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OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE (APPEALS), 7th FLOOR,L.B.STADIUM,BASHEERBAGH, HYDERABAD

Sub: Appeal against the O-I-O No. 44/2010 (Service Tax) (O. R. No. 82/2010-Adjn.ST Dated 15.10.2010 passed by the Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad – II Commissionerate., pertaining to Alpine Estates, Hyderabad.

Between:
Alpine Estates,
5-4-187/3 & 4,
III Floor,
MG Road,
Secunderabad – 500 003 ..... **Appellant**

VS.

Additional Commissioner of
Customs, Central Excise and Service Tax.,
Hyderabad II Commissionerate,
L.B.Stadium, Basheerbagh,
Hyderabad – 500 004. ..... **Respondent**

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FORM ST-4

Form of Appeal to the Commissioner of Central Excise (Appeals)

[Under Section 85 of the Finance Act, 1994 (32 of 1994)]

BEFORE THE COMMISSIONER (APPEALS),
7th Floor, L.B. Stadium Road, Basheerbagh,
Hyderabad – 500 004

(1) No. ..... of 2010	
(2) Name and address of the Appellant	M/s. Alpine Estates 5-4-187/3 & 4, III Floor, MG Road, Secunderabad – 500 003.
(3) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004. Order in Original No. 44/2010 (Service Tax) (O. R. No. 82/2010-Adjn. ST) passed on 15.10.2010
(4) Date of Communication to the Appellant of the decision or order appealed against	21.10.2010
(5) Address to which notices may be sent to the Appellant	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., **(Also copy to the Appellant at the above mentioned address.)**
(5A)(i) Period of dispute	Jan '09 to Dec '09
(ii) Amount of service tax, if any demanded for the period mentioned in the Col. (i)	Rs.31,10,377/- including Cess
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	Nil
(iv) Amount of Interest	Interest u/s 75 of the Finance Act 1994

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M/s Hiregange & Associates Chartered Accountants

(v) Amount of penalty	Rs. 31,10,377/- under section 78 . Rs. 5,000/- u/s 77 of the Finance Act, 1994.
(vi) Value of Taxable Service for the period mentioned in Col. (i)	Rs. 7,54,94,586/-
(6) Whether Service Tax or penalty or interest or all the three have been deposited.	No, An Application for dispensing with the pre-deposit and stay the recovery thereof is separately filed along with this appeal.
(6A) Whether the appellant wishes to be heard in person?	Yes, through its authorized representative
(7) Reliefs claimed in appeal	To set aside the impugned order and grant the relief claimed.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner.

Hiregange & Associates Chartered Accountants Hyderabad

For ALPINE ESTATES

Partner
Signature of the Appellant

Signature of the authorized representatives, if any

STATEMENT OF FACTS

1. Appellant is a registered partnership firm engaged in the business of construction of residential units. Appellant had undertaken a venture by name May Flower Heights wherein 102 apartments were constructed and sold. Appellant had obtained service tax registration and made payments of service tax for the receipts pertaining to the period May 2007 to December 2008.
2. In respect of the 102 residential units constructed and sold two agreements were entered into by the appellant, one for sale of the undivided portion of land and the other is the construction agreement.
3. Initially, upto December 2008, when amounts were received by the appellant and eventhough there was a doubt and lot of confusion on the applicability of service tax the appellant paid service tax in respect of the receipts of construction agreement. Later, on the issue of the clarification vide the circular No. 108/02/2009 dated 29.01.2009 by the department, the customers of the appellant, stopped paying the service tax and accordingly appellant was forced to stop collecting and discharging service tax liability on the amounts collected in respect of the construction agreement as they were of the bonafide belief that they were excluded vide the personal use clause in the definition of residential complex.

4. A letter dated_____ was written to the Assistant/Additional Commissioner of Service Tax indicating the stand taken by the Noticee and also intimating the non-payment of Service Tax.
5. Investigation was taken up by the department and summons dated 13.01.2010 were done for the submission of relevant records/documents/information for which the appellant had extended full cooperation.
6. Subsequently, the Additional Commissioner has issued a show cause notice dated 16.06.2010 to the appellant to show cause as to why:
    a. An amount of Rs.31,10,377/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2009 to December 2009;
    b. Interest on the above should not be demanded under section 75 of the Act;
    c. Penalty under sections 76 of the Act should not be demanded from them.
    d. Penalty under sections 77 of the Act should not be demanded from them.
    e. Penalty under sections 78 of the Act should not be demanded from them.

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7. Appellants made a detailed reply dated _____ countering and answering all the points raised by the respondent in the show cause notice mentioned above. (copy of the reply is enclosed along with this appeal).

8. The issues for determination in the present case are:-

   a. Whether the units in the residential complex that are sold to the customers would be excluded by the personal use clause?

   b. Whether the circular 108/02/2009 dated 29.01.2009 clarifies about the entire complex to be put to use for personal purpose or would suffice if one unit in the complex is put to personal use?

   c. Whether extended period of limitation can be invoked?

