



Hiregange & Associates LLP

Chartered Accountants

Date: 29.04.2022

To

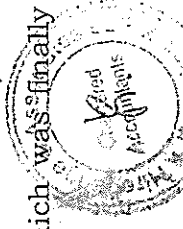
The Commissioner (Appeals-II),
07th Floor, GST Bhavan,
L.B. Stadium Road, Basheer Bagh,
Hyderabad - 500 004.

Dear Sir,

Sub: Filing of Appeal to Appellate authority in Form ST-4.

Ref: Order-in-Original No. 09/2021-22 (S.Tax-Adjn) dated 23.12.2021 pertaining to M/s. Modi & Modi Constructions

1. We have been authorized by M/s. Modi & Modi Constructions to submit an appeal to the above referred Order-in-Original No. 09/2021-22 (S.Tax-Adjn) dated 23.12.2021 and represent before your good office and to do necessary correspondence in the above referred matter. A copy of authorization is attached to the appeal..
2. In this regard, we are herewith submitting the appeal in Form ST-4 along with authorization letter and other annexures referred in the appeal along with this letter.
3. Further, we would like to bring to your notice that the time limit for filing the appeal against the order of Appellate Authority is 2 months from the date of receipt of order as per Section 86 of the Finance Act, 1994 i.e., 2 months from 23.12.2021 and the same was expired on 23.03.2022.
4. In this regard, we would like to state that, the Hon'ble Supreme Court taking the Suo-Moto cognizance of the difficulties faced due to the rapidly escalating corona virus outbreak (COVID-19), vide order dated 23.03.2020 read with order dated 08.03.2021 and read with order dated 27.04.2021 had held that the limitations from 14.03.2020 shall stand extended till further orders, which was brought to an end permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. Thereafter, considering the second wave, the Hon'ble S.C. further extended the relaxation till 02.10.2021, which was finally



extended till 28.08.2022 vide the Hon'ble Supreme Court vide Misc Application no. 21/2022 in MA 665/2021 in SMW(C) No. 03/2020 dated 10.01.2022 for the purpose of limitation as may be prescribed under the general or special laws. Further the Hon'ble court has stated that:

"In case in cases where the limitation would have expired during the period between 15.03.2020 - 28.02.2022, Notwithstanding the actual balance period of limitation remaining all persons shall have a limitation period of 90 days from 01.03.2022, in the event the actual balance period of limitation remaining with effect from 01.03.2022 is greater than 90 days, that longer period shall apply."

5. On conjoint reading of the above and considering the latest limitation order issued by the Hon'ble Supreme court as referred above, the period between 15.03.2020 to 28.02.2022 shall be excluded in calculating the limitation in respect of all the proceedings such as the filing of petitions/applications/suits/appeals, in any court/tribunal/forum in India, irrespective of the limitation prescribed under the general law or special law (either central or state), whether condonable or not.

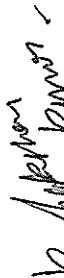
6. Accordingly, the time limit for filing the appeal after considering the Supreme Court Suo Moto Extension will be 28.05.2022. In this regard, we would like to state that the appeal is filed well within the time limit. Therefore, we request your good office to kindly acknowledge the receipt of the appeal, admit and post the hearing at the earliest.

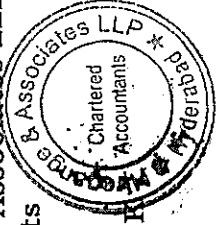
We shall be glad to provide any other information in this regard.

Thanking You,

Yours faithfully,

For M/s. Hiregange & Associates LLP
Chartered Accountants


CA Lakshman Kumar Hiregange
Partner Designate



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FORM ST-4

Form of Appeal to the Commissioner (Appeals-II)
[Under Section 85 of the Finance Act, 1994 (32 of 1994)]
BEFORE COMMISSIONER (APPEALS-II), 7TH FLOOR, L.B STADIUM ROAD,
BASHEERBAGH, HYDERABAD-500 004

