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BEFORE THECOMMISSIONER OF SERVICE TAX, SERVICE TAX COMMISSIONERATE, 11-5-423/1/A, SITARAM PRASAD TOWER, RED HILLS, HYDERABAD – 500 004

Sub: Proceedings under OR No.163/2014 Adjn (ST) (Commr) C.No. IV/16/63/2012ST Gr.X dated 26.09.2014 issued to M/s Modi Ventures, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

We are authorized to represent M/s.Modi Ventures, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad – 500003 vide authorized letter enclosed along with this reply.

FACTS OF THE CASE:

A. M/s Modi Ventures, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad – 500003 (hereinafter referred as Noticee) is a partnership firm registered under the Partnership Act, 1932 mainly engaged in the sale of residential units to prospective buyers while the units are under construction.

B. The Noticee had registered with service tax department vide STC No. AAJFM0646DST001under the category of construction of complex service. Later, based on The Additional Commissioner of Central Excise and Service Tax, Hyderabad – II Commissionerateclarifications, it registered itself under the category of "Works Contract Service" also.

C. The flow of activity involved is as under:

a.Noticee has purchased apart of the land from M/s Sri Sai builders and developed the flats such joint property/flats together and sold

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such flats to ultimate buyers. Further, In Phase II comprising of construction of Block F and Block G the land was fully purchased by the appellant from other landowners.

b. Construction Permit/ Sanction Plan were applied by the Noticee and approval has also been obtained for the entire residential complex consisting of 506 residential units from Greater Hyderabad Municipal Corporation/HUDA under their own names. The Approvals have been obtained in Phases and the date of receipt of approval for the various phases is as under:

Phase	**Date of Layout Approval from the municipal authorities**	**Completed/ Occupancy certificate obtained on**
PHASE-I		
Block A	22.08.2005	03.11.2008
Block B	22.08.2005	23.09.2008
Block C	22.08.2005	08.06.2007
Block D	22.08.2005	03.11.2008
Block E	22.08.2005	26.12.2008
PHASE-II		
Block F	01.04.2009	19.12.2011
Block G	01.04.2009	19.12.2011

c. Based on the above approvals, Noticee has started the activities of development of the said residential complex.

d. Simultaneous to, but independent of the activity of development of the said residential complex, Noticee enters into arrangements with prospective buyers for sale of the residential units contained in the said residential complex while the same is under construction.

e. The Agreement of Sale, is entered agreement for the sale of an apartment which consists of the standard construction, an undivided share in land and reserved parking space. All rights and obligations are cast on the respective parties accordingly. However, in certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Noticee may enter into a sale deed for sale of Apartment in a semi finished state, simultaneously entering into a separate construction contract for completing the unfinished apartment.

D. As intimated to department in their earlier correspondences, receipts from the customer were appropriated sequentially in the following manner.

a. Sale Deed.

b. Then towards the agreement of construction.

c. Towards addition and alteration and

d. Finally towards VAT, Service Tax, Stamp Duty, Registration charges, excess consideration received etc.

E. For the earlier period, the department has issued two show cause notices for the period April 2006 to December 2011and the status of such Show Cause Notices is as follows.

Period	SCN	Amount	Status
Apr 06 to Dec 10	OR No. 125/2011-Adjn (ST) (Commr.) dt. 25.10.2011	Rs.1,38,13,576/-	Stay granted by the Hon'ble CESTAT vide Misc. order 23566/2014
Jan 11 to Dec 11	OR No.95/2011-Adjn (ST), dated 24.04.2012	Rs.60,63,492/-	Pending Adjudication

F. For the period of the show cause notice i.e. January 2012 to March 2014, for the receipts received towards the Sale Deed, Noticee were/are on the understanding that the transaction is a sale of immovable property (***Which is a subject matter of Stamp Duty***) and not covered und>?:`4er the purview of Service Tax.

G. For the receipts received/appropriated towards the construction agreement, for the present period, Noticee are under bona fide belief that the same is not liable for Service Tax as they are selling/constructing the Flats for the individuals which is used for residential purpose. However, due to recurring issue of show cause notice from the department, for the present period, the Noticee are paying Service Tax under protest under works contract service for the amount received towards construction agreement.

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H. While computing the service tax liability on consideration received / for the construction portion, the Noticee has excluded the following from the total receipts.

a. Receipts towards the value of sale deed.

b. Receipts towards payment of VAT, Service Tax, Stamp Duty and Registration Charges that were remitted to the government whether in advance or on a later stage.

c. Receipts that are in excess of the agreed sale consideration which were refunded or liable to refunded to the purchaser.

d. Receipts towards the other charges like corpus fund, maintenance charges, electricity charges etc received on behalf of the Owners Association or the Electricity department which were paid to themA in advance or on a later date.

I. After making the payment of Service Tax under protest on the portion of ,.;/intimated the same to the Superintendent vide their various letters detailed as under

a. Letter dated 22nd July 2012 for the period January 2012 to March 2012 (copy of the letter enclosed as annexure 1)

b. Letter dated 29thApril 2013 for the period April 2012 to September 2012 (copy of the letter enclosed as annexure 2)

c. Letter dated 26th September 2013 for the period October 2012 to - March 2013 (copy of the letter enclosed as annexure 3)

d. Letter dated 11th November 2013 for the period April 2013 to September 2013 (copy of the letter enclosed as annexure 4)

e. Letter dated 1st June 2014 for the period October 2013 to March 2014.(copy of the letter enclosed as annexure 5)

Along with the letter, the Noticee has also submitted the annexure which clearly explains that they have excluded the amount received towards the sale of undivided portion of land and paid applicable service tax ***under protest*** on the amount received towards the construction portion

J. Initially there was a confusion whether advances from flat buyers on which Noticee is paying service tax under protest should disclose in ST-3 returns or not, Noticee filed ST-3 returns for the period upto March 2012 showing taxable amounts as 'Nil' since they are contesting on taxability of the impugned activity however later on understanding that ST-3 returns should disclose taxable amounts even paying service tax under protest so Noticee disclosed advances from flat buyers along with the exemptions claimed in ST-3 returns filed for the period April 2012 onwards.

K. Without appreciating the voluntarily disclosures made, the department vide their letter dated 16.09.2014 issued summons to furnish the information. Accordingly, on 17.09.2014, the Noticee has submitted the details of amount received for agreement of construction and they also,

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enclosed earlier intimation made to the department which is as explained above(Copy of the same is enclosed as annexure 6).

L. Without understanding the fact that the service tax has been paid on amount received for construction of service, the subject show cause notice has issued proposing service tax on gross amount received after excluding only VAT amount and to tax the amount received towards agreement to sale of semi-finished flat, amount received for electricity charges, stamp duty etc. and requiring the Noticee to show cause as to why;

a. An amount of Rs.74,39,581/- including cesses should not be demanded on the Works Contract services rendered by them during the period from July 2012 to March 2014 under section 73(1) of Finance Act, 1994 read with proviso thereto; and an amount of Rs.29,22,154/- already paid should not be adjusted against the above demand.

b. Interest on the amount of demand at (a) should not be recovered under section 75 of the Finance Act, 1994.

c. Penalty should not be imposed on them under section 78 of the Finance Act, 1994; and

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

In as much as:

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(i) As seen from the records, the Noticee entered into 1) Sale deed for sale of undivided portion of land together with semi-finished portion of the flat and 2) 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 Noticee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there is transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of constructions to each of their customers to whom the land was already sold are taxable services under works contract service.

