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सीमा शुल्क केन्द्रीय उत्पाद शुल्क एवं सेवा कर के आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX
हैदराबाद-I आयुक्तालय
HYDERABAD - I COMMISSIONERATE
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O.R.No.8 & 9/2016-Hyd-I Adjn (ST) Date: 25.04.2016
(SCN O.R.Nos. 65/2012 & 84/2013-Adjn (ST) (Commr))

मूल आदेश संख्या / ORDER-IN-ORIGINAL No.

HYD-EXCUS-001-COM-003-16-17

(श्री एम। श्रीनिवास, आयुक्त द्वारा पारित)

HYD-EXCUS-001-COM-003-16-17

(Passed by Shri M.Srinivas, Commissioner)

प्रस्तावना
PREAMBLE

1. निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति बिना मूल्य के दी जाती है

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2. जो भी व्यक्ति वित्त अधिनियम 1994 के अंतर्गत धारा 86(1) संशोधित के अधीन आदेश से दुष्प्रभावित हो तो इस प्रकार प्राप्त आदेश निर्णय के खिलाफ सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण के क्षेत्रीय न्यायपीठ, प्रथम तल, HMWSSB भवन, पीछे के हिस्से, खैरताबाद, हैदराबाद 500 004 स्थित रजिस्ट्री के पते पर अपना अपील प्रस्तुत कर सकता है ।

Under Sec.86 (1) of the Finance Act, 1994, as amended, any person aggrieved by this order can prefer an appeal to the Regional Bench of the Customs, Excise and Service Tax Appellate Tribunal having its Registry at 1st Floor, HMWSSB Building, Rear Portion, Khairatabad, Hyderabad-500 004.

3. इस आदेश के प्राप्त होने के तीन महिने के भीतर सेवा कर नियमावली 1994 के नियम 9 (1) के अधीन निर्धारित फार्म एस. टी-5 में अपील दर्ज की जानी चाहिए ।

Appeals must be filed in Form ST-5 prescribed under Rule 9(1) of the Service Tax Rules, 1994 within three months from the date of communication of this order.

4. हर एक अपील का ज्ञापन, प्रत्याक्षेप, स्थगित आवेदन या कोई अन्य आवेदन, फुल स्केप पेपर के एक ओर दुगना स्पेस छोडते हुए स्पष्ट रूप में टंकित किया जाए और इसे समयक रूप से पृष्ठों को क्रमवार जमाते हुए सूचक सहित एवं हर एक कागज पुस्तक को अलग फोल्डर में अधिक मजबूती के साथ नत्थी करना चाहिए ।

Every memorandum of Appeal, cross-objections, stay application or any other application shall be typed neatly in double spacing on one side of the full scape paper and the same shall be duly paged, indexed and tagged firmly with each paper book in a separate folder.

5. सीमा शुल्क उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण कार्यविधि नियमावली 1982 के नियम 13 के अधीन यथा अपेक्षित यदि अपील पर प्राधिकृत प्रतिनिधि द्वारा अपीलकर्ता की ओर से अपील एवं हस्ताक्षर करने के दस्तावेज सहित अधिकरण के क्षेत्रीय न्यायपीठ के सहायक रजिस्टार के नाम से राष्ट्रीयकृत बैंक से प्राप्त मूल्य की रेखित बैंक ड्राफ्ट के साथ अपील प्रस्तुत की जानी चाहिए एवं बैंक की शाखा हैदराबाद में स्थित बैंक के अधीन होनी चाहिए। केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की संशोधित धारा 35F के अधीन 7.5% की अनिवार्य पूर्व जमा राशि के साथ किया जाना चाहिए अपील मांग की है या जुर्माना लगाया था दोनों और देय पूर्व जमा की गई राशि 10 करोड़ रुपये की सीमा के अध्यधीन होगा।

The appeal must be accompanied by a crossed Bank Draft for a sum as applicable obtained from a Nationalised Bank drawn in favour of the Assistant Registrar of the Regional Bench of the Tribunal and should be on the branch of bank at Hyderabad; and the documents authorizing the representative to sign and appeal on behalf of the appellant if the Appeal is signed by authorized representative, as required under Rule 13 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. Under Section 35 F of Central Excise Act, 1944, the appeal also must be accompanied by mandatory pre-deposit amount of 7.5% of the duty demanded or penalty imposed or both and the amount of pre-deposit payable would be subject to a ceiling of Rs.10 Crore.

M/s. Mehta & Modi Homes, 5-4-187/3 & 4, 1st Floor, MG Road, Secunderabad-500 003 (hereinafter referred to as 'the assessee') were engaged in providing Construction of Complex service and Works Contract Service. Mehta & Modi Homes was a partnership firm and got themselves registered with department on 17.08.2005 under "Construction of Complex Service" and under "Works Contract Service" on 29.02.2008 vide STC No. AAJFMO647CST001.

2. On gathering intelligence that Mehta & Modi Homes was not discharging the service tax liability properly, investigation was taken up by the department. It was found that Mehta & Modi Homes had undertaken 3 (three) projects in the year 2004; Sliver Oak Bungalows (Phase I); Silver Oak Bungalows (Phase II) and Silver Oak Bungalows (Phase III) at Cherlapally village, Ghatkesar Mandal, Ranga Reddy District and received amounts from customers from April, 2006 to December, 2010 towards sale of land and agreements for construction. In the said projects, they entered into sale deed, mid agreement for construction with their customers in respect of 290 flats. They had paid the Service Tax under Construction of Complex service availing abatement under Notification No. 1/2006-ST, dated 1.3.2006 (as amended) and under "Works Contract service" availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. They informed that they had not availed Cenvat credit during the period 01.04.2006 to 31.12.2010. It was also found that they stopped payment of Service Tax on receipts from 01.01.2009 by misinterpreting the clarification of the Board vide Circular No. 108/02/2009-ST dated 29.01.2009.

2.1 Accordingly, a Show Cause Notice O.R.No. 128/2011-Adjn (ST) Commissioner dated 24.10.2011 was issued to the assessee demanding an amount of Rs. 22,72,979/- towards Service Tax (inclusive of Education and Secondary and Higher Education Cess) on the Construction of Complex Service for the period from 01.04.2006 to 31.05.2007 and Rs.5,66,04,153/- towards Service Tax (inclusive of Ed. and Secondary Higher Ed. Cess) on the "Works Contract Service" for the period from 01.06.2007 to 31.12.2010. The said notice was issued demanding the Service Tax on the amounts received towards Agreement of Construction executed with various customers in respect of the 3 (three) ventures mentioned above.

3. The jurisdictional Superintendent vide letter C.No. IV/16/256/2011-ST.Gr.III dated 31.01.2012, 07.03.2012 and 15.03.2012, called for the details of amounts received from January, 2011 to December, 2011 in respect of the three ventures Silver Oak Bungalows (Phase I), Silver

Oak Bungalows (Phase II) and Silver Oak Bungalows (Phase III). The assessees were also requested to intimate regarding any new ventures have been taken up by them.

3.1. The assessees vide their letter dated 07.02.2012 submitted the details of amounts received during the period from January, 2011 to December, 2011 and also informed that they had computed service tax liability for the period January, 2011 to December, 2011 under "Works Contract Service Composition Scheme" on the amounts realized in excess of sale deed value at the rate of 4.12%, which resulted in a tax liability of Rs.17,74,315/- and that they had remitted Rs.9,23,908/- by way of cash and Rs, 57,635/- by CENVAT and that the balance of Rs.7,92,772/- would be remitted at the earliest. The assessee had submitted the total details of the amounts received by them from each prospective purchaser, during the period from January, 2011 to December, 2011.

