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ANNEXURE III 87

Hiregange & Associates
Chartered Accountants

28.12.2016
To
The Joint Commissioner of Customs,
Central Excise and Service tax,
Hyderabad-I Commisisonerate,
Kendriya Shulk Bavan, Basheerbagh,
L.B Stadium Road, Hyderabad-500 004

Dear Sir,

Sub: Proceedings under SCN O.R No. 99/2016-ST(ADC) dated 22.04.2016 pertaining to M/s. Kadakia & Modi Housing, Secunderabad.

We have been authorized to reply and represent M/s. Kadakia & Modi Housing, Secunderabad. We herewith submit the reply to the Show Cause Notice along with annexures. Kindly acknowledges the receipt of the above.
Thanking You,
Yours faithfully,
For Hiregange & Associates
Chartered Accountants

Hiregange & Associates Chartered Accountants Hyderabad

Venkata Prasad.P
Chartered Accountant

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BEFORE THE JOINT COMMISSIONER OF SERVICE TAX, HYDERABAD I COMMISSIONERATE, L.B.STADIUM ROAD, BASHEERBHAG, HYDERABAD-500 004

Sub: Proceedings under O.R.No. 99/2016-Adjn. (ST) (Commr.) [HQPOR No: 10/2016-ST AE-VIII] dated 22.04.2016 issued to M/s. Kadakia & Modi Housing, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003.

FACTS OF THE CASE:

A. M/s. **Kadakia & Modi Housing** (hereinafter referred as 'Noticee') *inter alia* engaged in sale of residential villas on their own land under the name & style of **'Bloomdale'**. They are registered with department vide STC No. AAHFK8714ASD001 w.e.f. 25.04.2010 (copy of ST-2 enclosed as annexure (I))

B. Noticee initially executes Agreement Of Sale (AOS) for sale of residential villa and thereafter executes

i. Sale Deed (sample copies sale deed is enclosed as annexure (VIII & IX), that gets registered and appropriate 'Stamp Duty' has been discharged on the same. Initially 'sale deed' was entered only for the portion of land value and separate agreement was entered in the name of 'land development charges' however from 2012 practice of entering separate agreement for 'land development charges' was dispensed with as the land was already developed by that time and started entering 'sale deed' for the semi-constructed villa along with land attached thereto.

ii. Construction agreement is being entered for the construction work to be undertaken for the said villa's (sample copies of construction agreements are enclosed as annexure (VIII & IX). This agreement includes

construction of common amenities like club house, CC roads, street lighting, landscaped gardens etc.,

C. Noticee collects amounts from their customers towards:

i. Sale deed for sale of semi-finished villa along with land;

ii. Construction agreement (includes for *'common amenities/facilities'*);

iii. Other taxable receipts (additions/alternations works)

iv. Other non-taxable receipts (Corpus fund, electricity deposit, water deposit & service tax);

v. Taxes/duties (VAT, stamp duty, service tax etc.,);

vi. Land development charges (only during 2010-11, 2011-12, nominally in 2012).

Service tax Compliance & correspondence with department:

D. Appellant was given understanding that service tax is not liable and same was also clarified vide CBEC circular No. 108/02/2009-ST dated 29.01.2009. On this understanding, initially Appellant has not paid service tax and however with intent not to litigate and also in light of amendments took place in the year 2010, Appellant decided to pay service tax on the construction done from 01.07.2010 onwards.

E. The above understanding on the taxability prior to 01.07.2010 and after 01.07.2010 and compliance thereof was duly intimated to the department vide letter dated 16.08.2010 with specific request to revenue department on their understanding so that appropriate decision can be taken at Noticee end and same was followed-up vide letter dated 13.09.2010 (copy of both letters are enclosed as annexure III & IV). But there was no response from the department.

F. Again vide letter dated 30.12.2011, Noticee intimated that service tax was paid under protest for the period 01.04.2011 to 30.09.2011 on the value attributable to the construction done after 01.07.2010 under the category of 'construction of complex service' (COCS) after adjusting the service tax payments previously made, if any (prior to 01.07.2010). And filed ST-3 return also (copy of ST-3 return for the period April 2011 to September 2011 is enclosed as annexure VI). Here again there is no response from the revenue department.

The above was done only on their sole understanding of law and because of this, Noticee repeatedly requested the revenue department to confirm their understanding but Noticee at no point of time received any communication from department.

G. As the department was not responding and Noticee has their own doubts, Noticee approached consultant for advised on the compliance to be made for service tax. As per the consultant advise, Noticee started paying service tax under protest on the amounts received towards 'construction agreements' & also on the Other taxable receipts (stated supra) under the category of 'Works contract service (WCS). Said fact of paying under protest & on the amounts received towards 'construction agreement' was intimated to department along with detailed statements showing the total receipts, amounts included in taxable value and excluded from it etc., was also submitted. For instance, for the period January 2012 to March 2012, letter dated 22.07.2012 was filed and similarly for the subsequent period also (copies of letter filed are enclosed as annexure VII). Here again it was specifically requested

revenue department to confirm Noticee understanding and but no response again.

All these were done voluntarily and well before the intervention of revenue department.

H. And it was only after expiry of nearly 5 years from the date of filing letter asking for clarification/confirmation, officers of anti-evasion in the month of August 2015 sought various records, thereafter recorded statements and viewed that

i. Land development charges collected are liable for service tax under the category of *'site formation and clearance, excavation and earthmoving and demolition ('site formation' for short)';*

ii. Service tax is liable to be paid at full rate on *'common amenities/facilities* without any abatement;

iii. Other charges collected are liable for service tax;

I. Subsequently, Present SCN vide O.R.No. 99/2016-Adjn. (ST) (Commr) dated 22.04.2016 was served asking to show cause as to why: [-ANNEXURE-I

i. An amount of Rs. 14,35,330 /- (including all cesses) being the service tax payable on Site formation Service (as per Enclosure WS-5 read with WS-3 & WS-4 to this notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73(1) of the Finance Act, 1994;

ii. An amount of Rs.40,80,581/- (including all cesses) being the service tax payable on Works Contract Service (as per Enclosure WS-5 read with WS-3 & WS-4 to this notice) during the period October 2010 to

