

सेवाकरप्रधान आयुक्तकाकार्यालय, हैदराबाद
OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX, HYDERABAD
11-5-423/1/A::सीतारामप्रसादटावर::रेडहिलस::हैदराबाद- 4
11-5-423/1/A:: SITARAM PRASADTOWER:: RED HILLS:: HYDERABAD- 4
OR. No. 131/2015 Adjn (ST) (Commr) Dated:-15.12.2016

ORDER-IN-ORIGINAL NO. HYD-SVTAX-000-COM -144-16-17
(Passed by Shri Dr. D. Purushotham, Commissioner of Service Tax, Service Tax Commissionerate, Hyderabad)

प्रस्तावना
PREAMBLE

1. निजीप्रयोगकेलिए इसेजिसव्यक्तिकोजारीकियागया यह प्रतिविनामूल्यकेदीजातीहै

This copy is granted free of charge for the private use of the person to whom it is issued.

2. कोई भीव्यक्तिजोकेन्द्रीय उत्पाद शुल्कअधिनियम 1944 कीसंशोधितधारा 35 ख ह्याह केअधीनआदेशसेदुप्राभावितहोतो इसनिर्णयकेखिलाफगीमाशुल्क उत्पाद शुल्कएवंसेवाकरअपीलीयअधिकरणकेक्षेत्रीयपीठहैदराबाद प्रथमतःएच.एम.वीऔरएस.बी. इमारतकेपीछे, खैरताबाद हैदराबाद : 500004स्थितरजिस्ट्रीकेपलेपरअपनाअपीलप्रस्तुतकरसकताहै।

Under Sec.35 B (1) of the Central Excise Act, 1944, as amended, any person aggrieved by this order can prefer an appeal to the Regional Bench, Hyderabad of the Customs, Excise And Service Tax Appellate Tribunal (CESTAT) having its Registry at 1st Floor, HMWS&SB Building Rear Portion, Khairatabad, Hyderabad-500 004

3. इसआदेशकेप्राप्तहोनेकेदिनसेतीनमहीनोंकेअन्दरकेन्द्रीय उत्पाद शुल्कअपीलह नियमावली 2001 के नियम6ह्याह केअधीननिर्धारितफार्म ई ए. 3 मेंअपीलदर्ज कीजानीचाहिए।

Appeals must be filed in Form EA3 prescribed under Rule 6(1) of the Central Excise (Appeals) Rules, 2001 within 3 (three) months from the date of communication of this order.

4। हरएकअपीलकाज्ञापन प्रत्याक्षेपस्थितआवेदनयाकोई अन्य आवेदनफूलस्केपपेपरकेएकओरदुगनास्पेसछोडते हुए स्पष्ट रूप मेंटंकितकियाजाएऔर इसेसमयक रूप सेपुट्टोंको कमवारजमाते हुए सूचकरहितएवंहरएककागजपुस्तककोअलगफोल्डरमेंअधिकमजबूतीकेसाथनथीकरनाचाहिए।

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

5। सीमाशुल्क उत्पाद शुल्कएवंसेवाकरअपीलीयअधिकरण कार्य विधिनियमावली 1982 केनियम 13 केअधीनयथाअपेक्षितयदिअपीलपरप्राधिकृतप्रतिनिधिद्वाराअपीलकर्ता

कीओरसेअपीलएवंहरताक्षरकरनेकेदस्तावेजसहितअधिकरणकेक्षेत्रीयपीठहैदराबादकेसहायकरजिस्ट्रारकेनामसेराष्ट्रीयकृतबैंकसेप्राप्तमूल्यकीरिखितबैंकड्राफ्टकेसाथअपीलप्रस्तुतकीजानीचाहिएएवंबैंककीशाखहैदराबादमेंस्थितबैंककेअधीनहोनीचाहिए। केन्द्रीय उत्पादशुल्कअधिनियम 1944 कीसंशोधितधारा 35 प केअधीन 7।5%

कीअनिवार्यपूर्वजमाराशिकेसाथकियाजानाचाहिएअपीलमांगकीहैयाजुर्मानालगायायादोनोंऔरदेयपूर्वजमाकीगई राशि10 करोड़रुपयेकीसीमाकेअध्यधीनहोगा।

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, Hyderabad 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.