3.2. As stated by the assessees during the said period they received a total amount of Rs.6,96,62,033/-. Out of this an amount of Rs.1,65,69,000/- towards Sale Deed; Rs.1,00,27,134/- was received towards taxes, other charges, Advances mid refunds and Rs.4,30,65,899/- towards Development charge/agreement for construction/additions and alterations and other charges. Since, the projects were own ventures, it appeared that the assessees were required to pay service tax on all the amounts received after execution of sale deed. Thus, Rs.1,00,27,134/- received towards other charges and Rs.4,30,65,899/- towards construction and development were chargeable to service tax. Therefore, it appeared that the assessees were liable to pay Service tax on taxable amount of Rs.5,30,93,033/-.

4. The above three ventures of Mehta & Modi Homes were residential complexes as they contain more than 12 (Twelve) residential units with common area and common facilities like common water supply etc., and the layouts were approved by the concerned authorities. As seen from the records submitted, the assessees had entered into a sale deed for sale of undivided portion of land together with semi-finished portion of the flat and an agreement for construction, with their customers. On execution of the sale deed, the right on the property got transferred to the customer, hence the construction service rendered by the assessees thereafter to their customers under agreement of construction are taxable under service lax as there exists service provider and service recipient relationship between them. As transfer of property involved in the execution of the contract, it appeared that the services rendered by them after execution of sale deed against agreements of

construction were taxable services under "Construction of Complex Service"/"Works Contract Service".

4.1 As per the exclusion provided in Section 65(91a) of the Finance Act, 1994 the residential complex was not including a complex which was constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such, complex if intended for personal use as residence by such a person. It was 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 was 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/ develop constructs residential complex consisting of number of residential units and sells those units to different customers. So in such cases the construction of complex was not meant for one individual entity. Therefore, as the whole complex was not constructed for single person the exclusion provided in Section 65(91a) of the Finance Act, 1994 doesn't apply. Further, the builder/promoter/developer normally enters into construction/ agreements after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/ developer and the stamp duty was paid on the value consideration shown in the sale deed. As regards 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 under such services were leviable to service tax.

5. As per the Board's Circular No.128/10/2010-ST dated 24.08.2010, the service rendered by Mehta & Modi Homes during the period 01.04.2006 to 31.5.2007 were apparently classifiable under "Construction of Complex Services" and services rendered during the period from 01.06.2007 were classifiable under "Works Contract Services" as the said project was a continuous long term contract/project.

6. 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.

6.1 An optional Composition scheme for payment of Service Tax in relation to Works Contract Service was envisaged vide Notification No. 32/2007-ST dated 22.5.2007, effective from 01.06.2007, under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Under the said scheme, an assessee was liable to pay an amount equivalent to two percent of the gross amount charged for the Works Contract, excluding the Value Added Tax (VAT) or Sales Tax paid on transfer of property of goods involved in the execution of Works Contract. With effect from 01.03.2008 onwards, the said rate of 2% (Basic Excise Duty) was changed to 4% (Basic Excise Duty) vide Notification No. 7/2008-S.T dated 01.03.2008.

6.2 In terms of the Board Circular No.128/10/2010-ST dated 24.08.2010, it appeared that the amounts received towards construction agreement after 01.06.2007 are classifiable under "Works contract services". Mehta & Modi Homes had executed works in respect of 3 (three) projects during the period 01.01.2011 to 31.12.2011 viz. Silver Oak Bungalows (Phase-I) Silver Oak Bungalows (Phase-II) Silver Oak Bungalows (Phase-III) and all the three projects were started in the year 2004 and hence were ongoing Works Contracts. As clarified vide Board Circular dated 24.8.2010, the subject projects apparently were ongoing Works contracts and assessees had paid service tax under "Construction of Complex services". Hence it appeared that these projects were not eligible for Composition Scheme under "Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007".

6.3 It was apparent that as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, the value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract and the gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract.

6.4 Mehta & Modi Homes had not furnished the particulars of value of transfer of property or goods involved in the execution of the Works contract. Hence, the deduction of value of materials as envisaged under Rule 2A of Service Tax (Determination or Value) Rules, 2006 could not be done. Thus, the gross value received was taken as the value of the taxable service quantified under Rule 2A of the Service (Determination of Value) Rules, 2006. Hence, the value of the amounts received towards agreement of constructions from

January, 2011 to December, 2011 were taken as the value of the taxable service quantified under Section 67 of the Act and Rule 2A of the Service (Determination of Value) Rules, 2006 and service tax was calculated @10.30%.

7.0 For the period from 01.01.2011 to 31.12.2011, Mehta & Modi Homes, had collected an amount of Rs.5,30,93,033/- against agreements of Construction, development and other charges related to on-going works contracts. The Service Tax liability on these amounts worked out to Rs.54,68,882/- (Service Tax of Rs.53,09,303/-, Education Cess of Rs. 1,06,186/- and Secondary & Higher Education Cess of Rs.53,093/-). However, Mehta & Modi Homes had paid an amount of Rs.9,23,908/- by cash and Rs.57,635/- by CENVAT, totaling to Rs.9,81,543/- towards service tax during the period 01.01.2011 to 31.12.2011. Thus, they had short paid an amount of Rs. 44,87,039/- on the "Works Contract services" provided by them during this period. Mehta & Modi Homes were well aware of the provisions and of liability of Service tax on receipts agreements for Construction and had not assessed and paid service lax properly as per Section 68 of Finance Act, 1994. Hence, short paid service lax partible by Mehta & Modi Homes appears to be recoverable under Sub Section (1) of Section 73 of the Finance Act, 1994, along with interest under Section 75 of the Finance Act, 1994.

7.1 From the foregoing, it appeared that Mehta & Modi Homes, had contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 inasmuch as they did not pay 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 inasmuch as they had not shown the amounts received for the taxable services rendered in the statutory Returns 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, thereby had rendered themselves liable for penal action under Section 77 and 76 of the Finance Act,1994.

8. In view of the above, show cause notice bearing O.R.No. 65/2012-Adjn(ST)(Commr.) C.No. IV/16/179/2011-ST (Gr.III) dated 10.04.2012 was issued to Mehta & Modi Homes, Secunderabad requiring them to show cause to the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, as to why:-

i) an amount of Rs. 54,68,582/- towards Service Tax inclusive of cesses) on the "Works Contract Services" provided by them during the period 01.01.2011 to 31.12.2011 should not be demanded under Section 73(1) of the Finance Act, 1994; and an amount of Rs. 9,81,643/- already paid towards Service Tax, Inclusive of cesses, during the period 01.01,2011 to 31.12.2011 should not be

appropriated against the above payable amount;

ii) interest should not be paid by them on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994;

iii) penalty should not be Imposed on them under Section 77 of the Finance Act, 1994;

iv) penalty should not be imposed on them under Section 76 of the Finance Act, 1994, for failure to pay service tax, in contravention of Section 68, ibid.

8.1 Another show cause notice bearing O.R.No. 84/2013-Adjn.ST (ADC) C.No. IV/16/256/2010-ST (Gr.III) dated 03.12.2013 was issued to M/s Mehta & Modi Homes, Secunderabad requiring them to show cause to the Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, as to why:-

(i) An amount of Rs.25,29,830/- towards Service Tax (including Education Cess and Secondary and Higher Education Cess) should not be demanded on the services of "Works Contract Service" provided by them during the period 01.01.2012 to 30.06.2012, under Section 73(1) and 73(1 A) of the Finance Act, 1994, as amended;

(ii) Interest on the amount of Service Tax not paid as mentioned at (i) above should not be paid by them in terms of Section 75 of the Finance Act, 1994.

(iii) Penalty should not be imposed on them under Section 76 of the Finance Act, 1994 for failure to pay Service Tax.

(iv) Penalty should not be imposed on them under Section 70 of the Finance Act, 1994 in as much as they did not file the statutory Returns for the services stated above.

9. The assessee, vide their letter dated 20.06.2012, replied to the show cause notice, wherein they, interalia, submitted as under:-

(i) The SCN has not appropriately considered the nature of activity, the perspective of the same, documents on record, the scope of activities undertaken and the nature of activity involved, creating its own assumptions, presumptions and surmises, ignoring the statutory provisions. The Hon'ble Supreme Court in the case of Oudh Sugar Mills Limited v. UOI-1978 (2) ELT 172 (SC) has held that such show cause notices are not sustainable under the law. On this count alone the entire proceedings under SCN requires to be dropped and the refund has to be granted.