9. The respondent passed the impugned order on the following grounds:

   a. The circular 108/02/2009 dated 29.01.2009 clarifies about the entire complex being put to personal use by single person and that a single residential unit put to personal use will not be eligible to be excluded for the purposes of service tax.

   b. The judgment M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL-1106-CESTAT-Bang not applicable to the appellants as the

construction does not include construction of commercial complex.

c. Appellant not eligible for the benefit of CENVAT credit

d. Appellant not eligible for cum tax benefit even though the service tax was not collected from the customers.

e. There was no doubt and confusion at all regarding the levy of service tax on the construction of complex service.

10. The impugned order was passed which has aggrieved the Appellant, in which it was held to the following effect:

a. Demand of Service Tax amount of Rs. 31,10,377/- is hereby confirmed on under Sec 73 (1) of the Finance Act, 1994 (hereinafter referred to as the Act) for the period from Jan 09 to Dec 09.

b. Demand of interest under section 75 of the Act confirmed.

c. Imposition of penalty of Rs. 5,000 and Rs. 31,10,377/- under section 77 and 78 of the Act respectively.

Aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the appellant prefers this appeal on the

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following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.

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GROUNDS OF APPEAL

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

2. The Appellant submits that the adjudication proceeding was rendered a solemn farce and idle formality, and the attitude of the respondent shows that a made-up mind was his approach for confirming the demand and the order was a merely a formality to complete the process with wholly irrelevant findings, and the order is therefore untenable.

3. The Appellant submits that the impugned order was passed totally ignoring the factual position and also some of the submission made and judicial decisions relied but was based on mere assumption, unwarranted inferences and presumptions. Supreme Court in case *Oudh Sugar Mills Limited v. UOI,* 1978 (2) ELT 172 (SC) has held that such impugned order are not sustainable under the law. On this count alone the entire proceedings under impugned order requires to be set-aside.

4. The impugned order has not considered the various submissions made in the appeal and has passed the order based on certain assumptions without proper reasoning as if there was a made up mind and for this reason itself the impugned order shall be set aside.

5. The impugned order has been passed without considering the following submission made and hence the principle on Natural Justice has been violated and hence the order is void and requires to be set aside.

   a. The various circulars that have clarified that construction of complex for personal use is not liable to service tax.

   b. The interpretation that the personal use exclusion is available only where the entire complex is put for personal use is not correct in law.

   c. Penalty has been imposed even after stating the bonafide belief of the appellant based on which payment of service tax for the period Jan '09 to Dec '09 was not made.

6. Appellant submits that it was held in the case of Cosmo Films Ltd. *v.*Commissioner of Central Excise & Custom & Service Tax, Aurangabad [2009] 21 STT 217 (MUM. - CESTAT) that the impugned order having

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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.

7. Without prejudice to the foregoing appellant submits that they had given detailed reasoning and list of the various circulars that were issued by the department to clear doubts regarding the applicability of service tax on construction of residential complex. But the impugned order has stated that by the issue of the circular B1/6/2005-TRU, dated 27-7-2005 itself, the applicability of service tax on construction of residential complex was made clear and that the contention of the appellant that there was lot of confusion is not tenable.

8. Appellant submits that if by issue of the above circular all doubts were cleared then why were the subsequent circulars F. No. 332/35/2006-TRU, dated 1-8-2006 and 108/02/2009 –ST dated 29.02.2009 were issued on the same issue. This indicates that the impugned order has not considered all the submissions made by the appellant and have without any proper reasoning rejected their submissions. For this reason as well the impugned order shall be set aside.

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9. Without prejudice to the foregoing appellant had submitted in their reply the basis on which it is evident that the circular 108/02/2009-ST dated 29.01.2009 states that where a **residential unit** is put to personal use, and not necessarily the entire complex, it would be excluded under the taxable service 'Construction of Complex'. Though the impugned order, without giving any proper justification and by just reproducing a part of the above circular, concluded that the exclusion from taxable service would be available only when the entire complex is put to personal use. The impugned order has not considered any of the points stated by them in their reply regarding the fact that the above circular explains that personal use of a single residential unit itself would exclude it from service tax. For this reason as well the impugned order shall be set aside.

10. The impugned order has not considered the case law cited in respect of M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL-1106-CESTAT-Bang on the ground that in the present case there is no construction of commercial complex. It would be important to note that in the cited case there was both construction of residential complex and commercial complex and only part amount was pre deposited. Based on the circular 108/02/2009-ST this part amount deposited was considered sufficient and it was considered to cover the part of demand in respect of the construction of commercial complex.

11. Appellant submits that it is very rare that 2 cases would be exactly the same. But in such cases also the relevant inferences should be considered for passing orders. Such differences in the facts of the cases should not form a hindrance for passing orders. If such practice is followed then every case has to be fought from the scratch and the earlier decisions and orders would be of no use at all. For this reason as well the impugned order shall be set aside.

12. Appellant further submits that in the following 2 cases as well the impugned order was set aside and matter was remanded for passing fresh decision based on the circular 108/02/2009. Hence the appellant is also entitled for such benefit.