March 2015 should not be demanded from them, under proviso to Section 73(1) of the Finance Act, 1994;

iii. An amount of Rs.7,01,874/- (including all cesses) being the service tax payable on other taxable Services (as per Enclosure WS-5 read with Ws-3 & WS-4 to this notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

iv. An amount of Rs. 19,00,736/- paid towards service tax (as per Enclosure WS-5) should not be appropriated towards the service tax demanded at Sl No. (i) to (iii) above

v. Interest as applicable, on an amount at Sl.No. (i) to (iii) above should not be paid by them under Section 75 of the Financ Act, 1994.

vi. Penalty should not be imposed on the amount at Sl.No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;

vii. Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for delayed Registration;

In as much as:

a. Examination of the documents revealed that M/s.KMH have not filed the Statutory ST-3 Returns and not paid any service tax for the period October 2010 to March 2011. For the year 2011-12 they have filed the ST – 3 returns and self assessed their service under Construction of Residential Complex service for the period upto September 2011; and from October 2011 onwards they changed the classification of the

service and are discharging duty under Works Contract Service and they filed the returns for the period 2012-13 to 2014-15

b. Examination of the receipts vis-à-vis the amounts indicated in the Agreement of Sales showed that the cost of Land Development is not indicated in the Sale deed (Cost of land Value) and exemption is claimed in this respect.

c. The activity of land development involves preparing the site suitable for construction, laying of roads, laying of drainage lines water pipes etc thus it is a separate activity different from construction of Villas.

d. The activity of development of land appears to fall under the definition of site formation as per Section 65(97a) ibid and the development charges collected appear to be taxable to service tax as per Section 65 (105) (zza)ibid. and with effect from 1.7.2012 it appears to be a service under Section 66(B) of the Act. Further the activity does not fall under the negative list mentioned in Section 66D of the Act. Thus the activity of land development appears to be chargeable to Service Tax without any abatement.

e. M/s. KMH are entering into a Separate agreement of construction with his customers and the activity appears to be taxable under Works Contract service even during the period from October 2010 to September 2011 during which M/s. KMH appears to have erroneously classified the service under construction of Residential Complex Service. The fact that M/s. KMH are discharging VAT under Works Contract and are assessing the Service under Works Contract

confirms the nature of the service that it is "Works Contract Service" Only.

f. Providing common amenities is not a Works Contract as there is no transfer of property to the individual. Hence the abatement appears to be not available for the value of Rs.1,50,000/- per Villa (being the higher of the values admitted as M/s. KMH failed to arrive at the correct value of common amenities) and appears to be chargeable to full rate of Service Tax under other taxable services.

g. M/s. KMH appears to be liable to discharge charge service tax for Cost of land development shown in agreement of sales under "Site formation Service". They appear to be liable to service tax on the full value of Common amenities without any abatement at full rate. They appear to be liable to Service Tax under "Works Contract Service" in respect of the value of construction shown in agreement of sales excluding the value of Common amenities. The cost of land of shown in agreement of sales only appears to be exempt from service tax.

h. It appears what is transferred by way of sale deed is a semi-finished construction and not merely land. However it is observed that M/s. KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands.

i. M/s. Kadakia & Modi Housing have been rendering taxable services under the category of "Works Contract Services" and site formation

service however they have not paid the of service tax charged and collected from the customers to the account of the Central Government properly during the period from October 2010 to March 2015. They have not discharged service tax on site formation service and they have not discharged service tax on works contract service by under valuing the services they have not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation conducted. Therefore, it appears that the assessee has intentionally suppressed the facts to evade the payment of service tax.

Submissions:

1. The Noticee submits that they emphatically deny all the allegations made in Show Cause Notice (SCN) as they are not factually/legally correct.

2. Noticee submits that service tax is not at all payable by builder on the contracts entered with individual buyer involving the sale of land component in absence of proper mechanism for identification of service component therein. **Relied on Suresh Kumar Bansal Vs. UOI 2016 43 S.T.R. 3 (Del.)** wherein it was held that

   "Whilst Rule 2A of the Rules provides for mechanism to ascertain the value of services in a composite works contract involving services and goods, the said Rule does not cater to determination of value of services in case of a composite contract which also involves sale of land. The gross consideration charged by a builder/promoter of a project from a buyer would not only include an element of goods and services but also the value of undivided share of land which would be acquired by the buyer. ***(Para 45)"***

   "In absence of Rule 2A of the Rules there was no machinery for excluding the non-service element from such composite works contracts involving an element of services and transfer of property in goods. Whilst the impugned explanation expands the scope of Section 65(105)(zzzh) of the Act, it does not provide any machinery for excluding the non-service components from the taxable services covered therein. The Rules also do not contain any provisions relating to determination of the value of services involved in the service covered under Section 65(105)(zzzh) of the

Act. Thus the said clause cannot cover composite contracts such as the one entered into by the Petitioners with the builder. ***(Para 49)***

"in the present case, neither the Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract. ***(Para 53)***"

3. Further Noticee submits that construction of villas cannot be subjected to service tax *inter alia* due to

   a. Villas cannot be treated as residential complex defined u/s. 65(91a) of Finance Act, 1994 since villa is not a building containing more than 12 units. Consequently same does not fall under the category of 'Works contract service (WCS)' *qua* Section 65(105)(zzzza) of Finance Act, 1994;

   b. Further judicially also it was held that construction of villas cannot be treated as 'construction of complex' Relied on Macro Marvel Projects Ltd. v. Commissioner — 2008 (12) S.T.R. 603 (Tribunal) maintained by SC in 2012 (25) S.T.R. J154 (S.C.);

   c. Further Villas constructed are being used for his personal use and falls under exclusion portion of the definition of the "Residential complex" defined u/s 65(91a), ibid. hence no service tax. Relied on CBEC circular 108/2/2009-S.T., dated

29.01.2009 and M/s Virgo Properties Pvt Limited Vs CST, Chennai 2010-TIOL-1142-CESTAT-MAD;

d. For period 01.07.2012 onwards, same is exempted under entry No. 14(b) of Notification No. 25/2012 ST dated 20.06.2012 as amended;

4. Mere paying service tax or filing of ST-3 returns under self assessment system does not alter the taxability of the impugned activity as Self assessment cannot be considered as final/decisive and further there is no restriction for claim of the refund of the duty so self-assessed. In this regard reliance is placed on

a. Central Office Mewar Palaces Org. v. UOI 2008 (12) S.T.R. 545 (Raj.)

b. Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553 (Tri. - Bang.)