(ii) As per information furnished by the Noticee vide their letter dated 17.09.2014 along with statements it is seen that "the Noticee" have rendered taxable services under the category of Works contract service during the period Jan 2012 to March 2014. The Noticee had rendered services for a taxable value of Rs.16,40,81,782/-. After deduction of VAT of Rs.74,39,581/- the taxable value works out to Rs.15,79,68,136/- on which service tax (including cess) works out to Rs. 74,39,581/- was paid leaving an amount of Rs.45,17,427/- unpaid / short paid

for the services rendered during the said period, as detailed in the annexure enclosed.

(iii) Further, Notification No.25/2012-ST dated 20-06-2012, as amended specified services, which were exempt from payment of service tax. It appears that services provided by the Noticee are not covered under any of the listed therein.

(iv) The legal position insofar as "Works contract service" is concerned, the said service and its taxability as defined under sub-clause (zzzza) of clause 105 of section 65 of the Finance Act, 1994 as existed before 01.07.2012 stands now covered by section 65B(54) whereby the said service, covered under section 66E(h) of Finance Act, 1994 and for not being in the negative list prescribed under 66D continues to be as taxable service. But for the said changes in the legal provisions, the status of service and corresponding tax liability prior to 01.07.2012 remained same now also

(v) Assessee have filed Nil ST-3 returns online for the period October 2011 to March 2012. Later, however vide letter dated17.09.2014, they submitted that they have received Rs. 4,49,46,992/- for rendering taxable services.Despite having registered and discharging service tax liability on parts of taxable values, the assessee had not disclosed the receipt of taxable amounts for the period January – March 2012 in

statutory returns and also failed to discharge the service tax liability deliberately on the actual value of services under "Works contract services". They appear to have suppressed the material facts before the department that they had received said taxable amounts.

(vi) ***They have neither disclosed the same to the department by way of the details of the activities/service in the periodical returns filed by them during the period October 2011 to March 2012. They have intentionally not shown any receipts towards construction in their ST-3 returns.***

(vii) Assessee is well aware of the statutory provisions and of their liability to pay service tax. ***Since they have not disclosed the above facts to the department by way of periodical return and the facts were submitted at later stage, on specially asked by the department vide letters dated 20.08.2014, 10.09.2014 and summons dated 16.09.214 the same amounts to suppression of facts with sole intention to evade payment of service tax*** and hence the proviso to sub-section (1) of section 73 of Finance Act, 1994 is liable to be invoked for extended period.

Submissions:

1. For easy comprehension, the subsequent submissions in this reply are made under different heads covering different aspects involved in the subject SCN.

    A. Validity of the show cause notice when

        a. Issued on mere assumptions

        b. Issued without examination of the relevant provision

        c. burden of proof not discharged

    B. Exclusion under the definition of Construction of Residential Complex Service upto 30.06.2012

    C. No Service tax on sale of semi-finished flat

    D. No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department

    E. Quantification of the tax liability

    F. Benefit of cum-tax

    G. Extended period of limitationis not invokable

        a. In subsequent proceedings when earlier proceedings on same subject matter pending/decided

        b. when demand for subsequent period raised under normal limitation and demand for earlier period raised subsequently:

        c. When Returns filed

d. Extended period of limitation not invokable when there is no positive act of suppression

e. when demand raised on basis of balance sheets/ledger accounts of assessee

H. Interest under section 75 of Finance Act, 1994

I. Penalty under section 77 &78 of Finance Act, 1994

J. Benefit under section 80

***In Re:* Validity of Show Cause Notice:**

a) **Issues based on mere assumption**

2. Noticee submits that the subject SCN is issued based on mere assumption and unwarranted inference without considering the facts, the scope of activities undertaken and the nature of activity involved, creating its own assumptions, presumptions and many other factors discussed in the course of reply. Further, the show cause notice issued on the assumption that the

a. Service tax is computed on entire gross amount received from customer including amounts received towards sale of semi-finished flat, Corpus fund,electricity charges, stamp duty, Maintenance charges received on behalf of the owners association

b. Noticee has not submitted the details of amounts received from flat buyers

3. Noticee submits entire SCN seemsto have been issued with revenue bias without appreciating the statutory provision and also the objective of the transaction/activity/agreement. Further, the show cause notice has issued without appreciating the

   a. Fact that Noticee has paid voluntarily entire amount of service tax to the department on the amount towards agreement of construction as intended/alleged on the subject SCN.

   b. Noticee have voluntarily intimated service tax payment details at various dates clearly showing the receipts from each and every customer& explaining how tax liability has been arrived and also submitted the copies of Challansfor the impugned period.(refer letter enclosed as annexure 6) Further impugned show cause notice alleges that Noticee has not disclosed the said facts to the department and invokes the proviso to section 73(1) of Finance Act, 1994.

4. The Noticee submits that the subject show cause notice has issued by relying on the information submitted by the Noticee vide letter dated 17thSeptember 2014. The Noticee submits that in the said letter, they submitted the amount received towards agreement of construction as follows.

Sl. No.	Period	Total Receipts towards agreement of construction
1	Jan'12-Mar'12	Rs.2,48,00,944/-
2	Apr'12-Sep'12	Rs.2,80,09,684/-
3	Oct'12-Mar'13	Rs.1,32,12,277/-

4	Apr'13-Sep'13	Rs. 1,06,47,552/-
5	Oct'13-Mar'14	Rs.11,89,688/-

5. However, the annexure to the show cause notice mentioned the details of receipts as follows which is entirely different from the details furnished by the Noticee which are as follows.

Sl. No.	Period	Gross amount received
1	Jan'12-Mar'12	Rs.4,49,46,992/-
2	Apr'12-Sep'12	Rs.5,93,70,068/-
3	Oct'12-Mar'13	Rs.2,45,03,661/-
4	Apr'13-Sep'13	Rs. 2,37,07,665/-
5	Oct'13-Mar'14	Rs. 1,15,53,396/-

From the above comparison of the information submitted and information considered by the subject show cause notice, it clear that the subject show cause notice is based on wrong understanding of the information submitted by the Noticee. On this ground alone, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

6. Noticee submits that Para 2 of show cause notice reads as follows *"it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable under "Works contract service"* thus impugned show cause notice on one hand alleges that the liability of service tax is only on the construction agreement and not on the sale deed portion, and on other hand proposes tax on gross amount without

any deduction of amounts received towards the sale deed. Therefore issuance of notice in such unclear direction is not valid.