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

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

13. Without prejudice to the foregoing appellant submits that the impugned order has stated that if the interpretation as stated by the appellant is adopted then the entire provisions relating to service tax on residential complexes would be redundant. Appellant submits that this

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will not happen due to the reason that the sub contractors and contractors who provide service to the builders/developers would still be liable to service tax as such complexes would not be for personal use of the builders/developers. Further the interpretation of law has to be done word by word and there shall be no addition or omission of words to interpret the law for one's convenience as the impugned order has done. For this reason as well the impugned order shall be set aside.

14. Without prejudice to the foregoing, assuming but not admitting that service tax liability exists, the appellant had submitted that they would be eligible for CENVAT credit in respect of the input services and the capital goods. But the impugned order has held that no such credit would be available as per the Works Contract (Composition scheme for the payment of service tax) Rules, 2007. Appellant submits that 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.

*"(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."*

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15. Without prejudice to the foregoing, appellant submits that the impugned order has not given the benefit of payment of service tax on the cum tax basis for the reason that the appellant has opted for the composition scheme. Appellant submits that as per section 67 of the Finance Act (reproduced below) the appellant would be entitled for the benefit of payment of service tax on cum tax basis where the same is not collected from the customers. Such benefit would be available for all services as there is no exception/exclusion given for works contract service.

(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) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

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(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.

16. Appellant further submits that it was also held in the following cases that where no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis.

a. VGB Tyre Retreading Works *v.* Commissioner of Central Excise, Salem [2010] 26 STT 210 (CHENNAI - CESTAT)

b. Billu Tech Video Communication *v.* Commissioner of Central Excise, Jaipur[2010] 28 STT 325 (NEW DELHI - CESTAT)

c. M/s Vidyut Consultants Vs CCE, Indore (Dated: June 17, 2010) 2010-TIOL-1196-CESTAT-DEL

Eventhough the above cases do not pertain to the works contract service, appellant submits that there is no where in the statute stated that the works contract category would be given a different treatment in case the same is not collected from the customer. Hence the benefit (cum tax)

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given to the other services should also be available to the works contract service.

The impugned order has drawn conclusions without giving proper legal backup. For this reason as well the impugned order shall be set aside.

INTEREST

17. Without prejudice to the foregoing noticee submits that when service tax itself is not payable, the question of interest and penalty does not arise.

18. Noticee further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

PENALTY

19. The impugned order has stated that there is no confusion in the applicability of service tax in the present case and that this cannot be a reasonable cause for not having paid the service tax. Appellant states that the issue of so many circulars on the same subject at different points of time itself makes it evident that there was confusion. The

impugned order has not considered this submission of the appellant and has passed the impugned order. The same shall be set aside.

20. Without prejudice to the foregoing, Appellant submits that service tax liability on the builders till date has not been settled and there is full of confusion as the correct position till date. With this background it is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be intention of evasion and penalty cannot be levied. In this regard we wish to rely upon the following decisions of Supreme Court.

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

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

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

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 76.

21. Without prejudice to the foregoing, Appellant submits that there is no allegation as to any intention to evade the payment of service tax setting out any positive act of the Appellant. Therefore any action proposed in the SCN that is invokable for the reason of fraud, wilful mis-

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statement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made thereunder with intention to evade payment of duty, is not sustainable and penalty under section 78 is not sustainable. In this regard reliance is placed on the following decisions:

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

b. T.N. Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC) wherein it was held that - To invoke the proviso three

requirements have to be satisfied, namely, (1) that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded; (2) that such a short-levy or short-payment or erroneous refund is by reason of fraud, collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the Central Excise Act or the rules made thereunder; and (3) that the same has been done with intent to evade payment of duty by such person or agent. These requirements are cumulative and not alternative. To make out a case under the proviso, all the three essentials must exist. Further it was held that burden is on the Department to prove presence of all three cumulative criterions and the Revenue must have perused the matter diligently. It is submitted none of the ingredients enumerated in proviso to section 11A(1) of the Act is established to present in our clients case.

c. Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC) wherein it was held that proviso to section 11A(1) is in the nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualized by the proviso by using such strong expression as fraud, collusion etc. and on the

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other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. Further, when the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word `intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.

d. Padmini Products v. CCE, 1989 (43) ELT 195 (SC) wherein it was held that mere failure or negligence on the part of the manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation. Unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a licence. For invoking extended period of five years limitation duty should not had been paid,

short-levied or short paid or erroneously refunded because of either any fraud, collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act, therefore, failure to pay duty or take out a licence is not necessary due to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the Act. Likewise suppression of facts is not failure to disclose the legal consequences of a certain provision.

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

f. Gopal Zarda Udyog v. CCE, 2005 (188) ELT 251 (SC) where there is a scope for believing that the goods were not excisable and consequently no license was required to be taken, then the extended period is not applicable. Further,

mere failure or negligence on the part of the manufacturer either not to take out the licence or not to pay duty in cases where there is a scope for doubt, does not attract the extended period of limitation. Unless there is evidence that the manufacturer knew that the goods were liable to duty or he was required to take out a licence, there is no scope to invoke the proviso to Section 11A(1).

