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(A. S. Neer)

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OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX
HYDERABAD II COMMISSIONERATE
3RD FLOOR (Annexe) :: SHAKKAR BHAWAN :: L.B. STADIUM ROAD
BASHEERBAGH:HYDERBAD - 500 004

O.R.No. 34 /2010-ST
HQST No: 59/09 - AE IV

Date: 12.04.2010

SHOW CAUSE NOTICE

Sub : Service Tax – Works Contract Services – M/s. Modi & Modi Constructions - Non payment of Service tax on taxable services rendered – Show cause Notice – Reg.

M/s. Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003 [here in after referred to as "the service provider"] are engaged in providing works contract service. M/s. Modi & Modi Constructions is a registered partnership firm and got themselves registered with department for payment of service tax with STCNo. AAKFM7214NST001.

2. As per Section 65(105(zzzza)) of the Finance Act, 1994 "taxable service" under workscontract 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;

3. As per 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 the 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.

4. On gathering intelligence that M/s. Modi & Modi Constructions though registered with the service tax department are not discharging the service tax liability properly and also not filing the required returns, investigation has been taken up by the department and Summons dated 11.1.2010 for submission

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of relevant record /documents / information have been issued to them. On verification of records submitted by the assessee, it is found that M/s. Modi & Modi Constructions have undertaken a single venture by name Nilgiri homes located at Rampally village, Keesara Mandal, RR District, 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. In the said venture, in respect of 18 houses they have entered into sale deed, agreement for development charges and agreement of construction with their customers. Till date they have not filed the ST3 returns with the department. However, they have submitted the copies of the ST3 returns prepared for the periods October, 2007 to March 2008, October, 2008 to March 2009 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 13,56,460/-. It is also found that in respect of 18 houses they have paid the said service tax 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.

5. A Statement has been recorded from Sri. A. Shaanker Reddy, Deputy General Manager (Admn.) authorized representative of M/s. Modi & Modi Constructions on 1.2.2010 under Section 14 of the Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1994. Sri. Reddy vide his Statement dated 1.2.2010 had inter alia stated that "the activities undertaken by the company are providing services of construction of Residential Complexes. They purchased the land under sale deed. On that they constructed the residential complexes. Initially, they collect the amounts against booking form/agreement of sale. At the time of registration of the property, the amount received till then will be allocated towards Sale Deed and Agreement of construction. Therefore, service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement. The service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis. Agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction. The sale deed constitutes a condition to go for construction with the builder. Accordingly, the construction agreement will also be entered immediately on the same date of sale deed. All the process is in the way of sale of the constructed unit as per the agreement of sale but possession was given in two phases one is land / semi finished flat with undivided share of land and other one is completed unit. This is commonly adopted procedure as required for getting loans from the banks". Further, he stated that services to a residential unit / complex which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex. Further, he stated that they have stopped collection and payment of service from 1-1-2009 in the light of the clarification of the Board vide circular No. 108/02/2009 - ST dated 29th January 2009.

6. As per the exclusion provided in Sec 65(91a) of the Service Tax Act, the residential complex 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. Here, "personal use" includes permitting the complex for use as residence by another person on rent or without consideration. It is further clarified in para 3 of the Circular No. 108/02/2009 - ST, dated 29th January 2009 if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for one person for personal use as residence by such person would not be subjected to service tax. For example, construction of residential quarters by the Income tax department for their employees by employing a contractor for design, planning and construction is not leviable to service tax because it is for the personal use of the Income tax department. Normally, a builder/promoter/developer constructs residential complex consisting number of residential units and sells those units to different customers. So, in such cases the construction of complex is not meant for one individual entity. Therefore, as the whole complex is not constructed for single person the exclusion provided in Sec 65(91a) of the Service Tax Act doesn't apply. Further, the builder/promoter/developer normally enters into construction / completion agreements after execution of sale deed. Till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore there is no levy of Service Tax on the services rendered till sale deed i.e., on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements / contracts against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements of construction are invariably attracts service tax under Section 65(105(zzzza)) of the Finance Act, 1994.

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7. As per the definition of "Residential Complex" provided under Section 65(91a) of the Finance Act, 1994, it constitutes any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s. Modi & Modi Constructions qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like park, common water supply etc., and the layout was approved by HUDA vide permit No. 6092/MP2/Plg/HUDA/07, dated 16-11-2007. As seen from the records submitted, the assesseees have entered into 1) a sale deed for sale of land together with / without semi finished portion of the house and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the assesseees thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deeds are taxable services under works contract service.