				payable.
3	OR No. 52/2012-Adjn (Addl. Commr.), dt. 24-4-2012	Jan-Dec, 2011	46,81,850	Confirmed vide OIO No. 51/2012-Adjn (ST)(ADC), dated 31-8-2012. Ordered <i>de novo</i> by the Commissioner (Appeals) vide OIA No. 39/2013 (H-II) S.Tax for re-quantification of the Service Tax payable.
4	O.R.No.83/2013 Adjn. (ST) ADC dated 02.12.2013	Jan-June 2012	16,53,856	An amount of Rs. 15,64,777/- towards ST has been confirmed vide OIO No.HYD-SVTAX-000-COM-02-14-15 dated: 20.02.2015.
5	O.R.No.156/2014-Adjn (ST) (Commr) dated:25-09-2014.	July, 2012 to March, 2014	92,38,975/-	An amount of Rs. 89,57,783/- only towards ST has been confirmed for the period July, 2012 to December, 2013 vide OIO No.HYD-SVTAX-000-COM-02-14-15 dated: 20.02.2015. The S.Tax amount of Rs.14,96,770/-for the period 01/2014 to 03/2014 is not covered in the demand of Rs.92,38,975/-hence a fresh SCN covering the period from 01/14 to 03/14 along with payable amounts for the period 04/14 to 03/15 is issued, as observed by the Adjudicating authority.

4. In the Show Cause Notice vide O.R.No.156/2014-Adjn (ST) (Commr) dated:25-09-2014, covering period July'2012 to March'2014, in the Annexure to the said Show Cause Notice, which gives detailed calculation of the service Tax liability for the relevant period, there are 5 quarters period for which calculations are indicated separately. However, the service tax liability has been reckoned only for the period upto December'2013 and the service tax liability for the period January'2014 to March'2014 has not been added in the total while arriving at the tax liability which was demanded in the Show Cause Notice. Hence, the present Show Cause Notice covers period January, 2014 to March, 2015, which is inclusive of January'2014 to March'2014.

4.1 As per the information furnished by the assessee vide their letter dated 17.09.2014, 27.09.2014, 27.10.2014, 19.02.2015, 25.05.2015, 27.08.2015 and 18.09.2015 along with statements, it is seen that "the assessee" have rendered taxable services under the category of "Works Contract Services" during the period January, 2014 to March, 2015. The assessee had rendered services for a

layout, and the construction of such complex is intended for personal use as residence by such person. Here "personal use" includes permitting the complex for use as residence by another person on rent or without consideration. It is further clarified in para 3 of the Circular No.108/02/2009-ST dt. 29.01.2009, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal, then such activity is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer contracts entire complex for one person for personal use as residence by such person would not be subjected to service tax. Further, the builder/promoter/developer normally enters into construction/ completion agreement after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore, there is no levy of service tax on the services rendered till sale deed. I.e on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements/contract against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements of construction are invariably attracts service tax under Section 65(105(zzzza)) of the Finance Act 1994.

8.6. As per the definition of "Residential Complex" provided under Section 65(91a) of the Finance Act 1994, it constitutes any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s Greenwood Estates qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like park, common water supply etc., and the layout was approved by HUDA & the Alwal Municipality vide Letter No. 3822/P4/P/H/07 dt. 9.7.2007. As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the assessee thereafter to their customers under agreement of construction are taxable under Service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property

9.5. On going through the statements provided by the Assessee, it can be seen that a detailed breakup of the receipts into receipts towards “sale deeds”, receipts towards “construction agreements”, receipts towards other taxable receipts and receipts towards other non-taxable receipts were provided.

9.6. However, on going through the annexure to the SCN, it can also be observed that though the allegation is to demand service tax on construction agreements, the quantification is based on gross amounts mentioned above for all the activities including amounts received towards the “sale deeds”.

9.7. Since SCN read with earlier SCN’s agree on the principle that service tax cannot be demanded on the value attributable to sale deeds, the Assessee is not making detailed grounds on the legal merits of the said claim and would like to submit the following broad lines of arguments:

- a.** In many cases, the “sale deed” is entered into after the completion of the building and therefore the demand cannot be justified under the said entries.
- b.** Till the stage of entering into a “sale deed”, the transaction is essentially one of sale of immovable property and therefore excluded from the purview of Service Tax.
- c.** In any case, the deeming fiction for construction services prior to completion cannot be classified under works contract services since doing the same would render Section 66E(b) of Finance Act, 1994 & Notification 26/2012 ST dated 20.06.2012 redundant.
- d.** If at all a view is taken that the value of “sale deed” is liable to service tax, the benefit of the above notification should be granted after reclassification of the service.