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

22. Further the appellant submits that until there was no clarity on the applicability of service tax the amounts were collected and paid properly by the appellant. It was only on issue of a clarification by the department vide the circular 108/02/2009 ibid that the appellant stopped making service tax payments as it was of the bonafide belief that there was no service tax liability. There was never an intention to evade payment of service tax by the Appellant. Hence the penalty under section 78 is not leviable in the instant case. On the other hand it was not practicable for collection of service tax from the customer as the same was denied by the customer.

23. Appellant further submits that they have not intentionally mis-interpreted the circular to evade tax payment as is mentioned in the impugned order. Hence the extended period of limitation shall not be applicable to them.

24. Further section 80 of Finance Act provides no penalty shall be levied under section 76. 77 or 78 if the assessee proves that there is a reasonable cause for the failure. The appellant in the instant case was under confusion as to the service tax liability on their transaction, therefore there was reasonable case for the failure to pay service tax, hence the benefit under section 80 has to be given to them.

25. Appellant crave leave to alter, add to and/or amend the aforesaid grounds.

26. Appellant wish to be heard in person before passing any order in this regard.

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PRAYER

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

Appellant

VERIFICATION

We, M/s. Alpine Estates, Secunderabad, the Appellants herein do declare that what is stated above is true to the best of our information and belief.

Verified today the ..... day of November 2010.

Place: Hyderabad

For ALPINE ESTATES

Partner

Signature of the appellant.

Hiregange & Associates * Chartered Accountants * Hyderabad *

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

BEFORE THE COMMISSIONER (APPEALS), Hqrs., Offic, 7th Floor, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.

Between:

M/s. Alpine Estates.,

5-4-187/3 & 4, III Floor,

MG Road, Secunderabad – 500 003. .....**Appellant**

And:

The Additional Commissioner of Service Tax

7th Floor, L.B. Stadium Road, Basheerbagh,

Hyderabad – 500 004 .....**Respondent**

1. The Appellants submit that for the reasons mentioned in the appeal it would be grossly unjustified and inequitable and cause undue hardship to the Appellants if the amount is required to be paid. Having regard to the balance of convenience, which is in their favour, there is no case warranting deposit of the amount confirmed in the subject order.

2. The Appellant submits that they are entitled to be granted an order staying the implementation of the said order of the Respondent pending the hearing and final disposal of this appeal viewed in the light of the fact that the order is one which has been passed without considering the various submissions made during the

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adjudication. It has been held by the Calcutta High Court in Hooghly Mills Co. Ltd., Vs. UOI 1999 (108) ELT 637 that it would amount to undue hardship if the Appellant were required to pre-deposit when they had a strong prima facie case which in the instant case is present directly in favour of the Appellant.

3. The appellants also plead financial hardship due to the reason that the service tax has not been reimbursed by the recipient and also cash crunch due to the Telanga issue at Hyderabad.

4. The Appellants crave leave to alter, ad to and/or amend the aforesaid grounds.

5. The Appellants wish to be personally heard before any decision is taken in this matter.

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PRAYER

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

Appellant

VERIFICATION

We, M/s. Alpine Estates., Secunderabad, the Appellants herein do declare that what is stated above is true to the best of our information and belief.

Verified today the 6th day of January 2011.

Place: Hyderabad

FOR ALPINE ESTATES

Partner

Signature of the appellant.

Hiregange & Associates Chartered Accountants Hyderabad

BEFORE THE COMMISSIONER (APPEALS),
Hqrs., Offic, 7th Floor, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.

Sub: Appeal against the O-I-O No. 44/2010 (Service Tax) (O.R. No. 82/2010-Adjn. ST) dated 08.10.2010 passed by Additional Commissioner Of Service Tax, 7th Floor, L.B. Stadium, Basheerbagh, Hyderabad – 500 004, pertaining to M/s Grandeur Homes Pvt. Ltd., Secunderabad.

I/We, M/s Alpine Estates. hereby authorise 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: -

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

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

Executed this 5th day of January 2011 at Hyderabad.

For ALPINE ESTATES

Partner

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: 5th January 2011

Address for service :
Hiregange & Associates,
"Basheer Villa", House No: 8-2-268/1/16/B,
2nd Floor, Sriniketan Colony,
Road No. 3 Banjara Hills,
Hyderabad – 500 034.,

For Hiregange & Associates
Chartered Accountants

Sudhir V. S.
Partner. (M. No. 219109)

Hiregange & Associates Chartered Accountants Hyderabad

केन्द्रीय उत्पाद सीमा शुल्क एवं सेवा कर के आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX
हैदराबाद II आयुक्तालय
HYDERABAD -II COMMISSIONERATE
एल.बी. स्टेडियम रोड, बशीरबाग, हैदराबाद 500 004
L.B.STADIUM ROAD:: BASHEERBAGH :: HYDERABAD 500 004

O.R.No.82/2010-Adjn.ST **Dt:15.10.2010**

मूल आदेश संख्या 44/2010 (सेवा कर)

ORDER IN ORIGINAL NO.44/2010 (Service Tax)
(Passed by Shri. G.SREE HARSHA, Additional Commissioner, Service Tax)

प्रस्तावना
PREAMBLE

1. निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति बिना मूल्य के दी जाती है This copy is granted free of charge for the private use of the person to whom it is issued.

