OFFICE OF THE
COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, (APPEALS-II)
7th Floor, KENDRIYA SHULK BHAVAN, OPP. L.B.STADIUM, BASHEERBAGH,
HYDERABAD- 500 004.

Appeal No. 06 / 2011 (H-II) ST Date: 31.01.2011.

ORDER-IN-APPEAL No. 10 / 2011 (H-II) S.Tax
Passed By Dr.S.L.Meena, Commissioner (Appeals-II)

PREAMBLE

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

2. Any assessee aggrieved by this order may file an appeal under Section 86 of the Finance Act, 1994 to the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, 1st Floor, WTC Building, FKCCI Complex, Kemp Gowda Road, Bangalore-560 009.

3. Every appeal under the above Para (2) shall be filed within three months of the date on which the order sought to be appealed against is received by the assessee, the Board or by the [Commissioner] of Central Excise, as the case may be.

4. The appeal, as referred to in Para 2 above, should be filed in S.T.5/S.T.-7 proforma in quadruplicate; within three months from the date on which the order sought to be appealed against is communicated to the party preferring the appeal and should be accompanied by four copies each (of which one should be a certified copy), of the order appealed against and the Order-in-Original which gave rise to the appeal.

5. The appeal should also be accompanied by a crossed bank draft drawn in favour of the Assistant Registrar of the Tribunal, drawn on a branch of any nominated public sector bank at the place where the Tribunal is situated, evidencing payment of fee prescribed in Section 86 of the Act. The fees payable are as under:-

(a) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

No fee is payable in the case of Memorandum of Cross Objection referred to in Sub-Section 4 of Section 86 ibid.

5A. Every application made before the Appellate Tribunal,
(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or
(b) for restoration of an appeal or an application shall be accompanied by a fee of five hundred rupees:
No fee is payable in case of an application filed by Commissioner under this sub-Section.

6. The appeal should be filed within three months from the date of communication of the order.

7. Attention is invited to the provisions governing these and other related matters, contained in the Central Excise Act, 1944 and Central Excise Rules, 2002 and the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

****

Appeal No : 06 / 2011 (H-II) ST

ORDER

The subject appeal has been filed by M/s. Modi & Modi Constructions, 5-4-187/3 & 4, 2rd Floor, M.G.Road, Secunderabad – 500 003 (hereinafter referred to as Appellants) against the Order – In – Original No. 45 / 2010 S.Tax dt.29.10.2010 passed by the Additional Commissioner of Service Tax, Hyderabad-II Commissionerate, Hyderabad (hereinafter referred to as Respondent).-

2. Brief facts of the case are that the appellants are service tax registrants under the category of Works Contract Service in respect of construction of residential complex service. On investigation

40

conducted by the service tax department, it has come to light that they had undertaken a single venture viz. Nilgiri Homes and received amounts from customers from December 2007 to December 2009 towards sale of land, agreement for development charges for development of the layout into plots by laying of roads, drainage lines, electrical lines, water lines etc. and agreement of construction for construction of 18 independent houses for which sale deed agreements and construction agreements were entered by the appellants with the customers simultaneously. It was also noticed by the department from the ST3 returns filed by the appellants for the period October 2007 to March, 2008 and October 2008 to March 2009, that they had paid service tax of Rs.13,56,460/- for the period from December 2007 to December 2008 under Works Contract Service availing the option under Rule 3 (1) of the Works Contract (Composition Scheme for payment of Service Tax) Rules,2007, on the receipts against agreements of construction and Sale deed amounts are excluded from payment of service tax. The appellants enter sale deed agreements and construction agreements simultaneously from their customers and paid service tax on the part of construction agreement amounts It was also noticed that they had stopped paying service tax from January 2009 by misinterpreting the clarification issued by the Central Board of Excise & Customs, New Delhi vide Circular No.108/02/2009 – ST dt.29.01.2009. Therefore, a show cause notice was issued to the appellants demanding payment of service tax of Rs.6,04,187/- under Section 73 (1) of the Finance Act,1994 for the period January 2009 to December 2009 with interest under Section 75 of the Act, ibid and proposing penalties under Sections 76, 77 and 78 of the Act, ibid. The said show cause notice was adjudicated by the lower authority vide the impugned order confirming the demand of Rs.6,04,187/- towards service tax along with interest and imposed penalties of Rs.5,000/- and Rs.6,04,187/- under Sections 77 and 78 of the Act, ibid respectively.

