the date of booking along with payment of the 1st installment mentioned overleaf. In case, the purchaser fails to do so then this provisional booking shall stand cancelled and the builder shall be entitled to deduct cancellation charges as mentioned herein.



(2) REGISTRATION AND OTHER CHARGES

2.1 Registration Charges, Stamp Duty and incidental expenses thereto as applicable at the time of registration shall be extra and is to be borne by the purchaser.

2.2 Service Tax & VAT as applicable from time to time shall be extra and is to be borne by the purchaser.

(3) CANCELLATION CHARGES

3.1 In case of default mentioned in clause 1.3 above, the cancellation charges shall be Rs.25, 000/-

3.2 In case of failure of the purchaser to obtain housing loan within 30 days of the provisional booking, the cancellation charges will be NIL provided necessary intimation to this effect is given to the builder in writing along with necessary proof of non-sanction or else cancellation charges shall be Rs.25,000/-

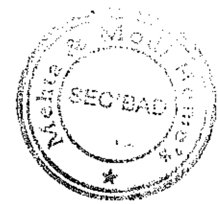
3.3 In case of request for cancellation in writing within 60 days of this provisional booking, the cancellation charges shall be Rs.50, 000/-

3.4 In all other cases of cancellation either of booking or agreement, the cancellation charges shall be 10% of the agreed sale consideration.

(4) OTHER CONSEQUENCES UPON CANCELLATION

4.1 The purchaser shall re-convey and redeliver the possession of the bungalow/plot in favour of the builder at his/her cost free from all encumbrances, charges, claims, interests etc., of whatsoever nature.

(5) POSSESSION



5.1. The builder shall deliver the possession of the completed bungalow to the purchaser only on payment of dues to the builder.

5.2. Once the booking is confirmed, the Appellant enters into an agreement of sale with the intending buyer. **A copy of the Agreement of Sale is enclosed and marked as Annexure "III".** The key aspects of the said Agreement of Sale are as under:-

i. Preamble A to I of the Agreement explains and demonstrates the Title of the Appellant in the underlying land and the sanction received by the Appellants from HUDA for development of the residential units as per the approved layout plans.

ii. Preamble I highlights that the Appellant has agreed to sell the PLOT together with a deluxe bungalow constructed thereon.

iii. Some important clauses of the Agreement of Sale are as under:-

1. The vendor in the scheme of development of project Silver Oak Bungalows are required to enter into three separate agreements viz. one with respect to sale of land, second with respect to development charges on land and third with respect to construction of bungalow. These are interdependent, mutually co-existing and are inseparable.
2. Agreement for land development charges is entered as the buyer agrees to pay the builder development charges for laying the pucca roads, drainage lines, electrical lines, water lines as per the rules of HUDA.
3. That the Vendor agrees to sell for a consideration and the Buyer agrees to purchase a Standard plot along with

bungalow constructed thereon. The construction of the Scheduled bungalow will be as per the specifications given in Annexure-II.

4. That the total sale consideration for the above shall be Rs. /- (Rupees only).
5. That for the purposes of creating a charge in favour of the bank/ financial institutions on the bungalow being constructed so as to enable the Buyer to avail housing loan, the Vendor will execute a sale deed in favour of the Buyer for sale of bungalow in a semi-finished state. In the event of execution of sale deed before the bungalow is fully completed, the Buyer shall be required to enter into a separate construction contract with the Vendor for completing the unfinished bungalow and the Buyer shall not raise any objection for execution of such an agreement.
6. That on payment of the full consideration amount as mentioned above and on completion of construction of the said bungalows, the Vendor shall deliver the possession of the schedule bungalow to the Buyer with all amenities and facilities as agreed to between the parties and the Buyer shall enter into possession of the schedule bungalow and enjoy the same with all the rights and privileges of an owner.
7. That the Vendor shall cause this Agreement of sale to be registered in favour of the Buyer as and when the Buyer intimates in writing to the Vendor his/her/their preparedness with the amount payable towards stamp

duty, registration charges and other expenses related to the registration of this Agreement.

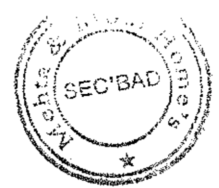
8. That the stamp duty, registration charges and other expenses related to the execution and registration of this agreement of sale and other deeds, or conveyances and agreements shall be borne by the Buyer only.

5.3. In certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Appellants may enter into a sale deed for sale of bungalow in a semi finished state, simultaneously entering into a separate construction contract for completing the unfinished bungalow. It may be noted that as per para 13 of the Agreement of Sale, the Sale deed, the Agreement for Construction and agreement of land development charges are interdependent, mutually co-existing and inseparable. **(Enclosed are copies of the Sale Deed, Agreement of Development charges and the Agreement for Construction in Annexure-III)**

5.4. Some important provisions from the Agreement for Construction (which is the subject matter of the current litigation) are extracted below for ready reference:-

A. The Buyer has purchased a plot of land bearing Plot No.__ admeasuring ___ sq. yds. Under a sale deed dated ______ registered as document no. ___ in the office of the sub-registrar, Uppal.

B. This sale deed was executed subject to the condition that the buyer shall enter into a agreement for construction and



agreement for development charges with the builder for construction of a bungalow on plot of land.

C. The Buyer is desirous of getting the construction completed with respect to the scheduled bungalow by the Builder.

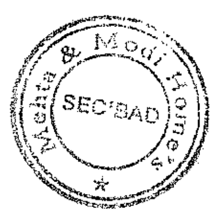
D. The Buyer as stated above had already purchased the plot of land bearing no. ___ and the parties hereto have specifically agreed that the construction agreement and the sale deed date ________ referred herein above are and shall be interdependent and co-existing agreements.

E. The Builder shall complete the construction for the Buyer of a deluxe bungalow on plot of land bearing no. ___ as per the plans annexed hereto and the specifications given hereunder for a consideration of Rs. _____/- (Rupees ____Only).

F. The Builder upon completion of construction of the bungalow shall intimate to the Buyer the same at his last known address and the Buyer shall within 15 days of such intimation take possession of the bungalow provided however, that the Buyer shall not be entitled to take possession if he/she has not fulfilled the obligations under this agreement. After such intimation, the Builder shall not be liable or responsible for any loss, breakages, damages, trespass and the like.

G. The buyer upon taking possession of the bungalow shall own and possess the same absolutely and shall have no claims against the Builder on any account, including any defect in the construction.

H. The Buyer upon receipt of the completion intimation from the Buyer as provided above shall thereafter be liable and responsible to bear and pay all taxes and charges for electricity,



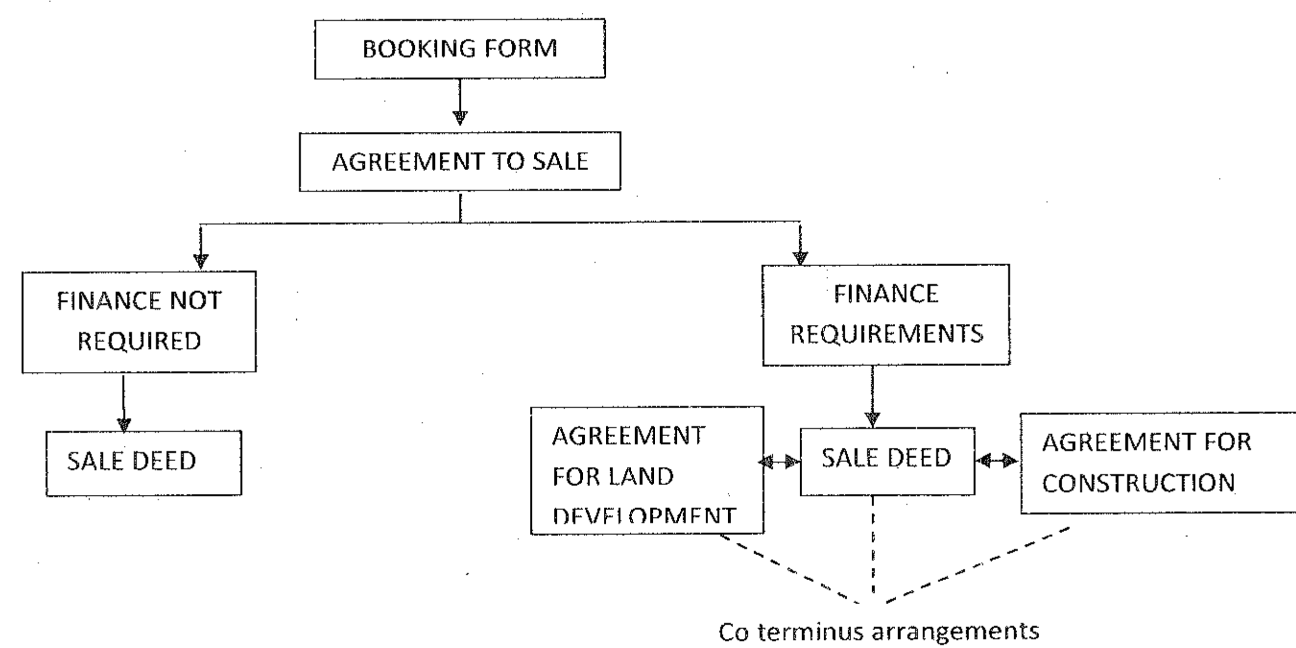
water and other services and outgoings payable in respect of the said bungalow.

I. The Builder shall deliver the possession of the completed bungalow to the Buyer only upon payment of entire consideration and other dues by the Buyer to the Builder.

J. The Buyer hereby covenants and agrees with the Builder that if he fails to abide with the terms and conditions of this agreement, the Builder shall be entitled to cancel this agreement without any further action and intimation to the Buyer. The Builder upon such cancellation shall be entitled to forfeit a sum equivalent to 10% of the total agreed consideration as liquidated damages from the amounts paid by the Buyer to the Builder. The Builder shall further be entitled to allot, convey, transfer and assign the said bungalow to any other person of their choice and only thereafter, the Builder will refund the amounts paid by the Buyer after deducting liquidated damages provided herein.

K. It is mutually agreed upon by the parties hereto that all the terms and conditions contained in the booking form as amended from time to time shall be deemed to be the part of this agreement unless otherwise specifically waived and/or differently agreed upon in writing.

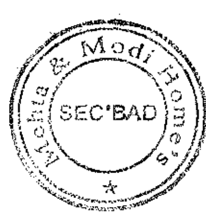
D. The entire process can be summarized below:-



E. It has been the belief of the Appellant that irrespective of the mode in which the transactions are undertaken, the Appellant has a singular obligation to deliver an bungalow hence the substance of the transaction is that of a sale of an immovable property and therefore, no service tax can be attracted.

F. However, subsequent to the decision of the Supreme Court in the case of K. Raheja Development Corporation, there has been substantial confusion on the applicability of service tax on such transactions. The developments on the legal front are summarized hereunder:-

DATE	PARTICULARS
10.09.2004	Any service provided to any person in relation to construction of buildings intended for commercial use were made liable for payment of service tax under section 65(105)(zzq) of the Act. Circular 80/2004-ST dated 10.09.2004 clarified that estate builders are selling shops and are therefore not liable for payment of service tax.
16.06.2005	Any service provided or to be provided to any person in relation to construction of complex was made taxable under sub-clause (zzzh) of section 65(105) of the Finance Act, 1994.
1.8.2006	Circular F. No. 332/35/2006-TRU, dated 1-8-2006 clarified that if no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own without engaging the



	services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise.
1.6.2007	The Finance Act, 1994 has sought to levy service tax for the first time on certain specified works contracts.
15.5.2008	Held in the case of Magus Constructions 2008 (11) S.T.R. 225 (Gau HC) that it becomes clear that the circular, dated August 1, 2006, aforementioned, is binding on the department and this circular makes it more than abundantly clear that when a builder, promoter or developer undertakes construction activity for its own self, then, in such cases, in the absence of relationship of "service provider" and "service recipient", the question of providing "taxable service" to any person by any other person does not arise at all.
29.1.2009	Circular No. 108/2/2009-S.T., dated 29-1-2009 clarified that where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. Secondly, 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

Mehta & Modi Homes SEC'BAD

	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'.
1.7.2010	An Explanation was inserted to both the definitions pertaining to commercial construction as well as construction of complex services, but no Explanation was inserted in the definition relating to works contract services. The Explanation deems the activity of construction undertaken by builders/developers as a service except in cases where the full payment is received after the completion certificate
15.2.2011	Trade Facility No. 1/2011, dated 15-2-2011 issued by Pune Commissionerate stated that where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of para 3 of Boards Circular number 108/02/2009-S.T., dated 29-1-2009.

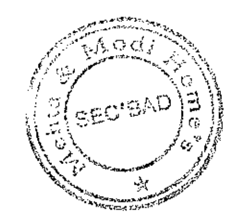
G. In fact, the Bombay High Court decision in the case of **Maharashtra Chamber of Housing Industry 2012 (25) S.T.R. 305 (Bom.)** brings out the detailed developments on the legal front and therefore the relevant extracts from the said decision are reproduced below:

> ***14.*** *The Finance Act of 2004 brought within the fold of taxable services, a service provided or to be provided to any person by a commercial concern in relation to construction service by introducing clause (zzq) in Section 65(105). By the Finance Act of 2005 clause (zzzh) was introduced to bring "the construction of complex" within the ambit of taxable services. Simultaneously, definitions were provided of the expressions 'commercial or industrial construction*

service' in clause (25b), of the expression 'construction of complex' in clause (30a) and of 'residential complex' in clause (91a).

15. *The rationale for the introduction of a service tax on these taxable services found elaboration in circulars of the Central Board of Excise and Customs. On 17 September 2004 the Board issued a circular, when clause (zzq) was on the statute clarifying that services provided by a commercial concern in relation to construction, repair, alteration or restoration of buildings, civil structures, or parts thereof occupied or engaged for the purposes of commerce and industry were covered by the new levy.* ***In this case, the circular noted, the service is essentially provided to a person who gets such construction done by a building or civil contractor. Hence, estate builders who construct buildings or civil structures for themselves (for their own use, for renting out or selling subsequently) were not regarded as taxable service providers. However, if a real estate owner were to hire a contractor, the payment made to a contractor would be subjected to service tax under the head.*** *The circular clarified that the gross value charged by a building contractor would include the cost of materials. The service provider would be eligible to take credit of the excise duty paid on inputs under the Cenvat Credit Rules, 2004. Since the inputs were normally procured from the market and were therefore not covered by duty paying documents, a general exemption was available to goods sold during the course of providing a service, but the exemption was subject to the condition of availability of documentary proof indicating the value of the goods sold. Since in the case of a composite contract, a bifurcation of the value of the goods sold is often difficult, an abatement of 67% was provided in case of composite contracts where the gross amount charged included the value of the material cost.*

16. *On 29 January 2009, a circular was issued by the Central Board of Excise and Customs recording that once an agreement of sale is entered into with a buyer for a unit in a residential complex, he becomes the owner of the unit and the activity provided by the builder of constructing the unit is a service to the customer on which service tax would be applicable. The contrary view which was expressed was that where a buyer makes a construction linked payment after entering into an agreement to sell, the nature of the transaction is not a service but a sale. Where an agreement to sell is entered into by a buyer with the builder, the property belongs to the builder till the completion of the transaction and any service provided towards construction would be in the nature of 'self service'. The circular of the Board noted that the matter was examined. The Board was of the view that in the case of a mere agreement to sell an interest in the property is not created under the Transfer of Property Act and the property continues to remain in the ownership of the seller. The ownership of the property gets transferred to the ultimate owner only upon the completion of construction. The Board therefore opined that a service provided by*



a seller in connection with the construction of a residential complex till the execution of a sale deed would be in the nature of 'self service' and would not attract a liability to pay Service tax. However, if the services of a person such as a contractor, designer or a similar service provider were received, then such a person would be liable to pay Service tax.

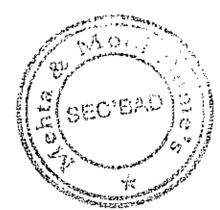
17. *The Finance Act of 2010 sought to bring within the field of Service tax such cases which may have passed out of the net of value added tax merely on account of the timing of the execution of the agreement. By the amendment, an explanation came to be inserted in clause (zzq) and clause (zzzh) of Section 65(105).* ***The explanation creates a legal fiction. The effect of the fiction is to provide a deeming definition of what constitutes a service provided by the builder to a buyer.*** *The explanation stipulates two pre-requisites before the construction of a new building or a complex is deemed to be a service provided by the builder to a buyer. The first condition is that the construction of a new building or, as the case may be, of a complex must be intended for sale wholly or partly by a builder or a person authorized by him whether before, during or after construction. The second requirement is that a sum must be received from or on behalf of the prospective buyer by the builder before the grant of a completion certificate by the authority competent to issue such a certificate under any law for the time being in force. Intent to sell whether before, during or after construction is therefore made the touchstone of the deeming definition of a service provided by the builder to the buyer. The exception is where no sum has been received by the builder from the prospective buyer before the grant of a completion certificate, in which case the deeming definition will not apply.*

18. *The rationale for the introduction of the explanation is contained in a circular issued by the Central Board of Excise and Customs on 26 February 2010. The circular explains that in the definition of 'taxable service' in clauses (zzq) and (zzzh) it is provided that unless the entire consideration for the property is paid after the issuance of a completion certificate, the activity of construction would be deemed to be a taxable service provided by the builder or developer to the prospective buyer and service tax would be charged accordingly. The reason for the explanation emerges from the following extract from the circular :*

"Service tax on construction services

8.1 The service tax on construction of commercial or industrial construction services was introduced in 2004 and that on construction of complex was introduced in 2005.

8.2. As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no Service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction



stamp duty. The sale deed would transfer title from the builder to the buyer. In other parts of the country initially an instrument for the sale of an undivided portion of the land would be executed by which an un-demarcated interest in a portion of the land would be transferred to the buyer. This was a device adopted to reduce the incidence of stamp duty since the vacant land in which an undivided interest was created would have a lower value. Simultaneously a construction agreement would be executed incorporating the obligation of the builder to build and of the buyer to pay the consideration. The legislative intent underlying the explanation was to bring about a parity in tax treatment by stipulating that unless the entire consideration for the property is paid by the prospective buyer after the completion of construction as certified by the local authority, the activity of construction would be deemed to be a taxable service provided by the builder to the prospective buyer. The scope of the existing service was consequently sought to be expanded. ***The ambit of the expression 'taxable service' in relation to construction service or, as the case may be, the construction of a complex has thus undergone a material change by bringing within the fold of service tax construction services provided by builders to buyers.***

H. The Appellants were also victims of the uncertainty prevalent in the law. However, true to their intentions, they obtained registrations and paid taxes where-ever there were doubts about the same. The compliances undertaken by the Appellant are as under:-

Date	**Event**
17.08.2005	Registered with the Service tax department under 'Construction of Construction Service' and paid service tax adopting aforesaid classification
21.02.2008	Received a written instruction from the Ld. Additional Commissioner of Service Tax Hyderabad II Commisionerate, to change classification to 'Works Contract Service' w.e.f. 01.06.07 (Copy of letter enclosed as Annexure IX)
Post	Service tax on amounts received paid at the rate of 2.06%

commencement/completion, pays the consideration in installments and takes possession of the property when the entire consideration is paid and the construction is over.

8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called 'Agreement to Sell'. At that stage neither the full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called 'Sale Deed' is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.

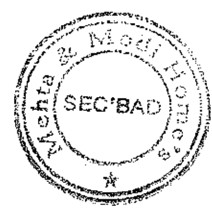
8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as 'Sale of Undivided Portion of The Land'. This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called 'Construction Agreement' is parrallely executed under which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of Service tax payment.