2. जो भी व्यक्ति वित अधिनियम, 1994 के अंतर्गत धारा 85 संशोधित से दुषप्रभावित हो, इस प्रकार प्राप्त आदेश निर्णय के खिलाफ आदेश की प्राप्ति के 90 दिन के भीतर आयुक्त (अपील), मुख्यालय कार्यालय, 7 वॉ तल, एल.बी. स्टेडियम रोड, बशीरबाग, हैदराबाद 500 004 को अपनी अपील प्रस्तुत कर सकता है ।

Under Sec.85 of the Finance Act, 1994, as amended, any person aggrieved by this order can prefer an appeal within three months from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs., Office, 7th floor, L.B.Stadium Road, Basheerbagh, Hyderabad – 500 004.

3. धारा 85 के के अंतर्गत आयुक्त (अपील) को की जानेवाली अपील फार्म, एस.टी-4 में हो और इसकी जॉच निर्धारित पद्धति के अनुसार की जानी चाहिए ।

An appeal under Sec.85 to the Commissioner (Appeals) shall be made in form ST-4 and shall be verified in the prescribed manner.

4. एस.टी–4 फार्म में की गई अपील अनुलिपि में प्रस्तुत की जानी चाहिए और उसके साथ जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उसकी एक प्रति भी संलग्न की जानी चाहिए;

The form of appeal in Form No: ST-4 shall be filed in duplicate and shall be accompanied by a copy of the decision or the order appealed against

service tax department were not discharging the service tax liability properly and also not filing the required returns, investigation was taken up by the department and Summons dated 13.1.2010 for submission of relevant record /documents / information were issued to them. On verification of records submitted by the assessee, it was found that M/s. Alpine Estates have undertaken a single venture by name **May Flower Heights** located at PNo. 3-3-27/1, Mallapur Old village, Uppal Mandal, RR District, and received amounts from customers from May, 2007 to December 2009 towards sale of apartment along with undivided portion of land and agreement for construction. In the said venture, in respect of 102 apartments they have entered into sale deed and agreement for construction with their customers. Till March 2010 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, April, 2008 to September, 2008 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 51,05,147/- including Rs. 22,910/- other receipts. It is found that in respect of 102 houses they have entered into sale deed and agreements for construction from May, 2007 to December, 2009. They paid service tax of Rs.50,82,237/- on receipts against said agreements of construction for the period from May, 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. It is found that they have stopped payment of Service Tax on receipts from 1-1-2009 by misinterpreting the clarification of the Board vide circular No. 108/02/2009 – ST dated 29th January 2009.

3. Statement of Sri. A. Shanker Reddy, Deputy General Manager (Admn.) authorized representative of M/s. Alpine Estates 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, was recorded, wherein Sri. Reddy, interalia, stated that the activities undertaken by the company were providing services of construction of Residential Complexes and they purchased the land under sale deed and constructed the residential complexes and initially, they collect the amounts against booking form/agreement of sale. Further, stated that at the time of registration of the property, the amount received till then will be allocated towards Sale Deed and Agreement of construction and service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement and the service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis. Further, stated that the agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction and the sale deed constitutes a condition to go for construction with the builder and accordingly, the construction agreement would also be entered immediately on the same date of sale deed and that the process was 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 was completed unit and this was commonly adopted procedure as required for getting loans from the banks. Further, 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 and 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.

4. As per the exclusion provided in Sec 65(91a) of the Service Tax Act, the

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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. *It is further clarified in Para 3 of the Circular No. 108/02/2009 – ST,* dated 29th January 2009 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 is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for a single person for personal use as residence by such person would not be subjected to service tax. Normally, a builder/promoter/developer constructs residential complex consisting 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 is not applicable . 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 service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements for construction invariably attract service tax under Section 65(105(zzzza)) of the Finance Act, 1994.

5. 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 ventures of M/s. Grandeur Homes (P) Ltd qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like common water supply, etc., and the layouts were approved by HUDA vide permit No. 14013/p4/plg/H/2006 dated 23-3-2007 . As seen from the records submitted, the assesses have entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat 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 assesses thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and service recipient relationship between them. As there involved transfer of property in goods, it appears that the services rendered by them after execution of sale deed against agreements of construction are taxable services under works contract service.

6. As, M/s. Alpine Estates, have not furnished the month wise 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. Alpine Estates. It is arrived at that they have collected an amount of **Rs. 7,54,94,586/-** 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. 31,10,377/- 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.