9.8. The Appellants also reserve their right to make additional arguments as felt necessary on this aspect of service tax on value of “sale deeds” if it is ultimately held that this aspect could be taken up without an allegation in the SCN.

9.9. Similar to the claim for exclusion of sale deed value, the value attributable to statutory taxes/charges like VAT, service tax, registration charges, stamp duty, electricity etc., need to be reduced. It is submitted that once the above deductions are allowed, the demand would be reduced to NIL.

11. Benefit under section 80 of Finance Act 1994.

11.1. The assessee submitted that there is bona-fide litigation is going on and issue was also debatable which itself can be considered as reasonable cause for failure to pay service tax. Accordingly waiver of penalty under section can be made. In this regard reliance is placed on C.C.E., & Cus., Daman v. PSL Corrosion Control Services Ltd 2011 (23) S.T.R. 116 (Guj.).

11.2. The assessee submitted that as explained in above Para they are not paying service tax on bonafide belief that same was not liable to be paid in view of

- a. Exclusion part of service definition given under section 65B(44) of Finance Act, 1994 in as much specifically excluding the sale of immovable property from levy of service tax.
- b. Activity performed till the execution of sale deed is in the nature of self service and not liable for service tax.
- c. Activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser and not prior to that.
- d. Earlier SCN's demanding service tax on the value of construction agreement.

11.3. The assessee submitted that they have established the reasonable cause for the non-payment of service tax. Since the Assessee explained the reasonable cause for the nonpayment of the service tax penalty imposition of the penalty is not sustainable. In this regard they wish to rely on Commissioner of Service Tax, Bangalore Vs Motor World 2012 (27) S.T.R 225 (Kar).

11.4. The assessee craves leave to alter, add to and/or amend the aforesaid grounds, and wishes to be heard in person before passing any order in this regard.

12. PERSONAL HEARING.

Accordingly a personal hearing was conducted on 22.06.2016, and Shri Sudhir VS, CA, has appeared for personal hearing on behalf of M/s Greenwood Estate. He highlighted that the demand proposed is the value in excess of sale deed, however, computation has considered even the value of the sale deed. They have made the remittance of the Service Tax in excess of

specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date.”

13.4. Reliance is also placed on the decision of the Authority on Advance Ruling in the case of HAREKRISHNA DEVELOPERS-2008 (10) S.T.R. 357 (A.A.R.) wherein it has been held as under:-

Advance Ruling (Service tax) - Works Contract service - Sale of plots to prospective buyers and construction of residential units under works contract - Applicant contesting liability on the ground that impugned works contract is for construction of individual residential unit and not for residential complex - Condition on transfer of property in goods leviable to sales tax satisfied - Records indicating construction of at least 12 residential units with common facilities and same covered under 'residential complex' as per provisions - Works contract not for construction of isolated house but for common facilities also - Impugned activity covered under Works Contract service - Sections 65(91a), 65(105)(zzzza) and 96D of Finance Act, 1994. - Individual houses built through works contract have to be viewed as parts of a residential complex rather than as stand alone house. [paras 1, 6, 7, 8

In view of the above, I find that the said activity is classifiable under 'Work Contract Service'.

13.5. I find that the composite scheme is not mandatory and service tax can be paid under Rule 2A. It is accepted that composite scheme is optional. They have not furnished the details of material cost supported by documentary evidence. In the absence of which, the demand of Service Tax on the full amount without any permissible deduction of material cost would have been very harsh on them. In this backdrop, the calculation of service tax liability in the show cause notice at composite rate is a beneficial act which does not make the show cause notice invalid. The assessee has not submitted the details of the material consumption supported by documentary evidences.