7. Noticee submits thatSupreme Court in case Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC) has held "*we must hold that the finding that 11,606 maunds of sugar were not accounted for by the appellant has been arrived at without any tangible evidence and is based only on inferences involving unwarranted assumptions. The finding is thus vitiated by an error of law. Such show cause notices are not sustainable under the law.*" Therefore, on this count alone the entire proceedings in the subject SCN requires to be set aside, since the notice is issues on a broad assumption and not on the actual examination.

b) <u>Issued without examination of the relevant provision</u>

8. The Noticee submits that the subject show cause notice has proposed service tax for the period January 2012 to March 2014 during which levy of service tax was governed in two different approaches one is taxation of services on selected services which applies till 30.06.2012 and another is taxation of services other than the services covered under the Negative list which applies for the period starting from 01.07.2012.

9. Noticeeproposes to tax the activity of Noticee under old law (upto 30.06.2012) and also under new law (after 01.07.2012) by merely

extracting the provisions of section 65 (105) (zzzzh) of Finance Act, 1994 and Works contract (Composition Scheme for payment of Service Tax) Rules, 2007 and Rule 2A of Service Tax (Determination of Value) Rules 2006 and sections 65B, 66B, 66D & 66E of Finance Act, 1994 and claiming that the status of service tax liability under new law. However there no discussion as to how the same liable for service tax under the said different period and the satisfaction of the levy in such period.

10. The Noticee submits that under taxation of services on selected services approach, only services of specified descriptions are subjected to tax whereas under Negative List approach, the services specified in the 'Negative List' shall remain outside the tax net. All other services, except those specifically exempted by way of notification, would thus be chargeable to service tax. Negative list approach to taxation of services was introduced w.e.f 01.07.2012 vide new sections, namely, 65B, 66B, 66C, 66D, 66E and 66F in Chapter V of the Finance Act, 1994. For operationalizing the Negative List approach, a number of changes have been made in Chapter V of the Finance Act, 1994 and consequently changes in Service Tax Rules, 1994, Service Tax (Determination of Value) Rules, 2006 and CENVAT Credit Rules, 2004 also had taken place. Provisions relating to positive list approach, namely, Sections 65, 65A, 66, and 66A in Chapter V of the Finance Act, 1994, will cease to operate from 01.07.2012.

11. Noticee submits that from the above it is clear that there is a substantial changes in the service tax law w.e.f. 01-07-2012 whereas impugned show cause notice alleges that taxability of Noticee activity remains same under new law also without explain the how it has been concluded. Therefore notice issued in such unclear direction is not valid and requires to be set aside.

12. 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 ....."

c) **Burden of proof not discharged**

13. Noticee submits that impugned show cause notice has not at all explained how and why the total gross amount received which is inclusive of amount received for sale of semi-finished flat, is covered under the ***definition of service*** as provided under section 65B(44) of

Finance Act, 1994. As the subject show cause notice has not proved its burden of proof, the proposition of demand of service tax is not sustainable and accordingly, the same requires to be dropped.

14. Noticee submits that the subject show cause notice has not made any allegations as to how and why there is a short payment of service tax in spite of detailed submissions made by them through way of correspondence, explaining their method of tax treatment for their activity. Further, the show cause notice merely considered the gross amount shown in the workings submitted by them ignoring the various deductions claimed by them for sale of semi-finished flat, amount received towards VAT, stamp duty, corpus fund, maintenance charges, electricity charges etc. As the subject show cause notice has not made any allegations as to how and why the deductions claimed by the Noticee is not applicable, the same is not sustainable and requires to be dropped.

15. Noticee submits that as the subject show cause notice is issued with extraction of the statutory provision and with broad allegations, however has not discharge the burden of proof of taxability, which is essential for proposing the demand. In this regard to Noticee wishes to rely on the following decisions.

a. In the case of Dewsoft Overseas Pvt. Ltd VsCommr. Of Service Tax, New Delhi 2008 (12) S.T.R 730 (Tri-Del) it was held that ***"Tax***

liability (Service tax) - Burden of proof - Revenue to prove liability on particular person if Service tax sought to be imposed"

b. In the case of United Telecom Ltd. Vs Commissioner Of Service Tax, Bangalore 2008 (9) S.T.R 155 (Tri-Bang) it was held that ***"The fundamental rule is that Revenue should discharge the burden pertaining to taxability for placing the activity under one head or another.*** *In a case of this type which is highly technical in nature, the Revenue ought to have referred the entire technical information furnished by the appellants to an expert body like National Informatics Centre. The same has not been done. To arrive at conclusion on reading the contract may lead to certain assumption and presumption. It may not be scientific also to crush aside the technical information given by the appellants by making our own reading of the terms of the contract. In view of Revenue not having produced any technical opinion, the appellant's contention that Revenue has failed to discharge their burden has to be taken into account"*

c. In the case of Jetlite (India) Ltd. Vs Commissioner Of C. Ex., New Delhi 2011 (21) S.T.R 119 (Tri-Del) it was held that ***"In case of classification burden was squarely upon the department"***

In light of the above judgments where the Department alleges that the service is taxable, the burden lies upon the Department to establish the taxability. In the present case, the department failed to discharge the burden as no evidence was placed on record to establish that the service is taxable. On the basis of the same, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

In Re: Exclusion under the definition of Construction of Residential Complex Service upto 01-07-2012:

16. Without prejudice to the foregoing, Noticeesubmits that from the above definition of taxable service given under section 65(105)(zzzzh) of Finance Act, 1994,it is evident that definition excludes construction of complex which is put to personal use by the customers and hence outside the purview of the definition and consequently no service tax is payable.

17. Noticee submits that non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from ab-inito.

Relevant Extract

"13.4 However, residential complex having only 12 or less residential units would not be taxable. ***Similarly, residential complex constructed by an***

individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is also not covered under the scope of the service tax and not taxable"

18. Without prejudice to the foregoing, Noticee further submits 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.

1. 2.	2. *Again will service tax be applicable on the same, in case he constructs commercial complex for himself for putting it on rent or sale?*	3. *Commercial complex does not fall within the scope of "residential complex intended for personal use". Hence, service provided for construction of commercial complex is leviable to service tax.*
	5. *Will the construction of an individual house or a bungalow meant for residence of an individual fall in purview of service*	6. *Clarified vide F. No. B1/6/ 2005-TRU, dated 27-7-2005, that residential complex constructed by an individual, intended for personal use as residence and constructed by*

	tax, is so, whose responsibility is there for payment?	*directly availing services of a construction service provider, is not liable to service tax.*

19. Noticee submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 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 Ac, 1994 and accordingly no service tax is payable on such transaction.

Relevant extract

"...***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'...***"

20. Without prejudice to the foregoing, Noticee further submits the various decision that has been rendered relying on the Circular 108 are as under

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

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

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

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

e. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

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

On the basis of the same also, Noticee submits that service tax not requires to pay under construction of complex service upto 30-06-2012. As the subject show cause notice has not considered this aspect, the proposition of the subject show cause notice is not sustainable and requires to be dropped.