8.6. In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/ promoter/developer to the prospective buyer and the Service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged."

19. *The notes on clauses annexed to the Finance Bill of 2010 would indicate that Section 65 was sought to be amended to modify the scope inter alia of certain taxable services by amending, among others, clauses (zzq) and (zzzh). From the circular issued by the Central Board of Excise and Customs it is evident that in different parts of the country agreements involving the transfer of residential and commercial properties followed various patterns. In certain cases, agreements to sell were entered into, at which stage the full consideration is not paid. The transfer of title to the property would take place on the conclusion of the contract and the completion of payments when a sale deed would be executed with appropriate*

01.06.2007	under Composition Scheme available under Works Contract.
27.01.2009	Appellant was summoned vide HQST No. 15/2009-ST AE dated 27.01.2009 **(~~Copy of Summons Letter enclosed as Annexure ___~~)** Mr. Shankar Reddy Admin Manager had appeared before the authorities.
12.03.2009	Appellant submitted the letter addressing to the Assistant Commissioner ST 3 Returns for the period 01.06.2006 to 31.12.2008 wherein they have clarified that they were not liable for service tax in terms of clarifications vide Circular No. 108/02/2009.
16.03.2009	Panchanama issued by the Assistant Commissioner during conducting search of premises.
29.05.2009	Received a letter from the Service Tax Department for Non-filing of ST-3 returns **(~~Copy of the letter enclosed as~~ Annexure ___)**
08.07.2009	Detailed reply filed for the letter dated 06.06.2009 **(Copy of the letter enclosed as Annexure IX)** stating the service tax was paid upto December 2008 and that no remittance have been made from January 2009 due to non applicability of service tax in view of Circular No. 108/02/2009 dated 29.01.2009 and in terms of Gauhati High Court in case of Magus Constructions. However, since amounts were paid till December 2008 duly filled ST-3 returns along with applicable late filing fees were submitted to the department.
29.10.2009	Another letter issued from the department vide HQST No.



	54/2009-ST AE for furnishing certain Balance Sheets, Bank statements, Project wise details of income, copies of sale deeds and agreements etc. ~~(Copy of the Letter enclosed as Annexure ___)~~
18.11.2009	Detailed reply by Appellant wherein it was stated in clear terms that such information was furnished over several visits to the department and brought to their notice **(Copy of the letter enclosed as Annexure IX).** Further they requested for 15 days time to re-submit entire data which was voluminous. It was also brought out specifically stated that the deputy commissioner has assured that the builders would not be pressurized until further clarification from CBEC is received.
04.01.2010	Another letter received from Assistant Commisioner vide HQST No. 58/09-AE IV for various statements, balance sheets and other information.
27.01.2010	Reply to letter dated 13.01.2010 with Copies of all sale deeds and construction agreements, bank statements upto 30.09.2009. All such information was given on a CD since the data was voluminous about 20000 Pages.

I. On the basis of the information submitted by the Appellant a Show Cause notice was issued by the Commissioner of Customs, Central Excise and Service Tax vide O.R. No. 128/2011-ST (Adjn). (Comm.) bearing C.NO.IV/16/79/2011 Hyderabad II Commissionerate dated 24.10.2011 (Copy of the SCN enclosed as Annexure II)to show cause as to why:

i. An amount of Rs.22, 72,979/- for 1.4.2006 to 30.06.2007 under Construction of Complex service and for 1.06.2007 to 31.12.2010 Rs.5, 55, 04,153/- under Works Contract service. under Section 73(1) of the Finance Act,1994.

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

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

iv. Penalty should not be imposed under Section 78 of the Finance Act, 1994.

J. The Appellant filed a detailed reply vide letter dated 22.02.2012 **(Copy of the SCN Reply enclosed as Annexure II)** to the said show cause notice and further made additional submission on 18.12.2012 **(Copy of the submission enclosed as Annexure II)** on which date a personal hearing was also fixed.

K. Despite making the submissions, the Ld. Commissioner has passed the impugned order as under.

a. Confirmed the demand of an amount of Rs.22, 72,979/- for 1.4.2006 to 30.06.2007 under Construction of Complex service and for 1.06.2007 to 31.12.2010 Rs.5, 55, 04,153/- under Works Contract service under Section 73(1) of the Finance Act, 1994.

b. Confirmed Interest on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994.

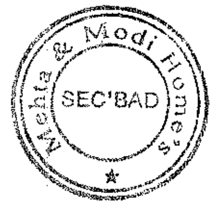
c. Confirmed a Penalty of 5, 77,77,132/- under Section 78 of the Finance Act, 1994

However, they may exercise the option for paying reduced penalty of 25% of the above penal amount subject to fulfillment of conditions prescribed therefore in Section 78 of the Finance Act,

1944 made applicable to service tax vide Section 83 of the Finance Act, 1994.

d. Confirmed Penalty of Rs.5000/- under Section 77 (2)of the Finance Act, 1994 for failure to furnish true and complete facts to the department within the time period as specified under Section 70 of the Finance Act,1994 read with Rule 7 of Service Tax Rules, 1994.

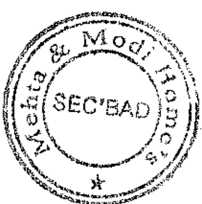
Appellant has been aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.



GROUNDS OF APPEAL

For easy comprehension, the subsequent submissions in this Appeal Memo are made under different headings covering different aspects involved in the subject order.

1. The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all
2. In substance also, the transaction is a sale of immoveable property
3. The transaction of sale of immoveable property is not a works contract at all
4. Individual bungalows cannot be considered as residential complex and demand of service tax not sustainable
5. The Show cause notice is contradictory to Circular No. 98/1/2008-ST dated 04.01.2008
6. Even if a view is taken that there is some element of service embedded in the transaction of sale of immoveable property, the same is taxable only with effect from 01.07.2010 and that too under a different classification of "Construction of Complex Service"
7. Land Development neither " Construction of Complex Service" nor "works contract".
8. The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer
9. There are fundamental errors in the quantification of the service tax demand
10. The Principles of Natural Justice have been violated
11. Benefit under section 73(3) should be granted
12. Extended Period of Limitation cannot be invoked in this case
13. Interest cannot be demanded



14. Penalties cannot be imposed

1. The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all

1.1. The Appellants crave leave to draw the attention of the Bench to the detailed fact matrix presented earlier. In particular, the Appellants wish to emphasize on the following documents:

1.1.1. The Booking Form signed by the intending buyer, which is the first document governing the relationship between the Appellant and the intending buyer.

1.1.2. The Agreement to Sell, which formalizes the said relationship between the Appellant and the intending buyer.

1.1.3. A set of three co-terminus agreements, viz. the Sale Agreement, Agreement of land development charges, Agreement for Construction, which are executed only to enable the transfer of title in semi-finished construction in cases where there is a financing requirement for the buyer.

1.1.4. Sale Agreement, without a corresponding Agreement for Construction in cases where there is no financing requirement for the buyer.

1.2. The Appellants have to submit that the Booking Form and the Agreement to Sell clearly define the relationship between the Appellants and the Buyer.

1.3. Preamble A to I of the Agreement explains and demonstrates the Title of the Appellant in the underlying land and the sanction received by the Appellants from HUDA for development of the residential units as per the approved layout plans. It may not be

out of place to stress that in a typical works contract/construction contract, the contractor works on client property and therefore the agreement has no necessity to emphasize on the title of the underlying land. The essence of the transaction between the Appellant and the Buyer is evident right from the first preamble of the Agreement and that essence is the title in the immoveable property.

1.4. Thereafter, Preamble I highlights that the Appellant has agreed to sell the Plot with the bungalow together for the total consideration and the buyer has agreed to purchase the same. Thus, the said Preamble clearly brings out the intention of the parties, which is sale of immoveable property. This would also be evident on reading of clauses 1, 2, 12, 19 and 25 of the Agreement to Sell.

1.5. The Appellants therefore submit that the Agreement to Sell is an agreement which evidences the transaction of commitment of sale of immoveable property at a future date and therefore there cannot be any service tax on the said transaction. In fact, the said position is accepted by the Department, since no service tax is demanded in cases where the agreement to sell is not followed by another co-terminus set of sale agreement and agreement for construction.

1.6. However, as stated in Para 9 of the Agreement, in certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Appellants may enter into a sale deed for sale of bungalow in a semi-finished state, simultaneously entering into a separate construction contract for completing the unfinished bungalow. It may be noted that as per para 13 of the Agreement of Sale, Agreement for development of land, the Sale

deed and the Agreement for Construction are interdependent, mutually co-existing and inseparable

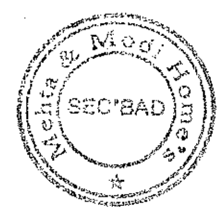
1.7. It may be noted that the said set of co-terminus agreements do not result in any exchange of consideration between the parties but are entered into so as to effectuate the objectives of the Agreement to Sell. Therefore, in that sense, the entering into the said set of co-terminus agreements cannot be considered as an economic transaction resulting in any tax consequence.

1.8. Further, the substance of the transaction continues to be that of sale of immoveable property. Merely because the buyer is interested in defending the title to the property in the interim does not change the transaction to be that of a rendition of service.

1.9. In the case of Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh [2000] 119 STC 0533 (SC), the Supreme Court held that a contract for construction of ship as per the specifications of the buyer with specific stipulations is a sale contract and not a works contract. The Supreme Court also observed that the clause in the contract providing for passing of property in goods as and when the said goods are used in the contract is not important in deciding the issue. The relevant extracts from the said decision are as under:

"22. Reverting back to the facts of the contract under consideration before us, a few prominent features of the transaction are clearly deducible from the several terms and conditions and recitals of the contract. The contract is for sale of a completely manufactured ship to be delivered after successful trials in all respects and to the satisfaction of the buyer. It is a contract for sale of made to order goods, that is, ship for an ascertained price. Although the plans and specifications for the ship are to be provided by the customer and the work has to progress under the supervision of the classification surveyor and representative of the buyer, the components used in building ship, all belong to the appellant. The price fixed is of the vessel completely built up although the payment is in a phased manner or, in other words, at certain percentages commensurate with the progress of the work. The payment of 15 per cent of the

price is to be made on satisfactory completion of the dock trials, that is when the vessel is ready to be delivered and strictly speaking excepting the delivery nothing substantial remains to be done. Twenty per cent of the price is to be paid upon delivery of the vessel. Thus 65 per cent of the price paid before the trials is intended to finance the builder and to share a part of the burden involved in the investments made by the builder towards building the ship. It is a sort of an advance payment of price. The "title and risk clause" quoted as sub-para (14) above is to be found in 6 out of 8 contracts in question. So far as these 6 contracts are concerned they leave no manner of doubt that property in goods passes from seller to the buyer only on the ship having been built fully and delivered to the buyer. In all the contracts the ultimate conclusion would remain the same. ***The ship at the time of delivery has to be a completely built up ship and also seaworthy whereupon only the owner may accept the delivery.*** *A full reading of the contract shows that the chattel comes into existence as a chattel in a deliverable state by investment of components and labour by the seller and property in chattel passes to the buyer on delivery of chattel being accepted by the buyer. Article 15 apparently speaks of property in vessel passing to the buyer with the payment of first instalment of price but we are not to be guided by the face value of the language employed; we have to ascertain intention of the parties. The property in machines, equipments, engine, etc., purchased by the seller is not agreed upon to pass to the buyer. The delivery of the ship must be preceded by trial run or runs to the satisfaction of the owner.* ***All the machinery, materials, equipment, appurtenances, spare parts and outfit required for the construction of the vessel are to be purchased by the builder out of its own funds. Neither any of the said things nor the hull is provided by the owner and in none of these the property vests in the owner.*** *It is not a case where the builder is utilising in building the ship, the machinery, equipment, spares and material, etc., belonging to the owner, whosoever might have paid for the same. The builder has thereafter to exert and invest its own skill and labour to build the ship. Not only the owner does not supply or make available any of the said things or the hull of the ship the owner does not also pay for any of the said things or the hull separately. All the things so made available by the builder are fastened to the hull belonging to the builder and become part of it so as to make a vessel. What the owner pays to the builder in instalments and in a phased manner are all payments at the specified percentage which go towards the payment of the contract price, i.e., the price appointed for the vessel as a whole. 65 per cent payment of the price is up to the stage of the main engine having been lowered in position on board the vessel, i.e., the stage by which the building of the vessel is complete. 15 per cent payment is to be done on satisfactory completion of the trial and 20 per cent upon delivery of the vessel.* ***Giving maximum benefit in the matter of construction and interpretation of this clause in favour of the appellant it can be said that it is the property in vessel which starts passing gradually to the buyer proportionately with the percentage of payments made and passes fully with the payment of last instalment on delivery of vessel having been accepted.***



1.10. Based on the above observations, the Supreme Court concluded that the contracts in question ***involve sale of the respective vessels within the meaning of clause (n) of the Andhra Pradesh General Sales Tax Act, 1957 and are not merely works contract as defined in clause (t) thereof.***

1.11. A similar view has been taken by the Supreme Court in the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd. [2005] 140 STC 0022 (SC), wherein it has been held that a contract for construction and supply of a lift is a sale contract and not a works contract. The relevant tests laid down in the said decision are reproduced below:

5. It can be treated as well-settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale"; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a "sale" or a "works contract"

1.12. We therefore have to submit that the transaction is essentially a transaction for sale of immoveable property and the relationship between the Appellants and the prospective owner is that of seller & buyer of an immoveable property. We submit that the said proposition is not altered even in cases where the set of co-terminus agreements are entered into.

1.13. The levy of service tax requires that there should be some rendition of service. In the instant case, there is a sale of immoveable property and therefore the provisions of the service tax law do not apply at all.

1.14. The view that the builders are not liable for service tax is confirmed by the Ministry of Finance *vide* its letter number F. No. 332/35/2006-TRU, dated 1st August 2006; wherein it is acknowledged that the relationship between a builder and the purchaser is not that of a "service provider" and "service recipient"[1].

2. *In substance also, the transaction is a sale of immoveable property*

2.1. It is an accepted principle that before characterizing a transaction, one has to carefully examine the exact legal nature of the transaction and other material facts. Not only the form but also the substance of transaction must be duly taken into account[2]. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of charging does not in itself determine whether the service provided is a single service or multiple services

---

[1] Reply to Question 1 addresses this issue.
[2] CBEC Letter (F. No. B14/2006-TRU) dated 19/04/2006.

Mehta & M... SEC'BAD

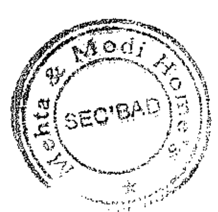
2.2. Further, in the following cases it has been held that substance of the transaction prevails over the form:

- Venus Jewel Vs. Commr of S.T. -I, Mumbai 2012 (285) E.L.T. 167 (Guj.)
- Bhootpurva Sainik Society Vs. Commr of C. EX. & S.T., Allahabad 2012 (25) S.T.R. 39 (Tri. - Del.)
- Commr. OF S.T., Bangalore Vs. Karnataka State Beverages Corp.Ltd. 2011 (24) S.T.R. 405 (Kar.)

2.3. Even in commercial & legal parlance, the transactions are not in the nature of the Works Contract Services

2.4. When one looks at the substance of the transaction in the fact matrix as explained earlier, the issue is crystal clear, the essential feature of the transaction is that the Appellants sell immoveable properties. That being the case, 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).

2.5. The Appellants submit that the activity of construction is for self and as a part of the obligation to deliver a developed immoveable property. Notwithstanding the same, even if it is presumed that the transaction contains elements of works contract services as alleged, the same are subsidiary and do not lend the essential characteristic to the transaction. For example, the Buyer has little wherewithal of the quality, quantity, brand or the price of most of the building materials used. Similarly, the Buyer is not concerned with the extent to which the labour or the services are required for the purpose of the completion of the unit. For both the Appellant as well as the Buyer, the linkage with works contracts is very remote and laborious.



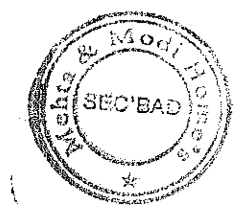
2.6. From the above clarifications and distinctions, it is more than evident that commercially and legally, the transaction does not represent the characteristics required of the alleged categories of taxable services.

2.7. We submit that in a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance i.e. "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". Such words must be understood in their 'popular sense'. The particular terms used by the legislature in the denomination of articles are to be understood according to the common, commercial understanding of those terms used and not in their scientific and technical sense "for the legislature does not suppose our merchants to be naturalists or geologists or botanists". This is referred to as the common parlance test[3].

2.8. Based on the above common parlance test, we have to submit that in common parlance, no one would treat us as a works contractor but would consider us as sellers of immoveable properties and therefore, the transaction cannot be classified as Works Contract Services. For the said purpose, we rely on the following decisions:

i. The expression "fish" is not wide enough to include prawns since If a man were to ask for fish in the market and if prawn is provided or in the vice versa, he would not accept the same[4]

[3] Mukesh Kumar Aggarwal & Co vs. State of Madhya Pradesh 2004 (178) ELT 3 (SC)
[4] Commissioner of Customs vs. Edhayam Frozen Foods 2008 (230) ELT 225 (Mad HC)



ii. Steam generated from water cannot be considered as chemical in common parlance[5]

2.9. The Appellants therefore submit that the essence of the transaction is not the same as alleged and therefore cannot be made liable for payment of service tax under the said categories of taxable services. The Appellants therefore submit that since the transaction in substance is that of sale of immoveable property and not one of construction, the same is not liable for payment of service tax.

3. *The transaction of sale of immoveable property is not a works contract at all*

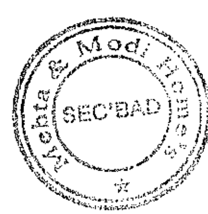
3.1. The Appellants have to submit that service tax is levied on a selective approach. The service tax is demanded under the category of "Works Contract Services". However, the Order in Original has no detailed analysis of why the alleged transaction constitutes a works contract.

3.2. It is a settled proposition in law that a works contract is a contract wherein the contractor works upon a property owned by the client and while performing the work transfers the ownership of materials to the client.

3.3. Whether the contracts for sale of immoveable properties can be considered as works contracts or not is right now an issue pending before the Supreme Court since the decision in the case of K Raheja Development Corporation v State of Karnataka 2005-TIOL-77-SC-CT has been doubted by the Supreme Court and the matter has been referred to a Larger Bench[6].

---

[5] Gopalanand Rasayan vs. State of Maharashtra 2011 (263) ELT 381 (Bom HC)
[6] Larsen & Toubro Ltd. Vs. State of Karnataka 2008 (12) STR 257 (SC)



3.4. Further, the transaction cannot be covered under the category of "Works Contract Services" since the activity is not specifically listed in the definition set

3.5. The relevant definition sets are reproduced below for ease of reference:

<table>
<tr>
<td>Taxable Service defined u/s 65(105)(zzzza)
a
p
e
r
u
s
a
l
o
f
t
h
e</td>
<td>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

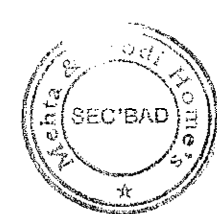
(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(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;</td>
</tr>
</table>

above definition sets, it is evident that there are twin conditions to consider a transaction as a works contract under the provisions of the service tax law. The first condition is that transfer of property in goods involved in the execution of such contract is leviable to tax as



sale of goods and the second condition is that the contract is for specific purposes, which inter alia includes construction of a new residential complex or a part thereof

3.6. The Appellants have to submit that the Order does not demonstrate in reasonable detail the satisfaction of either of the two conditions.