Therefore notwithstanding payment of service tax by Noticee during the subject period, there is no service tax liability at all on the entire transaction of villa sale that being a position there is no question of any short payment and entire demand fails on this count itself.

5. Without prejudice to the foregoing, For the ease of comprehension, the subsequent submissions in this reply are made under different heads covering different aspects involved in the subject SCN as listed below:

A. Land development charges are not liable for service tax;

a. It does not fall under the category of 'site formation';

b. species of 'works contract' but not 'works contract' taxable under section 65(105)(zzzza), *ibid;*

c. even assuming taxable, not liable for the cases wherein land development agreement was not entered;

B. Construction of common amenities involves the transfer of property and hence it is 'works contract' and correctly assessed at abated rate – there is no short payment to this extent;

C. Other charges (electricity, water etc.,) are not liable – hence shall not be included in 'taxable value'

D. Taxes/duties collected (VAT, service tax, stamp duty) are not liable – hence shall not be included in 'taxable value'

E. Extended period of limitation is not invokable;

F. Benefit of cum-tax shall be given;

G. Interest and penalties are not payable/imposable;

In Re: Land development charges are not liable for service tax:

6. Noticee submits that charges for 'land development' were collected towards development of the layout into plots by laying roads, drainage lines, electrical lines, water lines etc., as per the rules of HUDA. **Both materials, labour are involved in laying of said roads, drainages etc.,** For instance, murrum, concrete were being incorporated in the laying of roads apart from exerting the labour therein. Similarly while laying of electrical lines, Noticee incorporates goods namely electrical poles, wire etc.,

7. Noticee submits that impugned proposes to tax the 'land development' charges collected after alleging (vide Para 2.3.8) that same is classifiable under the category of 'site formation' u/s. section 65(105)(zzza) of Finance Act, 1994.

8. The Noticee submits that the definition of the *"Site Formation and Clearance, Excavation and Earthmoving and Demolition Services"* on one hand and reference to description of on another hand, concluded the liability of the service tax on the same activities without proving how the particular activity is covered under the provisions of Finance Act, 1994. Notice had not recorded any reasons for concluding the liability of service tax on the impugned activities. Authority has not discharged its onus on proving the liability without any doubt and hence the Notice is not valid. The Notice has been just issued in air and without proper examination and hence the same has to be set aside. In this regard Noticee wishes to rely on the case law – (The Special Bench of Tribunal consisting of three members) Crystic Resins (India) Pvt. Ltd., Vs CCE, 1985 (019) ELT 0285 Tri.-Del, which has made the following observations on uncertainty in the SCN and said the SCN is not valid.

"If show cause notice is not properly worded inasmuch as it does not disclose essential particulars of the charge any action based upon it should be held to be null and void."

"The utmost accuracy and certainty must be the aim of a notice of this kind, and not a shot in the dark ....."

.9. Noticee submits that the impugned SCN has merely extracted the entire provision under Section 65(97a) of Finance Act, 1994 and alleges that service tax is liable to be paid on the 'land development charges' under the category of 'site formation' u/s. section 65(105)(zzza) of Finance Act, 1994 but fails to specify under which clause of 'Site formation' is taxable more specifically when 'Site formation' contains several clauses covering different activities. Therefore such SCN is invalid and infirmity incurable therefore requires to be quashed. Reliance is placed on United Telecoms Limited vs. CCE, Hyderabad-2011 (21) S.T.R. 234 (Tri-Bang) wherein it was held that *"Commissioner does not give a finding as to the sub-clause (i) to (vi) of 65(19) to which maintenance of accounts related if the services fell under clause (vii). Moreover, there were no such proposals in the show cause notice. We find that no tax liability can be confirmed against any person unless the same is specifically alleged in the show cause notice. We hold that the impugned demand, therefore is not legally sustainable"*

10. Noticee submits that the definition of 'taxable service' & also the 'site formation' was reproduced for easy reference:

Section 65(105)(zzza) of Finance Act, 1994: *"to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities;*

Section 65(97a) of Finance Act, 1994: *"site formation and clearance, excavation and earthmoving and demolition" includes,—*

(i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or

(ii) soil stabilization; or

(iii) horizontal drilling for the passage of cables or drain pipes; or
(iv) land reclamation work; or
(v) contaminated top soil stripping work; or
(vi) demolition and wrecking of building, structure or road,
but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies;

Not falling under any sub-clauses of 'site formation' service:

11. The Noticee submits first sub-clause covers drilling, boring and core extraction services and in the instant case of 'land development' there was no such activities were undertaken and therefore same is not covered under this sub-clause.

12. The Noticee submits that second sub-clause covers the cases of soil stabilization and the instant case of 'land development' does not require any such type of 'soil stabilization' i.e. improving or changing the soil of surface. Therefore the not covered under second sub-clause too.

13. The Noticee submits that third sub-clause covers the cases of 'horizontal drilling' whereas 'land development' does not require such kind of drilling works hence not covered here also.

14. Similarly further sub-clause covers requires 'Land reclamation' works which involves the converting unusable/disturbed land into usable form whereas in the instant case of 'land development' land is in very well usable form before Noticee carried the development work and

development work only for laying of infrastructure as required by M/s. HUDA. Resultantly same is not covered under this sub-clause also.

15. The Noticee submits fifth sub-clause covers the cases of *'contaminated top soil stripping work'* involving the carrying out measures for preventing/correcting the soil contamination. Whereas in the instant case of 'land development' there is neither 'soil contamination' nor measures for prevention/correction. Therefore not covered under this sub-clause also.

16. The Noticee submits that last sub-clause covers the cases of 'demolition and wracking services' and the instant case of 'land development' does not require any such kind of 'demolition/wrecking' resultantly not covered under this sub-clause also.

In view of the above, it is clear that impugned case of 'land development' would not fit into any sub-clauses of 'site formation' category *qua* Section 65(105)(zzza), ibid. Hence demand is not sustainable.

Part of composite contract of villa construction/sale – hence not covered under the category of 'site formation':

17. Noticee further submits that taxability under 'site formation' attracts only when those specified activities were undertaken independently and not as part of any other composite work. This is because if such works are held to be taxable under the site formation service irrespective of whether carried our independently or part of composite work, then every

such construction work would involve the activity of site formation, which is separately taxed in other category. Same position was clarified by CBEC vide its Circular No. 123/5/2010-TRU, dated 24-5-2010. The relevant extract is as under:

"iv) 'site formation and clearance, excavation, earthmoving and demolition services' are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road."