7. M/s Alpine Estates are well aware of the provisions and of liability of Service tax on receipts as a result of these agreements for Construction and have not assessed and paid service tax properly by suppression of facts and convened the provisions of Section 68 of the Finance Act, 1994 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. Alpine Estates appears to be recoverable under **Sub Section (1) of Section 73 of the Finance Act, 1994.**

8. From the foregoing it appears that M/s. Alpine Estates, 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

9. Thus, M/s. Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003 , were required to show cause in O.R.No. 82/2010-ST, as to why:

(i) an amount of **Rs. 30,19,783/-** towards Service tax, **Rs. 60,396/-** towards Education Cess and **Rs. 30,198/-** towards Secondary & Higher Education Cess (a total amount of **Rs. 31,10,377/-**) 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 as shown in the Annexure attached to the Notice.

(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 of the Finance Act, 1994 for their failure to pay service tax in accordance with the provisions of Section 68 or the rules made under Chapter V of the Finance Act 1994.

(iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994 for the contravention of Rules and provisions of the Finance Act, 1994 for which no penalty is specified else where.

(v) Penalty should not be imposed on them under Section 78 of the Finance Act, 1994 for suppression of value of service tax and contravention of provisions of Chapter V of the Finance Act or the rules made there under, with intent to evade payment of service tax.

10. M/s Hiregange & Associates, Chartered Accountants, submitted vakalat Dt: .07.2010 and filed reply on behalf of the Assesses, interalia, stating that the notice has constructed flats and that the transaction with the customer was in two folds as under:

a. Assesses sold the undivided share of land along with the semi-constructed residential unit to the customer.
b. Subsequently the customer/owner of the land along with the semi-built up unit gets the construction done by the assesses.

and in respect of the first fold there is no construction service provided by the assesses to their customer as there is no distinct service provider and receiver and therefore there is no service tax on the same and the same was not disputed by the department as well and that in respect of the second fold of the transaction there was always a doubt regarding the applicability of service tax as the definition of residential complex mentioned in section 65((91a) states that where such a complex is for personal use then no service tax is payable and that although there was no liability the entire amount of service tax was paid out of doubt and the same was later clarified in the recent circular nos. 108/02/2009 -ST dated 29.02.2009, F. No. B1/6/2005-TRU, dated 27-7-2005, F. No. 332/35/2006-TRU, dated 1-8-2006 and the entire amount of service tax is eligible for refund.

10.1 They further submitted that non-taxability of the construction provided for an individual customer intended for his personal use was clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from abinito. That the board in between had clarified in an indicative manner that the personal use of a residential complex is not liable for service tax in the Circular F. No. 332/35/2006-TRU dated 1-8-2006 and that Board Circular No. 108/2/2009-S.T., dated 29-1-2009 states that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction and that with the above exclusion, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

10.2 They further submitted that the department has concluded that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very

reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex and that when the levy does not exist, then payment of penalty does not arise and hence the SCN has to be set aside.

10.3 They cited the following case laws in support of their contention :

i).M/s Classic Properties v/s CCE, Mangalore 2009-TIOL-I 106-CESTAT-Bang
ii).Mohtisham Complexes Pvt. Ltd. Vs Commr.of C.Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

10.4 They further submitted that the assesses would be eligible for CENVAT credit on the input services and capital goods used and hence the liability shall be reduced to that extent and that the SCN has not considered this and has demanded the entire service tax.

10.5 They further submitted that assuming that the service tax is payable as per the SCN, that they have not collected the service tax amount being demanded in the subject SCN and therefore the amount received should be considered as cum-tax in terms of Explanation to Section 67 of the Finance Act, 1994 and the service tax has to be re-computed giving the assesses the benefit of cum-tax.

10.6 Further submitted that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Hon'ble Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

10.7 Further submitted that service tax liability on the builders till date has not been settled and there is full of confusion and that it is a settled proposition of law that when the assessee acts with a bonafide belief especially when there was doubt as to statute also the law being new and not yet understood by the common public, there can't be intention of evasion and penalty can't be levied and cited the following decisions of Hon'ble Supreme Court :

i). Hindustan Steel Ltd V State of Orissa – 1978(2) ELT(J159) (SC)
ii). Akbar Badruddin Jaiwani V Collector – 1990(47) ELT(161)(SC)
iii). Tamil Nadu Housing Board V Collector – 1990(74)ELT(9)(SC)

10.8 Further submitted that there is no allegation as to any intention to evade the payment of service tax setting out any positive act of the Appellant and therefore any action proposed in the SCN that is invokable for the reason of fraud, willful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made there under with intention to evade payment of duty, is not sustainable and penalty under section 78 is not sustainable and placed reliance on the following decisions:

a.Cosmic Dye Chemical v. CCE, 1995 (75) ELT 721 (SC)
b.T.N.Dadha Pharmaceuticals v.CCE,2003(152)ELT251(SC)
c.Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)
d. Padmini Products v. CCE, 1989(43)ELT 195 (SC)

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e. Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC)
f.Gopal Zarda Udyog v. CCE, 2005 (188) ELT 251 (SC)
g.Kolety Gum Industries v. CCE, 2005 (183) ELT 440 (T)

10.9 Further submitted that until there was no clarity on the applicability of service tax the amounts were collected and paid properly by the assesses. It was only on issue of a clarification by the department vide the circular 108/02/2009 ibid that the assesses stopped making service tax payments as it was of the bonafide belief that there was no service tax liability. There was never an intention to evade payment of service tax by the assesses. Hence the penalty under section 78 is not leviable in the instant case. On the other hand it was not practicable for collection of service tax from the customer as the same was denied by the customer.