In Re: No Service tax on sale of semi-finished flat and Stamp duty, registration charges

21. The Noticee submits that the para 2 of the subject show cause notice reads as follows.

"As seen from the records, the Noticee entered into 1) Sale deed for sale of undivided portion of land together with semi-finished portion of the flat and 2) 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 Noticee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them.* ***As there is transfer of property in goods in the execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable service under Works Contract service."***

22. From the analysis of the above para i.e. 2 of the subject show cause notice it is clear that the show cause notice admitted the fact that ***only services rendered by the Noticee after execution of sale deed against agreements of construction to each of their customers*** is liable for service tax under works contract service and the subject show cause notice has accepted the fact that service tax is not applicable for the sale of semi-finished flat. Inspite of this admittance in para 2, the subject show cause notice in annexure while quantifying the demand has considered the total gross receipts which also includes the amount

received for sale of semi-finished flat. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on sale of semi-finished flat is not sustainable and requires to be dropped.

23. Noticee submits that the definition of service provided w.e.f 01-07-2012 reads as follows.

(44)"Service" means any activity carried out by a person for another for consideration, and includes a declared service, ***but shall not include—***

(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

(ii)such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii)a transaction in money or actionable claim;

(b)a provision of service by an employee to the employer in the course of or in relation to his employment;

(c)fees taken in any Court or tribunal established under any law for the time being in force.

24. Noticee submits that from the above exclusive portion of definition of service it is clear that it specifically excluded the ***Sale / transfer of***

immovable property. In the present case, the agreement of sale deed is entered for sale / register of semi-finished flat which is an immovable property. Accordingly, the amount received for sale of semi-finished flat, stamp duty and registration charges is excluded from the definition of service. On the basis of same also, Noticee submits that the proposition of subject show cause notice demanding service tax on the Noticee is not sustainable and requires to be dropped.

25. Noticee submits that the show cause notice in para2 admitted the fact that there is a sale of semi-finished flat and construction activity has been done on the land of buyers. It substantiates the fact that the activity of sale of semi-finished flat is covered under exclusive portion of definition of service as provided under section 65B(44) of the Finance Act, 1994. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the sale of immovable property is not sustainable and requires to be dropped.

26. TheNoticee submits that Article 265 of the Constitution of India is extracted here for ready reference.

"No tax shall be levied or collected except by authority of law"

27. TheNoticee submits that from the above it is clear that Article 265 prohibits the levy or collection of the tax except by authority of law.

Therefore the law should be within the legislative competence of the legislature being covered by the legislative entries in the Seventh Schedule of the Constitution.The question is whether the Parliament is empowered to levy the service tax on sale of materials, undivided share of land & others.

28. The Noticee submits that Parliament is empowered to levy the service tax vide Entry No. 97 of List of Seventh Schedule to Constitution of India. The Entry No. 97 is extracted here for ready reference.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

29. The Noticee submits that from the above it is clear that the Parliament under Entry 97 can levy the tax on matters, which are not covered under List II and List III. The question is whether the tax on sale of immovable property i.e. is not covered under List III.Relevant entries of the List IIIis extracted here for ready reference.

List III-6.Transfer of property other than agricultural land; registration of deeds and documents.

30. From the above it is clear that the tax on transfer of immovable property is covered under entry no.3 and service tax which is levied under entry no.97 is not applicable for the sale / transfer of immovable

property. On the basis of the same, Noticee submits that service tax is not applicable for sale / transfer of immovable property. As the subject show cause notice has not considered this aspects, the same is not sustainable and requires to be dropped.

31. Noticee submits that the subject show cause notice has computed service tax liability also on the receipts received for sale of semi-finished flat under works contract service. For this Noticee submits that section 67 of the Finance Act, 1994 reads as follows.

"SECTION67. Valuation of taxable services for charging service tax. *— (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —*

(i) 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."

32. Noticee submits that from the analysis of section 67 of the Finance Act, 1994, it is clear that service tax requires to be paid on the value of the ***services rendered.*** In the present case, the subject show cause notice has gone beyond the valuation provisions and demanding service tax even on the amount received for sale of semi-finished flat. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax beyond the provisions of section 67 is not sustainable and requires to be dropped.

33. The Noticee submits that Hon'ble High Court in the decision of GD Builders VS Union of India 2013 (32) STR 673 held that in case of a composite contract, **the service element should be bifurcated and ascertained and then taxed.** In the present case service there are two separate transactions one is sale of semi-finished flat and second one is construction service. Accordingly, the proposition of the above case law can be applicable. On the basis of same also, Noticee submits that demand of service tax on the sale of immovable property is not sustainable and requires to be dropped.

In Re: Sale of Semi-finished flats is **not a works contract**

34. Noticee submits that Para2 of show cause notice reads as follows "it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom

the land was already sold are taxable under "Works contract service" thus impugned show cause notice on one hand alleges that the liability of service tax is only on the construction agreement and not on the sale deed portion, hence without prejudice to the findings of the impugned SCN, Noticee hereinafter makes the submissions to justify that the value of sale deed is not a works contract.

35. Noticee submits that the subject show cause notice in Para 2 mentions that the Noticee is providing "works contract service" and liable for service tax and extracted the definition of works contract as provided under section 65B(54) of the Finance Act, 1994. For this Noticee submits that the subject show cause notice has not explained how and why, the transaction of the Noticee is liable for service tax under works contract service. As the subject show cause notice has not proved burden of proof, the same is not sustainable and requires to be dropped.

36. Without prejudice to the foregoing, Noticee further submits that the definition of works contract provided under new service tax law is as follows.

65B(54) ***"works contract"*** *means a contract wherein transfer of* ***property in goods*** *involved in* ***the execution of such contract*** *is leviable****to tax as sale of goods*** *and such contract is for the purpose of carrying out* ***construction, erection, commissioning, installation,***

completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property *or for carrying out any other similar activity or a part thereof in relation to such property;*

37. Noticee submits that from the definition of works contract as provided under section 65B(54) of the Finance Act, 1994, it is clear that to cover under the definition of works contract,

    a. There should be a contract. ***(Only a Single Contract)***

    b. In such contract, there should be transfer of property in goods and

    c. Such contract is for the purposes of carrying out, - specified services.

38. Noticee submits that in the present case, their agreement of construction may liable under the definition of works contract as provided under section 65B(54) of the Finance Act, 1994 and they are paying appropriate service tax as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006. Inspite of appreciating the voluntarily service tax payment made by the Noticee, the subject show cause notice is demanding service tax on the sale of semi-finished flat under works contract service, which is not beyond the definition of works contract service. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on

the value of sale of semi-finished flat is not sustainable and requires to be dropped.

39. Noticee submits that the transaction of sale of semi-finished flat is not covered under the definition of works contract due to the following reasons.

a. The Noticee has entered two separate transactions with the customer, whereas the definition requires only one contract.

b. Transaction is for sale of semi-finished flat and not for construction.

As the present transaction of the Noticee is not covered under the definition of works contract, the proposition of subject show cause notice demanding service tax under works contract service is not sustainable and requires to be dropped.

In Re: No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department

40. Noticee submits that the subject show cause notice also demanded service tax on the amount received towards, corpus fund, electricity charges, maintenance charges, which is received on behalf of the owners association or the electricity department. However, the subject show

cause notice has not provided any reasons as to how and why the said amounts were liable for service tax under works contract service. It is settled provision of law that the burden of proof of tax liability is always on the department. As in the present case, as the subject show cause notice has failed to prove its burden, the proposition of the subject show cause notice demanding service tax on the amount received amount received for corpus fund, electricity charges is not sustainable and requires to be dropped.