In the instant case, 'land development' activity was not carried out independently and part of composite contract for carrying out the villa construction/sale. This fact was fortifies from the Para 'E' of Agreement of sale (AOS). The relevant extract reads as

"the vendor in the scheme of the development of Bloomdale has planned that the prospective buyers shall eventually become the absolute owners of the identifiable land (i.e. plot of land) together with independent bungalow constructed thereon. For this purpose the vendor and the vendee are required to enter into three separate agreements, one with respect to the sale of land, second with respect to development charges on land and the third with respect to the construction of the bungalow. These agreements will be interdependent, mutually co-existing and inseparable though in the scheme of the project the vendor may execute a sale deed in favour of the vendee before commencing the construction of the bungalow." (sample copies of 'AOS' are enclosed as annexure __).

Therefore 'land development is not taxable under the category of 'site formation'

18. Noticee further submits that judicially also it was held that carrying out the activities that may cover under the category of 'site formation' if taken as part of any composite work then same cannot be taxed under the category of 'site formation' *qua* Section 65(105)(zzza), ibid. few of judgments are as follows:

a. M. Ramakrishna Reddy v. CCE & Cus, Tirupathi 2009 (13) S.T.R. 661 (Tri.-Bang.);

b. Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553 (Tribunal);

Species of 'works contract' as it involves supply of materials also and not liable for service tax as it was not specified under the category of 'works contract service' *qua* Section 65(105)(zzzza) of Finance Act, 1994:

19. Noticee submits that before going into the discussion as to whether impugned activity is works contract or not, it is worthwhile to keep in the mind the fundamental principle of works contract is that it is an composite agreement for transfer of property in goods by accretion together with rendition of labour/service. And further it is well recogonised naturally, lawfully and explicitly so in Central and State legislation as well that Works contract is a composite, indivisible, distinct and insular contractual arrangement, a specie distinct from a contract for mere sale of goods or one exclusively for rendition of services. And the above principles are flown from unvarying series of Apex court rulings *inter alia* the following:

a. State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd — (1958) 9 STC 353 (SC);

b. Gannon Dunkerley & Co. and others vs. State of Rajasthan and others (1993) 088 STC 0204;

c. Builders Association of India v. Union of India — (1989) 2 SCC 645;

d. Bharat Sanchar Nigam Ltd. v. Union of India — 2006 (2) S.T.R. 161 (S.C.);

e. Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.);

f. Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu — 2014 (34) S.T.R. 641 (S.C.)

g. CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.);

20. Noticee submits that in view of the above principles laid down by the Apex court and invariable factual position that Noticee is incorporating the various goods namely murrum, concrete, electrical poles, electrical wiring etc., in the execution of impugned activity of *'land development'* apart from exertion of labour, the impugned activity shall be treated as species of works contract.

21. Noticee further submits that it is settled law that in case of execution of works contract property in goods involved therein would get transferred through accretion. And in the instant case Noticee incorporated the goods namely murrum, concrete, electrical poles, electrical wiring etc., therefore it is clear case that Noticee transferred the property in goods to their customer while undertaking the impugned activity and

undisputedly exerted the labour for execution of impugned activity thereby satisfying the species of works contract viz., supply of goods and services/labour.

22. Noticee submits that value assessed for VAT also includes the *'land development charges'* collected which further fortifies that 'land development' is species of works contract.

23. In continuation to the above, Noticee submits that the provisions of 'Works Contract Service' in the Finance Act, 1994 are as follows:

a. Taxable service was defined in section 65(105)(zzzza) as "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".

b. The term Works contract is defined to explanation to the above provision as - "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;

24. From the above it is clear that only specified activities of 'works contract' are intended to tax and not every contract of 'works contract' like therein VAT provisions. Hence in order to tax under the category of 'works contract', activity shall fall in the list of works specified therein. And the instant case of 'land development' is not falling under any of such specific works since

a.It does not involve any work of 'erection, commissioning or installation' etc., accordingly sub-clause (a) fails;

b. 'Land development' does not involve any construction of building/civil structure accordingly sub-clauses (b), (c) & (d) fails on this count;

c. Similarly sub-clause (e) also fails in the instant case as there is no execution of any turnkey projects/EPC contracts;

Therefore impugned activity is not liable under the category of 'WCS'.

25. The Noticee further submits that composite contracts can be taxed only under the category of 'Works contract service' *qua* Section 65(105)(zzzza), ibid and not under any other categories including 'site formation'. Reliance is placed on Hon'ble **Supreme court decision in CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.).** That means service element in the works contracts other than those covered under the specified category of 'Works Contract Services (WCS)' is not taxable.

26. Noticee further submits that since there is a specific category for 'works contract' but Parliament has in its wisdom not covered the works contract in relation to 'land development', the same cannot be taxed under any other category of services. In this regard Relied on Dr. Lal Path Lab Pvt. Ltd. Vs Commissioner of C. Ex., Ludhiana 2006 (004) STR 0527 Tri.-Del and same was Affirmed in 2007 (8) STR 337 (P&H.) wherein it was held that *"What is specifically kept out of a levy by the legislature cannot be subjected to tax by the revenue administration under another entry"*. Therefore demand of service tax on 'land development charges' is not sustainable.

Even assuming taxable, not liable in the cases wherein land development agreement was not entered;

27. Noticee further submits that as stated in background facts, from 2012, Noticee stopped entering separate agreement for 'land development' since

land was already developed by that time and villas are in semi-constructed/finished stage (including villas not booked at that time). Accordingly, sale deed was being entered covering the both portion of land & semi-constructed villa/house and stamp duty was paid.