3. Aggrieved by the above order, the Appellants have filed the present appeal mainly on the following grounds:-

- The impugned order is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.
- The respondent had passed the impugned order with the prejudiced mind of confirming the demand on irrelevant findings and not considering the factual position and entire submissions made by the appellants ; therefore, the order is untenable. They relied on the case laws in the cases of Oudh Sugar Mills Ltd. Vs. UOI – 1978 (2) ELT 172 (SC) and Cosmo Films Ltd. Vs. CCE, Aurangabad – (2009) 21 STT 217 (Mum.- CESTAT).
- The respondent had contravened the principles of natural justice by not considering the following submissions made by them and therefore, the order is void and requires to be set aside.
    - The preamble, the question to be addressed before the CBEC while providing the clarification under Circular No.108 and intention before the same.
- It was held in the case of Cosmo Films Ltd. vs. CCE, Aurangabad – (2009) 21 STT 217 (Mum-CESTAT) that the impugned order having been passed without considering / dealing with all submissions of assessee including evidence produced regarding insurance service, was bad in law and void. Hence, the impugned order shall be set aside.
- They claimed that various circulars were issued to clear the doubts regarding applicability of service tax on construction of residential complex service, but the respondent stated that by the issue of Circular B1/6/2005 – TRU dt.27.7.2005 itself, the applicability of service tax on construction of residential complex was made clear and the contention of the contention of the appellants that there was lot of confusion, is not tenable. In that case why the Board has issued further circulars F.No. 332/35/2006-TRU dt.01.8.2006 and 108/02/2009 – ST dt.29.01.2009.

- It is evident that the Circular No. 108/02/2009-ST dt.29.01.2009 states that where a residential unit is put to personal use, not necessarily the entire complex, it would be excluded under the taxable service ' Construction of Complex'. Therefore, respondent's finding that the exclusion from taxable service would be available only when the entire complex is put to personal use. In view of this the impugned order shall be set aside.
- While interpreting the law no words should be added or deleted. The law should be read as it is in its entirety. According to Board's Circular 108/02/2009-ST dt.29.01.2009 in the following two scenario service tax is not payable.
    - For service provided until the sale deed has been executed to the ultimate owner.
    - For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.
- The above explained scenario exactly matches to their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore clarification issued in the said board's circular is applicable to them. They relied on the following case laws in support of their contention.
    - Classic Promoters and Developers, Classic Properties Vs. CCE, Mangalore – 2009-TIOL-1106-CESTAT-Bang.
    - Virgo Properties P Ltd. Vs. CST, Chennai – 2010 – TIOL-1142-CESTAT-MAD.
    - Ardra Associates Vs. CCE, Calicut – (2009) 22 STT 450 (Bang.- CESTAT)
    - Ocean Builders Vs. CCE, Mangalore – 2010 (19) STR 546 (Tri.-Bang.)
    - Mohtisham Complexes P Ltd. Vs. CCE, Mangalore - 2009 (16) STR 448 (Tri-Bang)
    - Shri Sai Constructions Vs. CST, Bangalore -2009 (16) STR 445 (Tri.-Bang.)
- As per the definition of Residential Complex it is clear that all the conditions have to be satisfied cumulatively that the complex is having 12 residential units, there should be a common area to be shared and common facilities, but in their Nilgiri Homes such is not the situation since each residential house is independent, covered by separate plan sanction having separate ownership and in such units there is no 12 units, no common area has been shared and no common facilities have been shared, therefore, the same is not a residential complex and no question of payment of service tax on such independent house. They relied on the Hon'ble Tribunal's decision in the case of Macro Marvel Project Ltd. Vs. CST, Chennai – 2008 (12) STR 603 (Tri.-Mad).
- The respondent erred in holding that no cenvat credit would be available as per the Works Contract (Composition Scheme for the payment of service tax) Rules,2007 since Rule 3 (2) of such rules states that the assessee would not be eligible for cenvat credit on inputs. There is no mention about credit in relation to input services and capital goods.
- Without prejudice to the foregoing, appellants submit that the respondent erred in not giving the benefit of payment of service tax on the cum tax basis for the reason that the appellants have opted for the composition scheme, but Section 67 of the Finance Act,1994 permits benefit of payment of service tax on cum tax basis where the same is not collected from the customers as there is no exception / exclusion given for works contract service. They relied on the following case laws.
    - VGB Tyre Retreading Works Vs. CCE, Salem – (2010) 26 STT 210 (CHENNAI-CESTAT)
    - Billu Tech Video Communication Vs. CCE, Jaipur – (2010) 28 STT 325 (New Delhi – CESTAT)
    - Vidyut Consultants Vs. CCE, Indore – 2010-TIOL-1196-CESTAT-DEL.