3.7. The first condition for treating a transaction as works contract is that the transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods. Neither the SCN nor the OIO at any point of time, refer to this vital condition nor is there any demonstration of how this condition is satisfied. ***In fact, the OIO, by demanding a service tax on the entire value of the contract negates this very condition and therefore the OIO is self conflicting.***

3.8. The Appellants have to submit that though they are paying sales tax on the agreement for construction, the mere act of paying the sales tax does not demonstrate that the sales tax was actually leviable and the condition of works contract requires that the sales tax was actually leviable. As stated earlier, the issue regarding the applicability of sales tax on such transactions is pending before the Supreme Court.

3.9. The Appellants have to further submit that the role played by them is much wider than that of mere construction. We typically undertakes numerous activities like

- Evaluation/Acquisition of a Site
- Removal of Encumbrances
- Demolition
- Layout Planning & Approval
- Purchase of Additional TDR

- Construction
- Sale
- Possession & Maintenance
- Society Formation & Handing over

3.10. All the above steps are performed by the Appellants for self and are not performed specific for any buyer or prospective buyer. In fact, the approval of the standard layout is obtained by the Appellants without any consultation with the buyers and much before the buyer even knows the Appellants.

3.11. The Appellants therefore have to submit that merely entering to co-terminus agreements in case of financing requirements do not change the substance of the transaction to that of provision of works contract services.

3.12. Further, the Supreme Court judgment of K Raheja Development Corporation v State of Karnataka 2005-TIOL-77-SC-CT, which is the sole basis for treating the transaction as works contract was rendered in the context of works contract tax. Under the Karnataka GST, the definition of works contract was specifically including development contracts, which is not the case with the service tax law, which includes only construction contracts. Further, the scope of development contracts is much wider than that of construction contracts and construction is just one of the responsibilities of the said contract.

4. ***Individual bungalows cannot be considered as residential complex and demand of service tax not sustainable***

4.1. Appellant submits that as brought out in the statement of facts the lands in the three phases are disjoint. In Phase I & II sanction for development of land into plots was obtained. As per rules of the urban development authority the tentative sanction was given and only after

completion of all land development works the final sanction / layout was released. Phase I & II land development works were completed and final layout released on 7.6.2005 and 1.2.2007 respectively. Subsequent to that sanction for individual bungalows were obtained. (Copy of Individual sanction enclosed in Annexure-__). Further, the approved layout of the project has been enclosed in Annexure-__ by which we can understand that public roads also exist between the bungalows in Phase-I & Phase-II. Further, Plot No. 261 to 286, 200A, 200C,200D & 200F are not part of any layout and the lands were purchased from several parties and sanction obtained independently.

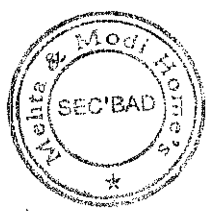
4.2. Appellant submits that in the case between Commissioner Vs. Macro Marvel Projects Pvt. Ltd. 2012 (25) S.T.R. J154 S.C it was held by Hon'ble Supreme Court as –

"The Appellate Tribunal in its impugned order had held that the appellants constructed individual residential houses, each being a residential unit, which fact is also clear from photographs. The law makers did not want construction of individual residential units to be subject to levy of Service tax. Appellant's plea that, from 1-6-2007, impugned activity can be covered under Works Contracts service, not acceptable. Works Contract service includes residential complex and not individual residential units."

4.3. Appellant submits that in the A.S. Sikarwar Vs. CCE, Indore 2012 (27) taxmann.com (New Delhi-CESTAT) wherein they have built 15 independent housesit was held as under-

"We further note that Revenue being aggrieved by the decision of the Tribunal in the said matter had filed appeal with the Hon'ble Supreme Court and the Hon'ble Supreme Court has dismissed the appeal filed as reported at 2012 (25) J514 (SC). So we consider that this matter is no longer res integra and service tax can be demanded under section 65(105)(zzzh) ***only if the building concerned has more than 12 residential units in the building and such levy will not apply in cases where in one compound has many buildings, each having not more than 12 residential units. Therefore, we set aside the impugned order and allow the appeal."***

Therefore, even in the present case where silver oak bungalows are independent houses it cannot be said that there has been construction



of complex and hence all amounts paid by them ought to be refunded to the appellant and there is no question of paying any further service tax to the Government.

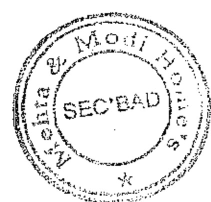
4.4. Appellant submits that in the case of Arihant Constructions Vs. CCE, Jaipur that 2012 (25) taxmann.com 540 (New Delhi-CESTAT) they constructed several quarters for Kendriya Vidyalaya. These residential quarters were distributed in different buildings in the same compound. None of the buildings had more than 12 flats in each building. In view of the Macro Marvel Projects Ltd. the Hon'ble Tribunal held that –

"We find that the explanation pointed out by the AR has nothing to do with the dispute in hand because that explanation defines 'residential unit' and the definition in dispute is that of 'residential complex'. The explanation can mean only that the building should have 12 residential units. So the explanation is not for interpreting the meaning of 'residential complex'. Since the Hon. Supreme court has already confirmed the interpretation in favour of the appellant, we find it proper to waive the requirement of pre-deposit of dues arising from the impugned order and stay collection of such dues during the pendency of the appeal."

5. ***The Show cause notice is contradictory to Circular No. 98/1/2008-ST dated 04.01.2008***

5.1. Without prejudice to the foregoing, The Appellants have to submit that the Circular No. 98/1/2008-ST

Categorically stated that- ***"In view of the above, a service provider who paid service tax prior to 1-6-07 for the taxable service, namely, erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, as the case may be, is not entitled to change the classification of the single composite service for the purpose of payment of service tax on or after 1-6-07 and hence, is not entitled to avail the Composition Scheme."***



Therefore, going by the said proposition the demand of service tax for the period 01.06.2007 to 31.12.2010 under "Works Contract" service is not sustainable.

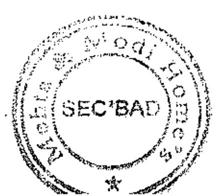
5.2. Appellant further submits that Supreme Court in *Commissioner of Customs, Calcutta & Others* v. *Indian Oil Corporation Limited & Another,* (2004) 3 SCC 488, after examining the entire case law, culled out the following principles:

1. *"Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it Is contrary to the terms of the statute.*
2. *Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.*
3. ***.A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.***
4. *. It Is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."*

In the Instant case, the show cause notice has been issued contrary to the directions of the **CBEC Circular 98/01/2008 dated 04.01.2008.** Based on the above judgment the entire proceedings under the subject Notice to the extent aggrieved is void abinitio and should be quashed.

6. ***Even if a view is taken that there is some element of service embedded in the transaction of sale of immoveable property, the same is taxable only with effect from 01.07.2010 and that too under a different classification of "Construction of Complex Service"***

6.1. The Appellants have to submit that even if a view is taken that there is some element of service embedded in the transaction of sale



of immoveable property, the same is taxable only with effect from 01.07.2010 and that too under a different classification of "Construction of Complex Service"

6.2. The Appellants submit that in order to impose service tax on the service component embedded within a transaction of sale of immoveable property where some amounts are received before the completion of construction, an Explanation was inserted to section 65(105)(zzzh) with effect from 01.07.2010. The said Explanation is reproduced below:

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 authorised 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 authorised 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.

6.3. In this context, it has been clarified[7] as under:

8.2 As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/ completion, pays the consideration in instalments and takes possession of the property when the entire consideration is paid and the construction is over.

8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called 'Agreement to Sell'. At that stage neither the full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called 'Sale Deed' is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.

8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as 'Sale of Undivided

[7] DOF. No. 334/1/2010-TRU, dated 26-2-2010

Portion of The Land'. This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called 'Construction Agreement' is parrallely executed under which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of service tax payment.

8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged.

6.4. The Appellant therefore submits that the demand raised for the period prior to the date of the explanation is inserted is incorrect. The explanation is inserted with effective from 01.07.2010 but the demand raised in the instant case is for the period 1.4.2006 to 31.12.2010 and therefore the demand raised for the period prior to 01.07.2010 is bad in law. The clarification issued by board TRU vide D.O.F No. 334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in tax treatment among different practices, the said explanation of the same being prospective and also clarifies that the transaction between the builder and buyer of the residential unit is not taxable until the assent was given to the bill. Hence this shows that the transaction in question is not liable to service tax for the period prior to 01.07.2010.

6.5. The Appellants further submit that even for periods after 01.07.2010, the service tax could be demanded only under the category of Construction of Complex Services and not under the category of Works Contract Services because the deeming fiction to tax the service component embedded in the transaction is brought

about only under the category of Construction of Complex Services and not under Works Contract Services.

6.6. The Appellants further submit that the need to "deem" a transaction to be a service can arise only in a case where the transaction is not understood to be a service in normal parlance. Thus, through the insertion of the Explanation, the Legislature has clearly accepted the proposition that the transaction is not a service in normal parlance. As such, service tax can be demanded only under the deeming provision and not under any other normal provision like Works Contract Services.

6.7. The above submissions are without prejudice to our earlier submissions that in view of the fact that the transaction constitutes a sale of immoveable property, the same cannot be deemed to be a service at all.

6.8. Without prejudice to the foregoing, Appellant submits that Trade notice F. No. VGN(30)80/Trade Notice/10/Pune dated 15.02.2011 issued by Pune Commissionerate, has specifically clarified that no service tax is payable by the builder prior to 01.07.2010 and amounts received prior to that date are also exempted.

6.9. The Appellant further submits that the Honorable Tribunal of Bangalore in the case of Mohtisham Complexes (P) Ltd. vs Commissioner of C. Ex., Mangalore 2011 (021) STR 0551(Tri.-Bang) stating that the explanation inserted to Section 65(105)(zzzh) from 01.07.2010 is prospective in nature and not retrospective. The relevant extract of the subject case is reproduced here under:

"In other words, the present case is covered by the situation envisaged in the main part of the Explanation, thereby meaning that the appellant as a builder cannot be deemed to be service provider vis-a-vis prospective buyers of the buildings. The deeming provision would be applicable only from 1-7-2010. *Our attention, has also been taken to the texts of*

certain other Explanations figuring under Section 65(105). In some of these Explanations, there is an express mention of retrospective effect. ***Therefore, there appears to be substance in the learned counsel's argument that the deeming provision contained in the explanation added to Section 65(105)(zzq) and (zzzh) of the Finance Act, 1994 will have only prospective effect from 1-7-2010.****Apparently, prior to this date, a builder cannot be deemed to be service provider providing any service in relation to industrial/commercial or residential complex to the ultimate buyers of the property.* ***Admittedly, the entire dispute in the present case lies prior to 1-7-2010. The appellant has made out prima facie case against the impugned demand of service tax and the connected penalty.***

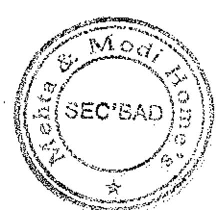
6.10. Appellant submits from the above, it is evident that there shall be no liability for the receipts received for the period prior to 01.07.10.

6.11. The Appellant further submits the Honorable Tribunal of Delhi in the case of Ambika Paints Ply & Hardware Store Vs Commissioner of Central Excise, Bhopal 2012 (27) STR 71 (Tri-Del) has held as under:

"Hon'ble Gau. High Court in the case of Magus Construction Pvt. Ltd. v. Union of India (supra) has held that construction of residential complex by a builder/developer against agreement for purchase of flat with the customers is not service, but is an agreement for sale of immovable property."

6.12. Hon'ble Punjab & Haryana High Court in the case of G.S. Promoters v. Union of India (supra) cited by the learned SDR has only upheld the validity of the explanation added to Section 65(zzzh) by the Finance Act, 2010.

"Moreover, we find that it is only w.e.f. 1-7-2010, that explanation was added to Section 65(zzzh) of the Finance Act, 1994 providing that for the purpose 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 prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authorized 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. ***This legal fiction introduced by explanation to Section 65(zzzh) has not been given retrospective effect. Therefore, for the period prior to 1-7-2010, the appellant's activity cannot be treated as service provided by them to their customers. In respect of the period***



prior to 1-7-2010 same view has been expressed by the Board in its Circular No. 108/2/2009-S.T., dated 29-1-09. We are, therefore, of prima facie view that the impugned order is not correct."

6.13. The Appellant submits that the Ld. Respondent vide para 16.2 of the impugned order alleges that since the construction agreement is entered into by Appellant after the execution of the sale deed, the Explanation inserted with effect from 01.07.2010 is not applicable therefore Appellant is liable for the service tax. The Appellant wishes to rely on Board Circular D.O.F. No. 334/1/2010-TRU, dated 26-2-2010

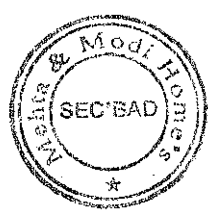
8. Service tax on construction services

8.1 The service tax on construction of commercial or industrial construction services was introduced in 2004 and that on construction of complex was introduced in 2005.

8.2 As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no Service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/completion, pays the consideration in instalments and takes possession of the property when the entire consideration is paid and the construction is over.

8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called 'Agreement to Sell'. At that stage neither the full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called 'Sale Deed' is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.

8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as 'Sale of Undivided Portion of The Land'. This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called 'Construction Agreement' is parrallely executed under



which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of Service tax payment.

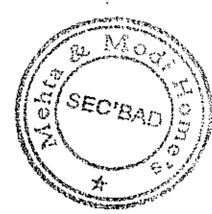
8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the Service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged.

6.14. The Appellant submits that the above Circular has covered both the situations whether the construction agreement is entered into or construction agreement is not entered into. Therefore even the separate construction agreement entered into by the builder prior to 01.07.2010 is not liable for the service tax. Therefore the allegation of the Ld. Respondent vide Para 16.2 of the impugned order is not tenable.

6.15. Further, the Appellants have already demonstrated in earlier submissions that the Construction Agreement cannot be looked at in isolation of the Sale Agreement.

6.16. The Appellant submits that all advances received prior to 01.07.2010 are not liable for the service tax. In this regard Appellant wishes to rely on Notification No. 36/2010-ST dated 28.06.2012.

"In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in clause (A) of section 76 of the Finance Act, 2010 (14 of 2010) other than services referred to in clause (zzc) and (zzzz) of sub-section (105) of section 65 of the Finance Act from so much of the service tax leviable thereon under section 66 of the Finance Act as is in excess of the service tax calculated on a value which is



equivalent to the amount of advance payment received before the said appointed date".

6.17. Based on the above developments, the Appellants submit that the service tax law has consistently provided for a differential treatment for contractors as compared to builders and developers. This is further evident from the fact that a different rate of abatement is provided for the builders and developers as compared to the contractors.

6.18. The intention of the Legislature is further evident from the fact that in 2010, when the Explanation was inserted to the definition of taxable service relating to Construction of Complex Service, the Legislature was aware of the two entries pertaining to Construction of Complex Service and Works Contract Service. Though both the entries are similarly worded, the Legislature amended the definition of Construction of Complex Service and also suitably notified a new abatement rate for builders, simultaneously providing for exemption for receipts prior to 01.07.2010, but consciously abstained from undertaking similar amendments under the category of "Works Contract Services"

6.19. The above action of the Legislature of bringing about selective amendments and also clarifying through the TRU Circular clearly suggests that at no point of time, the Legislature intended to tax the transactions undertaken by the Appellants under the category of "Works Contract Services"

6.20. It is an important proposition in law that once the classification alleged in the SCN is incorrect, the entire SCN is bad in law and the entire demand has to fail.

Mehta & Modi Homes SEC'BAD

6.21. The Appellants further submit that since the SCN only alleges categorisation under Works Contract Services, the tax cannot be demanded under any other category either. The demand cannot be confirmed under a category of service different than the one alleged under the show cause notice. For the said purpose, the Appellants rely on the decision of the Delhi Tribunal in the case of Motherson Pudenz Wickmann Limited vs. CCE 2006 (2) STR 63 (Del Trib) wherein it was held that if the allegation in show cause notice is for management consultant only, question whether nature of services provided that of Consulting Engineer could not to be considered in the adjudication order.

6.22. The following observations of the Supreme Court[8] are very relevant:

It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed.

7. Land Development neither "construction of complex service" nor "works contract service"

7.1. The impugned order has included the amounts received land development in the "construction of complex service" upto 30.06.2007 and under "works contract service" from 01.06.2007. In this regard it is submitted that the land was acquired by the Appellant outright and the same was developed into a layout at its own cost and has obtained the completion certificate for the same and there after the agreement to sell a bungalow on such

[8] Reckitt and Coleman of India Limited vs. CCE 1996 (88) ELT 641 (SC)

developed layout. The cost of such development was recovered from the buyer, such recovery is not for proving any service at all.

7.2. Further such activity of development is not covered under the definition of construction of complex since the activity was to make the land in to equal level, make roads, sewage line, electrical pole etc. which cannot be considered as residential complex and hence the liability under both "construction of complex service" and "works contract service" fails.

7.3. Appellant submits that amounts received for Phase-I & Phase-II in the column pertaining to agreement of construction given in the annexures also includes amounts received towards the land development charges. However, by virtue of the said discussion above no service tax liability arises on the land development charges. However, the bifurcation of which shall be made available subsequently.

7.4. Further all such development work was completed well before the levy of service tax and hence liability of service tax does not arise.

8. *The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer*

8.1. The Appellant submit that the notice has been issued alleging liability under "works contract service" defined vide Section 65(105)(zzzza) of the Finance Act, 1994 and the explanation of the said clause defines "works contact" for the purpose of levy of service tax which inter alia includes construction of a new residential complex or a part thereof. The definition of the "residential complex" has been defined vide section 65(91a) of the Finance Act, 1995 which the taxable object, in case the construction is performed by any person which does not fit the definition of residential complex, then

such construction would not be covered under the purview of works contract unless specially covered elsewhere.

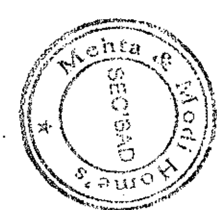
8.2. Appellant submits that the definition of the "residential complex" is common for both the definition of "Construction of Complex Service" defined under section 65(zzp) of the Finance Act and also the for the definition of "Works Contract Service" defined vide Section 65(105) (zzzza) of the said Act and hence any clarification provided for the "residential complex" is equally applicable for both "Construction of Complex Service" & "Works Contract Service"

8.3. Appellant submits that it has been specifically clarified vide Board ***Circular No. 108/2/2009- S.T. dated 29-01-2009*** that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of residential complex as defined under 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction. The relevant extract of the circular is reproduced here for easy reference:

"Further, if the ultimate owner enters into a Contract for construction if 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...."

Appellant reiterates that the activity undertaken by them is squarely covered by the Board's Circular i.e. they have entered into a construction contract with the Ultimate owner who shall use the said property for his personal use subsequently.

8.4. The Appellant submits that the argument is in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been



provided based on the examination of the above argument among others.

8.5. The Appellant submits the final clarification was provided by the board based on the preamble and the arguments. The relevant portion of the circular is provided here under for the ready reference.

> *"... 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..." (Para 3)*

8.6. The Appellant submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.

a. For service provided until the sale deed has been executed to the ultimate owner.

b. For service provided by entering into construction agreement with such ultimate owner, who receives the constructed bungalow for his personal use.

8.7. The Appellant submits that it is exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to

Modi & Homes SEC'BAD

construction in the construction agreement portion. Therefore this clarification is applicable to them ibid.

8.8. The Appellant submits that the circular has very narrowly interpreted by the department without much application of mind and has concluded in Show Cause Notice that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person.