28. Noticee submits that impugned SCN does not dispute the above fact that sale deed was entered conveying the title of semi-finished villa/house along with land but proposes to tax component of semi-constructed component after alleging that (vide Para 3.2) *"It appears what is transferred by way of sale deed is a semi-finished construction and not merely land. However it is observed that M/s. KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands."*

29. In this regard, it is submitted that semi-finished villa/house represents the construction work already done prior to booking of villa/house by the prospective buyer. The work undertaken till that time of booking villa/house is nothing but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be bought into the realm of works contract. In this regard, reliance is placed on the following:

a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.) wherein it was held that *"**115.** It may, however, **be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser**. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."*

b. CHD Developers Ltd vs State of Haryana and others, 2015 –TIOL-1521-HC – P&H-VAT wherein it was held that *"45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property."*

30. Noticee further submits that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi finished villa/house is not chargeable to VAT and it is mere sale of immovable property (same was supported by above cited judgments also). Therefore said sale cannot be

considered as works contract and consequently no service tax is liable to be paid. All the goods till the prospective customer become owner have been self consumed and not transferred to anybody. Further goods, being used in the construction of semi-finished villa/house, have lost its identity and been converted into immovable property which cannot be considered as goods therefore the liability to pay service under 'works contract service' on the portion of semi-constructed villa represented by *'sale deed'* would not arise.

31. Without prejudice to the foregoing, Noticee submits that there is no service tax levy on sale of semi-finished villa/house as the same was excluded from the definition of 'service' itself. The relevant portion of definition *qua* section 65B(44) reads as follows:

a) an activity which constitutes merely,—

(i) ***a transfer of title in goods or immovable property, by way of sale,*** *gift or in any other manner; or*

32. Noticee submits that to be covered under the above exclusion the following ingredients shall be satisfied:

a. There should be transfer of title:

Transfer of title means "change in ownership". And in the instant case there is change in ownership from Noticee to their customer since after execution of 'sale deed' customer is the owner of "said immovable property" thereby this condition is satisfied.

b. Such transfer should be in goods or immovable property:

What constitutes immovable property was nowhere defined in the provisions of Finance Act, 1994 or rules made thereunder. It is pertinent to refer the definition given in section 3 of Transfer of property act 1882 which reads as follows:

"Immovable property" does not include standing timber, growing crops or grass"

Further section 3 of General clauses act, 1897 which reads as follows:

*"Immovable property" shall **include land**, benefits to arise out of land, and **things attached to** the earth, or permanently fastened to anything attached to the earth.*

Reading of the above, undisputedly "land along with semi-finished villa/house" is immovable property thereby this condition was also met.

c. It **is** by way of sale, gift or other manner

In the instant case execution of 'sale deed' & payment of applicable stamp duty itself evidences that there is sale. Further it is pertinent to consider the definition given under section 54 of Transfer of property Act, 1882. In absence of definition of "sale" in the provisions of Finance Act, 1994 and relevant extract reads as follows:

*"Sale" is a **transfer of ownership in exchange for a price paid or promised or part-paid and part promised.** Sale how made — Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or*

other intangible thing, ***can be made only by a registered instrument.***

In the instant case also there is transfer of ownership and price was also paid (part of the price is promised to pay) and transfer was made by executing 'sale deed' which is validity registered with stamp authorities. Therefore, undoubtedly there is sale thereby this condition was also met.

d. **Merely**

Undoubtedly 'sale deed' was executed to transfer the title in immovable property only and such transaction (sale of immovable property) does not involve any other activity namely construction activity as the same done entering separate agreement Mis-constructed by the impugned SCN.

Therefore all the above conditions were satisfied in the instant case thereby making the transaction falling under said exclusion and hence amounts received towards 'agreement of sale' are not subjected to service tax.

33. Noticee further submits that if two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words, the discernible portion of the transaction, which constitutes a transfer of title in immovable property would be excluded from the definition of service by operation of the said exclusion clause while the service portion

would be included in the definition of service. In the instant case, it was well discriminated the activity involved & amounts received towards

a. Sale of "land along with semi-finished villa" ('sale deed' separately)

b. Construction activity (by executing construction agreement)

Noticee submits that whatever the activity involved & amounts received towards construction agreement was suffered service tax and again taxing the associated transaction alleging that construction was involved is not warranted under the Finance Act, 1994 more so in case when there is clear separation/bifurcation/vivisection of activity involved & amounts received towards such associated transactions from the activity of construction.

34. Without prejudice to the foregoing, Noticee further submits even assuming 'land development' activity is liable for service tax, it humbly request to allow the benefit of paying tax @4.8% in terms of 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 – as it is specie of works contract.

35. Even assuming 'land development charges' taxable, it is submitted that for the period 01.07.2012, adopting the principles of 'Bundled service' u/s. 66F of Finance Act, 1994, same shall be construed as 'works contract' and tax shall be levied only @40% on the amount received in terms of Rule 2A of Service tax (determination of value) Rules, 2012.

In Re: Construction of common amenities involves the transfer of property and hence it is 'works contract' and correctly assessed at abated rate – there is no short payment to this extent;

36. Noticee submits that as stated in background facts, Construction agreement is being entered for the construction work to be undertaken including construction of common amenities/facilities like club house, CC roads, street lighting, landscaped gardens etc., and there is no bifurcation on the amounts towards common amenities/facilities. And Noticee is paying service tax on the amounts received towards this agreement adopting the taxable value as per Rule 2A of Service tax (determination of value) Rules, 2006. All these facts are undisputed in SCN also.

37. Construction of common amenities like club house, CC roads, street lighting, landscaped gardens etc., requires both materials/goods (Murrum/clay, cement, concrete, rocks etc.,) and also the labour exertion in executing the said construction. The Common amenities/facilities constructed would be transferred to society/association that is being formed by all owners of villa in the impugned project. As the society/association (which is in turn owned by all customers) is owner of the same, the cost incurred for the construction is being recovered from each & every customer.

38. Noticee submits that impugned SCN propose to tax 'Common amenities' at full rate on the full value alleging that (vide Para 2.5) *"Providing common amenities is not a Works Contract as there is no*

transfer of property to the individual. Hence the abatement appears to be not available for the value of Rs.1,50,000/- per Villa (being the higher of the values admitted as M/s. KMH failed to arrive at the correct value of common amenities) and appears to be chargeable to full rate of Service Tax under other taxable services."

As seen from the above, impugned SCN propose to deny the abatement citing that transfer of property is not to individual and hence not a 'works contract'. In this regard, it is submitted that common amenities/faculties constructed are being transferred to society/association which is in turn owned by customers/individuals only and Noticee does not have any ownership over it. Further it is well settled principle that society/association formed by group of people are not different and both are one & same. That being a case, whatever the transfers made to society/association is nothing but transferred to individual customers. Hence SCN averment that property in goods is not transferred to individual customers is not correct.