(ii) It was specifically clarified vide Board Circular No. 108/2/2009- S.T. dated 29.01.2009 that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of residential complex as defined under 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction.

(iii) The activity undertaken by them was squarely covered by the Board's Circular i.e. they had entered into a construction contract with the ultimate owner who shall use the said property for his personal use subsequently.

(iv) The argument was in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been provided based on the examination of the above argument among others.

(v) The final clarification was provided by the board based on the preamble and the arguments. The clarification provided was that in the under mentioned two scenario service tax is not payable:-

- For service provided until the sale deed has been executed to the ultimate owner.
- For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

(vi) It was exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore this clarification was applicable to them ibid.

(vii) Circular has been very narrowly interpreted by the department without much application of mind and has concluded that if the entire complex was put to personal use by a single person, then it was excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it was very clear that the very reason for issuance of the circular was to clarify the applicability of residential unit and not the residential complex.

(viii) Where an exemption was granted through Circular No. 108/2/2009-S.T., dated 29.1.2009, the same could not be denied on unreasonable grounds and illogical interpretation as above. In the definition *"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."* Since the reference is "constructed by a person" in the definition, it could not be interpreted as "complex which was constructed by ONE person". similarly the reference "personal use as residence by such person" also could not be interpreted as "personal use by ONE persons". Such interpretation would be totally against the principles of interpretation of law and also highly illogical. With the above exclusion, no service tax was payable at all for the consideration pertaining to construction service provided for their customer and accordingly the SCN was void abinitio.

(ix) Without prejudice to the foregoing, the development and construction of a bungalow/Villa was done for the owner of the plot, who in turn used such bungalow/Villa for his personal use. Further, it was very important that for each such land/plot owner an agreement has been executed independently and also permission for construction of bungalow/Villa was independently applied by the owner of the land/plot and hence the same makes was independent by itself.

(x) Without prejudice to the foregoing, the independent house will not come under the ambit of the definition of residential complex as defined under Section 65(9 la) of the Finance Act, 1994. From the definition it was clear that all the conditions has to be satisfied cumulatively that is the complex would be having 12 residential units, there should be a common area to be shared and common facilities.

(xi) Each agreement/contract entered with the customer was for a residential bungalow/villa, which was independent, covered by a separate plan sanction having separate ownership and in such bungalow/villa there was no 12 units, no common area has been shared and no common facilities has been shared, therefore the same was not a residential complex and no question of payment of service tax on such independent bungalow/Villa.

(xii) Without prejudice to the foregoing, the Board had specifically clarified that independent bungalow or houses would not attract service tax vide Circular F. No. 332/35/2006-TRU, dated 1.8.2006.

(xiii) The show cause notice was issued contrary to the directions of the CBEC Circular 108/02/2009 S.T. dated 29.01.2009. The entire proceedings under the subject SCN was void abinitio and should be quashed as per the judgment of the Hon'ble Supreme Court in the case of Commissioner of Customs, Calcutta & Others v. Indian Oil Corporation Limited & Another, (2004) 3 SCC 488.

(xiv) Without prejudice to the foregoing, the decision of the Hon'ble Chennai Tribunal in case of Macro Marvel Projects Ltd. Vs Commr. of Service Tax, Chennai 2008 (012) STR 0603 Tri.-Mad which specifically held that individual houses were not taxable.

(xv) Without prejudice to the foregoing, assuming but not admitting Service Tax, if any was payable under the head Works Contract, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006. It was unreasonable to hold that material value was nil in any construction activity merely on the ground that material value was not furnished by them in their correspondence dated 07.02.2012, the same was not furnished as it was not asked for by the department, therefore it does not lead to a conclusion that the same was nil without being given an opportunity of being heard. The material consumption for the period January, 2011 to December, 2011 is Rs.2,98,60,284/- and submitted a detailed statement showing month-wise consumption of materials.

(xvi) The impugned SCN should be quashed and set- aside as it was issued without following the Principles of Natural Justice. It is a well-known Principle of Natural Justice - Audi Alteram Partem - as the maxim denotes that no one should be condemned unheard. The impugned SCN was issued without giving the opportunity to be heard and placed reliance on Circular No. 65/2000-Cus dated 27.07.2000.

(xvii) Without prejudice to the foregoing, the value of Work Contract Service shall be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006 which is equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract. In the instant case, Value of Works Contract is Rs.4,30,65,899/- and Value of Material involved in execution of Work Contract is Rs.2,98,60,284/-. Therefore, in view of rules ibid the taxable amount is only Rs. 1,32,05,615/- on which tax @10.30% is Rs. 13,60,178/- only. However, they had already discharged an amount of Rs.9,23,908/- prior to issue of SCN, Rs.7,92,772/- was paid vide challan on 21.02.2012 and Rs.57,635/- was utilized from available Cenvat Balance.

(xviii) Where the Value of Work Contract Service shall is determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, he shall also be entitled to utilize Cenvat Credit on Inputs, Input services and Capital goods which is Rs.57,635/- and Rs. 2,98,60,284/- Goods consumed in enhance of Work Contract.

(xix) Hence, service tax is to be levied on Rs.4,30,65,899/-. Thus, the service tax liability shall amount to Rs. 17,74,315/-. Out of the said amount, Rs.9,23,908/- was paid earlier to the issuance of notice and the balance of Rs.7,92,772/- was paid vide Challan dated 21.02.2012.

Therefore, the entire liability was discharged by them. Hence, the notice was required to be set aside and submitted copies of the challans.

(xx) In so far as levying service tax on the value of materials involved in the said Works Contract was concerned, it was Ultra-Vires the constitution as Article 265 of Constitution of India clearly stated that No tax can be collected without the authority of law. In the present case, Department has no authority to levy Service Tax on the materials portion involved in the contract. Reliance in this regard was placed on the decisions of the Hon'ble Supreme Court in the case of Builders' Association of India & Ors. v. Union of India & Ors. [(1989) 2 SCC 645] and M/s. Gannon Dunkerley & Co. & Ors. v. State of Rajasthan & Ors. [(1993) 1 SCC 364].

(xxi) With respect to long term works contract entered into prior to 01.06.2007 i.e. (the day on which the Works Contract Service came into effect) and were continued beyond that date the Board had clarified certain issues vide its Circular No. 128/10/2010-ST dated 24.08.2010.

(xxii) The clarifications provided by the said circular was totally illogical inasmuch as it was concerned with payment of service tax in relation to contract entered prior to 01.06.2007. Works Contract Service was introduced under the service tax regime only on 01.06.2007. Notification 32/2007 dated 22.05.2007 provided an option to the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two per cent of the gross amount charged for the works contract. An assessee does not have a super natural power to foresee the introduction of new service and pay service tax under the schemes introduced therein. Therefore, the option to pay under composition scheme could be exercised by him on or after the date of issue of the Notification and not at any time before that.

(xxiii) Without prejudice to the foregoing provisions, assuming the benefit of composition scheme is available as articulated by Rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was available only where an option has been exercised prior to payment of service tax in respect of a particular works contract. In this regard, it is pertinent to discuss what a contract was. Can it be said that entire project of Gulmohar Gardens is a Contract? According to Section 2 sub-section (7) of The Indian Contract Act, 1872, contract was defined as "an agreement enforceable by law"; In this regard, it was important to note that they enters into an individual agreement to sell for each unit in the Project Gulmohar Gardens. Later, a sale deed was executed to enforce each such agreement to sell. A sale deed is governed by The Registration Act, 1908 and was an important document for both the buyer or the transferee and the seller or the transferor. A sale deed is executed after the execution of the agreement to sell, and after compliance of various terms and conditions between the seller and the purchaser mutually. Therefore, each contract (sale deed) entered into with each owner was a separate works contract and benefit of composition should be given to each contract entered into on or after 01.06.2007 and where payment has not been made otherwise than for composition scheme. Out of Rs. 4,30,65,899/- an amount of Rs.409.56 Lakhs was received towards consideration for individual

- Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (New Delhi - CESTAT)

(xxx) Without prejudice to the foregoing, assuming but not admitting that service tax on said service is payable, penalty under Section 77 and Section 76 of the Finance Act, 1994 should not be imposed as there was a reasonable cause for the said failure as there was a fit case for waiver of penalty under Section 80 of the Finance Act, 1994.