8. As M/s. Modi & Modi Constructions have not furnished the monthwise particulars of amounts received exclusively on agreements for Construction, the tax liability has been arrived at on the basis of soft copies of the books of accounts provided by M/s. Modi & Modi Constructions. It is arrived at that they have collected an amount of Rs. 1,46,64,738/- against agreements of Construction during the period from January 2009 to December 2009 and are liable to pay service tax including Education cess and Secondary & Higher education cess of Rs. 6,04,187/- and the interest at appropriate rates under works contract service respectively. The details of amounts collected, service tax liability are as detailed in the Annexure to this Notice.

9. M/s. Modi & Modi Constructions are well aware of the provisions and of liability of Service tax on receipts agreements for Construction and have not assessed and paid service tax properly with an intention to evade payment of tax. They have intentionally not filed the returns and produced the particulars. Further, they misinterpreted the definition of the works contract service with an intention to evade payment of Service Tax. All the facts have come to light only after the department has taken up the investigation. Hence, the service tax payable by M/s. Modi & Modi Constructions appears to be recoverable under Sub Section 1 of Section 73 of the Finance Act, 1994.

10. From the foregoing it appears that M/s. Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003 have contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have not paid the appropriate amount of service tax on the value of taxable services and Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they have not filed statutory Returns for the taxable services rendered and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details / information, with an intent to evade payment of service tax and are liable for recovery under proviso to the section 73(1) of the Finance Act, 1994 and thereby have rendered themselves liable for penal action under Section 76, 77 and 78 of the Finance Act, 1994

11. Therefore, M/s. Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003, are hereby required to show cause to the Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, 3rd floor, Shakkar Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad-500 004, within 30 days of receipt of this Notice as to why:

- (i) a differential amount of Rs. 5,86,589/- towards Service tax, Rs.11,732/- towards Education Cess and Rs.5,866/- towards Secondary & Higher Education Cess (a total amount of Rs.6,04,187/-) should not be demanded on the works contract service under the Sub Section 1 of the Section 73 of the Finance Act, 1994 for the period from January 2009 to December 2009.
- (ii) interest is not payable by them on the amount demanded at (i) above and also on the delayed payments made during the period from January, 2009 to December 2009, under the Section 75 of the Finance Act, 1994
- (iii) penalty should not be imposed on them under Section 76, 77 and 78 of the Finance Act, 1994

12. They are also required to produce at the time of showing cause, all the evidence upon which they intend to rely in support of their defense. They are also required to state whether would like to

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avail of opportunity to be heard in person before the case is adjudicated. If they do not reply to the Show Cause Notice within 30 days or do not appear in person when the case is posted for personal hearing, it would be presumed that the Notice does not have anything to state in their defense or they do not prefer any personal hearing and case will be decided on merit based on the evidence available on record.

13. This show cause Notice is issued without any prejudice to any other action that may be taken against the recipients of this Notice or any other persons concerned with the Finance Act or any other law time being in force.

14. The above Notice is issued placing Reliance on the following Records:

- (1) Soft copy of the bank statements, books of accounts, Customer documents 2008-09 and 2009-10 (upto Dec 2009).
- (2) Service tax statement submitted by M/s. Modi & Modi Constructions vide letter dated 25-11-2009.
- (3) The Statement dated 2.1.2010 of Sri. A. Shankar Reddy, Authorised person of M/s. Modi & Modi Constructions.
- (4) Balance Sheets of M/s. Modi & Modi Constructions for the year 2008-09.


15/04/10
ADDITIONAL COMMISSIONER

To
M/s. Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003
(By Speed Post Ack. Due)

Copy to:
The Superintendent, Service Tax, Group-X, Hyderabad-II Commissionerate, Shakkra Bhavan,
Hyderabad.
The Superintendent, Adjudication, Hqrs, Hyderabad-II Commissionerate, Hyderabad.
Office Copy / Spare Copy.

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ANNEXURE

M/s Modi and Modi Constructions
Worksheet of tax calculation

1. Statement-I (Month wise total receipts as per customer ledgers, tax payable and paid details)

	Jan-09	Feb-09	Mar-09	Apr-09	May-09	Jun-09	Jul-09	Aug-09	Sep-09	Oct-09	Nov-09	Dec-09	Total
Receipts towards construction where sale deed & agreement of construction entered into	624780	2979292	147326	2880690	1980000	34980	1535000	400000	200000	1440000	200000	2242670	14664738
Rate of Service tax, Ed.Cess, S&Hed. Cess under works contract service	4.12%	4.12%	4.12%	4.12%	4.12%	4.12%	4.12%	4.12%	4.12%	4.12%	4.12%	4.12%	
Tax payable	25741	122747	6070	113684	81576	1441	63242	16480	8240	59328	9240	92398	604187

2. Statement-II (Due date, tax payable details)

Due date for payment of Tax	5/4/2009	5/7/2009	5/10/2009	5/1/2010	Total
Tax payable under works contract service	154558	201702	87962	159966	604187

3. Statement-III (Breakup of tax payable)

Service Tax	Education Cess	S&Hed Cess
586589	11732	5866

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