41. Noticee submits that the subject show cause notice in Para 2 has made allegation only for payment of service tax on the construction work undertaken by the Noticee. However, while quantifying the service tax liability, the subject show cause notice has also included the amount received for corpus fund and the electricity charges which is received on behalf of association / electricity board. Accordingly, the proposition of the subject show cause notice demanding service tax on the Noticee is not sustainable and requires to be dropped.

42. Noticee submits that the definition of works contract as provided under section 65B(54) reads as follows.

"(54)"works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction,

erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;

43. Noticee submits that in the present case, they have paid applicable service tax on the construction agreement, which may be liable under works contract service. However, the subject show cause notice without appreciating the voluntarily service tax payment made by the Noticeedemanding service tax on the amount received towards corpus fund and electricity charges which is not at all covered under the definition of works contract service. On the basis of same also, Noticee submits that the proposition of the subject show cause notice is not sustainable and requires to be dropped.

44. Noticee submits that they have received amount received for corpus fund and electricity charges is on behalf of the owners association and electricity board. In this regard, Noticee wishes to extract Rule 5(2) of Service Tax (Determination of Value) Rules, 2006, which reads as follows.

(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the

taxable service if all the following conditions are satisfied, namely :-

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

45. Noticee submits that in the present case, as they have received the amount towards electricity charges and corpus fund as an agent of the service receiver, the amount received towards to be excluded from the valuation as per Rule 5(2) of Service Tax (Determination of Value) Rules, 2006. As the subject show cause notice has not considered this aspect, the proposition of the subject show cause notice demanding service tax on these items is not sustainable and same requires to be dropped.

46. Noticee further submits that the amount received towards corpus fund and electricity charges can also be considered as reimbursement of expenses collected at actuals. In this regard, they wishes to rely on the decision of Hon'ble Delhi High Court in the case of Intercontinental Consultants &TechnocraftsPvt. Ltd Vs Union of India 2013(29) STR 9 (Del) where it is held that pure reimbursements of expenses is not liable for service tax and also it struck down Rule 5 of Service Tax (determination of value) Rules, 2006, as it is beyond the valuation provisions of service tax. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the Noticee for these reimbursement of expenses is not sustainable and same requires to be dropped.

In Re: Quantification of the tax liability

47. Noticee submits that assuming but not admitting they are liable for service tax under works contract service and also as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then Noticee submits that as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then the value of the land involved in the project should be excluded from the determination of service tax liability. For the said period, total amount of cost of land transferred and Noticee humbly request the adjudicating authority to exclude the value of land from determination of service tax liability.

In Re: Benefit of cum-tax

48. Noticeesubmits that assuming but not admitting there is a liability under works contract service for sale of semi-finished flat, then as the Noticee has not collected service tax from the buyer, the benefit of cum-tax requires to be provided to the Noticee. As the subject show cause notice has not extended such benefit, the same is not sustainable and requires to be dropped.

49. 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. In the case of P. Jani& Co. vs. CST, Ahmedabad 2010 (020) STR 0701 Tri.-Ahmd. It was held that *"I agree with the contention of the learned advocate that the decision of the Tribunal in the case of Advantage Media Consultant applies and in view of the provisions of Section 67 of Finance Act, 1994, the* ***amount received has to be treated as inclusive of tax.****"*

b. In the case of Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del it was held that ***"However, since they have not recovered service tax separately from their customers, value received by them should be taken as cum-tax value and tax should be re-determined.*** *Accordingly, impugned order is set aside. Matter is remanded back to the original authority for re-calculation of the demand"*

c. In the case of Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590 it was held that *"We also find strong force in the contention raised by the learned counsel that the amount collected by them should be considered as cum-duty amount.* ***The lower authorities need to recalculate the amount of Service Tax liability considering the entire amount received by the assessee as the cum-tax amount."***

d. In the case of BSNL Vs CCE, Jaipure 2011 (24) S.T.R 435 (Tri-Del) it was held that *"In view of our findings as above, we set aside the impugned order and remand the matter to the original authority for verifying as to whether the service tax amount has been separately*

paid by service recipient and ***for allowing*** *cum-tax* ***benefit in such of those cases where no service tax has been separately paid".***

On the basis of above decisions, Noticee submits that the benefit of cum-tax requires to be provided to the Noticee. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the Noticee is not sustainable and requires to be dropped.

In Re: Extended period of limitation is not invokable:

50. Noticee submits that impugned show cause notice proposes to demand service tax for the period January 2012 to March 2014 and by invoking larger period of limitation under proviso to Section 73(1) of Finance Act, 1994.

51. Noticee submits that Para 8 of impugned show cause notice reads as follows *"Assessee have filed Nil ST-3 returns online for the period October 2011 to March 2012. Later, however vide letter dated 17.09.2014, they submitted that they have received Rs. 4,49,46,992/- for rendering taxable services. Despite having registered and discharging service tax liability on parts of taxable values, the assessee had not disclosed the receipt of taxable amounts for the period January – March 2012 in statutory returns and also failed to discharge the service tax liability deliberately on the actual value of services under "Works contract services". They appear to*

have suppressed the material *facts before the department that they had received said taxable amounts.* ***They have neither disclosed the same to the department by way of the details of the activities/service in the periodical returns filed by them during the period October 2011 to March 2012. They have intentionally not shown any receipts towards construction in their ST-3 returns.*** Assessee is well aware of the statutory provisions and of their liability to pay service tax. ***Since they have not disclosed the above facts to the department by way of periodical return and the facts were submitted at later stage, on specially asked by the department vide letters dated 20.08.2014, 10.09.2014 and summons dated 16.09.214 the same amounts to suppression of facts with sole intention to evade payment of service tax*** and hence the proviso to sub-section (1) of section 73 of Finance Act, 1994 is liable to be invoked for extended period."

52. Noticee submits that above allegation of impugned show cause notice is not valid for the below mentioned reasons:

a. Noticee have voluntarily paid service tax on amounts received on towards construction agreement and intimated the said payment details at various dates clearly showing the receipts from each and every customer & explaining how tax liability has been arrived and also submitted the copies of Challans for the impugned period vide their letter dated 22nd July 2012 for the period January 2012 to March 2012 and vide their letter dated 29th April 2013 for the

period April 2012 to September 2012 and vide letter dated 26th September 2013 for the period October 2012 to March 2013 and vide letter dated 11th November 2013 for the period April 2013 to September 2013 and vide letter dated 1st June 2014 for the period October 2013 to March 2014. Along with the letter, the Noticee has also submitted the annexure which clearly explains that they have excluded the amount received towards the sale of undivided portion of land and paid applicable service tax ***under protest*** on the amount received towards the construction portion **(copy of the letters referred in this Para are enclosed as annexure __)**.

b. Noticee filed ST-3 returns showing the taxable amounts as "Nil" for the period upto March 2012 on the understanding that since they are contesting the demand of service tax on their activity and amounts paid as service tax is under protest, taxable amounts would be "Nil".Therefore allegation of non-disclosure of amounts received from customers in ST-3 returns is not valid.

c. Earlier two show cause notices were served on the Noticee proposing service tax on their activityand there was no change in activity carried out by the Noticee.