(xxxi) They requested an opportunity of personal hearing.

10. The show cause notice in O.R.No. 65/2012-Adjn (ST)(Commr) dated 10.04.2012 was issued by the Commissioner of Customs, Central Excise & Service Tax, Service Tax Commissionerate, Hyderabad and notice in O.R.No. 84/2013-Adjn (ST)(Commr) dated 03.12.2013 was issued by the Additional Commissioner, Service Tax Commissionerate, Hyderabad. Corrigendum dated 02.01.2015 was issued to the second notice asking the assessees to show cause to the Commissioner of Service Tax, Service Tax Commissionerate, Hyderabad. The notices were assigned for the purpose of adjudication to the Commissioner, Hyderabad-I Commissionerate as per letter C.No.IV/16/02/2015-(HZ) Tech dated dt. 05.02.2016 by the Chief Commissioner, Hyderabad Zone in terms of Notification No.06/2009-ST dated 30.01.2009. Accordingly, corrigendum dt. 09.02.2016 were issued asking the assessees to show cause to the adjudicating authority for the subject notice. As both the notice pertain to the same assessees for the same subject and as they are periodical in nature, I take up common adjudication proceedings for both the notices.

11. Shri P. Venkata Prasad, Consultant appeared for the personal hearing and requested to adjudicate both the show cause notices together under common proceedings as the issue involved was the same, although they pertain to different periods. They reiterated their submissions made in the replies to the show cause notices and further stressed the following points:-

(i) They did not construct residential complexes. They constructed individual villas which did not qualify as residential complex, hence service tax levy was not attracted under CRCS. As they did not qualify as CRCS, it could not come under WCS either. Therefore, the demand was not enforceable on merits.

(ii) They had already received a stay order against the earlier OIO on the same subject vide CESTAT Misc. Order No. 23565/2014 dt. 26.06.2014.

(iii) Notwithstanding the above submissions, alternatively he contended that the service was classified as WCS, they were eligible for compound levy @ 4.12%. Hence, the demand should

construction contracts with customers that were executed only after 01.06.2007.

(xxiv) In so far as finding in Para 5.1 is concerned the conclusion as to the said project was continuous long term contract/project goes to shows the confused state of mind of the authority passing the order. It was important that while interpreting statue or any circular no word should be added or deleted, so assuming or substituting long term contract with long term project was unwarranted and not justified.

(xxv) Without prejudice to the foregoing, assuming but not admitting that amount erroneously paid if considered service tax, they drew attention to the Rule 3(1) of the said rules. For the purpose of gross amount rule ibid prescribes that amount of VAT and other taxes paid on goods involved in contract shall be excluded. Therefore, Rs. 100.27 Lakhs was received from customers towards service tax, VAT & registration charges. Hence, even for arriving at value as per works contract out of receipts of Rs.43.65 lakhs Rs. 100.27 should be excluded.

(xxvi) Without prejudice to the foregoing, on close reading of Rule 3(1) and Rule 3(3) it clearly specified that instead of paying service tax at the rate specified under Section 66 composition rate may be opted and such option can be opted before paying service tax in respect of the said works contract, therefore the service tax so referred in Rule 3(3) was only the service tax paid at normal rates under works contract service only and not under any other service.

(xxvii) It was also a well settled principle of law that the law does not compel a man to do that which he cannot possibly do and the said principle was well expressed in legal maxim "lex non cogit ad impossibilia" which was squarely attracted to the facts and circumstances of the present case. The unforeseen circumstances beyond their control if resulted in payment of service tax under taxable service as existed at that point of time, substantial benefit extended under another service introduced at later point of time cannot be denied. Reliance in this regard was placed on the decision of the Hon'ble Special Bench in the case of Sundaram Fasteners Ltd. Vs. Collector of Central Excise, Madras – 1987 (29) ELT 275. Therefore, the benefit of composition scheme should be extended on or after 01.03.2007 in respect of contracts entered prior to such date and classifiable as "Works Contract".

(xxviii) Without prejudice to the foregoing, when service tax itself was not payable, the question of interest and penalty does not arise. It was a natural corollary that when the principal was 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).

(xxix) Assuming but not admitting the levy of service tax, the penalty was not imposable on them and their case was a fit case for waiver of penalty on the grounds that reasonable cause, bona fide belief and confusion, interpretation issues involved were involved in the case. Further, no evidence was brought on record by the Department to prove contravention of various provisions of Finance Act, 1994 by them only with intent to evade the payment of service tax. In this scenario, imposition of penalties upon them was not justified. Reliance in this regard was placed on the following case laws:-

- Hindustan Steel v. State of Orissa [1978 (2) B.L.T. J159 (S.C.)
- Eta Engineering Ltd. v. Commissioner of Central Excise, Chennai - 2006 (3) S.T.R. 429 (Tri.-LB) = 2004 (174) E.L.T. 19 (Tri.-LB)
- Ramakrishna Travels Pvt Ltd- 2007(6) STR 37(Tri-Mum)

be restricted by working out @ 4.12% on the value in excess of the value of the sale deed. The value of sale deed was covering the value of land and semi-finished villa.

(iv) As they had already paid the amount of service tax on service component of the villa, there should not be any other liability. Requested to decide the matter in their favour.

12. I have carefully gone through the relevant records and submissions. The main issues for decision are:-

i. Whether the services provisioned by the assessees for the period 01/2011 to 12/2011 and 01/2012 to 06/2012 are classifiable under WCS as proposed in the notice?

ii. Whether the assessees are liable for payment of service tax amounting to Rs. 54,68,582/- and Rs. 25,29,830/- respectively as alleged in the subject notices?

iii. Whether the assessees are liable for penalty under Section 76 and 77 of the Finance Act, 1994?

12.1. In the instant case, the demand of Service Tax was made against the noticee on the provision of service under the category of "Works Contract Service" for the period from 01.01.2011 to 30.06.2012. The nature of activity in the instant case was that the noticee undertook construction of three projects viz., Silver Oak Bungalows (Phase I), Silver Oak Bungalows (Phase II) & Silver Oak Bungalows (Phase III) having more than 12 residential units in each project. Consequent to sale deed for semi-finished residential units, they entered into agreement of construction/completion with individual buyers of residential units.