42

- Show cause notice has raised demand under Construction of Residential Complex Service as well as Works Contract Service of the same period for the same scope of work, which is totally against the provision and therefore the same requires to be set aside.
- They submitted that the show cause notice and the impugned order have considered the wrong amounts for the purpose of demand. They submitted an annexure indicating the original amounts received as per the books of accounts and the amount considered as per the show cause notice and order passed thereof, difference arising thereof has been indicated.
- Without prejudice to the foregoing, the appellants submit that when service tax itself is not payable, the question of interest and penalty do not arise. They relied on the case law in the case of Prathiba Processors Vs. UOI – 1996 (88) ELT 12 (SC).
- Issue of so many circulars on the same subject at different points of time itself makes it evident that there was confusion on the issue and this aspect was not considered by the respondent and imposed penalty not treating the non payment of service tax on bonafide belief as such impugned order shall be set aside. They relied on the following decisions.
    - Hindustan Steel Ltd. Vs. State of Orissa – 1978 (2) ELT (J159) (SC)
    - Akbar Badruddin Jaiwani Vs. Collector – 1990 (47) ELT 161 (SC)
    - Tamilnadu Housing Board Vs. Collector – 1990 (74) ELT 9 (SC)
- When there is no allegation as to any intention to evade payment of service tax setting out any positive act of the appellants, no penalty to be imposed under Section 78 of the Finance Act,1994 for the reason of fraud, willful misstatement, collusion or suppression of facts or contravention of any of the provisions of the Act or Rules made there under with intention to evade payment of duty. They relied on the following case laws.
    - Cosmic Dye Chemical Vs. CCE – 1995 (75) ELT 721 (SC)
    - T.N.Dadha Pharmaceuticals Vs. CCE – 2003 (152) ELT 251 (SC)
    - Tamilnadu Housing Board Vs. Collector – 1990 (74) ELT 9 (SC)
    - Padmini Products Vs. CCE – 1989 (43) ELT 195 (SC)
    - Pahwa Chemicals P Ltd. Vs. CCE – 2005 (189) ELT 257 (SC)
    - Gopal Zarda Udyog Vs CCE – 2005 (188) ELT 251 (SC)
    - Kolety Gum Industries Vs. CCE – 2005 (183) ELT 440 (T)
- They stopped paying service tax on bonafide belief that there was no service tax liability as per the clarification issued in Board's Circular 108/02/2009. There was no other intention to evade payment of service tax by them. On the other hand it was not practicable for collection of service tax amounts from the customers as they denied payment of such service tax. Hence, penalty under Section 78 is not leviable in this case.
- They have not intentionally misinterpreted the Circular to evade tax payment as is mentioned in the impugned order. Hence, extended period of limitation shall not be applicable to them.
- They requested for waiver of penalties in terms of Section 80 since they were under confusion as to the service tax liability on their transaction, therefore there was reasonable cause for failure to pay service tax.