10.10 Further submitted that when there was a confusion prevalent as to the leviability and the mala fide not established by the department, it would be a fit case for waiver of penalty as held by various tribunals as under.

i). The Financiers Vs CCE, Jaipur – 2008 (009) STR 0136 Tri-Del.
ii). Vipul Motors (P) Ltd Vs CCE, Jaipur-I -2008 (009) STR 0220 Tri-Del.
iii). Commissioner of Service Tax, Daman Vs Megha Cement Depot – 2009 (015) STR 0179- Tri-Ahmd.

10.11 Further submitted that penalties under Sections 76 and 78 are mutually exclusive and both the penalties can't be imposed simultaneously and placed reliance on the following decisions :

i). Opus Media and Entertainment Vs CCE, Jaipur – 2007 (8) STR 368 (T)
ii). The Financers Vs CCE, Jaipur – 2007 (8) STR 7 (T).

11. Personal hearing was held on 10.08.2010, wherein Shri. V.S.Sudhir, Chartered Accountant and Shri. Shanker Reddy, DGM (Admn.), M/s Alpine Estates have appeared and reiterated the submissions made in their reply and requested to drop proceedings initiated in the notice and further stressed that the agreement of construction is meant for completion of a residential unit but not the complex per se.

DISCUSSIONS AND FINDINGS :

12. I have carefully gone through the case records and the submissions made by the retainers of the assesses vide reply dt: Nil and submissions made during the personal hearing held on 10.08.2010. I observe that M/s. Alpine Estates, was registered with department on 29.02.2008 under STC No. AANFA5250FST001. M/s. Alpine Estates have under taken a venture, namely May Flower Heights located at P.No.3-3-27/1, Mallapur Old Village, Uppal Mandal, RR District, and have entered into sale deed, and agreement for construction with their customers in respect of 102 apartments. Till March 2010 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, April, 2008 to September, 2008 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 51,05,147/- including Rs. 22,910/- other receipts. It is found that in respect of 102 houses

they have entered into sale deed and agreements for construction from May, 2007 to December, 2009. They paid service tax of Rs.50,82,237/- on receipts against said agreements of construction for the period from May, 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.

13. As M/s Alpine Estates have not furnished the month wise particulars of amounts received exclusively on agreements for Construction, the same, on the basis of soft copies of the books of accounts provided by M/s. Alpine Estates, is arrived at an amount of Rs. 7,54,94,586/- against agreements of Construction during the period from January 2009 to December 2009. Thus, the issue before me is to decide whether M/s Alpine Estates, are liable to pay Service Tax on Rs.7,54,94,586/- being the amount received against agreements of construction during the period from Jan'2009 to Dec'2009, under Works Contract service.

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

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

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

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

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

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

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

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

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

14.2. 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,

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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.

15. I observe in the instant case, that the venture, namely **May Flower Heights** located at PNo. 3-3-27/1, Mallapur Old village, Uppal Mandal, RR District, qualify to be classified under 'residential complexes' by virtue of the following facts :

i). buildings having more than twelve residential units

ii). having common area

iii). having common facilities like common water supply etc.

iv). having layouts approved by HUDA vide permit No. 14013/p4/plg/H/2006, 23.03.2007.

16. I find as per the reply, which the transaction with the customer in such ventures were in two folds as under:

a. Sale of undivided share of land along with the semi-constructed residential unit to the customer.

b. Subsequently the customer/owner of the land along with the semi-built up unit gets the construction done by the notice, under agreement of construction.

The issue before me revolves around the agreement of construction, since the sale of undivided share of land is not taxable.

17. I notice that M/s Alpine Estates have discharged their service tax liability of Rs.50.82,237/- on the receipts against agreements for construction pertaining to the period from May, 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 and and stopped payment of Service Tax with effect from January 2009. I also notice that they have not filed the ST3 returns till March'2010 with the department.

18. Shri. A.Shanker Reddy, Deputy General Manager (Admn.), authorized representative of the noticee in his statement recorded under Section 14 of the Central Excise Act 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act,1994, interalia, stated that the activities undertaken by the company were providing services of construction of Residential Complexes and that at the time of registration of the property, the amount received till then would be allocated towards Sale Deed and Agreement of construction and service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement and the service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis. Further, stated that the agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction and the sale deed constitutes a condition to go for construction with the builder and accordingly, the construction agreement would also be entered immediately on the same date of sale deed and that the process was 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 was completed unit and this

was commonly adopted procedure as required for getting loans from the banks. Further, 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 and 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.