13. It was contended by the noticee that the independent house will not come under the ambit of definition of residential complex inasmuch as the conditions mentioned in the said definition except common facilities were not satisfied. It was further contended that the construction of residential units for individual prospective buyers intended for personal use were outside purview of Service Tax in terms of Section 65(91a)(iii) of the Finance Act, 1994 and Board's Circulars No.108/2/2009-ST dated 29.01.2009, F.No. 332/35/2006-TRU dated 01.08.2006 and Board's letter F.No. B1/6/2005- TRU dated 27.07.2005 and as such there was case to levy of Service Tax. In this regard, it is pertinent to look into relevant provisions of the Finance Act, 1994, which are reproduced hereunder:

Section 65(91a) of the Finance Act, 1994:

"(91a) "residential complex" means any complex comprising of—
(i) a building or buildings, having more than twelve residential units;
(ii) a common area; and
(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.
Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;
(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

13.1. On a careful reading of the above provisions, it is abundantly clear that the residential complex means any complex comprising of a building or buildings having more than 12 residential units, a common area and common facilities located in a premises which is approved by an authority under any law. It has clearly been brought out in the notice that the each project comprises of more than 12 residential units, having common area & common facilities and also the layouts of the same were duly approved by the competent authorities. Having conceded that the projects were having common facilities, the argument put forth by the noticee that the other conditions mentioned in the definition were not fulfilled is not acceptable and without any basis. It is of common knowledge that any layout which provides for common facilities will automatically have common area. Hence, the contention of the noticee is not acceptable. As regard to their contention that the residential unit is intended for personal use, it is clear from the statutory provisions that if a complex is constructed by a person directly engaging any other person for designing or planning and the construction of the said complex is intended for personal use then such service is excluded from the levy of Service Tax. However, the said exclusion is not applicable to the individual residential unit in a project having more than twelve residential units. Further, as rightly contended by the noticee that while interpreting the statutory provisions of the law no words should be added or deleted. Further, when the law is unambiguous, the same needs to be implemented in letter & spirit and without any deviation to it. From the above, the intent of the legislature is very clear that construction of entire residential complex which is intended for personal use is excluded from levy of Service Tax and not the single residential unit in a complex. In this regard, I rely on the ratio of the following judgements:

(i) State Vs. Parmeshwaran Subramani [2009 (242) ELT 162 (SC)]

"15. In a plethora of cases, it has been stated that where, the language is clear, the intention of the legislature is to be gathered from the language used. It is not the duty of the court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain. The court cannot rewrite the legislation for the reason that it had no power to legislate. The court cannot add words to a statute or read words into it which are not there. The court cannot, on an assumption that there is a defect or an omission in the words used by the legislature, correct or make up assumed deficiency, when the words are clear and unambiguous. Courts have to decide what the law is and not what it should be. The courts adopt a construction which will carry out the obvious intention of the legislature but cannot set at naught legislative judgment because such course would be subversive of constitutional harmony".

(ii) UOI Vs. Dharmendra Textile Processors [2008 (231) ELT 3 (SC)]

"It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements."

13.2. Further I find that, the Hon'ble CESTAT, Chennai Bench, in case of M/s.LCS City Makers Pvt. Ltd., vs. CST, Chennai (Final Order No. 507/12 dated 03.05.2012 – 2012-TIOL-618-CESTAT-MAD), wherein, held that the exclusion in the definition of the service is for a complex intended for personal use and the clause cannot be applied to individual flats in a complex. Further, in the circulars relied upon by the noticee, it was categorically been clarified that when the ultimate owner enters into a contract for construction of a ***residential complex*** with a builder and after such construction the owner receives such property for personal use then the same is excluded as per the definition provided under Section 65(91a) of the Finance Act, 1994. Thus, it is clear that the noticee failed to appreciate the provisions of statute and content of the said circulars. It is also pertinent to mention that it was clearly brought out in the show cause notice that the demand of Service Tax is in consonance with the Board's Circular dated 29.01.2009.

13.3 Further, I find that with effect from 01.07.2010, an explanation was inserted in sub-clause (zzzh) of clause 105 of Section 65 of the ACT, as under:-

"Explanation : For the purpose of this sub-clause, the "construction of a complex", which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorized by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer."

13.4 A plain reading of the above explanation indicates that any amount received towards construction of complex intended for sale is subjected to levy

of Service Tax under the category of construction of complex service, if the said amount is received before grant of completion certificate by the competent authority. In other words, even sale of constructed complex is deemed service and the same is subjected to levy of Service Tax, in case the same had taken place before grant of completion certificate by the competent authority, which was hitherto exempted from levy of Service Tax under the category of construction of complex service. However, in the instant notice, the amounts received from each individual customer to the extent of sale deed value were already excluded from the value of taxable services for the purpose of computation of Service Tax. Thus, there is no demand of Service Tax on the value corresponding to the sale of residential units and demand was made only on the amounts received from the customers towards construction agreement i.e., post execution of sale deed. Hence, there is no case for the noticee inasmuch as their contention was already considered positively in the demand notice itself.

13.5 As such in view of the clarification issued by the Central Board of Excise and Customs vide the Circular cited supra and in view of the explanation inserted in sub-clause (zzzh) of clause (105) of Section 65 of the ACT, I come to the conclusion, that, the activity of the assessees provisioned by the assessees for the period 01/2011 to 06/2012 fall under the ambit of "Construction of Residential Complex Services".

13.6. It is an undisputed fact that Work contract services is an umbrella of services, which covers contract relating to: (i) erection, commissioning or installation, (ii) construction of new building or a civil structure/pipeline, (iii) construction of a new residential complex or a part thereof, (iv) completion and finishing services etc. and (v) turnkey projects. Even assuming that the services provisioned by the assessees are covered under WCS, the specific description of the activities rendered by the assessees fit into the ambit of construction of residential complex services. When there is a clear and unambiguous service available for categorization of certain services, I find that there is no necessity to classify the service under a different service. There are a plethora of judgments wherein it was consistently held that when specific classification of service is available, there is no need for classifying a specific service under a general one. The CBEC vide various circulars issued for the period 2009 to 2012 clarified the stand to be taken with respect to interpretation of the activities relating to construction of residential complex service. I find that the services provisioned by the assessees are squarely covered under the ambit of "Construction of Residential Complex Service."

14. Moreover, as categorically mentioned in the show cause notice,

classification of the service under WCS was optional – for the purpose of compounded levy. Even to classify the subject activity under WCS, it ought to fall under any one of the services specified under the said umbrella of service. Once it falls under Construction of Residential Complexes, it ought to be examined with reference to its taxability under Section 65 (105) (zzzh) and its explanation inserted w.e.f, 01.07.2010 and it still remains taxable even under WCS w.e.f. 01.07.2010.

15. In view of the above facts, discussion and findings, I classify the subject services provisioned by the assessees for the period from 01.04.2012 to 31.12.2012 under Construction of Residential Complex Service. I find that the ratio of the decisions of the following cases are squarely applicable in support of my decision that the services provisioned by the assessees fall under CRCS for the subject period involved in both the notices.

1. CCE, Chandigarh vs Skynet Builders, Developers, Coloniser, CESTAT, New Delhi - 2012 (027) STR 0388 –(Tri. Del).

Construction of Residential Complexes - Period in dispute prior to enactment of Finance Act, 2010 - Impugned order holding no service to prospective buyers and construction for assessee's benefit to meet contract for sale of future flats to be constructed - Impugned order passed prior to addition of explanation to Section 65(105)(zzzh) of Finance Act, 1994 - Reliance on explanation by Revenue - HELD : Issue of explanations retrospective effect decided in Shrinandnagar's-IV Co-op. Housing Society Ltd. [2011 (23) S.T.R. 439 (Guj.)] against Revenue - In view of entry in force during relevant period and CBEC clarification till 2009, Revenue's case fails on merits - Section 65(105) (zzzh) ibid. [paras 4, 5, 6, 12).

2. CCE, Chandigarh vs. UB Construction Pvt Ltd, CESTAT, New Delhi:

Construction of Complex service prior to 1-7-2010 - Assessee paid Service Tax after abatement of cost of land - Explanation added to Section 65(105)(zzzq) and 65(105)(zzzh) w.e.f. 1-7-2010 prospective in nature as it expands scope of taxable service, provided by builder to buyer pursuant to intended sale of property before, during or after the construction - No liability on assessee to remit Service Tax under the then extant legislative regime - Section 65(30a) read with Section 65(91a) of Finance Act, 1994 - Section 65(105)(zzq) and 65(105)(zzzh) of Finance Act, 1994. [2012 (25) S.T.R. 305 (Bom.) followed]. [paras 1, 5, 6].