39. Noticee further submits that the entire definition of 'works contract' (either before 01.07.2012 or thereafter) does not provide that transfer should to individual/customer/contractee and what all it requires only the transfer of property that may be to customer/contractee or any third person and such transfer should be leviable to VAT, all these ingredients are satisfied in the instant case *inter alia* property in goods incorporated was transferred to society/association and VAT was levied & paid also. Hence SCN averment is not correct.

40. Further 'residential complex' construction falls within the realm of 'WCS' and the expression "residential complex' was defined u/s. 65(91a), ibid to include 'common amenities/facilities'. On conjoint reading of this, it is clear that construction of 'common amenities/facilities' also specie of 'works contract'. Therefore averment of SCN goes contrary to this and hence not valid.

In Re: Other non-taxable receipts (Corpus fund, Electricity deposit, water charges, service tax etc.,) are not liable – hence shall not be included in 'taxable value':

41. Noticee submits that these receipts consists of

a. Corpus fund which is collected & totally kept in separate bank account and transferred to society/association once it s formed; collection of corpus fund & keeping in separate bank account and subsequent transfer to association/society is statutory requirement;

b. Electricity deposit collected & totally remitted/deposited with the 'electricity board' before applying electricity connection to the villa and Noticee does not retain any amount out of it; this deposit is collected & remitted as per the statutory provisions of AP Electricity Reform Act 1998 r/w rules/regulations made thereunder;

c. Water deposit collected & totally remitted to 'Hyderabad Metropolitan Water Supply & Sewerage Board (HMWSS)' before taking the water connection. This Deposit amount also includes water consumption charges for first two months along with sewerage cess. All these

deposits are collected & paid in terms of HMWSS Act, 1989 r/w rules/regulations made thereunder;

d. Service tax collected & remitted to the Central government as per the provisions of Finance Act, 1994;

As seen from the above, all these charges collected 'other non-taxable receipts' are statutory charges/deposit and received as mere reimbursements of expenses/charges incurred/paid on behalf of customers and does not involve any provision of service. Hence same shall be excluded from the taxable value *inter alia* in terms of Rule 5(2) of Service tax (determination of value) Rules, 2006.

42. Judicially also it was held that above charges are not to be included in taxable value. Relied on ICC Reality & Others Vs CCE 2013 (32) S.T.R. 427 (Tri. - Mumbai); Karnataka Trade Promotion Organisation v. CST 2016-TIOL-1783-CESTAT-BANG; hence demand does not sustain to this extent.

In Re: Extended period of limitation is not invokable:

43. Noticee submits that impugned SCN proposed to demand service tax invoking larger period of limitation of 5 years after alleging that (Para 6) *"They have not discharged service tax on site formation service and they have not discharged service tax on works contract service by under valuing the services they have not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation*

conducted. Therefore, it appears that the assessee has intentionally suppressed the facts to evade the payment of service tax."

44. Noticee submits that suppression means not providing information which the person is legally required to state, but intentionally or deliberately not stated. As stated in factual matrix there was continuous intimation (from year 2010) regarding the compliance being made from time to time and repeated requests were made asking to confirm the understanding of Noticee. Letters were filed giving the detailed breakup of amounts collected, amounts offered to tax & not offered (excluded) to tax. At no point of time, department responded/rebutted to the above intimations/requests.

45. Noticee submits that what is believed to be not taxable/leviable as backed by their legal understanding was well put forth before the authorities in the year 2010 i.e. at the time of beginning their compliance itself and subsequently also. Thus **full facts of subject SCN were voluntarily disclosed by the Noticee without any enquiry/request from the departmental authorities and they had never hidden any fact from the officers of department** and subject matter of present SCN was known to the department before the beginning of SCN period itself as evident from the corresponded referred above.

46. Not objecting/responding at that time which gave vehement belief that understanding & compliance made is in accordance with the law and but now that is after expiry of nearly 5 years coming out with the present SCN with illusory & baseless allegation to invoke larger period of limitation and proposing to punish the Noticee for the failure of departmental authorities is not valid in the eyes of law. In this regard reliance is placed on Pushpam Pharmaceuticals Company Vs Collector Of C. Ex., Bombay 1995 (78) E.L.T 401 (S.C) it was held that *"suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties,the omission by one to do what he might have done not that he must have done would not render it suppression.It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression.*

47. Noticee submits that the extended period of limitation is not invokable in the instant case:

a. Most of the builders/developers across the country are not at all paying service tax (especially on villas constructions) and there were serious doubts expressed on the applicability of service tax and customers are also very reluctant to reimburse citing the above practice of non-payment by other similar builders;

b. Judicially also it was held that construction of villas are not subjected to service tax as submitted supra;

c. There was lot of confusion on the liability of builders on the applicability of service tax and was challenged before various courts and courts also expressed different views and most of the cases in favour of tax payer. For instance, recently Hon'ble High court in case of Suresh Kumar Bansal v. UOI 2016-TIOL-1077-HC-DEL-ST held that construction contracts are not subjected to service tax.

d. Further taxability of contracts involving immovable property was also subject matter of dispute during the subject period. There were contrary judgments of Supreme Court at such point of time and which was finally settled by larger bench of Supreme Court in the year 2014 as reported in Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.).

e. The issue of classification of indivisible contracts under 'COCS'/'WCS' was in dispute. Courts expressed different views, referred to larger bench and finally settled by Supreme Court in the year 2015 in favour of tax payer as reported in Commissioner v. Larsen & Toubro Ltd. — 2015 (39) S.T.R. 913 (S.C.).

f. Apart from the above difficulties, construction industry was in slump (especially in erstwhile state of Andhra Pradesh due to state bifurcation issue) and builders were facing huge financial problems/difficulties.

Despite of above challenges/doubts/confusion, Noticee voluntarily paid all service tax dues within the due date before the intervention of revenue department. There is no evasion of tax. Therefore in the above background, intension to evade or delay the payment cannot be

attributed. Further differentiation shall be made between the assessee (like Noticee) who is voluntarily complying with the law and paying all dues despite of doubts/confusion/challenges etc., and assessee who is not at all complying with the law despite knowing his liability. Giving equal punishment for errant assessee and non-errant assessee shall be best avoided. Hence in view of above factual & legal matrix, larger period of limitation is not invokable.