19. I also notice that M/s Hiregange & Associates in the reply filed on behalf of the assesses, pleaded that there was always a doubt regarding the applicability of service tax as the definition of residential complex mentioned in section 65(91a) states that where such a complex is for personal use then no service tax is payable and that although there was no liability the entire amount of service tax was paid out of doubt and the same is eligible for refund and cited Board's Circular Nos.10//02/2009-ST dt: 29.02.09, B1/6/2005-TRU dt: 27.07.05 & 332/35/2006-TRU dt: 1.08.06.

20. I find that the Board's Circular No. B1/6/2005-TRU Dt: 27.7.05 states that residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is not covered under the scope of the service tax and not taxable and the Circular Nos. 332/35/2006-TRU dt: 1.8.06 and 108/2/2009-St dt: 29.01.09, reiterated the same. Hence, the contention of the notice that there was confusion is not tenable.

21. I find from the definition of 'residential complex' as reproduced at Para 14.2 above, it is clear that residential complex meant for personal use of a person has been excluded. In the case of the assesses, the residential complex constructed by them is not meant for personal use of one person and the complexes constructed by the assesses were sold out to various customers under two agreements. What has been excluded in the definition is the residential complex as a whole if meant for one person for personal use of such person. The interpretation adopted by the assesses would render the entire provisions relating to levy of service tax on residential complex redundant. Therefore, the contention of the assesses is not acceptable. The Board vide circular dt: 29.01.2009 has also clarified as under :

"Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax".

22. Further, The Consultant has cited the following case laws in support of their contention : i). the case law of M/s Classic Properties v/s CCE Mangalore 2009-TIOL-I 106-CESTAT-Bang ii). Mohtisham Complexes Pvt. Ltd. vs. Commr. of C.
Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang. I observe that these case laws are not applicable to the instant case, as building of commercial complexes is also involved therein and

Hon'ble CESTAT has not into the merits of the case in Mohtisham Complexes Pvt. Ltd case and remanded the case.

23. The Consultant further submitted that the assesses would be eligible for CENVAT credit on the input services and capital goods used and hence the liability shall be reduced to that extent and that the SCN has not considered this and has demanded the entire service tax. Since the Assesses has discharged their service tax liability under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, upto Dec'2008, and the notice proposes to demand service tax on 'works contract service', the question of eligibility of CENVAT credit on the input services and capital goods does not arise.

24. They further submitted that assuming that the service tax is payable as per the SCN, that they have not collected the service tax amount being demanded in the subject SCN and therefore the amount received should be considered as cum-tax in terms of Explanation to Section 67 of the Finance Act, 1994 and the service tax has to be re-computed giving the assesses the benefit of cum-tax. The question of cum-tax value does not arise, since the assesses have opted and paid service tax upto 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. As per the provisions of Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the assesses has to discharge service tax liability on the gross amount charged for the works contract. Hence, the issue of cum-tax / cum-duty value does not arise. As per Rule 3(3) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, *" 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".* Since, the assesses has discharged their service tax liability under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, upto Dec'2008, I propose to demand service tax under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

25. In view of the above, it is clear that there was no confusion during the impugned period and it was a clear case of suppression of taxable value with an intention to non- payment of service tax without any valid reasons. The fact of suppression would have not come to the knowledge of the department but for the investigation taken up. Hence, I hold that the assesses have made themselves liable for penal action under Section 78 of the act. Since the assesses has failed to file the ST3 returns correctly reflecting the taxable value received by them during the period from October,2008 to September, 2009, I proceed to levy penalty under Section 77 of the Finance Act also.

26. I propose to not to levy penalty under Section 76 of the Act, in view of the proviso to Section 78, which reads as *" provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply."*

27. Accordingly, I pass the following order.

ORDER

(i) I demand an amount of **Rs. 31,10,377/- (Rupees Thirty One Lakhs Ten Thousands Three Hundred and Seventy seven only)** towards Service tax of Rs.30,19,783/-, towards Education Cess of Rs.60,396/- and towards Secondary & Higher Education Cess of Rs.30,198/-, 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) I demand interest on the amount demanded at (i) above, under the Section 75 of the Finance Act,1994

(iii) I impose a Penalty of **Rs.5,000/- (Rupees Five Thousands only)** on them under Section 77 of the Finance Act, 1994 for the contravention of Rules and provisions of the Finance Act, 1994.

(iv) I impose a Penalty of **Rs. 31,10,377/- (Rupees Thirty One Lakhs Ten Thousands Three Hundred and Seventy seven only)** on them under Section 78 of the Finance Act, 1994 for suppression of value of service tax and contravention of provisions of Chapter V of the Finance Act or the rules made there under, with intent to evade payment of service tax.

Show Cause Notice in O.R.No. 82/2010 – Adjn.ST dated 16.06.2010 is accordingly disposed off.

OCNO.395/2010

(G.SREE HARSHA)
ADDITIONAL COMMISSIONER

To
M/s. Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003.
(Registered post with Ackn. Due)

Copy submitted to the Commissioner of Customs, Central Excise & Service Tax, Hyderabad II Commissionerate, Hyderabad (By name to Superintendent (Trib.)

Copy to the Superintendent of Service Tax, Gr. X, Hyderabad-II Comm'te.

Master Copy

Spare Copy.

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