4. When the case was posted for personal hearing on 31.01.2011, Sri V.S.Sudhir, CA and Sri A. Shankar Reddy, DGM (Admn), Modi Properties & Investments appeared for personal hearing on behalf of the appellants and made the following submissions:

- Reiterated the submissions made in the grounds of the appeal.
- Construction of houses for individuals does not come under 'Works Contract Service' definition as construction of individual houses / villas would not come under meaning of construction of residential complex or a part thereof.

- Draw attention of Tribunal Chennai decision in the case relating to Macro Marvel Projects Ltd. Vs. CST, Chennai – 2008 (12) STR 603 (Tri.-Mad.), which specifically held that individual houses are not taxable.
- As per Board's Circular No.108/02/2009-ST dt.29.01.2009, it has been clarified that residential unit sold for a customer for his personal use, is not liable to service tax. The respondent has considered only the conclusion of the Board's Circular and the preamble or the arguments have not been taken into consideration while adjudicating the show cause notice.
- It is further submitted that builders became liable to service tax from 01.7.2010 as per Finance Act,2010 as per Explanation added to the taxable service.
- Since the matter was not free from confusion, the facts were intimated to the department and the issue involved is a matter of interpretation, penalty under Section 80 may be waived as the appellants had acted under bonafide belief.

5. I have gone through the impugned order, grounds of appeal, submissions made at the time of personal hearing and the case laws relied by the appellants and findings made by the lower authority in the impugned order. The issues to be decided in these appeals are (i) whether construction activity undertaken by the appellants falls under Construction of Residential Complex Service or under Works Contract Service ? (ii) whether service tax is payable by the appellants in the light of the Board's Circular No.108/2/2009 – ST dt.29.01.2009? (iii) whether cum tax benefit for payment of service tax is extendable to the appellants ? and (iv) whether re-quantification of demand is required or not ? (v) whether penalties are imposable by invoking extended period ? and (vi) whether cenvat credit is available on capital goods and input services ?

6.0. As far as classification and taxability aspects are concerned, it is pertinent to look into the relevant statutory provisions of the Finance Act, 1994.

Section 65 (91a) of the Finance Act,1994 : "residential complex" means any complex comprising of —

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

Section 65 (105) (zzzh) of the Finance Act,1994 "taxable service" means any service provided or to be provided to any person, by any other person, in relation to construction of complex;

Explanation. — For the purposes of this sub-clause, construction of a complex which is

44

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;

Section 65 (105) (zzzza) of the Finance Act,1994: Taxable Service under **Works Contract** means 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) -----; or

(b) -----; or

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

6.1. In view of the above definition of Construction of Residential Complex Service and scope of Works Contract Service , I find no merits in the contention of the appellants regarding classification of same construction service as Construction of Residential Complex Service and Works Contract Service since the appellants themselves had paid service tax under Works Contract Service during the period from December 2007 to December 2008 in respect of construction activity undertaken by them after availing option under Rule 3 (1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules,2007. As per Works Contract Service, option is given to the assessees to pay service tax of 4% instead of regular payment of service tax at 10% leviable for Construction of Residential Complex Service. Further, it is also envisaged in Rule 3 (3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules,2007 that for the same contract, payment of service tax under both these services is not payable simultaneously. Accordingly, the appellants had made service tax payments from December 2007 to December 2008 under Works Contract Service. In view of this, I hold that payment of service tax made by the appellants under Works Contract Service from December 2007 onwards is proper and just and thereby their above mentioned contention is defeated.