Interpretation is involved

48. The Noticee submits that present SCN arises due to difference of interpretation of provisions between Noticee & revenue. Further various letters were filed before department authorities, who never objected/responded on the compliance made by Noticee. In this regard it is submitted that not objecting the compliance made & taking nearly 6 months time after investigation to arrive their view/conclusion fortifies that subject matter **is plausible for different interpretations and involves in complexities in the determination of taxability. Thus it is pure case of interpretational issue under which circumstances larger period of limitation cannot be invoked.** In this regard reliance is placed on CCE v. Poonam Plastics Industries 2011 (271) E.L.T 12 (Guj);

49. Noticee submits that merely because Noticee chooses an interpretation beneficial to him, malafide intension to evade payment of service tax cannot be attributed on part of the assessee accordingly larger period of

limitation is not invokable. In this regard reliance is placed on Rangsons Electronic Solutions (P) Ltd v. CCE 2014 (301) E.L.T. 696 (Tri. - Bang.) wherein it was held that *"It is a settled principle that merely because an assessee chooses an interpretation beneficial to him, there can be an allegation of suppression or misdeclaration. In view of the available facts and circumstances of the case and several decisions relied upon and cited by the learned counsel (we have not taken note of all of them since we do not feel the need), appellant cannot be found fault with for coming up with an interpretation and availing the benefit which was not available to them. Under these circumstances, we have to take a view that the order of the Commissioner limiting the demand to the normal period and not imposing the penalty was an order which rendered justice to the appellant/assessee without being unfair to the Revenue. Therefore we do not find any merit in the appeal filed by the Revenue and reject the same."*

Returns filed regularly

50. Noticee submits that they regularly paid service tax and duly filling ST-3 returns showing the all these particulars as required/permitted in the format prescribed in this behalf (Form ST-3 specified by CBEC). If the Noticee wants to suppress the fact with intent to evade the payment of taxes, they might not have disclosed the same in ST-3 returns. Further allegation of impugned SCN that Noticee has not disclosed the relevant details/information to the department is not factually correct and requires to be set aside. In this regard, Noticee wishes to rely on the following judgments wherein it has been held that if disclosure of

amounts received/charged towards impugned activity are made in ST 3 Returns, extended period of limitation cannot be invoked:

a. Shree Shree Telecom Pvt Ltd., Vs. CCE Hyderabad [2008 (232) E.L.T. 689 (Tri. - Bang.)

b. Sopariwala exports pvt. Ltd v. CST 2014 (36) S.T.R. 802 (Tri. - Ahmd.)

c. Bajaj Hindusthan Ltd v. CCE 2014 (33) S.T.R. 305 (Tri. - Del.)

Matters referred to larger bench and view supported by court decisions:

51. Noticee submits that as state supra various matters involved in the issue were referred to larger bench. When the matter(s) were referred to larger bench, extender period of limitation cannot be invoked. Relied on the following:

a. Continental Foundation Jt. Venture v. CCE, Chandigarh-I [2007 (216) E.L.T. 177 (S.C.)

b. J.R. Construction CO. v. CCE & ST 2016 (41) S.T.R. 642 (Tri. - Del.)

c. Megafine Pharma Pvt Ltd Vs CCE & ST 2014-TIOL-1312-CESTAT-AHM

d. CCE v. Mapro India Ltd 2015-TIOL-2554-CESTAT-MUM

52. When the issue was disputable and at one point of time, the view of the courts was in favour of the assessee, question of invocation of extended period of limitation does not arise. Relied on CCE v. Saurashtra Cement Ltd 2016-TIOL-365-HC-AHM-CX

53. Noticee submits that long list of familiar judicial pronouncements holding impugned two grounds of non-payment of Service Tax and failure to file correct ST-3 returns by themselves totally inadequate to sustain allegation of wilful misstatement/suppression of facts. Relied on Punj Lloyd Ltd. V. CCE & ST 2015 (40) S.T.R. 1028 (Tri. - Del.)

54. Noticee submits that averment of SCN that, lapse would not have come to light but for the investigation of department, standing alone cannot be accepted as a ground for confirming suppression, Mis-statement or mis-declaration of facts. More so considering the fact that the very objective of conducting the Audit of records of an assessee is to ascertain the correctness of payment of duty, availment of CENVAT credit, etc., any shortcomings noticed during the course of Audit, itself cannot be reasoned that the deficiency was due to mala fide intention on the part of assessee. In this regard relied on LANDIS + GYR LTD Vs CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata).

55. Noticee submits that they are under bonafide belief that compliance made by them not in accordance with the law and whatever believed to be paid was paid. It is well settled legal position that suppression of facts cannot be attributed to invoke longer period of limitation if there is bonafide belief. Same was flown from the following:

a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)

b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

Other cases:

56. The Noticee submits that expression "suppression" has been used in the Section 73 of the Finance Act, 1994 accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. **Suppression means failure to disclose full information with the intent to evade payment of duty.** Relied on Continental Foundation Jt. Venture CCE, **2007 (216) E.L.T 177 (S.C)**

57. Noticee submits that the show cause notice proposed demand by invocation of the extended period of limitation only on the ground that Noticee has suppressed the details to Central Excise department. In this regard it is submitted that **extended period of five years applicable only when something positive other than mere inaction or failure on the part of manufacturer/service provider is proved** - Conscious or deliberate withholding of information by manufacturer/service provider necessary to invoke larger limitation of five years. In this regard wishes to rely on **CCE, Chemphar Drugs & Liniments 1989 (40) E.L.T 276 (S.C).** Therefore the allegation of SCN is not legal and proper.

58. Intention to evade payment of tax is not mere failure to pay tax. It must be something more i.e. that assessee must be aware that tax was leviable/credit was inadmissible and he must act deliberately avoid such payment of tax. Evade means defeating the provision of law of paying tax and it is made more stringent by the use of word 'intent'. Where there was scope for doubt whether tax is payable or not, it is not 'intention to evade payment of tax'. reliance is placed on Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)

59. Mere non-payment/short payment of tax per se does not mean that Noticee has willfully contravened the provisions with the intent to evade payment of tax. in this regard reliance is placed on **Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.)** wherein it was held that *"The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the Appellant as fit for the applicability of the proviso.".*

60. The Noticee submits that all the entries are recorded in books of accounts and financial statements nothing is suppressed hence the extended period of limitation is not applicable. Wishes to place reliance on LEDER FX Vs DCTO 2015-TIOL-2727-HC-MAD-CT; Jindal Vijayanagar Steel Ltd. v. Commissioner — 2005 (192) E.L.T. 415 (Tri-bang);

In Re: Benefit of cum-tax shall be given

61. Noticee submits that in case demand stands confirmed, same shall be re-quantified after allowing the benefit of cum-tax u/s. 67(2) of Act, ibid since Noticee has not collected service tax from the buyer to the extent of alleged short/non-payment of service tax.