Therefore invocation of larger period of limitation on the ground that Noticee has suppressed the facts is not valid. Noticee hereinafter explains in details why the larger period of limitation is not invokable.

a) **No suppression of facts if show cause notice issued earlier:**

53. Noticee submits that impugned show cause notice alleges that Noticee suppressed the facts of rendering taxable services. In this regard Noticee submits that suppression of facts involves "holding back facts".

54. Noticee submits that impugned show cause notice proposes to tax the amounts received towards sale of flats in respect of project named as " ***"Gulmohar Gardens"***andsaid project was started during the month of May 2006 thereby activity which is subjected to present show cause notice was existed from Jan 2007. Further there was no other project executed by the Noticee during the subject period.

55. Noticee submits that a show cause notice was served by the office of this Commissionerate on Noticee proposing service tax for the period 01.06.2007 to December 2010 vide O.R. No 125/2011-Adjn. (ST) (Commr.) dated 25.10.2011 and it was followed byperiodical show cause notice vide O.R No. 95/2012 – Adjn. (ST) (Commr.) dated 24.04.2012 covering the period January 2011 to December 2011. Thus officers of department were well aware of the activity carried out by the Noticee before the initiation of proceedings under present show cause notice in the form of earlier show cause notices

56. Notice submits that above mentioned earlier show cause notice disputed the payment of service tax on construction of apartments classifying under the category of works contract and now present show cause notice also proposes to demand service tax on same subject matter for the later period invoking the larger period of limitation is not sustainable and requires to be set aside. in this regard, Noticee wishes to rely on P & B Pharmaceuticals (P) Ltd. v. Collector — 2003 (153) E.L.T. 14 (S.C.), Apex court held that "the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, **it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."**

57. Noticee submits that Noticee has not done any thing new in respect of matters covered in present show cause notice and same were existed and continuing from the initiation of earlier show cause notice proceedings and merely officers of department revealed information in subsequent proceedings and based on which present show cause notice was issued invoking the larger period of limitation on the ground that Noticee suppressed facts is not valid and requires to be set aside. In case of Collector v. Chemphar Drugs and Liniments —1989 (40) E.L.T. 276 (S.C.), Apex court held that

"when the manufacturer ***in the same situation as appellant has revealed certain information in another proceeding and that information is available to the Department, the enlarged period of limitation available under Section 11A of the Central Excise Act cannot be invoked by the Department."***

58. Noticee submits that they have filed appeal before CESTAT, Bangalore along with stay application and subsequent to this Hon'ble CESTAT granted stay vide Miscellaneous order No. 23566/2014 dated 26.06.2014 and disposal of main appeal is pending. That being a case, issuing second show cause notice invoking the larger period of limitation on the ground that Noticee suppressed facts is not sustainable and requires to be set aside. in this regard, Noticee wishes to rely on ECE Industries Ltd. v. Commissioner — 2004 (164) E.L.T. 236 (S.C.)wherein Apex court held that **"as earlier proceedings in respect of same subject matter were pending adjudication it could not be said that there was any suppression and the extended period under Section 11A was not available".**

59. Noticee submits that department is well aware of all activities carried out and compliance with tax provisions in respect of such activities. That being a case, allegation of impugned show cause notice that notice suppressed the facts of case is not sustainable and requires to be set aside. To substantiate this submission Noticee submits that Apex court

in case of *Nizam Sugar Factory* - 2008 (9) S.T.R. 314 (S.C.) = 2006 (197) E.L.T. 465 (S.C.) held that *"Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."*

b) <u>Specific disclosure is made:</u>

60. Noticee submits that they are paying service tax (under protest) on amounts received from customer after excluding the amounts attributable to the sale of semi-finished flat i.e. paying on amounts received towards construction agreement.The same was intimated to the officers of department vide their

a. letter dated 22nd July 2012 for the period January 2012 to March 2012

b. letter dated 29th April 2013 for the period April 2012 to September 2012

c. letter dated 26th September 2013 for the period October 2012 to March 2013

d. letter dated 11th November 2013 for the period April 2013 to September 2013

e. Letter dated 1st June 2014 for the period October 2013 to March 2014.

While filling the above mentioned letters, Noticee also submitted the computation sheet specifically showing the amount received from each customer, deductions made from the gross amount chargedto arrive the tax liability and also submitted Challan copies. Therefore Noticee voluntarily intimated all facts without any interaction of department.

61. Noticee submits that,contrasting to this, impugned show cause notice alleges that the facts were submitted at later stage, on specially asked by the department vide letters dated 20.08.2014, 10.09.2014 and summons dated 16.09.214 the same amounts to suppression of facts with sole intention to evade payment of service tax. Therefore this allegation is not valid since it is contrary to what was actually happened.

62. The Noticee submits that from the above it is clear that there is clear and continuous correspondence between the service tax department and the Noticee in the form of above disclosures, show cause notice proceedings. It is settled position of the law that when there is correspondence between the Noticee and the service tax department suppression of the

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facts cannot be applicable. In this regard Noticee wishes to rely on the following judicial pronouncements.

a. In the case of Andhra Pradesh Paper Mills Ltd Vs CCE, Visakhaptnam-II 2006 (200) E.L.T 326 (Tri-Bang). It was held that *"Once the Department was fully aware of the fact of the activity of conversion of paper, the larger period for confirming demand is not attracted. Revenue itself had rejected their plea for registration, therefore,* ***they cannot at a latter point of time allege suppression of facts.*** *The confirmation of demands for larger period is not sustainable, as there was no suppression of facts or deliberate withholding of information or mis-declaration or fraud"*

b. In the case of Collector Of Central Excise, Hyderabad Vs I.T.W. Signode India Ltd. 2005 (188) E.L.T 65 (Tri-Del) it was held that *"It is thus clear from the* ***correspondence between the assessee and the revenue that the nature of the product and the processes involved for making "box strappings" were all known to the Department.*** *This was, therefore, not a case of any fraud or wilful mis-statement or suppression of facts or contravention of the Act or the Rules with an intent to evade payment of duty. There was, therefore, no scope for invoking the extended period of limitation of five years for recovery of the duties not levied or not paid in respect of the said product."*

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

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

c) <u>When there is no malafide intention and it is based on bonafide belief</u>

63. Noticee submits that provisions of Section 73 of Finance Act, 1994 makes it clear that to invoke larger period of limitation, person liable to pay service tax shall involve in any of act specified acts namely fraud, suppression of facts etc., and such act should be coupled with malafide

intention to evade payment of service tax and in present case Noticee himself assessed the tax, paid tax without any action from the officers of department and same was intimated to the department, this shows Noticee has no malafide intention to evade payment of tax. Therefore, invocation of larger period of limitation is not sustainable.