6.2. As per the above statutory provisions, the appellants are liable to pay service tax on the construction of residential complex undertaken by them since the above mentioned definition of Residential Complex service squarely applicable and no exemption whatsoever can be allowed for such construction activity as it is not meant for self use and "taxable service" means any service provided or to be provided to any person, by any other person, in relation to construction of complex. It is observed from the records that the appellants had paid service tax on the amounts attributable to the value received by them over and above the sale deed values till December 2008 under Works Contract Service during the period from December 2007 to December 2008 in respect of construction activity undertaken by them and not paid service tax for the period from January 2009 to December 2009 under

LS

the pretext that there is no service tax liability on the service rendered by them in view of the Board's Circular No.108/02/2009-ST dt.29.01.2009. Thereby, it is evident that the appellants had not paid service tax on the amount pertaining to the sale deed till December 2008 and paid service tax only on the part of amounts received towards construction agreements entered with their customers. Further, it is also observed that the appellants had collected total value of the independent houses from the customers and entered into sale deed agreements and construction agreements simultaneously and paid service tax amount to the department on the value excluding the value of sale deed till December 2008 and not paid any service tax for the period January 2009 to December 2009. From these two agreements, it is evident that construction of flat is not yet completed to treat it as a sale of flat. Board's Circular *No.108/102/2009-ST* dated 29.0l.2009 states that ***"It is only after the completion of 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' consequently would not attract service tax."*** It implies that three conditions should be satisfied for not attracting service tax (i) construction should be completed, (ii) full payment of the agreed sum should be paid, and (iii) sale deed should be executed for the full value of the residential unit. In the present appellant' case, though full payments were made construction was not complete and sale deed was executed for part amount of the total consideration. As such, the appellants are not covered by the situation explained in the Board's circular referred to above. In view of this position, the appellants' argument that they are covered by the impugned Board's Circular is without any basis.

6.3. Board has also clarified in the said circular that " ***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."*** Exclusion clause would apply to the "complex as a whole" and not to individual residential units. In other words, if the entire residential complex is meant for use by one person then it gets excluded from the definition of "residential complex". For example, if 'BHEL' gets their residential colony (having more than 12 units) for their employees constructed from a builder or Income Tax Department gets their residential colony constructed from a builder, then such construction would not attract service tax. However, this exclusion does not apply to individual residential units as in the instant case. In other words, if a builder constructs residential complex and sells the residential units to number of individuals under "two agreement system" viz., sale deed and construction agreement as in the instant cases, then, even though such individual unit is for personal use of that customer, still the service tax is liable to be paid. As stated above, "entire complex as a whole" meant for use by one person is under 'exclusion' clause and not the 'individual residential unit'. Secondly, each "construction agreement" with the customer is a "works contract" independent of the agreement entered, with another customer. Therefore, the contentions of he appellants on this count cannot be agreed.

6.4. Further, the appellants are also not covered under of Notification No.24/2010 – ST dt.22.6.2010 read with Notification No.36/2010 – ST dt.01.7.2010, for exemption of service tax on advance payments made since the said two Notifications are issued by the Board for eight New Services and carrying out amendments to the existing services effective from 01.07.2010 and therefore, they are prospective amendments to be complied with effect from 01.07.2010 i.e., the advances made prior to 01.07.2010 are not taxable in respect of the taxable services mentioned in the Notification No.36/2010-ST dt.01.07.2010 rendered from 01.07.2010 since the said taxable services are effective only from 01.07.2010 on account of the provisions of the Finance Act 2010, whereas in the instant [illegible]

46

involved was for the period January 2009 to December 2009, which is much earlier than 01.07.2010. Moreover, this aspect has been clarified by the Board vide its letter D.O.F.No.334/3/2010 – TRU dt.01.07.2010. In this context I draw attention to the Hon'ble Punjab & Haryana High Court's decision in the case of G.S. Promoters Vs. Union of India reported in 2011 (21) STR 10 (P & H), wherein the Hon'ble High Court has held as under:

> **10.This being the legal position, contention that there is no element of service of construction involved in a builder selling a flat cannot be accepted. Whether or not service is involved has to be seen not only from the point of view of the builder but also from the point of view of the service recipient. What is sought to be taxed is service in relation to construction which is certainly involved even when construction is carried out or got carried out before construction and before flat is sold.**
>
> **11.In *Magus Construction Pvt. Limited*, challenge was to a notice requiring registration under Section 69 of the Act on the ground that construction service was rendered by the builder to itself prior to sale of the flat and no construction service was rendered to the buyer. Transaction with the buyer was of sale. Learned Single Judge of Gauhati High Court held that in view of circular dated 1-8-2006, issued by the CBDT, there could be no question of taxable service when a builder undertakes construction work without engaging services of any one else. In our view, the said circular will not apply when service recipient is purchaser of a flat. As already discussed, the levy of tax is on service and not on service provider and construction services are certainly provided even when a constructed flat is sold. Taxing of such transaction is not outside the purview of the Union Legislature as the same does not fall in any of the taxing entries of State list.**

6.5. Further, I find no merit in the case law cited by the appellants contending that construction of independent houses are not leviable to service tax, since the appellants had constructed 18 independent houses in a complex called Nilgiri Homes, which is having more than 12 independent houses having common area, having common facilities like common water supply and having layouts approved by HUDA. From this it is evident that Nilgiri Homes constructed by the appellants rightly fall under the definition of Works Contract Service read with Construction of Residential Complex Service as detailed in para 6.0 supra. Moreover, it was observed by the Hon'ble Tribunal in its decision vide last three lines of para 2 in the case of Macro Marvel Projects Ltd. Vs. CST, Chennai – 2008 (12) STR 603 (Tri.- Chennai) that **" These observations of ours with reference to ' Works Contract' have been occasioned by certain specific grounds of this appeal and the same are not intended to be a binding precedent for the future."** . Therefore, the case law relied by the appellants is not useful to them.

6.6. In view of the above, I find no merits or force in the grounds and contentions submitted by the appellants and the case laws relied are also not helpful to them. In this regard, I concur with the findings made in the impugned order by the lower authority.

7.0. With regard to the appellants' contention that they are entitled to pay service tax on cum tax basis, it is pertinent to examine the following relevant statutory provisions pertaining to Service Tax.

> **SECTION 67. Valuation of taxable services for charging service tax.** — (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —
>
> (i) -----

47

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

WORKS CONTRACT (COMPOSITION SCHEME FOR PAYMENT OF SERVICE TAX) RULES, 2007 *[Notification No. 32/2007-S.T., dated 22-5-2007 as amended]*

RULE 3. — 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 [four per cent.] of the gross amount charged for the works contract.

(2) The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

(3) 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.

7.1. A combined reading of Section 67 (2) of the Finance Act,1994 and Rule 3 (1) of Works Contract (Composition Scheme for payment of Service Tax) Rules,2007, it is evident that assessee adopting to work contract provisions cannot be permitted to pay service tax under Section 67 of the Act, ibid, therefore, it is crystal clear that cum tax basis payment of service tax is not permitted under Works Contract Rules as it is not prescribed under the said Rules. Hence, the appellants request in this regard is not acceptable and therefore the case laws relied are not helpful to them.

7.2. Contention of the appellants that they are entitled for availing cenvat credit on input services and capital goods as they are not excluded vide Rule 3 (2) of Works Contract (Composition Scheme for payment of Service Tax) Rules,2007, is not a valid contention since in the construction of residential complex service rendered by them there is no requirement for input services and capital goods, which will be having no nexus with their output service, whereas inputs like steel, cement etc. are essential inputs for their output service and they are having nexus with their output service, as such Rule 3(2) of the said Rules specifically mentioned ineligibility of CENVAT Credit of duties or cess. Moreover, as per records no details with regard to input service credit have been furnished at appellate stage.