8.9. The Appellant submits that where an exemption is granted through Circular No. 108/2/2009-S.T., dated 29-1-2009, the same cannot be denied on unreasonable grounds and illogical interpretation as above. In the definition "*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**.*" Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person**....." similar the reference "personal use as residence by **such** person" also cannot be interpreted as "personal use by **ONE persons**" Such interpretation would be totally against the principles of interpretation of law and also highly illogical. Appellant submits that with the above exclusion, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the impugned is void abinitio.

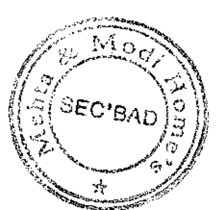
8.10. Without prejudice to the foregoing, the Appellant submits that assuming but not admitting that when the entire residential complex is meant for a person for his personal use, then such complex falls under excluded category is to be considered as

interpreted by the impugned order, then the entire section 65(91a) gets defeated as in case complex belonging to single person there would be nothing called as a common area, common water supply etc. the word "common" would be used only in case on multiple owner and not in case of single owner; therefore the interpretation of the department is meaningless.

8.11. Appellant submits that the impugned order is silent on the allegation as per SCN relating to usage of the complex by a single person, and has concluded that *"However, the said exclusion is not applicable to the individual residential units in a complex having more than twelve residential units"* but has admitted the complex intended for the personal use is excluded, the impugned notice has failed to give the reasoning as the logic or reasoning for such conclusion but has just plainly extracted the definition and has come to such conclusion and hence the same improper. In the instant case all the residential units are for the personal use and hence the complex cumulative of such residential units which is used for the personal use becomes a complex for personal use which has been totally ignored.

8.12. Appellant submits that it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex. If the interpretation given by the Ld. Respondent is correct the Board could have clarified that much only. The interpretation given by the ld. Respondent is nowhere whispered in the Circular and it is a bland statement therefore the allegation of the Ld. Respondent is not tenable.

8.13. Appellant further 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 abinitio.

Relevant Extract

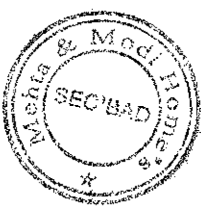
"13.4 However, residential complex having only 12 or less residential units would not be taxable. Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is also not covered under the scope of the service tax and not taxable"

8.14. Appellant further submits that Supreme Court in *Commissioner of Customs, Calcutta & Others* v. *Indian Oil Corporation Limited & Another,* (2004) 3 SCC 488, after examining the entire case law, culled out the following principles:

"Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it Is contrary to the terms of the statute.
2. Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.
*3 .**A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.***
4. It Is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."

In the Instant case, the show cause notice has been issued contrary to the directions of the **CBEC Circular 108/02/2009 S.T. dated 29.01.2009.** Based on the above judgment the entire proceedings under the subject order is void abinitio and should be quashed.

8.15. Without prejudice to the foregoing, the Appellant further submits that various decision have been rendered relying on the Circular 108 as under



8.15.1. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL–1106-CESTAT–Bang,

8.15.2. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,

8.15.3. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)

8.15.4. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

8.15.5. Mohtisham Complexes Pvt. Ltd. vsCommr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

8.15.6. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

8.16. The Appellant submits that Ld. Respondent vide Para 16.1 of the impugned order alleges that *"For the instance in the case of M/s. Classic Promoters and Developers, M/s. Classic Properties Vs. CCE Mangalore [2009-TIOL-1106-CESTAT-Bang] it is only interim order while disposing the stay application and has not attained finality".*

8.17. The Appellant submits that Ld. Respondent has not relied on the Stay order given by the Hon'ble CESTAT since it is interim order. The stay order of the Tribunal has categorical finding that the individual flats constructed for personal use covered under the exclusion clause and hence the Appellant has prima facie of the case and hence the amounts adjudicated in the order are waived. Just because it is an order of stay, the intention of the decision and prima facie of the case cannot be ignored.

8.18. The Appellant submits that submits that Ld. Respondent vide Para 16.1 of the impugned order relied on M/s LCS City Makers Pvt. Ltd

Vs CST, Chennai Bench, (Final order No. 507/12 dated 03.05.2012) to conclude that one person should use the total complex for the personal use. It is submitted the said circular 108 deals with two portion viz. "self- construction" i.e. construction upto sale deed and "personal use" i. e. construction intend for the personal use of the customer, the decision relied on by the Respondent deals only with the self-construction and the ground taken by the Appellant here is the personal use and hence this decision is not having any bearing in the present case.

9. There *are fundamental errors in the quantification of the service tax demand*

9.1. The Appellants have to submit that notwithstanding the basic ground that service tax is not payable at all, even if it is ultimately held that service tax is indeed payable, there are fundamental errors in the manner of quantification of the service tax demand. The said errors are summarized hereunder:

9.1.1. There is a mismatch in the calculation of the gross receipts on which service tax is demanded

9.1.2. The benefit of reduction on account of materials as statutorily provided under Rule 2A of the Service Tax (Determination of Value) Rules, 2006 has not been granted. In the alternative, the benefit of composition scheme should be granted

9.1.3. Composition Benefit

9.1.4. CENVAT Credit is not granted

9.2. Each of the above aspects are explained in detail in subsequent submissions.

Mehta & Modi Homes SEC'BAD

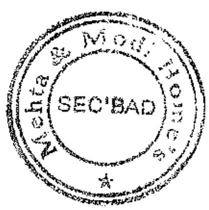
In Re: Compilation of the gross receipts

9.1.1.1 The gross receipts has been compiled by the Department based on the books of accounts submitted by the Appellant, however there seems to be a gross error in compilation of the receipts since the same is not matching with to our books of accounts. For instance in the month of March 2008 actual receipts were Rs.98,98,144 whereas the receipts considered by SCN is Rs.15,70,99,760/-. The compilation of the gross amount received and the bifurcation thereof towards Sale Deed, Construction Agreement and other amounts has been given in the annexure to this appeal which has been duly certified by the statutory auditor has been enclosed.

In re: Quantification of Demand - Rule 2A of Service Tax (Determination of Value) Rules, 2006

9.1.2.1 Appellant submits that the demand had been confirmed on the gross amount at the full rate of service tax. However if at all service tax has to be paid, the same under Works Contract Service, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, which is 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.

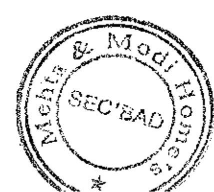
9.1.2.2 The Appellant submits that in so far as levying service tax on the value of materials is involved in the said Works Contract is concerned, it is Ultra-Vires the constitution as Article 265 of Constitution of India clearly stated that *No tax can be collected without the authority of law.* In the present case, Department has no authority to levy service tax on the materials portion involved in the contract.



9.1.2.3 The Appellant submits that 6th line of the Para 16.5 of impugned order alleges that *"it is also pertinent to mention that it has clearly be brought out in the notice that the gross receipts were taken in to account as noticee fails to submit the details of the value of transfer of property in goods."*

9.1.2.4 The Appellant submits that in reply to show cause notice they have given the material consumption statement showing the total value of the material consumed during the material period. But the Ld. Respondent has not given the benefit of the Rule 2A of Service Tax (Determination of the value) Rules, 2006.The Appellant submits that the allegation of the Ld. Respondent in this regard vide 16.5 of the impugned order *"however, in the instant case the noticee could not produce any meaningful documentary evidence except submitting a mere statement of consumption of the materials. On perusal of the same, it is observed that the statement was given without any supporting documentary evidence. Further, the statement does not specify at least that the said consumption pertains to the impugned project".*

9.1.2.5 The Appellant submits that Ld. Respondent is alleging that Appellant has not produced the meaningful documentary evidence therefore the benefit of deduction has not given. The Ld. Respondent has made bland allegation and has not explained what constitutes the meaningful documentary evidence and what not constitutes meaningful documentary evidence. It is obvious that in works contract material should be transferred along with provision of the service. The Ld. Respondent has not came with different figure of value of material consumed to oppose the figure of material consumption given by the Appellant, in that scenario it is



unreasonable to deny the deduction provided under the Rule 2A of the Service tax (Determination of value) Rules, 2006 to the Appellant.

9.1.2.6 The Appellant submits that Ld. Respondent vide 16.5 of impugned order alleges that *"further the statement does not specify at least that the said consumption pertains to impugned project."* The allegation in the show cause notice pertains to only one project. When the subject matter is only about one project there should not be any doubt about the value of material produced pertains to which project. **The value of material consumed statement along with invoices (documentary proof) has been enclosed along with this appeal memo therefore there shall not be service tax on value of the material.**

9.1.2.7 The Appellant submits that in the case of Indian Railways C & T Corp. 2010 (20) S.T.R. 437 (Delhi HC)–

> *"The legal propositions, which emerge from a careful analysis of the above-referred decisions, can be summarized as under :-*
> *(a) It is open to the States to levy sales tax/ Value Added Tax, on the whole of the consideration, in transactions of sale of goods, such as sale to a customer in a restaurant, irrespective of the incidental element of service which is necessarily involved in sale of goods of this nature;*
> ***(b)If the transaction between the parties is covered under Article 366 (29A) of the Constitution, it is permissible for the States to levy and collect sales tax/Value Added Tax on the value of the goods involved in the execution of the transaction. It is not permissible to levy sales tax/Value Added Tax in respect of service component of such composite transactions"***

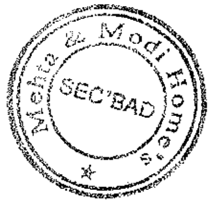
Appellant submits that what emerges from the above judgment is that in case of a composite transaction the state are not permitted to levy sales tax/ VAT in respect of service component of such composite transactions. Therefore, similarly applying this rationale in case of Construction contracts which is covered under Article 366 (29A) of the Constitution service tax cannot be levied by the Union on the component of goods. Therefore, impugned order levying service tax at 12.36% on

amounts received from the customer is void ab initio and not legally sustainable, which should be quashed in the hands of Hon'ble Tribunal.

9.1.2.8 The Appellant submits that in the case of Deluxe Color Lab Pvt. Ltd Vs. CCE, Jaipur 2009 (13) S.T.R. 605 it was held that-

"***The Supreme Court found that out of various composite transactions envisaged in different sub-clauses of clause 29-A - 'works contract', 'hire purchase contract' and 'catering contract'- covered by sub-clauses (b), (c) & (f) of clause (29A) - involve the fiction of deemed sale, and out of these three, works contract and catering contract involve the elements of service and sale at the same time*** (see para 44 of the BSNL judgment above).

9.1.2.9 ***It would thus appear that the decision in BSNL case lays down the law that works contract (and also catering contract) involves the element of both sale and service contract and that the service and sale elements can be split up.*** That being so, we do not find any merit in the submission of the Revenue that the decision in BSNL case cannot be treated as an authority on the issue of service tax. ***If the photography service is a 'works contract', it would follow that it involves the element of both sale and service, and the sale portion of the activity or transaction cannot be included in the taxable value of service...............'Sale' and 'Service' cannot stand in the same box. Sale cannot be treated as service and vice versa."*** Appellant submits that from the above judgment it emerges that in case of a composite contract of nature specified in Article 366 (29A) particularly the Works Contract and Catering contract both the elements of sale as well as service is involved and the sale portion cannot be included in the taxable value portion for the purpose of service tax, therefore impugned order is levying service tax at 12.36% on amounts received from the customer which is ex-facie and illegal.



9.1.2.10 The Appellant further submits that the question came for consideration in *Builders' Association of India & Ors.* v. *Union of India & Ors.* [(1989) 2 SCC 645] and *M/s. Gannon Dunkerley& Co. &Ors.*v. *State of Rajasthan &Ors.* [(1993) 1 SCC 364]. It has expressly been laid down therein that the effect of amendment by introduction of clause 29A in Article 366 is that by legal fiction, certain indivisible contracts are deemed to be divisible into contract of sale of goods and contract of service. In *Gannon Dunkerley* case (supra), it had been held :

> *"Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services."*

9.1.2.11 Applying the same rationale, in the present case service tax should be collected on charges which appertain to the contract for supply of labour and services and should not be levied on the value of goods involved in the execution of the Works Contract.

In Re: Benefit of composition

9.1.3.1 Appellant submits that Rule 3 (1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

> *"Notwithstanding anything contained in section 67 of the Act and rule 2A of (1) the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided,* ***instead of paying service tax at the rate specified in section 66 of the Act,*** *by paying an amount equivalent to two percent* of the gross amount charged for the works contract"*

* *[increased to four per cent for the notice period]*

9.1.3.2 Appellant also wishes to draw attention to Rule 3 (3) of the said rules extracted as under

> *"The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of* ***A WORKS CONTRACT*** *prior to* ***PAYMENT OF SERVICE TAX in respect of THE SAID WORKS CONTRACT*** *and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract"*

9.1.3.3 Appellant submit that from the above provision, it is clear that other alternative payment mechanism for the works contract in case not opted for Rule 2A valuation would be to pay at a composition rate of 2%/4% on the gross amount charged. However such composition has not been extend in the impugned order on the following regards .

9.1.3.4 That service tax was already paid before exercising the option

9.1.3.5 Entire project has been treated as one contract and hence such benefit is not allowed for all the bungalows.

In re: Each residential unit is a works contract

9.1.3.6 The Appellant submits that restriction if at all applicable is for the ongoing works contract and not ongoing residential housing project. The impugn order has denied the ground of exclusion from the residential complex definition stating that in the instant case each residential unit is used for the personal use and not the complex, and hence it is evident that each unit is treated separately and governed by a separate contract and hence if at all the restriction is to be made the same is to be on those bungalows on which payment has been made prior to 01.06.2007 and not for those bungalows for which the first payment was received after 01.06.2007 and payment of ST was made under composition scheme.

Mehta & Modi Homes SEC'BAD

9.1.3.7 The impugned order in Para 16.4 has brought out its own theory that construction of entire residential complex is subjected to levy of service tax and accordingly the entire complex is one works contract in terms of clause (c) of explanation under works contract service and Ld. Respondent has not assigned any reasons for such conclusion.

9.1.3.8 The Appellant submits term Contract has been defined in the *Black Laws Dictionary* as *an **agreement between two or more parties** creating obligations that are enforceable and otherwise recognizable at law. William R. Anson, Principles of law of contract (Arthur L.Corbined 3d Am ed 1919) defines as*

*"The term contract has been used indifferently to refer three different things (1) **series of operative acts by the parties resulting in new legal relations,** (2) the physical documents executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative facts in itself, (3) the legal relations resulting from the operative acts consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges and immunities."*

Therefore from the above, it is clear that for a contract there must be agreement between two or more parties, a housing project as whole cannot be termed as ***A WORKS CONTRACT.***

9.1.3.9 The Appellant submits that in Gerald Dworkin Odgers Construction of Deeds and statutes deeds were defined in following terms-

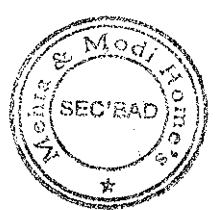
*"All deeds are documents but all documents are not deeds. For instance, a legend chalked on a brick wall or a writing tattooed on a sailor's back may be documents but they are not deeds. It must be in writing and writing on paper or its like eg.Vellum or parchment. **Any instrument under seal is a deed if made between private persons. It must be signed, sealed and delivered."***

Therefore, in the present case every sale deed is separate contract by itself and the rule intended to deny composition scheme for a works contract and not for all works contract in a housing project. Hence, since each contract (sale deed) entered into with each owner is a

separate works contract and benefit of composition should be given to each contract (sale deed) entered into on or after 01.06.2007 and where payment has not been made otherwise than for composition scheme.

9.1.3.10Appellant submits from the above, bungalows on which no ST was paid prior to 01.06.2007 in certain bungalows in Phase I, II would be eligible for the composition scheme and in the fact that the GHMC permit order to undertake the construction has only been issued after 1.6.2007 the benefit of composition scheme should be made available in case of all the customers pertaining to Phase-III in toto. **(Copy of the GHMC permit order enclosed for perusal).**

9.1.3.11 The Appellant relies on the case of Viswas Promoter Pvt. Ltd. Vs. Asst. Comm. Of Income Tax [2013] 29 taxmann.com 19 (Madras). Wherein the Hon'ble High Court has held that-*"Assessee claimed proportionate deduction under section 80-IB(10) for those blocks which were of less than 1500 square feet area - Assessing Officer denied proportionate deduction on ground that each block could not be considered as a separate 'housingproject' - Whether going by definition of 'housing project' as given in section 80HHBA each block in a larger project had to be taken as an independent 'housing project' for purpose of claiming deduction under section 80-IB(10) - Held, yes"* Appellant submits that the facts of the above case are applied to this case then each Phase can be considered as a separate works contract and the benefit of composition can be given to those receipts from bungalows which are in Phase-III



9.1.3.12 Appellant submits that the impugned order has relied upon in Para 16.4 on the Nagarjuna Construction case by Hon'ble Apex Court vide 2012-TIOL-107-SC-ST. However, appellant submits that in the impugned case the court has categorically made a finding that the Court has merely held that whether the circular issued by the board is in line with the rules made in this regards and it has concluded that circular is not prejudicial to the rules, however the court has not discussed about the validity of the rules as such which was clearly stated by the Apex court in the said case. However, in the present case appellant is challenging the very rule which requires appellant to do an impossible thing and which is prejudicial to the assessee who are tax compliant and favorable to the assessee who have not been tax compliant.

9.1.3.13 Appellant submits that since every sale deed is separate contract by itself and each contract (sale deed) entered into with each owner is a separate then for all those sale deed prior to 01.06.2007 the classification should not be changed in view of the Circular No. 98/1/2008 and they should continue to be classified under Construction of Complex service and appellant should be entitled to take the abatement of 67% as specified under Notification No. 1/2006 amended from time to time.

9.1.3.14 The Appellant relies on the case of Lanco Infratech Vs. CST, Hyderabad 2011(23) S.T.R. 351 as affirmed by Andhra Pradesh High Court 2012 (275) E.L.T. 32 states that – "the learned Counsel submits that, even if it be assumed that the Department is entitled to demand Service Tax at the normal rate for the period of dispute, the quantum of demand is liable to be revised. It is submitted that abatement from taxable value to the extent of 67% should have been allowed to the

appellant in terms of Notification No. 1/2006-S.T...

In the result, we are inclined to grant the benefit of abatement from taxable value of the works contract service under Notification No. 1/2006-S.T., for the present purpose" Therefore, in the present case the show cause notice dated 23-10-2008 proposing service tax, interest and penalty during the period from June, 2007 to March, 2008 to M/s Lanco Infratech on the ground that the petitioner was not eligible to avail the benefit under the Composition Scheme, and they had to pay service tax at the full rate of 12.36%. confirmed the demand of service tax of ` 7,78,34,714/-, however the Hon'ble CESTAT granted benefit of Notification No. 1/2006-ST, since the facts under the present case are similar to the above case the benefit of abatement should be granted for all those contract (sale deed) entered into with each owner prior to 01.06.2007.

In Re: CENVAT Credit has not been granted

9.1.4.1 The Appellant further submits that where the Value of Work Contract Service shall is determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, he shall also be entitled to utilize CENVAT Credit on Inputs, Input services and Capital goods **which is Rs.2, 17,996/-.** The Ld. Respondent vide Para 16.6 of the impugned order has given the finding that Appellant can avail the Cenvat Credit and hence there is no dispute in this regard.

10. Non consideration of submissions vis-à-vis violation of the principles of natural justice

10.1. The Appellant submits that the impugned order is *ex-facie* illegal and untenable in law since the same is contrary to facts and judicial decisions.