62. The Noticee submits that in light of the statutory backup as mentioned above and cases where it was held that when no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis

a. P. Jani & Co. vs. CST 2010 (020) STR 0701 (Tri.-Ahmd).

b. Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del

c. Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590

d. BSNL Vs CCE, Jaipur 2011 (24) S.T.R 435 (Tri-Del).

In Re: Interest and penalties are not payable/imposable:

63. Without prejudice to the foregoing, Noticee submits that when service tax is paid on time, the question of interest & also penalties does not arise.

64. Without prejudice to the foregoing, Noticee submits that all the grounds taken for ***"In Re: Extended period of limitation is not invokable"*** above is equally applicable for penalty as well.

65. As submitted supra, there is no intention to evasion of tax and what are all believed to be payable was paid (Rs.19,00,736/-) within time, which is undisputed. Hence no penalty shall be imposed to that extent.

66. The Noticee submits that the impugned show cause notice had not discharged burden of proof regarding the imposition of the penalty under Section 78 of the Finance Act, 1994. In this regard wishes to rely on the judgment in the case of Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) it was held that "***It is unjustified in absence of discussion on fundamental conditions for imposition of penalty under Section 78 of Finance Act, 1994".***

67. Noticee submits that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner

prescribed by the statute. Relied on Hindustan Steel Ltd. v. State of Orissa —1978 (2) E.L.T. (J159) (S.C.)

68. The Noticee submits that as submitted supra there were favourable judgments holding that **service tax is not at all payable and there was confusion existed at such point of time and the issue involved interpretation of provisions and law is at nascent stages and courts expressed different views**. Therefore the penalties cannot be imposed. Relied on CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.L.T 661 (S.C).

69. It is further submitted that when schemes of 'Extraordinary tax payer friendly' and VCES was introduced to waive the penalty when assessees who did not at all comply with service tax law can be given immunity provided they pay service tax along with appropriate rate of interest, no reason why law abiding assessee who had got himself registered more or less in time and started paying service tax, shall be denied benefit of waiver of penal provisions. In this regard relied on Commissioner v. R.K. Electronic Cable Network — 2006 (2) S.T.R. 153 (Tribunal).

70. Further Noticee is new to the service tax law and not much conversant with the provision of service tax and whatever believed to be taxable, same was assessed without any department intervention. In this background, no penalty shall be imposed. Relied on Sundeep Goyal and Company v. Commissioner — 2001 (133) E.L.T. 785 (Tribunal).

71. Noticee submits that impugned SCN proposed to impose penalty u/s. 77 of Finance Act, 1994 citing delayed registration. in this regard it is submitted that they had registered with department vide STC No. AAHFK8714ASD001 w.e.f. 25.04.2010 (copy of ST-2 enclosed as annexure __) and now it is settled law that builders/developers are not liable for service tax upto 30.06.2010 and same position was clarified by CBEC in its circulars & confirmed judicially also. That being a case, Noticee registered well within the time limit as per Section 69 of Finance Act, 1994 in fact before they become liable. Therefore no penalty can be imposed u/s. 77, ibid.

Benefit of Section 80:

72. Noticee submits that alleged short/non-payment of service tax was due to various reasons *inter alia*

a. Given understanding that compliance made by Noticee is in accordance with the law;

b. Whatever believed as taxable was duly paid voluntarily;

c. Various letters/disclosures were made to the department informing their compliance and requested for confirmation also;

d. There were divergent views of Courts over the classification of indivisible contracts, taxability of transaction involving immovable property etc.,;

e. There was enough confusion prevalent on the applicability of the Service tax among the industry;

f. Matters were referred to larger bench at various instances;

All the above can be considered as reasonable cause and waiver of penalty can be granted in terms of section 80 of Finance Act, 1994. Relied on **CST, Vs Motor World 2012 (27) S.T.R 225 (Kar)**

73. The Noticee submits that several grounds are urged in SCN reply, in this regard, Noticee wishes to communicate that **all grounds are without prejudice to one another.** Reliance is placed on the decision in case of Bombay Chemicals Pvt Ltd Vs Union of India 1982 (10) E.L.T 171 (Bom)

74. Noticee craves leave to alter, add to and/or amend the aforesaid grounds.

75. Noticee wishes to be heard in person before passing any order in this regard.

For M/s Kadakia & Modi Housing

Authorized Representative

Chartered Accountants
Hyderabad

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BEFORE THE JOINT COMMISSIONER, CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD-I COMMISSIONERATE, 3ST FLOOR KENDRIYA SHULK BHAVAN, BASHEERBAGH, HYDERABAD – 500 004

Sub: Proceedings under SCN OR No.99/2016-Adjn (ST)(Commr) dated 22.04.2016 issued to M/s. Kadakia & Modi Housing, 5-4-187/3&4 II Floor, Soham Mansion, MG road, Secunderabad 500 003

I, Jai Prakash, Finance Manager of M/s Kadakia & Modi Housing, 5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad–500 003 hereby authorizes and appoint Hiregange & Associates, Chartered Accountants, Hyderabad 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: -

a. 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.
b. 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.
c. 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.

KADAKIA & MODI HOUSING SEC'BAD

Executed this on 27th day of December 2016 at Hyderabad **Signature**

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: 27.12.2016

Address for service:
Hiregange & Associates,
Chartered Accountants,
"Basheer Villa" H.No.8-2-268/1/16/B,
2nd Floor, Sriniketan Colony,
Road No.3, Banjara Hills,
Hyderabad-5000034

For Hiregange & Associates
Chartered Accountants

Hiregange & Associates Chartered Accountants Hyderabad

Sudhir V S
Partner (M.No.219109)

I employee/associate of M/s Hiregange & Associates duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

Sl. No	Name	Qualification	Membership No.	Signature
1	Shilpi Jain	CA	221821	
2	Venkata Prasad P	CA	236558	

Hiregange & Associates Chartered Accountants Hyderabad