(1) Appeal No.	_____ of 2022
(2) Name and address of the Appellant	M/s Modi & Modi Constructions., 5-4-187/3& 4, 2 nd Floor, Soham Mansion, M.G. Road, Secunderabad -500003
(3) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	Deputy/Assistant Commissioner of Central Tax and Customs, Secunderabad GST Division & Secunderabad Commissionerate, Salike Senate, D.No.2-4-416 & 417, Ramgopalpet, MG road, Secunderabad-500003. ORDER-IN-ORIGINAL No. 09/2021-22 (S.Tax-Adjn) dated 23.12.2021
(4) Date of Communication to the Appellant of the decision or order appealed against	24.12.2021.
(5) Address to which notices may be sent to the Appellant	M/s Hiregange & Associates, 4th Floor, West Block, Srida Anushka Pride, Above Lawrence and Mayo, Road No.12, Banjara Hills, Hyderabad, Telangana - 500 034 Email: venkataprasad@hiregange.com Mob: +91 89781 14341 (And also copy to the Appellant)
(5A)(i) Period of dispute	April 2015- June 2017
(ii) Amount of service tax, if any demanded for the period mentioned in the Col. (i)	42,07,651/- under the section 73 of the Finance Act, 1994.
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	NA
(iv) Amount of Interest	Interest u/s 75 of Finance Act, 1994.
(v) Amount of penalty	4,20,765/- as per section 76 and 10,000/- under section 77 of the Finance at, 1994.
(vi) Value of Taxable Service for the	NA



period mentioned in Col.(i)

(6) Whether Service Tax or penalty or interest or all the three have been deposited.

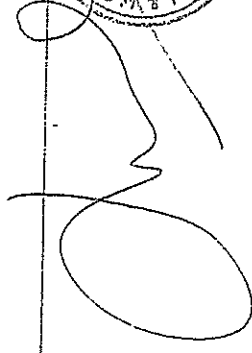
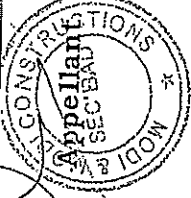
An amount of Rs. 2,59,503/- was already paid while filing the ST-3 returns and an amount of Rs. 56,070/- was paid vide Challan No. _____ dated _____ which can be adjusted towards pre-deposit under Section 35F of Central Excise Act, 1944.

(6A) Whether the appellant wishes to be heard in person?

NA

(7) Reliefs claimed in appeal

NA

BRIEF FACTS OF THE CASE:

A. M/s.Modi & Modi Constructions, Secunderabad (hereinafter referred to as 'Appellant') is mainly engaged in the sale of residential villas to prospective buyers during and after construction.

B. Sale of (Flats) ^{villas} after receipt of Completion Certificate (CC) without any agreement of construction: In these transactions, sale deed is executed for the entire sale consideration without entering into any construction agreement. As the flats sold after CC is not leviable to service tax, Appellant has not paid any service tax on the same.

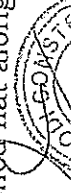
Eg: For instance, the villa No. 85 was booked on 28.05.2016 with agreed price of Rs.38,00,000 + taxes and registration charges. The copy of the booking form is enclosed as annexure IV and for the entire amount the sale deed dated 04.08.2016 was executed which is enclosed as annexure V and as seen from the receipt's statements, Appellant received Rs.40,81,851/- which consists of

- i. Rs.38,00,000 towards sale deed (Rs.50,000/- was not received during the subject period);
- ii. Rs.2,81,300 towards VAT & registration charges and
- iii. Rs.50,544/- towards water & electricity connection/deposits;

As the above referred flat is sold after OC, Appellant had not paid any service tax on the same. Further, the amounts received towards VAT, registration charges, water and electricity connections are not leviable to service tax therefore Appellant had not paid any service tax on the same.

C. Sale of Flats after receipt of Completion Certificate (CC) with agreement of construction: In these cases, Appellant is selling the villas by entering into sale deed but the customers are asking to make extensive changes to the villas therefore Appellant is entering into agreement of construction to make changes. In most of the cases, sale deed is executed for the entire sale consideration and in some cases Sale deed is being executed for semi-finished construction along with an agreement of construction. As the flats sold after CC is not leviable to service tax, Appellant has not paid any service tax on sale deed value but paid service tax only on amounts received towards construction agreements

D. Sale of Flats before receipt of Completion Certificate (CC): In these transactions, Appellant is executing sale deed for semi-finished flat along with



an agreement of construction. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same. Appellant is discharging service tax on agreement of construction value after availing deduction towards sale deed value and non-taxable receipts

Eg: For instance, the Villa No. 74 was booked in the year 2012 wherein the agreement of sale was entered for total consideration of Rs.43,05,000 + taxes + registration charges etc., and the sale deed dated 28.02.2013 was executed for Rs.15,00,000 conveying the title of the land as well the semi-finished flats and balance consideration was agreed towards the construction work to be undertaken as on that date (Rs.28,05,000 vide construction agreement dated 28.02.2013). Copy of the sale deed and construction agreement is enclosed as annexure V.