13.6. I find that the assessee had also contested the qualification of demand. They have submitted that taxes and other charges need to be deducted. I find that the demand of service tax has been made after excluding the sale deed value. The total amount collected from a customer minus sale deed value has been taken as gross amount charged for the works contract. No other deduction of any amount collected under any head, "Whether land development charges or any other charge" is permissible except VAT. It is neither their submission that VAT amount has also been included in the gross

- c. Other Charges like electricity charges, etc.
 - d. Collection of taxes like VAT, Service Tax, Stamp Duty and Registration Charges from the buyer.
- C. The levy of service tax on such arrangements has seen a fair share of litigation and amendments. The assessee is also a party to the litigation process and matters for earlier periods are pending at various adjudication/judicial forums.
- D. In July 2012, the service tax law underwent a paradigm shift and importantly, the exemption for personal use available for construction of residential complexes was removed. Accordingly, it became evident that service tax was payable on the construction agreement as per valuation prescribed under Rule 2A of the Service Tax (Determination of Value) Rules, 2012 i.e. on a presumed value of 40% of the contract value. The Assessee regularly discharged the service tax on the said value in normal course. they also discharged service tax on other charges. However, they did not discharge service tax on sale deed value, which is in the nature of immovable property and on the value of taxes collected.
- E. Previously several SCN's were issued covering the period upto December 2013 with sole allegation that "*services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under "works contract service"*".


Now the present SCN was also issued with similar error of quantifying the proposed demand of service tax in as much treating the sale deed values & other taxes as taxable value of services (annexure to SCN) while alleging that service rendered after execution of sale deed alone liable for service tax (Para 2 of SCN).

- 9.1. The Assessee submitted that the subject show cause notice in para 5 extracted the provisions of section 73(1A) of the Finance Act, 1994 and in para 6 mentions that the grounds as explained in the show cause notice issued for the earlier period is also applicable for the present case. Hence, this statement of demand / show cause notice is issued in terms of section 73(1A) of Finance Act, 1994, for the period January 2014 to March 2015. For this, Assessee submits that section 73(1A) of the Finance Act, 1994 reads as follows.

"(1A) Notwithstanding anything contained in sub-section (1) (except the period of eighteen months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously

reduced penalty of Rs. 1,72,843/- (being the 25% of the penalty amount of Rs. 6,91,373/-) provided the assessee pays the Service Tax confirmed on them along with interest and also along with reduced penalty of Rs. 1,72,843/- within thirty days of receipt of this order, under Section 76 of the Finance Act, 1994. If the assessee fails to pay the amounts within thirty days, from the receipt date of the receipt of the order, they will forfeit the facility of reduced penalty and are liable to pay penalty of Rs. 6,91,373/-.

- (iv) I impose penalty of Rs. 10,000/- (Rupees Ten Thousand only) on the assessee, M/s Greenwood Estates, under Section 77 of the Finance Act, 1994.


(DR. D. PURUSHOTHAM)
COMMISSIONER

To
M/s Greenwood Estates,
5-4-187/3 & 4, 2nd floor,
Soham Mansion,
M.G. Road, Secunderabad - 500003.

(By RPAD)

Copy submitted to:

The Chief Commissioner, Customs, Central Excise & Service Tax, Hyderabad Zone, Kendriya Shulk Bhavan, L.B Stadium Road, Basheerbagh, Hyderabad-4.

Copy to:

(i) The Assistant Commissioner of Service Tax, Division-II, Service Tax Commissionerate, Hyderabad.

(ii) The Superintendent of Service Tax, Service Tax Range II A, Service Tax Commissionerate, Hyderabad. (He is directed to serve a copy to the assessee and obtain acknowledgement)

(iii) The Sr. PS to Commissioner, Service Tax Commissionerate, Hyderabad.

(vii) Master Copy/File Copy/Spare Copy.

- (iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.

The present Show Cause Notice is issued on the similar grounds as explained in the show cause cum demand notices mentioned above.

8. The summary of grounds, for issue of present Show Cause Notice OR. No. 131/2015 Adjn (ST) (Commr) dated 21.10.2016, as mentioned in the OR No.61/2011-Adjn(ST)ADC, and OR. No. 52/2012-Adjn (ST) ADC, are reproduced as follows:

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

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

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

(ii) *such contract is for the purposes of carrying out, -*

(a) *erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise,*

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

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

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

(e) *Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects."*

8.2. As per Section 65(91a) of the Finance Act, 1994, "Residential Complex" means any complex comprising of -

(i) *a building or buildings, having more than twelve residential Units*