64. Noticee submits that following judicial pronouncements in support of the above view:

a. Apex court in case of Tamil Nadu Board v. Collector — 1994 (74) E.L.T. 9 (S.C.): it was held that *"A bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years, it has to be construed strictly. The initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the Section, the burden shifts and then applicability of the proviso*

has to be construed liberally. 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.

b. In case of CCE., v Fermenta Pharma Biodil Ltd 2009 (234) E.L.T. 609 (H.P.) it was held that "Both the main section and the proviso have to be read together. It is well settled law that the proviso is an exception and cannot be read in a manner that it over-shadows the main provision itself. If we read the proviso in its entirety it is clear that the same is applicable only in a case where the non-payment, short levy, short payment or erroneous refund is on account of fraud, collusion or wilful mis-statement or suppression of facts or contravention of the provisions of the Acts or Rules. The words contravention of any provision of this Act will have to be read 'ejusdem generis' with the words fraud, collusion, wilful misstatement and suppression of facts. The intention of the enactment is that where the manufacturer of goods has made fraudulent claims or has purposely mis-stated facts then the limitation is 5 years. **This proviso will apply only if the**

Department can show that there is some positive act done by the manufacturer which was covered by the words mentioned above. It must be established that the non-payment of duty or short levy or short payment or erroneous refund is on account of fraud, collusion, willful misstatement etc."

65. Assuming but not admitting that Noticee liable to pay service tax, Noticee submits that they have not remitted the service tax on bonafide belief that

a. Residential units are used for personal use of the buyer and excluded from the definition of the complex service

b. As per circular no. Circular No. 108/2/2009- S.T. dated 29-01-2009 not liable for service tax

c. Service tax is not leviable on the amount received towards sale deed

Thus Noticee acted on bonafide interpretation of the provisions of the Act and relevant rules & Notifications issued thereunder. It is settled position of the Law that when the conclusion is arrived on the basis of bonafide belief, the allegation of the suppression of the facts and thereby the invocation of extended period of limitation is not sustainable.

d) Extended period of limitation not invokable when there is no positive act of suppression

66. The Noticee submits that it was held in the case of CCE, Bangalore VsGowri Computers (P) Ltd. 2012 (25) S.T.R.380 (Tri-Bang) *"Though, in the show-cause notice, there was a proposal to impose penalty under Section 78 of the Act "for willful suppression of the value of taxable services rendered by them", there was no allegation of any such suppression elsewhere in the notice in the context of demanding/appropriating Service Tax. Nowhere in the show-cause notice was there any specific allegation of suppression of taxable value, nor was it stated as to how much of the taxable value was suppressed. The show-cause notice also did not allege any of the other ingredients of the proviso to Section 73(1) of the Act for invoking the extended period of limitation. In this scenario, it can hardly be inferred that the show-cause notice invoked the proviso to Section 73(1) of the Act. Mere mention of the proviso to Section 73(1) of the Act in the operative part of the show-cause notice would not suffice. It has, therefore, to be held that the proviso was not invoked by the department. Consequently the appellant's prayer for imposing penalty on the respondent under Section 78 is not acceptable."* From the above case law it is clear that mere mention of the Proviso to Section 73(1) is not sufficient, the department has to prove beyond the doubt that the Noticee has indulged in suppression of the facts with intent to evade the payment of the service tax. It was not happened in the present case therefore the proceedings under the impugned SCN require to be dropped on this count alone.

67. The Noticee submits that the only one allegation in the SCN for invoking extended period of limitation was suppression of facts which is not proper in view of the Supreme Court decision in as much as there is no intention to evade the payment of service tax, therefore the SCN is barred by limitation and requires to be set aside.

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

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

the proviso to Section 11A. Mis-statement or suppression of fact must be willful"

b. T.N. Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC) wherein it was held that - To invoke the proviso three requirements have to be satisfied, namely, (1) that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded; (2) that such a short-levy or short-payment or erroneous refund is by reason of fraud, collusion or willful mis-statement or suppression of facts or contravention of any provisions of the Central Excise Act or the rules made there under; and (3) that the same has been done with intent to evade payment of duty by such person or agent. These requirements are cumulative and not alternative. To make out a case under the proviso, all the three essentials must exist. Further it was held that burden is on the Department to prove presence of all three cumulative criterions and the Revenue must have perused the matter diligently. It is submitted none of the ingredients enumerated in proviso to section 11A(1) of the Act is established to present in our client's case.

c. Padmini Products v. CCE, 1989 (43) ELT 195 (SC) wherein it was held that *"mere failure or negligence on the part of the manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation. Unless*

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

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

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

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

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

70. The Noticee submits that in case of Martin & Harris Laboratories Ltd. v. CCE 2005 (185) E.L.T. 421 (Tri.), and in case of Hindalco Indus. Ltd., v. CCE, Allahabad, 2003 (161) E.L.T. 346 (T), it was held that *"Balance sheet of companies being a publicly available document, allegation of suppression of such information, not sustainable and Extended period is not invokable."* Further if at all part of the activity was to be suppressed then why not suppress the other activities also is a point requiring ponder. As the only basis for invoking the extended period of limitation is this demand under proviso to Section 73(1), which is not sustainable and the same requires to be set aside.

In Re: Interest under Section 75 of Finance Act, 1994

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

72. 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)

In Re: Penalty under Section 77 & 78 of Finance Act, 1994

73. Without prejudice to the foregoing, Noticee submits that penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as to why how penalty is applicable under section 77 of the Finance Act, 1994. Further, the Noticee is already registered under service tax under works contract service and filing returns regularly to the department. Accordingly, penal provisions mentioned under section 77 are not applicable for the present case. As the subject show cause notice has not considered these essential aspects, the proposition of levying penalty under section 77 is not sustainable and requires to be dropped.

74. Noticee submits that in the following two cases, M/s Creative Hotels Pvt. Ltd. Vs CCE, Mumbai (2007) (6) S.T.R (Tri-Mumbai) and M/s Jewel

Hotels Pvt Limited Vs CCE, Mumbai-1 (2007) (6) S.T.R 240 (Tri- Mumbai) it was held that " The authorities below have not given any finding as to why penalty is required to be imposed upon them. Only because penalty can be imposed, it is not necessary that in all cases penalty is required to be imposed. In this case I accept the explanation of the appellant and therefore set aside the penalty and allow the appeal." In the present case, as the subject show cause notice has not provided any reason for imposition of penalty under section 77, the subject show cause notice is not sustainable and requires to be dropped.