10.2. The Appellant submits that the SCN is issued based on mere assumption that Central Government has power to tax the sale of bungalows and unwarranted inference without considering the facts, the scope of activities undertaken and the nature of activity involved, incorrect basis of computation, creating its own assumptions, presumptions and many other factors discussed separately Supreme Court in case Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC) has held *"we must hold that the finding that 11,606 maunds of sugar were not accounted for by the appellant has been arrived at without any tangible evidence and is based only on inferences involving unwarranted assumptions. The finding is thus vitiated by an error of law. Such show cause notices are not sustainable under the law"* Therefore, on this count alone the entire proceedings in the subject SCN requires to be set aside.

10.3. The Appellant submits that the impugned order is in violation of the principles of natural justice, as the submissions made by the Appellant, which are meritorious, have not been adverted to or rebutted. The Appellant submits that the following **vital submissions** were made before the Ld. Respondent vide SCN reply but Ld. Respondent has **totally ignored** the same while passing the impugned order:

a. Applicability of Circular No. 98/1/2008-S.T dated 01.04.2008

b. Board Circular D.O.F. No. 334/1/2010-TRU, dated 26-2-2010

c. Applicability of Trade Notice F. No. VGN/30/80/Trade Notice/10/Pune dated 15.02.2011

d. The following judicial pronouncements has not been considered

i. Ocean Builders Vs. CCE, Mangalore 2010 (019) STR 0546 (Tri-Bang)

ii. Virgo Properties Pvt. Limited Vs. CST, Chennai 2010-TIOL-1142-CESTAT Mad

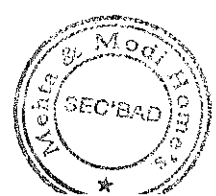
iii. Mohtisham Complexes Pvt. Ltd. Vs. CCE Mangalore 2009 (016) STR 0448 (Tri-Bang)

e. The fact of error in determination of the gross receipts and computation thereof

f. Chartered Accountant certificate for Detailed break-up of consumption of material for benefit of Rule 2A valuation.

g. The fact of the payment of the service tax prior to the issuance of the show cause.

10.4. Appellant submits that the impugned order has not made findings as to the reason why the facts of those cases are not applicable in the present case and has merely stated that contention of appellant is not acceptable and case laws are clearly distinguishable to the facts of the case. In this regard appellant wishes to rely on Anil Products Limited Vs CCE, Ahmadabad 2011 (21) S.T.R 329 (Guj) it was held that "*In the above view of the matter, we are of the opinion that the sole reliance placed by the Tribunal in the decision of Shanpur Industries (supra) is not justified and the* ***Tribunal ought to have given its specific findings on the various submissions made, judgments relied upon and the distinguishing features pointed out by the appellant before the Tribunal.*** *We, therefore, set aside the impugned order passed by the Tribunal and remand the matter back to the Tribunal to decide the whole issue afresh after giving an adequate opportunity to the parties and after considering various submissions that may be made before it and to pass a reasoned as well as speaking order.*" In light of the above judgments since the Ld.



Respondent has not considered the relied Judgments it is gross violation of the principles of natural justice.

10.5. The Appellant submits that all the above meritorious grounds apart from submissions have not been considered while passing the impugned order. The system of departmental adjudication is governed by the principles of natural justice. The impugned order neither analyses the submissions, nor discusses the relevant case law, but has given the order without proper reasoning making the same a non-speaking and predetermined order. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. In the case of Southern Plywoods Vs. Commissioner of C. Ex. (Appeals), Cochin 2009 (243) E.L.T 693 (Tri-Bang) it was held that *"Order - Sustainability of - Non-consideration of submission of parties makes order unsustainable. [paras 6.4, 9]"*

b. In the case of Kesarwani Zarda Bhandar Vs. Commissioner Of C. Ex., Thane-I 2009 (236) E.L.T 735 (Tri-Mum) it was held that *"I have considered the submissions made by both sides and perused the records. I find that the Commissioner (Appeals) has not dealt with any of submission made by the Appellant and simply stated that the same has been fully discussed by the original authority and clearly brought out in the Panchnama and show cause notice etc. This cannot be considered as speaking order and Commissioner (Appeals) should have dealt with the submissions made by the Appellant. The matter is, therefore, remanded back to the Commissioner (Appeals) with the direction that he should take into account the submissions made by the Appellant and after providing sufficient opportunity of hearing to the Appellant to pass a speaking*

order. All issues are kept open. The Revenue's appeal is also likewise remanded."

c. In the case of Herren Drugs & Pharmaceuticals Ltd. Vs CCE, Hyderabad 2005 (191) E.L.T 859 (Tri-Bang) it was held *"In any case the adjudicating authority has violated the principles of Natural Justice, in not considering all the submissions of the Appellant"*

d. In the case of Youngman Hosiery Factory Vs. CCE, Chandigarh 1999 (112) E.L.T 114 (Tribunal) it was held that *"We have also heard the ld. SDR, Shri. A.K. Agarwal for the Revenue. We are of the view that the adjudicating authority in having ignored the main submission of the Appellant that they are not undertaking any dutiable process on the grey fabric and are therefore not liable to duty, principles of natural justice have been grossly violated. Consequently, the matter is fit for remand. Hence, we set aside the impugned order and allow the appeal by remand and direct the Addl. Collector to re-adjudicate the case taking into account the aforesaid plea of the Appellant."*

In light of the above judicial pronouncements, the order passed without considering the submissions and without discussing and distinguishing the case laws relied by Appellant is liable to be quashed.

10.6. The Appellant submits that the adjudication proceedings was rendered a solemn farce and idle formality, and the attitude of the Ld. Respondent shows that a made-up mind was his approach for confirming the demand and the order was merely a formality to complete the process with wholly irrelevant findings, and the order is therefore untenable in law. The act of confirmation of the demand of the service tax on value of the material even after accepting that tax cannott be demanded indicates that the impugned order has been passed with a made up mind.

In re: Non supply of relied upon documents vis-à-vis violation of the principles of natural justice

10.7. The Appellant submits that the show cause notice has placed reliance interalia, on the following documents which were not submitted to the Noticee:

a. Soft copy of the Bank statement, Books of Accounts, customer 2008-09 and 2010-11 (up to December 2010)

b. Service tax statement submitted by M/s. Modi Ventures vide letter dated 29.12.2009

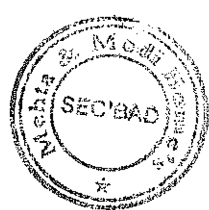
c. The statement dated 01.02.2010 of Sri. A. Shankar Reddy, authorized person of M/s. Modi Ventures

d. Balance sheet of M/s. Modi Ventures of the years 2006-07 to 2010-11.

None of the above documents were furnished along with the show cause notice. It is the duty of the authority to serve the relied upon documents to Appellant along with the SCN.

10.8. The Appellant submits that the show cause notice on the one hand places reliance on the document, alleges contravention of the provision of service tax and requires to show cause and on the other hand not furnished the documents so relied, therefore this shows the clear mind of the Department of giving an opportunity is merely an eye wash and not actually an opportunity extended. Hence, there is clear violation of principles of Natural Justice and therefore Notice issued violating the Principles of Natural Justice is void ab initio.

10.9. The Appellant submits that the Circular 224/37/2005-Cx. Dated 24.12.2008 clearly states *"All relied upon documents should be referred to*



in the SCN while preparing the draft SCN. Copies of all relied upon documents should accompany the draft SCN"

10.10. The Appellant submits that in the case of CCE, Calcutta Vs Indian Oil Corporation Ltd. 2004 (165) ELT 0257 S.C. – (Maintained in 2005 (186) ELT A119 (S.C.)) it was held that *"that circulars are binding on the department"*. Therefore, the said circular is binding on the department and the SCN issued violating such binding circular is not valid at all and requires to be set aside.

10.11. The Appellant submits that in this regard he wishes to place reliance on the following judicial pronouncements as support of their claim of violation of Principle of Natural Justice:

a. Kothari Filaments Vs CCE, (Port), Kolkata 2009 (233) ELT 0289 S.C. It was held that *"A person charged with mis-declaration is entitled to know the ground on the basis whereof he would be penalized. He may have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply."*

b. Rajam Industries (P) Ltd. Vs Addl. D.G, D.C.E.I., Chennai 2010 (255) ELT 0161 Madit was held that *"Nevertheless, the petitioner is entitled to have copies of those statements obtained during preliminary investigation to enable it to give proper explanation to the show-cause notice. If it is found that the petitioner has not been furnished with copies of those statements/documents which are relied upon by the authorities concerned in the show-cause notice, certainly this Court would interfere and compel the authorities to furnish copies of statements documents which are relevant before*

SEC'BAD

proceeding with the adjudicating process. ***On the facts of the present case, admittedly the process of adjudication has not commenced and the entire case stands at preliminary stage of giving show-cause notice.***

c. Robust Protection Forces Vs CCE, Hyderabad 2010 (019) STR 0117 (Tri.-Bang) it was held that *"On a careful consideration of the case records and submissions, we find that the show cause notice has specifically mentioned that all the relevant records are available with the Adjudicating* ***Authority and the appellants can have the copies of documents. There is no mention as to the relied upon documents are given with SCN. We find that there is a violation of principle of natural justice in this case in not providing*** *the relied upon documents to the appellant along with show cause notice. In order to meet ends of jusitce, we are of the considered view that the matter needs to be reconsidered by the Adjudicating Authority. Impugned order is set aside and the matter is remanded back to the Adjudicating Authority to reconsider the issue afresh, before coming to any conclusion. Adjudicating Authority will also grant an opportunity of personal hearing before coming to any conclusion. Since the issue is of 2006, Adjudicating Authority should try and dispose the matter within a period of 4 months from the date of receipt of this order.*

d. In the case of CCE, Ludhiana VsGulab Industries (P) LTD (Tri-Del) it was held that *"Once it is clear that the respondents were* ***sought to be issued show cause notice without furnishing copies of relied upon documents and even the efforts were made on the part of the respondents to get the same did not yield any fruitful result*** *and even today the copies of the documents are not*

made available to the respondents, we do not find any case for interference in the impugned order."

10.12. The Appellant submits that Ld. Respondent vide Para 18 of the impugned order observes that all the relied upon documents in fact submitted by the Appellant only and hence there is no question of the violation of the principles of the natural justice. There is no dispute that the documents were supplied by the Appellant only. In reply to the show cause notice they have given submission that there is error in calculation of the service tax liability but the Ld. Respondent has not considered the submissions and passed the impugned order. If the Ld. Respondent don't serve the relied upon documents how the Appellant can know the extent the department relied on the documents submitted by them. Since there is calculation error in the computation and the extent to which the department relied upon documents plays an important role for the Appellant to submit their case, which has been violated.

In re: Non-speaking order

10.13. The Appellant submits that the impugned order had stated that the construction of entire residential complex is subjected to levy of service tax and accordingly the entire complex is one works contract in terms of clause (c) of explanation under works contract service. However, the impugned order has failed to explain the reasoning behind such conclusion.

10.14. The Appellant submits that the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give **reason for arriving at any conclusion showing proper application of mind**. Violation of either of them could in the given facts and circumstances of the case,

vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that order of lower authorities should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the **reasons of rationality.**

10.15. The Appellant submits that it would neither be permissible nor possible to state as a principle of law, that while exercising power of quasi-judicial on administrative action and more particularly confirming the demand of duty in adjudication before the authority, providing of reasons can never be dispensed with.

10.16. The Appellant submits that the administrative authority is obliged to give reasons, absence whereof could render the order liable to judicial chastise. Thus, it will not be far from absolute principle of law that the Authority should record reasons for its conclusions to enable the appellate authority or higher Courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher appellate authority or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the lower authority whose order is impugned, whether sustainable in law and whether it has adopted the correct legal approach.

10.17. The Appellant submits that **reasons are the soul of orders.** Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of authority.

10.18. The Appellant submits that it needs to be emphasized that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the

parties have a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the quasi-judicial authority in denying him the relief prayed for, the remedy of appeal will not be meaningful.

10.19. The Appellant submits that in the case of *State of Orissa* v. *Dhaniram Luhar* - (2004) 5 SCC 568 The Supreme Court while reiterating that "reason" is the heart beat of every conclusion and without the same, it becomes lifeless", observed thus :

> *Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court.* ***Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;........"***

10.20. The Appellant submits that Ld. Respondent failed to give the reasons as to how and why the individual contract entered by the customer for the every single customer with the builder does not constitute the single works contract. Ld. Respondent neither given statutory back up or nor given the legal back up to support his contention. Order without giving the reasons in recording is not sustainable under the Law. In this regard appellant wishes to rely on the following judgments.

a. *Siemens Engineering and Manufacturing Co. of India Ltd.* v. *Union of India and Anr.* AIR 1976 SC 1785 (S.C) it was held that "If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and **give sufficiently clear and explicit reasons in support of the orders made by them.** Then alone

administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by **inspiring confidence in the adjudicatory process**. The rule requiring reasons to be given in support of an order is, like the principle of *audialterampartem*, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ..."

b. In the case of *State of Rajasthan v. Rajendra Prasad Jain Criminal Appeal No. 360/2008 (Arising out of SLP (Crl.) No. 904/2007)* stated that***"reason is the heartbeat of every conclusion, and without the same it becomes lifeless."***

c. In the case of Sathyan A.V. VsGovt of Kerala 2011 (21) S.T.R 690 (ker) it was held that *"To grant or not, is within the power of the authority empowered to grant in terms of law. But, it is of the core principles of administrative law,**that a decision has to contain its reasons."***

d. In the case of Aspinwall & CO. LTD. Vs CCE, Maglr 2011 (21) S.T.R 257 (Tri-Bag) *"Here again, we find that the adjudicating authority has not given any reasoning for coming to a such a conclusion that the appellant had not paid the service tax on these two services rendered by him. In the absence of any reasoning or findings, we are constrained to remit the matter back in the case of this appellant-assessee to the adjudicating authority,"* From the above analysis and case laws it is clear that order is passed without reason therefore liable to be set aside.

Modi Homes SEC'BAD

11. Benefit under Section 73(3) of the Finance Act, 1994

11.1. Without prejudice to the foregoing, Appellant submits that assuming but not admitting that there was a liability and it was not paid, the provisions of Section 73(3) reads as follows:

> "*Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or* ***on the basis of tax ascertained by a Central Excise Officer before service of notice*** *on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information* ***shall not serve any notice*** *under sub-section (1) in respect of the amount so paid*"

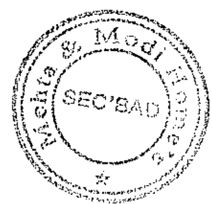
11.2. Further Appellant submits that C.B.E.& C. Letter F. No. 137/167/2006-CX 4, dated 03.10.2007 & Commissioner of Central Excise, Madurai, Trade Notice No. 48/2008, dated 3-10-2008 clarifies that the no notice to be issued for recovery if the service tax and the interest has been paid voluntarily as provided in section 73(3) of the Finance Act. On this ground also the proceedings in the subject order requires to be dropped.

11.3. The Appellant submits that in the case of C.C.E & S.T., L.T.U, Bang Vs Adecco Flexione Workforce Solution LTD it was held that *"Unfortunately the assessing authority as well as the appellate authority seems to think. If an assessee does not pay the tax within the stipulated time and regularly pays the tax after the due date with the interest. It is something which is not pardonable in law.* ***Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make***

payment and certainly not to harass and initiate proceedings against the persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of sec. 73. The parliament expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in governance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the tribunal and this court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this court hereafter, certainly it will be a case for taking proper action against those law breakers.

In that view of the matter, we do not see any merit in these appeals. The appeals are dismissed.

Mark a copy of this order to the commissioner of large tax payers unit who is in charge of collection of service tax to issue proper circular to all the concerned authorities, not to contravene this provision, namely sub-section (3) of section 73 of the act." From this it is clear that show cause notice is in contravention of Section 73(3) of the Finance Act, 1994 in as much as authority has issued show cause notice for the amount already paid before the issuing the SCN even though the Section 73(3) says not issue the SCN.



11.4. The Appellant submits that in the case of CST, Baglr Vs. Info Technologies India P. Ltd, while dismissing the C.E.A No. 100 of 2009 filed by the CST against the Hon'ble CESTAT order No. 1438/2008, dated 02.01.2009 by the Hon'ble Karnataka High Court held that ***"It is not in dispute that assessee has paid the entire service tax with interest before the issue of show cause notice. Once the penalty and interest is paid and duly intimated to the authorities, sub-section (3) of the section 73 comes into operation, which mandates that the authorities shall not serve any notice*** *under sub-section (1) in respect to the amount so paid and initiate proceedings to recover any penalty.*

In that view of the matter, the order passed by the tribunal is in accordance with law. No substantial question of law is involved. Hence, appeal is dismissed." The facts of the above case is exactly matches to the facts of the present case and hence it is not good in Law to issue the SCN for the amount already paid before the issuing the SCN.

11.5. The Appellant submits it was held by the Honorable Tribunal of Bangalore in the case of Commissioner of Service Tax, Bangalore vs Master Kleen 2012 (025) STR 0439 Kar as under:

"The material on record discloses that the assessee on being pointed out by the authorities for not paying the service tax, has paid the service tax with interest even before the issue of show cause notice. Sub-section (3) of Section 73 of the Finance Act, 1994, categorically states that if tax and interest is paid and the same is informed to the authorities, then the authorities shall not serve any notice calling upon the authorities to pay penalty. It is unfortunate that inspite of statutory provisions, the authorities have issued a show cause notice claiming penalty. So tax and interest was paid before issue of show cause notice. Therefore, the Tribunal was justified in setting aside those orders. As the said order is strictly in accordance with law we do not find any legal infirmity that calls for interference. Therefore this appeal is dismissed.

Hence, Appellant submits that the facts of the above case are identical to the instant case and the ratio of the judgment shall be applicable and

hence the notice issued has to be kept aside and the order has to be quashed.