3. M/s. Krishna Homes vs. CCE, Bhopal, CESTAT, New Delhi – 2014 (034) STR – 0881(Tri-Del).

Construction of Residential Complex - Liability of Builder/Promoter/ Developer - Construction of residential units against payment by prospective buyers in instalments during construction and transfer of possession upon completion of complex and full payment by customers - Engaging of contractors for undertaking construction and finishing work - HELD : C.B.E. & C. Instruction F. No. 332/35/2006-TRU, dated 1-8-2006 clarifying contractor liable to Service Tax on gross amount charged - Addition of Explanation to Section 65(105)(zzzh) of Finance Act, 1994 w.e.f. 1-7-2010 expanding scope of impugned section - Impugned amendment held by Tribunal in UB Construction (P) Ltd. [2013 (32) S.T.R. 738 (Tri.-Del.)] as prospective

amendment - In view of Apex Court judgment in Larsen & Tourbo Ltd. [2014-(34) S.T.R. 481 (S.C.)], agreement between builders with prospective customers to be treated works contract - Works contract involving transfer of immovable property taxable w.e.f. 1-7-2010 - Therefore, contracts during period prior to impugned date not covered by Section 65(105)(zzzh) ibid - Sections 65(30a), 65(91a) and 65(105)(zzzh) of Finance Act, 1994. [paras 8, 9].

4. Josh P John & Others vs Department – 2014-TIOL-1753-CESTAT-BANG -

Service Tax – Construction of Residential Complex Service – Prior to 01.07.2010 Builder/Developer not liable to pay service tax on construction services provided to individuals who purchased flats/residential units in Residential Complex – because the definition did not include the nature of services provided by the builder/developer to the individual purchasers of flat in a complex – matter remanded for sanction of refund of tax collected.

Prior to 01.07.2010, what was liable to be taxed was only the construction of a residential complex service, Construction of Residential flats for an individual entered into the taxability area only after the introduction of explanation in clause (zzh) of Finance Act, 1994 – with insertion of explanation even construction of part of the residential complex brought under Service Tax net. (para 14)

When the construction of individual apartments/residences itself is not covered by the definition at all prior to 01/07/2010, the question of who acquires the ownership/the date of ownership/nature of interest would not be relevant. What is required to be considered is when the builder/developer enters into an agreement with the individual, can it be called as an agreement for construction of a residential complex or a construction of a flat/residence (part of the complex). It is quite sure nobody would call it as construction of a residential complex for an individual.

The explanation inserted in clause (zzh) cannot have retrospective effect and therefore services provided to individual purchasers of flat cannot be held as taxable prior to 01.07.2010 : As observed by the High Court, "In absence of any indication in the amendment to make it either retrospective or explanation being merely declaratory or clarificatory in nature, such statutory change cannot be made applicable to the long past events."

14.1 In fact, the work contract services is an umbrella of services, which covers contract relating to erection, commissioning or installation; construction of new building or a civil structure/pipeline; construction of a new residential complex or a part thereof; completion and finished services etc. and turnkey projects. Even assuming that the services provisioned by the assessees are covered under WCS, the specific description of the activities rendered by the assessees fit into the ambit of construction of residential complex services. When there is a clear and unambiguous service available for categorization of certain services, I find that there is no necessity of classifying the service under a different service. There are a plethora of judgments wherein it has been decided that when specific classification of service is available, there is no need for classifying a specific service under a general one. The CBEC has vide various circulars issued for the period 2009 to 2012 clarified the stand to be taken with respect to interpretation of the activities relating to construction of

residential complex service. I find that the services provisioned by the assessees are squarely covered under the ambit of construction of residential complex service.

15. As I have already come to the decision that the assessees are liable for payment of service tax on the services provisioned by them under "Construction of Residential Complex Services" for the subject period viz. 1/2011 to 6/2012, I proceed to quantify the service tax payable by the assessees for the said period. The total receipts of income towards sale of villas by the assessees after deducting the value adopted in the sale deeds, as per the show cause notice, works out to Rs.5,30,93,033/- for the period 1/2011 to 12/2011 and Rs.2,25,81,202/-for the period 1/2012 to 6/2012 respectively and after allowing the permissible abatement of 67% under Construction of Residential Complex Services (as land value is not added to the gross receipts), the net taxable value works out to Rs. 1,75,20,701/-for the period 1/2011 to 12/2011 and Rs.74,51,797/- for the period 1/2012 to 6/2012 and the service tax payable amounts to Rs.18,04,632/- for the period 1/2011 to 12/2011 & Rs.8,34,844/- for the period 01/2012 to 06/2012, as detailed in the Table I & II hereunder:-

TABLE-I

O.R.No.65/2012-Ajdn ST - TABLE DEPICTING THE SERVICE TAX LIABILITY OF THE ASSESSEES UNDER CRCS FOR THE PERIOD 01/2011 TO 12/2011

PERIOD	SERVICE PROCEEDS RECEIVED	ABATEMENT @ 67% ALLOWED UNDER CRCS	TAXABLE VALUE @ 33% OF SERVICE INCOME	RATE OF SERVICE TAX	SERVICE TAX PAYABLE	SERVICE TAX PAID IN CASH	DIFFERENTIAL SERVICE TAX PAYABLE
01/2011 TO 12/2011	53093033	35572332	17520701	10.30%	1804632	1716680	87952

TABLE-II

O.R.No.84/2013-Ajdn ST - TABLE DEPICTING THE SERVICE TAX LIABILITY OF THE ASSESSEES UNDER CRCS FOR THE PERIOD 01/2012 TO 06/2012

PERIOD	SERVICE PROCEEDS RECEIVED	ABATEMENT @ 67% ALLOWED UNDER CRCS	TAXABLE VALUE @33% OF SERVICE INCOME	RATE OF SERVICE TAX	SERVICE TAX PAYABLE	SERVICE TAX PAID IN CASH	DIFFERENTIAL SERVICE TAX PAYABLE
01/01/2012 to 31/03/2012	12679930	8495553	4184377	10.30%	430991	0	430991
01/04/2012 to 30/06/2012	9901272	6633852	3267420	12.36%	403853	0	403853
TOTAL	**22581202**	**15129405**	**7451797**		**834844**	**846595**	**-11751**

16. Though the demand of service tax was made under Works Contract Services for the period 1/2011 to 6/2012, I confirm the demand of service tax for the entire period on the assessees under Construction of Residential Complex Service under Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Raising demand of service

tax on the services provisioned, although by wrongly classifying the services rendered by the assessees does not prevent the department to collect what is due to the ex-chequer. Moreover, when the classification claimed by the assessee is accepted and the demand is considered accordingly, there is no dispute with regard to the classification. In fact it is a settled issue that citing a wrong provision of law wouldn't vitiate the demand as long as the demand is sustainable as per the law applicable to the facts of the case. In this regard, I rely upon the ratio of the following decisions/judgements:-

(1) J. K. STEEL LTD. Vs UNION OF INDIA--1978 (2) E.L.T. J 355 (S.C.)--in which it was inter alia held that *" Show cause notice citing wrong rule not vitiated if issuing authority competent to issue it under correct rule - Section 33 of Central Excises and Salt Act, 1944 - Rules 9(2), 10, 10A and 173Q of Central Excise Rules, 1944 - If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well-settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in P. Balakotaiah v. The Union of India, 1958 SCR 1052=(AIR 1958 SC 232) and Afzal Ulah v. State of U.P., 1964—4 SCR 991=(AIR 1964 SC 264). Further a common form is prescribed for issuing notices both under Rule 9(2) and Rule 10. The incorrect statements in the written demand could not have prejudiced the assessee. From his reply to the demand, it is clear that he knew as to the nature of the demand. Therefore, I find no substance in the plea of limitation advanced on behalf of the assessee. [paras 1, 45]".*

(2) COLLECTOR OF CENTRAL EXCISE, MEERUT Vs STAR PAPER MILLS LIMITED--1986 (26) E.L.T. 81 (Tribunal)-- *in which it was inter alia held that " Demand - Show cause notice valid even if not described as such but making recipient aware of position. - Even if the notice does not describe it as a show cause notice but the contents thereof make a recipient aware and conscious of the position, the recipient cannot be permitted to raise a technical argument to defeat a just demand. Therefore, the argument of the respondents that the show cause notice is not a valid notice in the eyes of law as it is a letter dated 29.12.1979, cannot be accepted. 1983 E.L.T. 338 (Bom.) rel. on]. [paras 6 & 4]--- Show cause notice not invalidated merely by citation of incorrect rule, if otherwise in order - Show cause notice issued under Rule 9(2) read with Section 11A, and not under Rule 10, as appropriately required - Show cause notice in order.*