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

76. Noticee submits that, they may not interpret the Law as interpreted by the Authority that does not mean that they have an intention to evade the payment of service tax. The dispute regarding the taxability of service tax on construction of residential complex is pending before various Appellate forums. Accordingly, it always involves the interpretation of legal provisions and judicial pronouncements. It is a settled position of Law that when there is an issue of interpretation of the provisions of the Finance Act, 1994 there is no question of imposition of the penalty under

Section 76 of the Finance Act, 1994. In this regard Appellant wishes to rely on the following judgments pronouncements:

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

b. In the case of Ispat Industries Ltd Vs CCE, Raigad 2006 (199) E.L.T 509 (Tri-Mumbai) it was held that *"Apart from holding that the credit was admissible to the appellants on merits, we also find that the demand raised and confirmed against them is hopelessly barred by limitation. Admittedly, the appellant had reflected the fact of availing the balance 50% credit in the subsequent financial year, in their statutory monthly returns filed with the revenue. This fact is sufficient to reflect knowledge on the part of the revenue about the fact of taking balance 50% credit and is also indicative of the bona fides of the appellant. The appellants having made known to the department, no suppression or mis-statement on their part can be held against them.* ***The issue, no doubt involves bona fide interpretation of provisions of law and***

failure on the part of the appellants to interpret the said provisions in the way in which the department seeks to interpret them cannot be held against them so as to invoke extended period of limitation. *When there is a scope for doubt for interpretation of legal provisions and the entire facts have been placed before the jurisdictional, Central Excise Officer, the appellants cannot be attributed with any suppression or misstatement of facts with intent to evade duty and hence cannot be saddled with demand by invoking the extended period of limitation.As much as the demand has been set aside on merits as also on limitation, there is* ***no justification for imposition of any penalty*** *upon them.*

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

d. In the case of Itel Industries Pvt. Ltd Vs CCE, Calicut 2004 (163) E.L.T 219 (Tri-Bang) it was held that *"In view of the facts of this case, we do not find any case or cause to invoke the penal liabilities, as we find that the Commissioner has held "It is*

*essentially, **a question of interpretation of law** as to whether Section 4 or Section 4A would be applicable...." and not sustained the penalty under Section 11AC. We concur with the same. Therefore we cannot uphold the Revenue's appeal on the need to restore the penalty under Section 11AC as arrived at by the Original Authority. As regards the penalty under Rules 173Q & 210, we find the Commissioner (Appeals) has not given any finding why he considered the same as correct and legal in Para 8 of the impugned order. Imposition of penalty under Rules 173Q &210 **on matters of interpretation,** without specific and valid reasons, is not called for".*

On the basis of the above judgments it is clear that whenever due to bonafide interpretation of law service tax not paid penalty is not leviable under section 77,78 of the Finance Act, 1994.

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

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

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

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

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 76& 78.

In Re: *Benefit under section 80*

78. The Noticee submits that Section 80 of the Finance Act, 1994 states that "notwithstanding anything contained in the provisions of section 76, or 77 or first proviso to section 78 of the Finance Act, 1994, no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure."

79. Assuming but not admitting, Noticee further submits that no reasons have been adduced for imposing penalty under Section77 and 78. The authority has ignored the provisions of Section 80 of the Act, as per which no penalty under Sections 77 and 78 shall be imposed on the assessee for any failure, if the assessee proves that there was reasonable and sufficient cause for the said failure. In the present case, the assessee was under bona fide belief that the activities sought to be taxed by the impugned SCN are not liable for the service tax in as much as such activities are not covered under provisions of Finance Act, 1994 and

therefore it is the right case for waiver of the penalty, under Section 80 of the Finance Act, 1994.

80. Without prejudice to the foregoing, Noticee submits that when the tax itself is not payable, the question of penalty under section 77 and 78 does not arise. Further assuming but not admitting, that there was a tax liability as envisaged in SCN as explained in the previous paragraphs, and further also there was a basic doubt about the taxability of activities itself, Noticee is acting in a bona fide belief, that he is not liable to service tax on such activities, there is no question of penalty under section 77 and 78 and resorting to the provisions of Section 80 considering it to be a reasonable cause for not collecting and paying service tax.

81. Noticee submits that when there is 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. Further there cannot be intent to evade payment of duty in such cases and just because the Noticee has interpreted the law differently, it cannot be said that there is intent to evade payment of tax. This does not prove the malafide intent at all, as was decided in -

i. Vipul Motors (P) Ltd. vs Commissioner of C. Ex., Jaipur-I 2008 (009) STR 0220 Tri.-Del

ii. Commissioner of Service Tax, Daman vsMeghna Cement Depot 2009 (015) STR 0179 Tri.-Ahmd.

82. TheNoticee submits that in the case of Bajaj Travels Ltd Vs CST (Delhi) 2012 (25) S.T.R 412 (Del. HC) it was held that *"We are of opinion that in the instant case, the appellant has been able to prove its bona fides. Explanation of appellant for short payment was, already pointed out above, that it was paying the service tax as per its bona fide understanding that it was required to pay the same on commission retained by it and that method of calculation was not clear to the appellant. This explanation gains momentum from the conduct depicted by the appellant after the visiting team of the department had pointed out correct method of computing service tax.The said team of department visited the office of the appellant on 05th September, 2005 and pointed out the irregularity committed by appellant. Once this mistake was realized, without even waiting for the show cause notice, which was issued on 17thOctober, 2005 short fall was made good on 6th September, 2005 i.e. on the very next day after the search. Thus not only the entire tax was paid within two days, so much so, even interest on the delayed payment was made good. This has further to be seen under the surrounding circumstances prevailing at that time. The service tax was a new tax imposed on Air travel agent services. There were many misgivings and confusion which lead to committal of defaults by many such persons. In fact, the department itself issued circular accepting that there was confusion and on that basis penalties in all such cases were waived in respect of those who had paid service tax in response of the said scheme.*

On the basis of the above judgment of the Delhi High Court the Noticee is rightly eligible for the waiver of the penalty under Section 80 of the Finance Act, 1994.

83. Noticee submits that in so far as Section 80 of the Act is concerned, it overrides provisions of Sections77, 78 of the Act and provides that no penalty shall be imposable (assuming but not admitting) even if any one of the said provisions are attracted if the assessee proves that there was reasonable cause for failure stipulated by any of the said provisions. Whether a reasonable cause exists or not is primarily a question of fact.

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

85. The Noticee submits discretion to exercise the power under Section 80 of the Finance Act, 1994 to waive the penalty is an obligation on the authority. It is the duty of the authority to ascertain whether there is any reasonable cause for nonpayment of duty. In the case of KNR Contractors Vs CCE, Thirupathi 2011 (021) 436 (Tri-Bang) it was held that *"Perusal of Section 80 of the said Act, undoubtedly discloses that it will have overriding effect on the provisions of Sections 76, 77 & 78, in the*

sensethat imposition of penalty under any of those provisions is not mechanical exercise by the concerned authority. On the contrary, before proceeding to impose the penalty under any of those provisions of law, the authority is expected to ascertain from the records as to whether the assessee has established that there was reasonable cause for the failure or default committed by the assessee."

86. Therefore Noticee submits authority must exercise power under Section 80 and grant the waiver of the penalty under Section 77 and 78 of the finance Act, 1994.

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

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

For M/s Modi Ventures,

Authorized Signatory

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BEFORE THECOMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, HYDERABAD-II COMMISSIONERATE, 7th FLOOR, KENDRIYA SHULK BHAVAN, BASHEERBAGH, HYDERABAD – 500004

Sub: Proceedings under OR No.163/2014 Adjn (ST) (Commr) Adjn (ST) (Commr.) C.No. IV/16/62/2012 ST Gr.X dated 25.09.2014 issued to M/s Modi Ventures, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

I,Soham Modi, Partner of M/sModi Ventures, 5-4-187/3 & 4, II Floor,Sohan Mansion, MG Road, Secunderabad–500003 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.

For MODI VENTURES

Signature

Executed this on 31st January 2015 at Hyderabad.

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: 31.01.2015

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)