11.6. The Appellant submits that it is being followed judicially that if the entire tax along with the interest has been paid before issue of show cause notice, then no need to issue the SCN and no penalty is leviable. The fact of payment of the entire service tax along with the interest is confirmed in order in original. Appellant wishes to rely on the following cases in this regard

a. Bhoruka Aluminium Ltd Vs CCE, Mysore 2008 (11) S.T.R 163 (Tri-Ban) it was held that *"In this case, it is not in dispute that the* ***Service Tax along with interest had been paid on 30-8-2006 and 12-9-2006 but the show cause notice itself had been issued much latter only 9-10-2006, hence, the issue is squarely covered by*** Section 73(3) ***of the Finance Act and therefore, there would not have been any necessity even to issue the show cause notice.****This is also in consonance with the Board's Circular Lr., dated 3-10-2006 cited supra by the learned Advocate. In any case, the appellant was also having a bona fide doubt in the activity being subject to levy of Service Tax. In our opinion, this is a reasonable cause for not imposing penalty under Section 78 of the Finance Act. In these circumstances, the impugned order has no merit and therefore, we set aside the same and allow the appeal with consequential relief."* In the present case also payment of the service tax along with interest has been paid even before the issuance of SCN. On the basis of the above case law it is clear that there is no necessity even to issue of the SCN therefore it is rightly set aside the impugned order for amounts already paid.

b. CCE, Raj kotVs Port Officer 2011 (21) S.T.R 606 (Tri-Ahdm) it was held that *"First of all, I agree with the views taken by the Commissioner (Appeals) that there was reasonable cause for delay in payment. In fact, if the assessee had considered the legal provisions properly, assessee could have paid the service tax with interest before the issue of notice and in such a case, provisions of Section 73(3) of Finance Act, 1994 would have become applicable."* From the above, it can be seen that leave alone the imposition of penalty, as per the provisions of Section, even show cause notice could not have been served.

c. CCE Mangalore Vs. ShanthaSatelite Vision [2009 (13) S.T.R. 76 (Tri. - Bang.)] it was held that *"This Bench has considered the issue afresh in all similar appeals and upheld the view that when service tax and interest has been paid before the issue of show cause notice, in such circumstance, the penalty is not leviable"*

d. K. Prabhakar Reddy VsCCE, HYD-IV 2011 (24) S.T.R 0330 (Tri-Bang) it was held that "*We also find that the provisions of* Section 73(3) *would apply in this case as the appellant have discharged almost 90% of the Service Tax demand and are willing to discharge the balance amount of Service Tax. It is seen that the appellant has pre-deposited an amount of Rs. 5,00,000/- (Rupees Five Lakh only) as per direction of this Bench, which can be adjusted for recovery of balance dues. In our considered view, the bona fide view entertained by the appellants could not be faulted with. Hence, invoking the provisions of Section 80 of the Finance Act, 1994 we hold that the penalty imposed by the Adjudicating Authority under Sections 77 and 78 of the Finance*

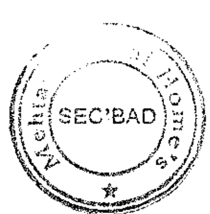
Act, 1994 for not discharging the Service Tax liability under Rent-a-Cab services is liable to be set aside. The same provisions will also apply in case of penalties not imposed under Section 76 for which revenue is in appeal."

e. Sneha Minerals VsCCE, Belgaum 2011 (21) S.T.R 657 (Tri-Bang)it was held that *"It is submitted that, as soon as the appellant was instructed to pay Service tax with interest, they paid it forthwith, which fact was brought to the department's knowledge, which is evident from the very show-cause notice issued by the Dy. Commissioner. In the circumstances, according to the learned counsel, the Dy. Commissioner* ***should not have issued the notice*** *in view of the provisions of* Section 73(3) *of the Act."* In the present case also payment of the service tax has been paid even before the issuance of SCN. On the basis of the above case law it is clear that there is no necessity even to issue of the SCN therefore it is rightly set aside.

11.7. The Appellant submits that Proviso to Sub section (3) of Section 73 of the finance Act, 1994 deals with the issuance of SCN when the Appellant made the payment of service tax along with the interest before the issuance of SCN. The proviso is extracted here for your ready reference

Provided that the Central Excise officer may determine the amount of short payment of service tax or erroneously refunded service tax if any which in his opinion has ***not been paid*** *by such person and then the Central Excise officer shall proceed to recover such amount in the manner specified in this Section and the period of one year referred to in Sub section (1) shall be counted from the date of receipt of such information of payment.*

11.8. The Appellant submits that from the above it is clear that the department has a right to issue the SCN for the remaining amount which was not paid. In this case Appellant has paid Rs.75, 47,519 - amounts before the issuance of SCN. The Central Excise office has right



to issue the SCN only for remaining amount if at all there is due which is not paid before the issue of SCN. Therefore from the above it is clear that issuance of SCN itself is volition of the Section 73(3) of the Finance Act, 1994 and above quoted case laws.

11.9. Appellant therefore submits that an amount of Rs.75,47,519 has been paid prior to issue of Show cause notice, however the SCN has only acknowledged the receipt of Rs.59,57,473/- and this anomaly was brought to the notice of the Ld. Adjudicating authority who has not made any findings of the same in the order. However, appellant prays that the Hon'ble CESTAT takes the above plea into cognizance and set aside the interest and penalty on the amounts already paid prior to issue of SCN.

12. *Extended period of limitation cannot be invoked*

12.1. Without prejudice to the foregoing Appellant submits that the demands are barred by limitation inasmuch as it has invoked the extended period of limitation under proviso to section 73(1) of the Finance Act, 1994 mechanically without any justification. Impugned order alleged *"the fact of nonpayment of service tax would not have seen light of the day but for the detailed investigation carried out by the department."*. The allegation of the impugned order is not sustainable in as much it contained the contradictory findings and SCN has not proved how the Appellant has suppressed the fact to the department and has not proved such suppression coupled with the intent to evade the payment of the service tax. In such a scenario the allegation of the impugned order regarding the invocation of extended period of limitation is not sustainable.

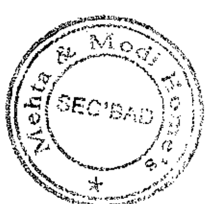
12.2. Thc Appellant submits that they have received a written instruction from the Ld. Additional Commissioner of Service Tax Hyderabad II Commissionerate, asking them to change the Classification to 'Works Contract Service' with effective from 01.06.2007. (The copy of the letter of the Additional Commissioner is enclosed along with this reply.)

12.3. Since all the residential units are sold personal use purposes the Appellant had written to the Jurisdictional Assistant Commissioner of Service Tax, Hyderabad-II Commissionerate stating that in view of the Circular 180/02/2009-ST dated 29.01.2009 issued by TRU, they understood that Service Tax was not applicable for their transaction and sought clarifications on above issue.

12.4. Subsequently, Appellant received Correspondence No. CON.166 dated 08.07.2011 from the Ld. Assistant Commissioner of Service Tax, Hyderabad –II Commissionerate stating that circular applies only in case the entire complex is put to use by a single person. The copy of the letter is enclosed along with this appeal.

12.5. The Appellant responded to the said letter stating their stand that the circular did not intend the same and sought clarification, the copy of the Correspondence was also sent to The Commissioner of Service Tax, Hyderabad-II Commissionerate and sought clarification, however no clarification has been issued till date. The copy of the letter is enclosed along with this appeal.

12.6. The Appellant submits that from the above it is clear that there is clear and continuous correspondence between the service tax department and the Appellant which has also been brought out chronologically in the **"Statement of Facts"** It is settled position of the law that when there is continues correspondence between the Appellant and the service tax

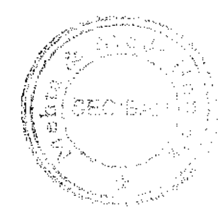


department suppression of the facts cannot be applicable. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. In the case of Andhra Pradesh Paper Mills Ltd Vs CCE, Visakhaptnam-II 2006 (200) E.L.T 326 (Tri-Bang). It was held that *"The correspondence on this point is on record. The Commissioner has merely held that the assessee is trying to take advantage of those* ***correspondences*** *at the cost of revenue. The finding is not just and proper. Once the Department was fully aware of the fact of the activity of conversion of paper, the larger period for confirming demand is not attracted"*

b. In the case of Collector Of Central Excise, Hyderabad Vs I.T.W. Signode India Ltd. 2005 (188) E.L.T 65 (Tri-Del) it was held that *Demand - Limitation - Correspondence with department indicating their knowledge about product and manufacturing processes - Held : There was no fraud, wilful misstatement etc. for invoking extended period of limitation - Section 11A of Central Excise Act, 1944. [para 7]"*

c. In the case of Commissioner Of Central Excise, Indore VsRajkamal Plastics 2004 (163) E.L.T 312 (Tri-Del) it was held that *"The perusal of the record shows that all the necessary facts regarding the manufacture of the goods bearing brand name "Kamal" were known to the Department from the correspondence exchanged between both the sides and the declaration furnished by the respondents. The Commissioner (Appeals) has recorded detailed reasons for holding that all the necessary facts were within the knowledge of the Department regarding the manufacture of the goods under the brand name "Kamal" by the respondents and that the demand from 1-3-97 to 10-1-98 was time-barred".*



d. In the case of Vir Rubber Products Pvt. Ltd. Vs CCE, Mumbai-III 2003 (161) E.L.T 623 (Tri-Mum) it was held that *"Demand - Limitation - Extended period - Samples of the goods showing the nature of the markings that is put on the goods sent to the Department - Correspondence between the appellant and the jurisdictional Superintendent made it very clear that the appellant was putting the initial of the buyers and not their brand name on the goods - Extended period of limitation not available - Section 11A of Central Excise Act, 1944. [para 9]"*

Therefore the Appellant submits that they have not suppressed the details to the department as there is correspondence between the departments and appellant hence in light of the above judicial pronouncements extended period of limitation is not invocable.

12.7. The Appellant submits that in the preceding paragraphs mentioned the judicial pronouncements where in it was held that even the residential unit constructed for the single person for the personal use is not liable for the service tax. In the later case (LCS) the Hon'ble Tribunal has taken the contrary view. There are divergence views on the same matter. It is settled position of the Law that when there contrary views by the different Appellate forums for the same issue suppression of the facts and the extended period of limitation is not invokable. In this regard Appellant wishes to rely on following judicial pronouncements.

a. In the case of Commissioner Of C. Ex., JalandharVsAfcons Pauling Joint Venture 2009 (242) E.L.T 352 (P & H) it was held that ***"It has come on record as a fact that that there was divergence of opinion amongst various High Courts whether crushing of bigger stones or boulders into smaller pieces amounts to manufacture. Accordingly, there was bona fide doubt as to***

whether or not such an activity could attract the payment of duty and the dealer-respondent did not apply for licence."

b. In the caseof Kay Kay Press Metal Corporation VsCommr. Of Cen. Ex., Valsad 2011 (270) E.L.T 691 (Tri-Ahmd) it was held that ***"Inasmuch as the law on the issue is clear, i.e. to the effect that when there are divergent views, many of which are in favour of the assessee holding the field, no suppression or mis-statement can be attributed to the assessee, to entertain the same belief.*** *As admittedly, in the present case, judgment prior to Larger Bench in the case of Mahindra & Mahindra Ltd., were laying that the processes allegedly adopted by the appellant did not amount to manufacture, we are of the view that the demand raised beyond the period of limitation, by invoking extended period, is barred. As such, irrespective of the fact as to whether the appellants themselves have undertaken the said activity or not, the demand is required to be quashed on the above issue itself. Ld. SDR appearing for the Revenue have placed on record the written submissions, which we find are mainly dealing with issues other than limitation. Inasmuch as we are not expressing any opinion on other issues, we do not deem it fit to deal with the various issues in the written submission of ld. SDR".*

c. In the case of Commissioner Of Central Excise, Hyderabad VsItwSignode (India) Ltd. 2005 (179) E.L.T 120 (Tri-Bang) it was held that ***"In view of the conflicting judgments on the issue, the appellants are entitled to seek the benefit of time bar.*** *Therefore, while upholding the matter on merits in the Revenue's favour, we have to hold that the demands are barred by time and not liable to recovery. The appeal is disposed off in the above terms."*

Mehta & Modi SEC'BAD

d. In the case of Supreme Rubber Inds.VsCommissioner Of Central Excise, Mumbai-V 2011 (273) E.L.T 301 (Tri-Mumbai) it was held that ***"Further we find that as has been stated in para 4 of the judgment of the Larger Bench of the Tribunal in the case of M/s. Namtech Systems Ltd. (supra) there were conflicting judgments on the issue involved in this case. As held by the Apex Court in the case of Mentha& Allied Products Ltd. (supra), longer period of limitation under Section 11A would not be available in a situation where on some issue of excisability, classification, valuation or rate of duty involved in a case of alleged short payment of duty, there are conflicting judgments of Tribunal and High Courts. We find that the same view has been taken by the Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture (supra) (para 11 of the judgment). We, therefore, hold that longer limitation period under proviso to Section 11A was not available to the department and the duty can be demanded only for normal limitation period."***

In light of the above judgments since there are the divergent views expressed in the same the suppression of the facts and extended period of limitation is not applicable.

12.8. The Appellant submits that they have stopped the payment of service tax on the impugned activity because of the bonafide interpretation of the Board Circular No. 108/02/2009-ST dated 29.01.2009 that service tax is not applicable on the construction activity undertaken for personal use purposes. It is settled position of the Law that when the conclusion is arrived on the basis of bonafide belief on the basis of the circular the allegation of the suppression of the facts and thereby the

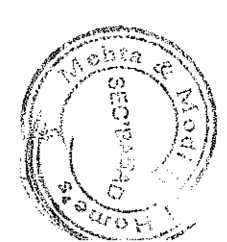
Mehta & Modi Homes SEC'BAD

allegation of the extended period of limitation is not sustainable. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. Jagdambay Concast Pvt. Ltd. Vs. Commissioner Of C. Ex., Jalandhar 2009 (246) E.L.T 393 (Tri-Del) it was held that *"dispute relates as to whether the steel former is input or capital goods. The Board resolved the issue vide circular dated 20-1-2003. So, the contention of the learned Advocate that the appellant acted on a bona fide belief regarding non-levy of duty is justifiable. The case law relied upon by the learned D.R. are not applicable in the present case, where Board circular reveals doubt regarding the leviability of duty. In view of that the impugned order is set aside on limitation. Both the appeals are allowed with consequential relief.*

b. In the case of R.B. Precision ComponentsVsCommissioner Of C. Ex., Bangalore 2009 (241) E.L.T 408 (Tri-Bang) it was held that ***"Demand - Limitation - Interpretation of Board Circular regarding classification can lead to bona fide belief of assessee regarding non-payment of duty - In such cases, extended period is not invocable - Section 11A of Central Excise Act, 1944. [para 9.1]"***

c. PowericaLtdVs Commissioner Of Central Excise, Daman 2009 (236) E.L.T 274 (Tri-Ahmd) it was held that *"As such, it is seen from the above, there is a clear finding by the appellate authority that there was no mala fide intent to evade duty by undervaluation of the impugned goods. As such, he has set aside penalty imposed under Section 11AC.* ***He has also observed that there was scope of difference in interpretation in the***



CBEC circular operative at the material time. *We are of the view that the same ingredients which are required for imposing penalty in terms of Section 11AC, would be relevant for the purposes of invocation of longer period. In view of a clear finding of the appellate authority that there was no mala fide on the part of the appellants, the proviso to Section 11A cannot be invoked. We accordingly on this ground itself set aside the impugned order and allow the appeal with consequential relief to the appellants"*

d. In the case of Alps Industries Ltd. Vs Commissioner Of Central Excise, Ghaziabad 2005 (185) E.L.T 405 (Tri-Del) it was held that *"Demand - Limitation - Declaration filed regularly by assessee -* ***CBEC circular existing inducing bona fide belief*** *- Correspondence with department indicating confusion about correct interpretation of words in exemption notification - HELD :Extended period not invocable - Section 11A of Central Excise Act, 1944. [para 6]"*

e. In the case of Vishal IndustriesVsCommissioner Of Central Excise, Kanpur 2000 (121) E.L.T 319 (Tribunal) it was held that **"Even in the case of *Vivek Re-rolling Mills* and *RehalIndustrial Corporation*, the demands were set aside as time-barred due to *bona fide* belief based upon CBEC circulars".**

Since the non-payment of service tax happened on the basis of the bonafide interpretation of Board Circular therefore in light of the above judgments allegation of the suppression of the fact is not sustainable.

12.9. The Appellant submits that it is not in dispute that there are various circulars operating at different points of time regarding taxability of residential complexes put to personal use therefore the allegation of the

suppression of the facts are not sustainable. In this regard wishes to rely on Continental Foundation Jt. Venture Vs. Commr. Of C. Ex., Chandigarh-I 2007 (216) E.L.T 177 (S.C).

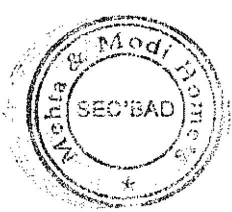
12.10. The Appellant submits that the Chapter 13 of the Central Excise Manual *Demand notice/Show Cause Notice, Adjudication, Interest, Penalty, confiscation, Duty payment under protest* Part 1 of Para 2.9 states that *"Invoking of the extended period under the Proviso to Section 11A in the Show Cause Notice proposed to be issued should be resorted to only in the event of fraud, collusion, willful mis-statement, suppression of fact or contravention of any of the Excise Act/Rules with the intent to evade payment of duty and* ***not as matter of routine.*** *[Circular No. 5/92 dated 13.10.1992]".* In the present case Ld. Respondent hasconfirmed the impugned demand with an extended period of limitation as matter of routine.

12.11. The Appellant submits that the department cannot automatically invoke the larger period of limitation. The department has the duty to prove beyond the doubt that the ingredients specified under the Proviso to Section 73(1) are satisfied in the facts and circumstances of the case of the Appellant. It is clear from the SCN that the department has extracted the one of the ingredient specified in the Proviso to Section 73(1) on one hand and the fact of nonpayment of service tax in time was noticed during the enquiry on one hand concluded the appellant had suppressed the facts to the department. Further it is clear from the SCN and in the impugned order that, the SCN nowhere discussed any other ingredients specified in Proviso to Section 73(1) to invoke the extended period of limitation.

12.12. The Appellant submits that it was held in the case of CCE, Bangalore Vs. Gowri Computers (P) Ltd. 2012 (25) S.T.R.380 (Tri-Bang) *"Though, in*

the show-cause notice, there was a proposal to impose penalty under Section 78 of the Act "for willful suppression of the value of taxable services rendered by them", there was no allegation of any such suppression elsewhere in the notice in the context of demanding/appropriating Service Tax. Nowhere in the show-cause notice was there any specific allegation of suppression of taxable value, nor was it stated as to how much of the taxable value was suppressed. The show-cause notice also did not allege any of the other ingredients of the proviso to Section 73(1) of the Act for invoking the extended period of limitation. In this scenario, it can hardly be inferred that the show-cause notice invoked the proviso to Section 73(1) of the Act. ***Mere mention of the proviso to Section 73(1) of the Act in the operative part of the show-cause notice would not suffice.*** *It has, therefore, to be held that the proviso was not invoked by the department. Consequently the appellant's prayer for imposing penalty on the respondent under Section 78 is not acceptable."* From the above case law it is clear that mere mention of the Proviso to Section 73(1) is not sufficient, the department has to prove beyond the doubt that the Appellant has indulged in suppression of the facts with intent to evade the payment of the service tax. It was not happened in the present case therefore the proceedings under the impugned order in original require to be dropped on this count alone.

12.13. The Appellant further submits that suppression of the facts may also be explained as "to hold back the facts." However such holding back should be with intent to evade the payment of duty. Appellant acting upon to avoid the payment of duty which he was entitled to pay has to be proved. Intent should show that mens-rea should be present. The Appellant has made all the records before the Anti-evasion officers and hence it is not the case where the suppression of facts with the intent to



evade the payment of service tax and hence the imposition of penalties are not justified.

12.14. The Appellant submits that the impugned order has not proved that failure to the payment of the service tax within the due dates does with intention to evade payment of service tax. The Honorable Supreme Court in *Jaiprakash Industries Ltd. v. CCE,* 2002 (146) ELT 481 (SC) has held in para-6 of the decision *that mere failure or negligence on the part of the manufacturer in not taking out a licence and in* ***not paying*** *duty does not attract the extended period of limitation. There must be evidence to show that the manufacturer knew that the goods were liable to duty and that he was required to take out a license. For invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, willful mis-statement, suppression of fact or contravention of any provision or rules. These ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilfulmis-statement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation.* It is submitted that there is nothing in the SCN or in the impugned order to establish that there was any **positive act** on the part of my client in not paying Service Tax. Further in my clients case they have taken registration and filing the returns with in the due dates and it is not a possible case of suppression at all. Therefore proceedings under impugned order barred by time.

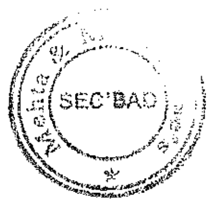
12.15. The Appellant submits that the only one allegation in the SCN for invoking extended period of limitation was suppression of facts which is not proper in view of the Supreme Court decision in as much as there is

no intention to evade the payment of service tax, therefore the SCN is barred by limitation and requires to be set aside.