(3) PETLAD BULKHIDAS MILLS CO. LTD. Vs UNION OF INDIA--*2000 (126) E.L.T. 269 (Guj.) ---in which it was inter alia held that " Demand - Power to issue duty demand, reference to wrong rule - If the officer could justify the demand legally, then a wrong reference would not invalidate the notice - Demand of duty made under Rule 9(2) of Central Excise Rules when it could have been demanded under Rule 10 would not vitiate the action taken - Erstwhile Rule 9(2) and Rule 10 of Central Excise Rules, 1944 (Now Section 11A of the Central Excise Act, 1944). - The learned Judge followed the ratio of the decision of a Division Bench of this High Court in Jamnadas Chhotalal Desai v. C.L. Nangia, Deputy Collector, Central Excise, (1965) 6 G.L.R. 137. If the authority has incorrectly mentioned in the order a portion of the section, no prejudice is caused to the person liable to make the payment and the court would not strike down such an order for that reason only. It has been observed in that decision that the court would look at the substance rather than mere form and if it finds that the order has been made with jurisdiction though there is an error in citing*

a particular part of the section and no prejudice is caused to the petitioner, the court would not interfere and set aside the order. The learned District Judge thus allowed the appeal before him and set aside the decree of the trial court. The authority that had passed the order had the jurisdiction to pass it. It was only a mere wrong reference of the power under which the action is taken by the officer which was in challenge. But, this would not vitiate the action done if it can be justified under some other power that the action can lawfully be taken. In the instant case, the duty could have been demanded from the plaintiff under Rule 10. [paras 1, 2].

(4) RISHI ENTERPRISES Vs COLLECTOR OF CENTRAL EXCISE, BOMBAY--1984 (15) E.L.T. 260 (Tribunal) ---*in which it was inter alia held that "- If the exercise of power can be treated to a legitimate source, the fact that the same was purported to have exercised under a different power does not vitiate the exercise of power in question. Thus the officer who made the demand first under one Rule and then under another was valid. [1978 E.L.T. (J 355) followed]. [para 29]. When citation of a provision itself couldn't vitiate the demand, raising the demand under an inappropriate category of service also couldn't vitiate the demand.*

16.1 When citation of a provision itself can't vitiate the demand, raising the demand under an inappropriate category of service also can't vitiate the demand.

17. The assessees had paid an amount of Rs. 17,16,680/- for the period from 01/2011 to 12/2011 and an amount of Rs. 8,46,595/- for the period 01/2012 to 06/2012 respectively on their own assessment towards service tax payable as detailed in the table hereunder:-

In respect of SCN O.R.No. 65/2012			In respect of SCN O.R.No. 84/2013		
CHALLAN NO	DATE	AMOUNT OF SERVICE TAX PAID	CHALLAN NO	DATE	AMOUNT OF SERVICE TAX PAID
10	12.01.2011	200000	33	18.06.2012	100000
11	14.01.2011	100000	25	09.07.2012	100000
36	14.03.2011	100000	18	09.07.2012	100000
0	29.06.2011	239000	1	26.07.2012	71595
14	06.06.2011	248000	22	10.07.2013	100000
7	26.11.2011	36908	14	11.12.2012	100000
	21.02.2012	792772	5	15.12.2012	100000
TOTAL SERVICE TAX PAID		**1716680**	3	09.01.2013	100000
			20	28.01.2013	75000
			TOTAL SERVICE TAX PAID		**846595**

17.1 The service tax paid by the assessees amounting to Rs.17,16,680/- is liable to be appropriated towards the service tax payable for the period 01/2011 to 12/2011 and the amount of Rs. 8,46,595/- is liable to be appropriated towards the service tax payable amounting to Rs. 8,34,844/- for the period 01/2012 to 06/2012 and balance of service tax payable amounting to Rs. 11,751/- is liable to be adjusted against balance of service tax payable

for the earlier period viz. 01/2011 to 12/2011. The entire service tax paid by the assessees was paid on their own assessment and prior to the issue of the notices.

18. In view of the above discussions, I hold that the balance of service tax to be paid by the assessees on the service proceeds received by them during the period from 01/2011 to 06/2012 under the category of CRCS, is liable to be recovered from them under Section 73(1) of the Finance Act, 1994 along with interest under Section 75, ibid. Further, by failing to pay the service tax liable to be paid by them and by not disclosing the taxable amounts received by them in the periodical returns filed by them, with a malafide intention to evade payment of tax, the assessees have contravened the provisions of Sections 67 & 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, thus rendering themselves liable for penalty under Section 76 of the Finance Act, 1994.

19. Notwithstanding existence of their intent to evade service tax, Section 76(1) of the Finance Act, 1994 does not prescribe for existence of intent to evade duty for imposition of penalty. In other words, for imposing penalty under Section 76(1) of the Finance Act, 1994 mensrea need not be proved. As the assessee contravened the provisions of Sections 68 of the Finance Act, 1994 read with Rules 6 & 7 of the Service Tax Rules, 1994 inasmuch as they failed to properly assess and pay the appropriate service tax, they rendered themselves liable for penalty under Section 76(1) of the Finance Act, 1994.

20. With regard to my observation that there is no need to establish mensrea for imposing penalty under Section 76(1) of the Finance Act, 1994, I rely upon the ratio of the following decisions:

a) REAL MATHEMATIC CLASSES Vs COMMISSIONER OF C. EX., JAIPUR---2008 (10) S.T.R. 570 (Tri. - Del.)----Penalty (Service tax) - *Default in payment of Service tax - Penalty under Section 76 of Finance Act, 1994 mandatory in nature - Section 76 ibid applicable from the due date till failure is rectified - Nature of penalty imposable under Section 76 ibid different from that under Section 78 ibid - Decisions rendered under Section 78 ibid not applicable to cases involving Section 76 ibid. [para 3];;;*

b) COMMR. OF C. EX., KOLKATA-I Vs GURDIAN LEISURE PLANNERS PVT. LTD.---2007 (211) E.L.T. 229 (Tri.-Kolkata)---Para:9...*Provisions of section 76 of Finance Act 94 has fastened liability to mandatory penalty in addition to the tax payable and there is no exception provided except cases covered by Section 80 of the Act.* ....

c) UNIQUE CABLE NETWORK Vs COMMISSIONER OF CENTRAL EXCISE, KANPUR---2010 (20) S.T.R. 102 (Tri. - Del.)---*Penalty - Default in tax payment - Service tax not paid for particular period by Multi System Operator - MSO treated cable operator as service provider and took credit of Service tax paid by cable operator and utilised for tax payment - ST-3 returns filed enclosing TR-6 challans - Responsibility of assessee to correctly determine tax liability as system of assessment by jurisdictional*

officer absent - Satisfactory explanation for treating cable as service provider and wrongly utilising credit, not provided - Penalty under Section 76 of Finance Act, 1994 imposable for non-payment of Service tax by due date - Impugned order sustainable - Section 76 ibid. [paras 1, 3].

d) AVTAR & COMPANY Vs COMMISSIONER OF CENTRAL EXCISE, NAGPUR------2015 (37) S.T.R. 781 (Tri. - Mumbai)---*Penalty under Section 76 of Finance Act, 1994 is imposable for mere default in payment of Service Tax and no mens rea is required to be proved - Appellant had neither obtained any registration nor did they discharge the statutory obligation or the Service Tax liability under Chapter V of Finance Act, 1994 or the Service Tax Rules, 1994 - Penalty of ` 1000 fully justified under Section 77 of Finance Act, 1994. [paras 5.3];;;;---Penalty - Suppression of fact - Appellant neither obtained any registration nor did they file any statutory returns - In absence of compliance to any of provisions of law, contravention of law and suppression of facts stand fully established - Service Tax liability is not dependent wheather the service recipient makes the payment of Service Tax or not - Taxable event is the rendering of service and liability has to be discharged on receipt of consideration - Merely because the service recipient did not pay the Service Tax liability initially, that would not take away/obliterate the liability on service provider to discharge the tax - Plea of appellant that service recipient did not reimburse Service Tax and hence the appellant did not pay Service Tax is not acceptable or satisfactory explanation - Penalty imposable under Section 78 of Finance Act, 1994. [paras 5, 6]*