8.0. With regard to invocation of extended period and imposition of penalties, it is pertinent to examine the relevant statutory provisions as reproduced below.

SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. — (1) Where any service tax has not been levied or paid or has been

48

short-levied or short-paid or erroneously refunded, [Central Excise Officer] may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that 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)wilful 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 intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted.

SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, —

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to five thousand rupees.

SECTION 78. Penalty for suppressing value of taxable service. —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) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (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 not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded :

8.1. With regard to the contentions of the appellants that larger period is not invocable and penalties are not imposable, I find no force in their submissions in view of the fact that the appellants had obtained service tax registration and paid service tax under works contract service till December 2008 and stopped payment of service tax abruptly from January 2009 to December 2009 misinterpreting the Circular No. 108/02/2009-ST dt.29.01.2009 issued by the Board even though they received taxable amounts from their customers during the said period, contravening the provisions of Works Contract (Composition Scheme for Payment of Service Tax) Rules,2007 with an intention to evade payment of duty since the clarification sought by them was negated by the department by issue of the subject show cause notice not accepting their contention regarding applicability of the said Board's Circular to them stopping payment of service tax. The fact of non-payment of service tax had come to light only after department conducted investigation proceedings. In view of this, the appellants had willfully suppressed the facts of receiving taxable amounts from their customers in their ST 3 returns filed with the department, with an intention to evade / avoid payment of service tax as such on their part cannot be treated as bonafide act, as claimed by them. In this background, I find no merit in the appellants

49

contentions and invocation of extended period and imposition of penalties are rightly applicable in the instant case and I concur with the findings of the lower authority in this regard and the case laws relied are not helpful to theim. In this context I rely on the following case laws.

(i) 1994 (74) E.L.T. 9 (SC)

TAMIL NADU HOUSING BOARD Versus COLLECTOR OF CENTRAL EXCISE, MADRAS
Demand - Limitation for extended period invokable only if existence of both situations (1) suppression, fraud, collusion etc. and (2) intent to evade payment of duty proved.

(ii) 2008 (229) E.L.T. 107 (Tri. - Kolkata)
BHARAT ROLL INDUSTRY (PVT.) LTD. Versus COMMR. OF C. EX., HALDIA

Relevant information having not been disclosed to Department, extended period invokable.

(iii) 1999 (113) E.L.T. 331 (Tribunal)
BOMBAY DYEING & MFG. CO. PVT. LTD. Versus COMMISSIONER OF C. EX., MUMBAI

Demand - Limitation - Extended period invokable when the assessee is in the know of the situation and the department has no knowledge of it -

(iv) 2005 (179) E.L.T. 334 (Tri. - Del.)
BHARTI CELLULAR LTD. Versus COMMISSIONER OF CENTRAL EXCISE, DELHI

Service tax - Demand - Limitation - Suppression - Details and mode of computation of service tax being paid not disclosed in ST- 3 form - Plea that there was bona fide belief that service was not taxable rejected and held that there was suppression of material facts - Invocation of extended period upheld - Section 73 of Finance Act, 1994. ***[para 6]***

(vii) 2001 (138) E.L.T. 1021 (Tri. - Del.)
FARIDABAD METAL UDYOG (P) LTD. Versus COMMISSIONER OF C. EX., DELHI-II

Fact of non-use of entire quantity of inputs, came to notice of Revenue only at the time of investigation - Extended period invokable.