12.16. The Appellant places reliance on the following judicial decisions to support their contention, that under the above circumstances there cannot be any allegation or finding of suppression:

a. Cosmic Dye Chemical v. CCE, 1995 (75) ELT 721 (SC) *wherein at para-6 of the decision it was held that – "Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts is concerned, they are clearly qualified by the word "willful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not willful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be willful"*

b. T.N. Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC) *wherein it was held that - To invoke the proviso three requirements have to be satisfied, namely, (1) that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded; (2) that such a short-levy or short-payment or erroneous refund is by reason of fraud, collusion or willful mis-statement or suppression of facts or contravention of any provisions of the Central Excise Act or the rules made there under; and (3) that the same has been done*



with intent to evade payment of duty by such person or agent. These requirements are cumulative and not alternative. To make out a case under the proviso, all the three essentials must exist. Further it was held that burden is on the Department to prove presence of all three cumulative criterions and the Revenue must have perused the matter diligently. It is submitted none of the ingredients enumerated in proviso to section 11A(1) of the Act is established to present in our client's case.

c. Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC) *wherein it was held that proviso to section 11A(1) is in the nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualized by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. Further, when the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word `intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.*

d. Padmini Products v. CCE, 1989 (43) ELT 195 (SC) *wherein it was held that mere failure or negligence on the part of the*

manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation. Unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a licence. For invoking extended period of five years limitation duty should not had been paid, short-levied or short paid or erroneously refunded because of either any fraud, collusion or wilfulmis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a ***positive act****, therefore, failure to pay duty or take out a licence is not necessary due to fraud or collusion or wilfulmis-statement or suppression of facts or contravention of any provisions of the Act. Likewise suppression of facts is not failure to disclose the legal consequences of a certain provision.*

e. Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC) *wherein it was held that mere failure to declare does not amount to mis-declaration or willful suppression. There must be some* ***"positive act"*** *on the part of party to establish that either willful mis-declaration or willful suppression and it is a must. When the party had acted in bonafide and there was no positive act, invocation of extended period is not justified.*

f. GopalZardaUdyog v. CCE, 2005 (188) ELT 251 (SC) *where there is a scope for believing that the goods were not excisable and consequently no license was required to be taken, then the extended period is not applicable. Further, mere failure or negligence on the part of the manufacturer either not to take out the license or not to pay duty in cases where there is a scope for*

doubt, does not attract the extended period of limitation. Unless there is evidence that the manufacturer knew that the goods were liable to duty or he was required to take out a license, there is no scope to invoke the proviso to Section 11A(1).

g. Kolety Gum Industries v. CCE, 2005 (183) ELT 440 (T) *wherein it was held that when the assessee was under bonafide belief that the goods in question was not dutiable, there was no suppression of fact and extended period is not invokable.*

h. GTN Enterprises Ltd., Vs. CCE, 2006(200) E.L.T. 76(Tri. Bang) *wherein it was held that when Department informed of activities of appellant by of way of filing declaration/returns, suppression of facts not proved, hence extended period of limitation not invokable.*

12.17. The Appellant submits that the above mentioned Supreme Court judgments have been relied by various Tribunals for Service Tax also, therefore irrespective of the difference in language of section 11A of the Central Excise Act and Section 73 of the Finance Act, all such citation are applicable to service tax also. Therefore extended period of limitation is not invokable.

12.18. The Appellant submits that in case of Martin & Harris Laboratories Ltd. v. CCE 2005 (185) E.L.T. 421 (Tri.), and in case of Hindalco Indus. Ltd., v. CCE, Allahabad, 2003 (161) E.L.T. 346 (T), it was held that "*Balance sheet of companies being a publicly available document, allegation of suppression of such information, not sustainable and Extended period is not invokable.*" Further if at all part of the activity was to be suppressed then why not suppress the other activities also is a point requiring ponder. As the only basis for invoking the extended period of limitation

is this demand under proviso to Section 73(1), which is not sustainable and the same requires to be set aside.

12.19. The Appellant submits that the Ld. Respondent vide Para 17 of the impugned order denied the applicability of the above case law by the relying on CCE, Calicut Vs Steel Industries Kerala Ltd 2005 (188) E.L.T 33 (Tri-Bang). In the above case it was held that the theory of the universal knowledge of balance sheet being public document is not attracted when the Appellant has not filed the initial declaration. In the present case Appellant has filed the declaration stating that why they are not liable to pay the service tax therefore the reliance on placed on casse law by the Ld. Respondent is distinguishable.

12.20. The Appellant further submits that when the demand was raised on the basis of Balance sheet, ledger accounts and bank statements of the Appellant, it is bad in law to say the assessee indulged in suppression of the facts with an intention to evade the payment of service tax. In this regard Appellant wishes to rely the following judgments.

a. In the case Rama Paper Mills Vs Commissioner of C. Ex., Meerut 2011 (022) STR 0019 (Tri.-Delit) was held that *"Demand based on figures in appellant's ledger and balance sheet - Reflection of income and activity in ledger account and balance sheet points to absence of wilful suppression - Extended period not invocable."*

b. In the case of Kirloskar Oil Engineers Ltd Vs CCE, Nasik, 2004, (178) ELT .998 (Tri-Mum) it was held that *"since the balance sheet of the company being publicly available document, the allegation of suppression of such information is not sustainable. Therefore, extended period cannot be invoked under proviso to Section 11A(1) of the Act ibid. In my considered opinion, the*

provisions of Section 11AC for imposition of penalty and the provision of Section 11AB for demanding duty are not applicable to the facts of this case"

c. In the case of Hindalco Industries Ltd Vs CCE Allahabad 2003, (161) ELT 346 (Tri-Del) it was held that *"Balance Sheets of companies is a publicly available document. Therefore, the allegation that data stated in the Balance Sheet was suppressed from Central Excise authorities is not a viable allegation. The demand has to fail on the ground of limitation itself."*

d. In the case of U.T Ltd Vs CCE, Calcutta -1, 2001 (130) ELT 791 (Tri-Kolkata) it was held that ***"Further, had there been any intention on the part of the appellants to suppress the above fact, they would not have reflected the factum of receiving of commission in their balance sheets.*** *This shows the bona fides of the appellant. Accordingly, we hold the demand as barred by limitation. Appeals are thus allowed on merits as well as on limitation and the impugned order is set aside in toto."*

12.21. In the instant case also since entire demand raised is on basis of the records of the appellant there is no suppression hence extended period cannot be invokable and penalty under section 77and 78 cannot be invokable.

12.22. Without prejudice to the foregoing the Central Government does not have any power to tax the material sold during the course of service and construction of the residential complex for the personal use are kept out of taxability of service and this information is not required to disclose in ST-3 Returns. It is a settled position of law that the information not required to be supplied under law, when not supplied does not amount to suppression [Apex Electricals Pvt. Ltd., Vs. UOI 1992 (61) ELT 413

Mehta & Modi Homes SEC'BAD

(Guj)], Appellant have acted under a bonafide belief that their activity did not attract service tax.

13. ***Interest under Section 75 of Finance Act, 1994 cannot be demanded***

13.1. Appellant further submits that in the case of Blue Star Limited v. UOI 2010 (250) ELT 0179 it was clearly held- *"As noted earlier interest is compensatory.* ***It is to recompensate a party. In the instant case the State for not recovering its monies (duties) on time. At the point of time interest becomes due the interest there must be an ascertained amount of duty which a party needs to pay. If there is no ascertained duty, there is no question of compensating the State by way of interest."*** Hence, in the present case where the amount has been paid to the Government although under wrong accounting code there is no need pay interest as the nature of interest is essentially compensatory and not mandatory.

13.2. Appellant further submits that it is well-settled position in law that the interest is compensatory in character and it has to be paid by a party, who has withheld the payment of principal amount payable to the person to whom he has to pay the same. This basic concept about 'interest' should be borne in mind. This difference between 'tax', 'interest' and 'penalty' has been expounded by the Supreme Court in the case of A. C. C. v. Commercial Tax Officer. Hence where the Service Tax itself is not payable, the question of paying of interest on the same does not arise as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

13.3. The Appellant further submits that in the case of CCE v. Bill Forge Pvt. Ltd. 2012 (279) E.L.T. 209 (Kar.) it was held that the-*"Interest is compensatory in character, and is imposed on an assessee, who has*

withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest." Therefore, the appellant submits that where there is no liability of tax on them due to reasons mentioned aforesaid, there cannot be a levy of interest.

14. *Penalties cannot be imposed*

In re: Penalty under Section 77 (2) of the Finance Act, 1994

14.1. Appellant submits that the impugned order intends to levy penalty under Section 77(2) for not furnishing the true and complete facts in the statutory returns. Appellant submits that what is true and complete facts is a 'subjective issue' and there cannot be levied any penalty under the act for it, as what is true and complete for the appellant may not be so for the adjudicating authority. In this regards, reliance is placed on Godavari Khore Cane Transport Co. P. Ltd v.CCE, Aurangabad 2012 (26) S.T.R. 310 which stated that- "Penalty Imposition of Mis-representation of facts in ST-3 returns No penalty was imposable under Section 77 of Finance Act, 1994, which could be invoked only for failure to furnish Service tax return in due time."

14.2. Appellant submits that in the case of Cement Marketing Co. India Pvt. Ltd. v. Assistant Commissioner of Sales Tax 1980 (6) E.L.T. 295 (S.C) held that- "If the assessee entertained belief that he was not liable to include the amount of freight in the taxable turnover, it could not be said to be mala fide or unreasonable nor it can be dubbed as frivolous contention taken up merely for the purpose of avoiding liability to pay tax. What the law requires is that the assessee should not have filed a false return. A return cannot be said to be `false' unless there is an

element of deliberation in it. It is true that where the incorrectness of the return is claimed to be due to want of care on the part of assessee and there is no reasonable explanation forthcoming from him for such want of care, the court may in a given case infer deliberateness and the return may be treated as a false return. **But, where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to brand the return as a 'false return' inviting penalty"** Therefore, appellant submits that when there is a bonafide belief on their part that the service tax is not attracted on a particular activity that they have filed returns under NIL Category.

In re: Penalty under Section 78 of the Finance Act, 1994

14.3. The Appellant submits that explanation 2 to Sub section (3) to Section 73 of the Finance Act, 1994 deals with the issuance of SCN and levy of the penalty when the Appellant makes the payment of service tax along with the interest the same is reproduced here for your ready reference.

*For the removal of the doubts it is here by declared that **no penalty** under any of the provisions of this Act or the Rules made there under **shall** be imposed in respect of payment of service tax under this Sub section and interest thereon.*

14.4. The Appellant further submits that the above explanation clearly says that no penalty shall be imposed on service tax when the Appellant makes the payment before the issuance of SCN. In this case there is no allegation regarding the fact of payment of service tax of Rs. 38,13,888/- by the Appellant. Therefore benefit under Section 73(3) of the Finance Act, 1994 shall be granted.

14.5. The Appellant submits that if any shortage found in the amount so paid, SCN may be issued for the short amount of tax so paid if any. But if the payment of tax is found correct then no penalty can imposed as per the true legislative spirit of section 73(3).

SEC'BAD

14.6. Appellant submits without prejudice to the foregoing that when the tax itself is not payable, the question of penalty under section 78 does not arise. Further assuming but not admitting, that there was a tax liability as envisaged in the impugned order as explained in the preceding paragraphs, when appellant were not at all liable for service tax and further also there was a basic doubt about the liability of the service tax itself, Appellant is acting in a bona fide belief, that he is not liable to collect and pay service tax, there is no question of penalty under section 78 resorting to the provisions of Section 80 considering as there was reasonable cause for not collecting and paying service tax.

14.7. Appellant further submits that penalty under Section 78 is imposable when the duty should not have been paid, short levied or short paid or erroneously refunded ***because of*** either fraud, collusion, willful mis-statement, suppression of fact or contravention of any provision or rules. These ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a license which is not due to any fraud, collusion or willful mis-statement or suppression of fact or contravention of any provision is not sufficient to attract the penalty under Section 78. In the appellants case there is no intention to evade duty , particularly where all information asked by the department was promptly made available and audit was conducted by the department and report issued thereon , It cannot be a case of suppression of facts and no penalty under Section 78 is payable.

14.8. Without prejudice to the foregoing, Appellant submits that all the grounds taken for ***"Extended period of limitation"*** above is equally applicable for penalty as well.

14.9. Assuming but not admitting that there is a contravention of the rules or provisions attracting penalty under Section 78, the appellants submit

that a detailed analysis of the provisions of Section 78 assumes significance in the instant case. The relevant extract of the Section 78 is reproduced here under for ready reference:

78. Penalty for suppressing, etc. of value of taxable services

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, *by reason of—*

(a) fraud; or
(b) collusion; or
(c) willful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, ***as determined under subsection (2) of section 73, shall also be liable to pay a penalty,*** in addition to such service tax and interest thereon, if any, payable by him, ***which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or*** erroneously refunded.

14.10. Appellant submits that the Section provides for imposition of a penalty which shall be equal to the amount of such **'service tax thathas not been levied or paid or has been short-levied or short -paid''as determined under sub-section (2) of section 73'**. The amount that could be determined under Section 73(2) shall mean **'the amount of service tax that has not levied or paid or short-levied or short-paid'.**

14.11. Appellant submits that from the above, it is evident that the penalty under the Section 78 is on the amount as determined under Section 73(2). Therefore the provisions of Section 73(2) assume examination. The extract of Section 73 (2) is reproduced hereunder for ready reference:

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), **determine the amount of service tax due from,** or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and **thereupon such person shall pay the amount so determined.**

14.12. Appellant submits on combined reading of Section 78 and 73(2), it can be seen that the penalty under Section 78 can be levied only on the

amount found payable by the appellant as determined under Section 73(2). The words "service tax due', "short levied" and "short paid" in both these Sections clearly indicate the service tax amount found to be due after taking into account the amounts already paid and the penalty could be levied on such amounts as are short paid or found payable.

14.13. Without prejudice to the foregoing, Appellant submits that suppression or concealing of information with intent to evade the payment of tax is a requirement for imposing penalty. It is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be intention of evasion and penalty cannot be levied. In this regard we wish to rely upon the following decisions of Supreme Court.

(i) Hindustan Steel Ltd. V. State of Orissa – 1978 (2) ELT (J159) (SC)

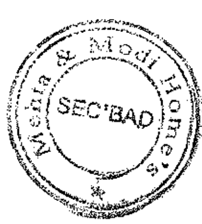
(ii) Akbar BadruddinJaiwani V. Collector – 1990 (47) ELT 161(SC)

(iii) Tamil Nadu Housing Board V Collector – 1990 (74) ELT 9 (SC)

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 78.

14.14. The Appellant submits that in the case of DCM TextilesVs CCE, Gurgaon 2012 (26) S.T.R 359 (Tri-Del) it was held that *"The provisions of Section 78 of the Finance Act, 1994 are in parimateria with the provisions of Section 11AC and proviso to Section 11A(1) of the Central Excise Act, 1944. The Hon'ble Supreme Court in the case of Cosmic Dye Chemical v. C.C.E., Bombay (supra) has held that for invoking extended period under Section 11A(1) of Central Excises Act & Salt Act, 1944, the intention to*

evade the duty must be proved and for this purpose, the mis-statement or suppression of facts must be wilful and mere omission to provide some information or omitting to do something which the person is required to do would not be sufficient to invoke the provisions to Section 11A(l). ***Since the wordings of Section 78 of the Finance Act, 1994 are identical to the wordings of the proviso to Section 11A(1) of the Central Excise Act, 1944, the ratio of the judgment of the Hon'ble Supreme Court in the case of Cosmic Dye Chemical (supra) would be applicable to the question of imposition of penalty under Section 78 of the Finance Act, 1994. In this case, there is no dispute about the fact that the appellant were disclosing the information about the receipt of taxable service of procuring export orders on commission basis from commission agents abroad, in their balance sheets and as soon as the information in this regard was asked for by the department, the same was provided. Not only this, they also applied for and obtained the service tax registration and paid the substantial part of the same, Rs. 7,62,349/- plus interest though their liability to service tax was much less as the service tax liability*** *upheld by the Commissioner (Appeals) from 18-4-2006 comes to only Rs. 88,650/-. From the conduct of the appellant, it cannot be said that nonpayment of service tax was wilful or with intention to evade service tax. In view of this, merely on account of not obtaining service tax registration or non-payment of tax, it cannot be concluded that the same was with intention to evade the tax. Therefore, following the judgment of Hon'ble Supreme Court in the case of Cosmic Dye Chemical (supra), I hold that provisions of Section 78 of the Act are not attracted and as such the order of the Commissioner (Appeals)*



upholding the penalty under Section 78 is not sustainable. The same is set aside. The appeal is allowed."

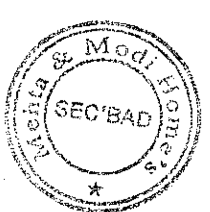
14.15. The Appellant submits that in the case of Krishna Security & Detective Services Vs CST Ahmadabad 2011 (24) S.T.R 574 (Tri-Del) it was held that "*Further the learned advocate also drew my attention to the circular issued by the Board in this regard. According to the Board's Letter F.No. 137/167/2006-CX-4, dated 3-10-2007, once the service tax due has been paid with interest before issue of show cause notice, as provided in Section 73 discussed above, no show cause notice can be issued. When no show cause notice can be issued as per the provisions of law, there cannot be any justification for imposition of penalty. Further, I also find that the reliance of the learned advocate on the decisions of this Tribunal in the case of Nishchint Engineering Consultants Pvt. Ltd. v. C.C.E, Ahmedabad reported in 2010 (19) S.T.R. 276 (Tri. - Ahmd.) and is applicable to the facts of the present case. In view of the above, the imposition of penalty is not justified. Accordingly appeal is allowed with consequential relief to the appellant.*

14.16. The Appellant submits that in the case of Hajarilal Jangid Vs. CCE, Nagpur 2011 (24) S.T.R 510 (Tri-Mum) it was held that "*A plain reading of the above provisions makes it abundantly clear that if the assessee has discharged the service tax liability on his own ascertainment or on the basis of ascertainment by the Central Excise officers and inform the Central Excise officer of payment of such service tax then, no notice under sub-section (1) in respect of the amount so paid shall be served. In the instant case, the assessee discharged the tax liability for the period April to September, 2007 in August 2007 and March 2008 along with interest of Rs. 2,300/- on 8-8-2007. The balance amount of interest of Rs. 3,321/- was paid by them on 25-5-2009. They had filed the return due on 25-10-*

2007 by 28-8-2008. They also paid the late fee of Rs. 2,000/- for the delayed filing of the return as per the instructions of the officer who received the return. The above conduct of the assessee make it abundantly clear that there was no willful mis-statement or suppression of fact on the part of the assessee. Therefore, the provisions of sub-section (3) of Section 73 is clearly attracted in the facts of the case and issuance of a show-cause notice for demand of service tax and imposition of penalties was not at all warranted."

14.17. The Appellant submits that in the case of CST New Delhi Vs Competent Automobiles CO. LTD. 2011 (24) S.T.R 561 (Tri-Del) it was held that *"Penalty - Imposition of - Suppression of facts, etc. - Since Section 78 of Finance Act, 1994 is within the scope of Section 80 ibid, even in cases involving suppression, adjudicating authority can exercise discretion under Section 80 ibid to waive penalty - On facts, as assessee had paid Service tax and interest immediately when Revenue pointed it out, and thereafter cooperated with Revenue authorities, discretion exercised by adjudicating authority to waive of penalty found to be correct even though there was finding of suppression also. [para 4]"*In light of the above case laws the penalty under Section 78 of the Finance Act, 1994 requires to set aside.