21. In the show cause notice issued vide O.R.No. 65/2012-Adjn(ST)(Commr) dated 10.04.2012there is no allegation on the part of the assessees that they had not filed ST-3 returns and in the show cause notice issued vide O.R.No. 84/2013-Adjn(ST)(Commr) dated 03.12.2013, the demand in the subject notice was based on the ST-3 return filed (para 12 of the SCN). Hence, I do not find any case to cast penal liability on the assessees under Section 77 of the Finance Act, 1994, as there was no contraventions envisaged under the said provisions; and the Section 76 of the Finance Act, 1994 provides for penal liability for other violations, as already discussed above.

22. In view of the foregoing facts, circumstances and discussions, I pass the following order:

ORDER

I. In respect of the Show Cause Notice OR No. 65/2012-Adjn (ST) (Commr) dated 10.04.2012:-

(i) I confirm the demand of service tax of Rs. 18,04,632/- and adjust the amount of service paid by the assessees on their own assessment amounting to Rs. 17,16,680/- and order recovery of Rs.87,952/- (Rupees Eighty Seven Thousand Nine Hundred and Fifty Two Only), towards Service Tax (including Education Cess and Secondary & Higher Education Cess) on the value of services rendered for the period from 01.01.2011 to 31.12.2011, under "Construction of

Residential Complex Services" from M/s.Mehta & Modi Homes, under Section 73 of the Finance Act, 1994;

(ii) I demand interest at the applicable rates from them on the amount mentioned at (i) above under Section 75 of the Finance Act, 1994; and

(iii) I impose a penalty of Rs. 8,000/- (Rupees Eight Thousand Only) on them under Section 76 of the Finance Act, 1994.

II. In respect of the Show Cause Notice OR No. 84/2013-Adjn (ST) (Commr) dated 03.12.2013:-

(i) I confirm the demand of service tax of Rs. 8,34,844/- and appropriate the amount of service tax amounting to Rs. 8,34,844/- from the payment of Rs. 8,46,595/- made by the assessees, on their own assessment towards Service Tax (including Education Cess and Secondary & Higher Education Cess) on the value of services rendered for the period from 01.01.2012 to 30.06.2012, "Construction of Residential Complex Services" from M/s.Mehta & Modi Homes, under Section 73 of the Finance Act, 1994;

(ii) I demand interest at the applicable rates from them on the delayed payments of service tax for the period 01/2012 to 06/2012 under Section 75 of the Finance Act, 1994; and

(iii) I drop further proceedings contemplated in the Show Cause Notice O.R. No. 84/2013-Adjn (ST) (Commr) dated 03.12.2013.

(M.SRINIVAS)
COMMISSIONER

M/s. Mehta & Modi Homes,
5-4-187/3 & 4, 1st Floor,
MG Road,
Secunderabad-500 003. (By Speed Post)

Copy submitted to the Chief Commissioner, Customs, Central Excise & Service Tax, Hyderabad Zone, Hyderabad.

Copy to:

1. The Commissioner of Service Tax, Service Tax Commissionerate, Kendriya Shulk Bhavan, L.B Stadium Road, Basheerbagh, Hyderabad-4.
2. The Deputy/Assistant Commissioner of Service Tax, Service Tax Division, 11-5-423/A, Sitaram Prasad Tower, Red Hills, Hyderabad-500 004.
3. The Superintendent of Service Tax, Tribunal Section, Service Tax Commissionerate, Kendriya Shulk Bhavan, L.B Stadium Road, Basheerbagh, Hyderabad-4.

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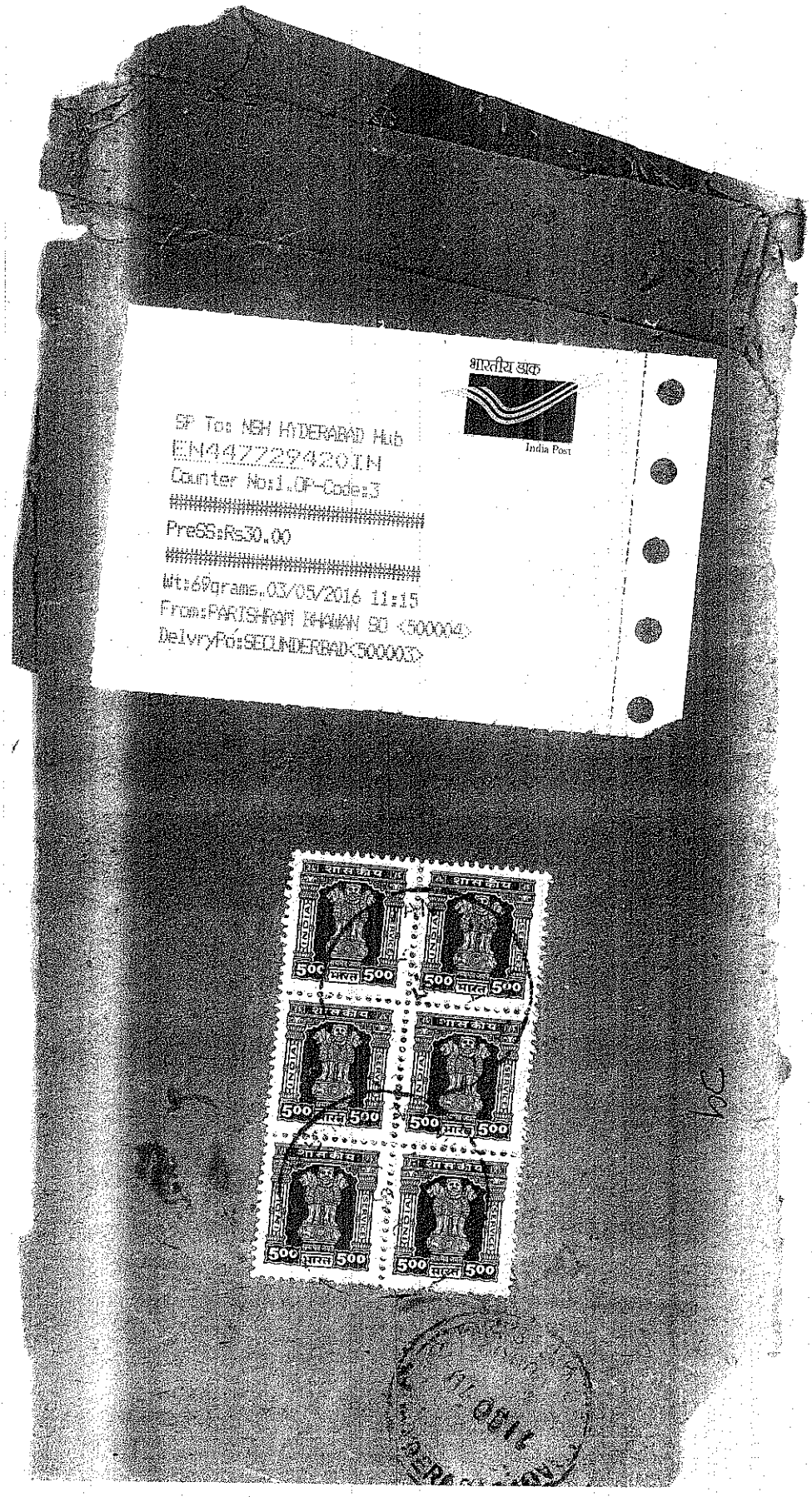
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