9. **SECTION 80. Penalty not to be imposed in certain cases** — Notwithstanding anything contained in the provisions of section 76, [section 77 or 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.**

As per Section 80 of the Finance Act,1994, there is provision for not imposing any penalty if the appellants proved that there was a reasonable cause for said failure. They merely stated that with a bonafide belief they had not paid service tax on the basis of clarification issued in the Board's Circular No.108/02/2009-ST dt.29.01.2009, which is contrary to the statutory obligation cast upon the appellants under Works Contract Rules,2007. Such a bald statement cannot be acceptable. There should have cogent reasons as to what made to bonafidely believe that they were not liable to pay service tax on such defrayed amounts. This reason is not reasonable cause for attracting waiver of penalty under Section 80 of the Finance Act,1994. The scope and ambit of expression ' reasonable cause' has been well explained in a case under the Income Tax Act. '**Reasonable cause can be said to be cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bonafides**' as held in the case of Azadi Bachao Andolan Vs. Union of India 2001 (116) Taxman 249/252 ITR 471 (Delhi). Further, it is evident from the record that the Appellants had not shown the taxable amounts in their ST 3 returns filed with the department during January 2009 to December 2009 even though they received taxable amounts from their customers and not paid service tax on such taxable amounts as required under Works Contract (Composition Scheme for Payment of Service Tax) Rules,2007 and this fact came to the

SD

knowledge of the department after conducting investigation into their activities. In this regard, it can be noticed from the records of this case that the appellants vide their letter dt.08.7.2009 replied to the department's letter for non-filing of ST3 returns for Half Year ending 31.3.2009 that they were not required to pay service tax on the construction activity undertaken by them in the light of Hon'ble Gauhati High Court's decision in the case of Magus Construction (P) Ltd – 2008 (11) STR 225 (Gau) and Board's Circular No.108/02/2009-ST dt. 29.01.2009, but the department had issued subject show cause notice not accepting their contention. Therefore, it is evident on record that their bonafide belief for non-payment of service tax is defeated. Further the case law cited in their letter is distinguished by the Hon'ble Punjab & Haryana High Court's decision in the case of G.S. Promoters Vs. Union of India reported in 2011 (21) STR 10 (P & H) as detailed in para 6.4 supra. Thus, they had not paid service tax on the taxable amounts received from their customers with an intention to avoid / evade payment of tax contrary to the statutory provisions. Adhering to the ratio of the above decision, there is nothing on record to show that the Appellants were prevented by reasonable cause for non-payment of service tax to entitle them for grant waiver of penalty under Section 80 of the Finance Act,1994. It should be kept in mind that under Section 80 of the Finance Act,1994, where the person / assessee succeeds in proving reasonable cause for failure to pay service tax , penalty may be waived altogether. But such is not the situation in the instant case. The Appellants had not proved reasonable cause for non-payment of service tax as required under Section 80 of the Finance Act,1994. Considering the gravity of the offence, I hold that their case is not a fit case for waiver of penalty under Section 80 of the Finance Act,1994.

10. With regard to the contention of the appellants that there was mistake in quantification of service tax, it is observed vide para 6 of the impugned order, the lower authority had quantified the tax liability based on the soft copies of the books of accounts provided by the appellants, as such the contention of the appellants is not valid one since the quantification was done by the lower authority based on the soft copies provided by them.

11. In view of the above, appeal filed by the appellants is dismissed.

21/11/11

(Dr.S.L.Meena)
Commissioner (Appeals-II)
Customs, Central Excise & Service Tax
Hyderabad.

To

1. M/s. Modi & Modi Constructions, 5-4-187/3 & 4, 2nd Floor, M.G.Road, Secunderabad – 500 003.

2. The Deputy Commissioner of Service Tax, Hyderabad-II Commissionerate, Hyderabad.

Copy to:

1. The Chief Commissioner, Customs, Excise & Service Tax, Hyderabad Zone, Hyderabad.
2. The Commissioner, Customs, Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad.
3. M/s. Hiregange & Associates, Basheer Villa, House No. 8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Road No.3, Banjara Hills, Hyderabad – 500 034.
4. Master Copy.

51