14.18. The Appellant submits that taxability of service under the residential complex service depends on interpretation of "Residential complex" definition, Circular No. 108/02/2009-ST dated 29.01.2009, Circular No. D.O.F 334/03/2010-TRU dated10.02.2010 and various judicial pronouncements. It is settled position of the Law that whenever there is any scope for interpretation of the provisions of Finance Act, 1994 there cannot be extended period of limitation and imposition of Penalties. In



this regard Appellant wishes to rely on the following judicial pronouncements.

a. In the case of Suprasesh G.I.S. & Brokers P. Ltd Vs CST, Chennai 2009 (013) S.T.R 641 (Tri-Chennai) it was held that *"We have however found a good case for vacating the penalties. By and large, the dispute agitated before us was highly **interpretative of the various provisions of the Finance Acts 1994** and 2006, the IRDA Act, 1999 and the IRDA (Insurance Brokers) Regulations, 2002. In the circumstances, it will not be just or fair to inflict any penalty on the assessee"*

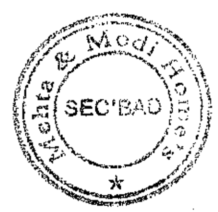
b. In the case of Ispat Industries Ltd Vs CCE, Raigad 2006 (199) E.L.T 509 (Tri-Mumbai) it was held that *"Apart from holding that the credit was admissible to the appellants on merits, we also find that the demand raised and confirmed against them is hopelessly barred by limitation. Admittedly, the appellant had reflected the fact of availing the balance 50% credit in the subsequent financial year, in their statutory monthly returns filed with the revenue. This fact is sufficient to reflect knowledge on the part of the revenue about the fact of taking balance 50% credit and is also indicative of the bona fides of the appellant. The appellants having made known to the department, no suppression or mis-statement on their part can be held against them. **The issue, no doubt involves bona fide interpretation of provisions of law and failure on the part of the appellants to interpret the said provisions in the way in which the department seeks to interpret them cannot be held against them so as to invoke extended period of limitation.** When there is a scope for doubt for interpretation of legal provisions and the entire facts have been placed before the jurisdictional,*

Mehta & Modi Homes SEC'BAD

Central Excise Officer, the appellants cannot be attributed with any suppression or misstatement of facts with intent to evade duty and hence cannot be saddled with demand by invoking the extended period of limitation.As much as the demand has been set aside on merits as also on limitation, there is ***no justification for imposition of any penalty*** *upon them.*

c. In the case of Haldia Petrochemicals Ltd Vs CCE, Haldia 2006 (197) E.L.T 97 (Tri-Del) it was that the "*extended period of limitation cannot be invoked under the proviso to Section 11A(1) of the Central Excise Act, 1944. There is also no case for imposition of penalty, firstly for the reason that the demand of duty is unsustainable and secondly for the reason that the case involves* ***a question of interpretation of law.***"

d. In the case of Itel Industries Pvt. Ltd Vs CCE, Calicut 2004 (163) E.L.T 219 (Tri-Bang) it was held that "*In view of the facts of this case, we do not find any case or cause to invoke the penal liabilities, as we find that the Commissioner has held "It is essentially,* ***a question of interpretation of law*** *as to whether Section 4 or Section 4A would be applicable...." and not sustained the penalty under Section 11AC. We concur with the same. Therefore we cannot uphold the Revenue's appeal on the need to restore the penalty under Section 11AC as arrived at by the Original Authority. As regards the penalty under Rules 173Q & 210, we find the Commissioner (Appeals) has not given any finding why he considered the same as correct and legal in Para 8 of the impugned order. Imposition of penalty under Rules 173Q & 210* ***on matters of interpretation,*** *without specific and valid reasons, is not called for*".



On the basis of the above judgments it is clear that whenever due to bonafide interpretation of law service tax not paid extended period of limitation and penalty is not leviable.

In re: Benefit under Section 80 of the Finance, Act, 1994

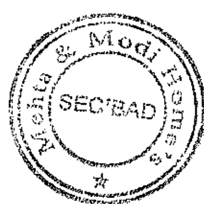
14.19. Appellant further submits that under Section 80 of the Finance Act, 1994 which reads as under :

> "***Notwithstanding*** *anything contained in the provisions of section 76, section 77 or first proviso to sub-section (1) of section 78* ***no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause*** *for the said failure.*"

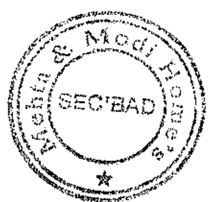
On this ground the proceedings in the impugned order in so far as imposition of penalties is concerned should be dropped taking recourse to the Section 80 ibid.

14.20. Appellant submits that it is a undisputed fact that the levy of service tax on Construction of complex service had created lot of confusion and many questions have been raised about the constitutional validity, The following are the significant outcomes/events surrounding the levy of service tax right from date of introduction of this Service:

DATE	PARTICULARS
16.6.2005	Any service provided or to be provided to any person, by any other person, in relation to construction of complex is taxable under sub-clause (zzzh) of section 65(105) of the Finance Act, 1994. Provisions relating to levy of service tax by amending sections 65 and 66 of the Finance Act, 1994 have been made effective from 16th June, 2005.
1.8.2006	Circular F. No. 332/35/2006-TRU, dated 1-8-2006If no other person is engaged for construction work and the



	builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise
1.6.2007	The Finance Act, 1994 has sought to levy service tax for the first time on certain specified works contracts.
15.5.2008	Held in the case of Magus Constructions 2008 (11) S.T.R. 225 (Gau. That in the light of what has been laid down in the catena of decisions referred to above, it becomes clear that the circular, dated August 1, 2006, aforementioned, is binding on the department and this circular makes it more than abundantly clear that when a builder, promoter or developer undertakes construction activity for its own self, then, in such cases, in the absence of relationship of "service provider" and "service recipient", the question of providing "taxable service" to any person by any other person does not arise at all.
29.1.2009	Circular No. 108/2/2009-S.T., dated 29-1-2009 clarified that firstly that Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. Secondly, 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'.
1.7.2010	In the Finance Act, changes have been made in the construction services, both commercial construction and construction of residential complex, using 'completion certificate' issued by 'competent authority'. Before the issuance of completion certificate if agreement is entered into or any payment is made for sale of complex or apartment in residential complex, service tax will be leviable on such transaction since the builder provides the construction service.
15.2.2011	Trade Facility No. 1/2011, dated 15-2-2011 issued by Pune Commissionerate stated that Where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of para 3 of Boards Circular number 108/02/2009-S.T., dated 29-1-2009.

14.21. The Appellant submits that they have not paid the service tax on bonafide belief that as per the Circular 108/02/2009-ST dated 29.01.2009 they are not liable to when the construction undertaken for personal use and the also the value of the material is not liable for the service tax on which they have paid. In the case of CCE, Delhi Vs Softalk

Lakhotia Infocom (P) Ltd. 2006 (1) S.T.R 24 it was held that *"The Revenue is relying upon the provisions of Section 75 of the Act whereas Section 80 of the Act provides that no penalty is imposable in case the assessee explains the reasonable cause for failure to comply with the provisions. In view of the above, I find no infirmity in the impugned order. The appeals are dismissed."*

14.22. The Appellant further submits that the above reported case laws or the text of the Section 80 of the Finance Act, 1994 does not speak of proving to the satisfaction of Central Excise Officer regarding the reasonable cause. Therefore from the above it is clear that noticee is rightly eligible for the benefit under the Section 80 of the Finance Act, 1994.

14.23. The Appellant submits that in so far as Section 80 of the Act is concerned, it overrides provisions of Sections 76, 77, 78 of the Act and provides that no penalty shall be imposable (assuming but not admitting) even if any one of the said provisions are attracted if the assessee proves that there was reasonable cause for failure stipulated by any of the said provisions.

14.24. The Appellant submits that they have established the reasonable cause for the non-payment of service tax. Once reasonable cause is established the authority has the discretion to hold that no penalty is imposable. The provision does not say that even upon establishment of reasonable cause, penalty is imposable. The provision only says no penalty is imposable.

14.25. The Appellant submits discretion to exercise the power under Section 80 of the Finance Act, 1994 to waive the penalty is an obligation on the authority. It is the duty of the authority to ascertain whether there is any reasonable cause for nonpayment of duty. In the case of KNR Contractors Vs CCE, Thirupathi 2011 (021) 436 (Tri-Bang) it was held

that *"Perusal of Section 80 of the said Act, undoubtedly discloses that it will have overriding effect on the provisions of Sections 76, 77 & 78, in the sensethat imposition of penalty under any of those provisions is not mechanical exercise by the concerned authority. On the contrary, before proceeding to impose the penalty under any of those provisions of law, the authority is expected to ascertain from the records as to whether the assessee has established that there was reasonable cause for the failure or default committed by the assessee."*

15. The appellant craves leave to alter, add to and/or amend the aforesaid grounds.

16. The appellant wish to be personally heard before any decision is taken in this matter.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner

For M/s Mehta & Modi Homes

Authorised Signatory

PRAYER

Wherefore it is prayed that this Hon'ble CESTAT be Pleased to hold:

a. Set aside the impugned order of the Respondent.

b. The activity is sale of immovable property and not works contract.

c. Service tax is not applicable on construction of individual bungalows.

d. The activity cannot be classified under two heads i.e. Construction of complex and works contract in terms of Circular 98/1/2008-ST dated 04.01.2008

e. Service is not taxable in terms of Circular 108/02/2009 dated 29.01.2009.

f. Service tax cannot be demanded on gross receipts from the customer.

g. To hold that the benefit of composition scheme is extendable to the Appellant.

h. Extended period is not invocable.

i. Interest is not imposable.

j. No Penalty is imposable under Section 77 & Section 78

k. Any other consequential relief is granted.

For Mehta & Modi Homes

Partner

Appellant

VERIFICATION

I, Soham Modi, Managing Partner of M/s Mehta & Modi, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today the 18th of April, 2013

Place: Hyderabad

For Mehta & Modi Homes

Partner

Appellant

STAY APPLICATION UNDER SECTION 35F OF THE CENTRAL EXCISE ACT, 1944.

BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL BANGALORE

Service Tax Appeal No. _________ Of 2013

Stay Application No. ___________ Of 2013

Between:
M/s. Mehta & Modi Homes,
5-4-187/3&4, 2nd Floor,
M.G Road,
Secunderabad- 500 003 .... **Appellant**

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-I Commissionerate,
Central Revenues Building,
1st Floor, L.B.Stadium Road,
Hyderabad – 500 004 .... **Respondent**

Application seeking waiver of pre-deposit and stay of recovery of Adjudication levies under section 35F of the Central Excise Act, 1944

The Appellant in the above appeal petition is the Applicant herein and craves to submit for kind consideration of this Hon'ble tribunal as under:

1. The Applicant/Appellant is now in appeal against Order-In-Original No. 7/2013- (Service tax)-Commr. (O. R. No. 53/2012-Hyd-1 Adjn (S.T) dated 17.01.2013, passed by the Commissioner of Customs, Central Excise & Service Tax, Hyderabad, Hyderabad I Commissionerate, L.B Stadium Road, Hyderabad- 500 004 confirming the demand of service tax under provisions of Section 73 of the Finance Act, 1994.
2. The facts and events leading to the filing of this application and grounds of appeal have been narrated in the memorandum of appeal in Form ST-5 filed along with this application, and the Applicant/Appellant craves leave of this Honorable tribunal to adopt, reiterate and maintain the same in support of

this application. The Applicant / Appellant maintain and reiterate the same grounds in support of this application.

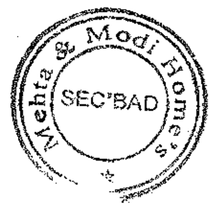
3. The Applicant submits that they have paid an amount of Rs.75, 47,519 towards service tax this application for the waiver is filing for the waiver of the remaining service tax, interest and penalty under Section 78 of the Finance Act, 1994.
4. The Applicant submit that for the reasons mentioned in the appeal it would be grossly unjustified and inequitable and cause undue hardship to the Appellants if the amount of demand raised is required to be paid.
5. The Applicant submits that they are entitled to be granted an order staying the implementation of the said order of the Respondent pending the hearing and final disposal of this appeal viewed in the light of the fact that the order is one which has been passed without considering the various submissions made during the adjudication. It has been held by the Calcutta High Court in *Hooghly Mills Co. Ltd., Vs. UOI 1999 (108) ELT 637* that it would amount to undue hardship if the Appellant were required to pre-deposit when they had a strong prima facie case which in the instant case for reasons stated above is present directly in favour of the Appellant.

16.1. Without prejudice to the foregoing, appellant submits that the service tax is not applicable in case of construction of individual bungalows. Appellant submits that as brought out in the statement of facts the lands in the three phases are disjoint. In Phase I & II sanction for development of land into plots was obtained. As per rules of the urban development authority the tentative sanction was given and only after completion of all land development works the final sanction / layout was released. Phase I & II land development works were completed and final layout released on 7.6.2005 and 1.2.2007 respectively. Subsequent to that sanction for individual bungalows were

obtained. (Copy of Individual sanction enclosed in Annexure-__). Further, the approved layout of the project has been enclosed in Annexure-__ by which we can understand that public roads also exist between the bungalows in Phase-I & Phase-II. Further, Plot No. 261 to 286, 200A, 200C,200D & 200F are not part of any layout and the lands were purchased from several parties and sanction obtained independently. Reliance is placed on the following:

a. Macro Marvel Projects Pvt. Ltd. 2012 (25) S.T.R. J154 S.C
b. Arihant Constructions Vs. CCE, Jaipur that 2012 (25) taxmann.com 540 (New Delhi-CESTAT)
c. A.S. Sikarwar Vs. CCE, Indore 2012 (27) taxmann.com (New Delhi-CESTAT)

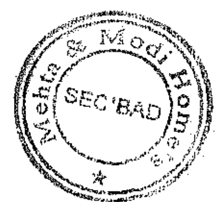
6. Without prejudice to the foregoing, appellant further submits the various decision that has been rendered relying on the Circular 108 are as under
   a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009 (015) STR 0077 (Tri-Bang)
   b. M/s Virgo Properties Pvt Limited 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. vsCommr. 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



7. Appellant submits that demands raised will not stand the test of appeal as correct legal and factual position were not kept in mind while passing the adjudicating Order. It is judicially following across the country when the demand has no leg to stand it is right case for 100% waiver of the pre deposit of the service tax.

8. The Appellants have to submit that there are multiple alternative lines of arguments on merits and on quantification. Even if a few of the arguments are accepted, the demand is likely to be fully satiated. The following table summarises the impact on the demand based on the arguments

Position held by the Hon'ble Bench	Demand recalculated	Annexure Reference
The transaction is sale of immoveable property and cannot be made liable for payment of service tax at all.	Nil	- No reference -
The transaction is a sale of immoveable property but can be made taxable with effect from 01.07.2010 under the category of Construction of Complex Services, but reclassification of service after issuance of SCN is not permitted	Nil	- No reference -
The transaction is a sale of immoveable property but can be made taxable with effect from 01.07.2010 under the category of Construction of Complex Services, reclassification of service after issuance of SCN is also permitted, benefit of Notification 36/2010-ST is granted	Rs.9,90,185/-	IX



The transaction is classifiable under Works Contract Services, reduction on account of materials transferred under Rule 2A is permitted	11,913,861/-	X
The transaction is classifiable under Works Contract Services, option of composition scheme is extended	10,219,269/-	X
Estimate of tax excluding Phase I & Phase-II only for Phase-III under composition scheme	Rs.51,80,350/-	X
Demand within normal period of limitation (From SCN itself)	29,99,797/-	

9. As compared to the above, the Appellants have already paid service tax as under:

Amount paid by Cash	Rs.75,47,519/-
Amount entitled as CENVAT Credit	Rs.2,17,996/-

10. Applicant submits that there has been gross error in considering the receipts in the computation as compared to the books of accounts. The Gross receipts as per the books of accounts in March 2008 is Rs. 98,98,144/- whereas Rs.15,70,99,760/- has been considered in the SCN,

11. Without prejudice to foregoing Notification No. 36/2010-ST dated 28.06.2010 and Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010 exempts advances received prior to 01.07.2010, this itself indicates that the liability of service tax has been triggered for the construction service provided after 01.07.2010 and not prior to that, hence there is no liability of service tax during the period of the subject notice excluding the receipts

prior to 01.07.2010 the revised service tax liability without prejudice to submission would be Rs.9,90,185/-

12. Without prejudice to the foregoing, assuming but not admitting Service Tax, if any is payable under the head Works Contract, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006 would be Rs. 11,913,861/-

13. Without prejudice to foregoing assuming but not admitting Service Tax liability, if any is payable under composition scheme, the same has to be restricted to only on those bungalows on which service tax was paid prior to 01.06.2007. On calculating the composition scheme for all bungalows entered after 01.06.2007 under composition scheme and for the bungalows already paid service tax under the abatement scheme continued to be calculated under abatement scheme amounts to 16,836,858/- subject to that no service tax liability on receipts from sale deed executed prior to 16.06.2005 which is the date of levy for construction.

14. In the case of *Silliguri Municipality and Ors.* v. *Amalendu Das and Ors.* (AIR 1984 SC 653) it was held that *"It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that* ***the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand.*** *There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim*

relief ***may lead to public mischief,*** *grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given".*

15. The Applicant also plead financial hardship due to the reason that the service tax has not been reimbursed by the recipient and also that the Appellant is not a business entity as is required to pay out a portion of their earnings.
16. The Applicant crave leave to alter, ad to and/or amend the aforesaid grounds.
17. The Applicant wish to be personally heard before any decision is taken in this matter.

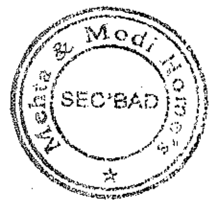
PRAYER

WHEREFORE, the Applicant pray that pending the hearing and final disposal of this appeal, an order be granted in their favor staying the order of the Respondent and granting waiver of pre-deposit of the entire amount.

For Mehta & Modi Homes

Partner

Signature of the Applicant



VERIFICATION

I, Mr. Soham Modi, Managing Partner of M/s Mehta & Modi, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today the18th of April, 2013

Place: Hyderabad

For Mehta & Modi Homes

Partner

Signature of the Applicant

IN THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL BANGALORE

Sub: Appeal against the order of the. Commissioner of Customs, Central Excise and Service Tax (Appeal), Hyderabad in Order in Original No 7/2013 (H-I) S. Tax dated 17.01.2013

I/We, Mr. Soham Modi, Managing Partner of M/s Mehta & Modi, hereby authorise and appoint Hiregange & Associates, Chartered Accountants, Bangalore or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

- To act, appear and plead in the above noted proceedings before the above authorities or any other authorities before whom the same may be posted or heard and to file and take back documents.
- To sign, file verify and present pleadings, applications, appeals, cross-objections, revision, restoration, withdrawal and compromise applications, replies, objections and affidavits etc., as may be deemed necessary or proper in the above proceedings from time to time.
- To Sub-delegate all or any of the aforesaid powers to any other representative and I/We do hereby agree to ratify and confirm acts done by our above authorised representative or his substitute in the matter as my/our own acts, as if done by me/us for all intents and purposes.

This authorization will remain in force till it is duly revoked by me/us.

Executed this 18th day of April 2013 at Hyderabad

For Mehta & Modi Homes

Signature Partner

I the undersigned partner of M/s Hiregange & Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 35Q of the Central Excises Act, 1944. I accept the above said appointment on behalf of M/s Hiregange & Associates. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated: 18.04.2013

Hiregange & Associates,
No. 1010, 26th Main,
Above Corporation Bank,
4th T Block, Jayanagar,
Bangalore- 560 041

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner (M. No. 219109)