E. The details of no of flats booked before OC and after OC are as follows

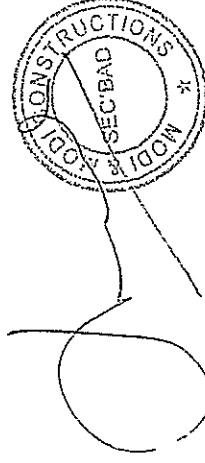
Particulars	No of Flats
No of Villas booked before receipt of CC (Taxable as the flats are booked before CC)	11
No of Villas booked after receipt of CC (Not-taxable as the flats are booked after CC)	16
No of Villas booked after receipt of CC but with Construction Agreement (Taxable only to the extent of Agreement of Constructions)	4
Total	31

F. Completion certificate from the 'chartered engineer' for 33 villas was obtained on 05.05.2013 and applied for Occupancy Certificate (OC) on 05.11.2014 and same is under process.

G. The amount charged from the customers are as under:

- Value towards the sale deed
- Value towards the construction agreement
- Other Charges like electricity charges, etc.
- Collection of taxes like VAT, Service Tax, Stamp Duty and Registration Charges from the buyer

H. The levy of service tax on such arrangements has seen a fair share of litigation and amendments. The Appellant is also a party to the litigation process and matters for earlier periods are pending at various adjudication/judicial forums.



I. 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 and also the condition of having more than 12 residential units was dispensed with. 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 Appellant regularly discharged the service tax on the said value in normal course. It also discharged service tax on other charges. However, it did not discharge service tax on sale deed value, which is in the nature of immovable property and on the value of taxes collected.

J. The detailed working of the receipts and the attribution of the said receipts was already provided to the Department authorities, identified receipt wise and flat wise. The summary of the same is provided hereunder:

Description	Receipts	Non taxable	Taxable
Sum of towards sale deed	66,085,098	66,085,098	0
Sum of towards agreement of construction	3,426,600	0	3,426,600
Sum of towards other taxable receipts	172,289	0	172,289
Sum of towards VAT, Registration charges, etc	5,365,770	5,365,770	0
Total	75,049,757	71,450,868	3,598,889

K. Accordingly, the value of taxable services constituted 40% of Rs.35,98,889/- i.e. Rs.14,39,555/- and the service tax thereon @ 12.36%/14%/14.5%/15% constituted Rs.2,05,803/-. It was also explained that the actual payment of service tax amounted to Rs.205,803/-.

L. Previously, several SCN's were issued covering the period upto March 2015 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".

- Vide Para 3 of SCN dated 12.04.2010 and Para 2 of the Order adjudicating the said SCN
- Vide Para 3 of Second SCN dated 23.04.2011
- Vide Para 2 of third SCN dated 24.04.2012



iv. Vide Para 2 of fourth SCN dated 02.12.2013

v. Vide Para 2 of fifth SCN dated 24.09.2014

vi. Vide Para 2 of sixth SCN dated 18.04.2016

M. In all the above SCN's, there is error in as much including the value of sale deeds within the ambit taxable value while alleging service tax is liable only after execution of sale deed i.e. on construction agreements.

N. The status of SCN's as referred above is as follows:

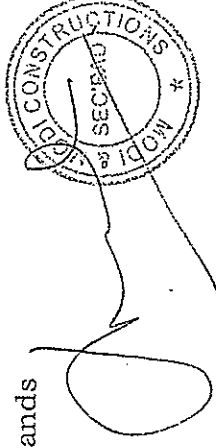
Period	SCN	Amount	Status
2009	HQPQR No. 34/2010 Adjn (ST)(ADC) dated 12.04.2010	Rs.6,04,187/-	Final Order No. A/30172-30178/2019
2010	OR No.59/2011-Adjn (ST) Gr. X,dated 23.04.2011	Rs.12,06,447/-	CESTAT Final Order No.A/30575/2019 dated 03.10.2019
2011	OR No. 53/2012 Adjn (ADC) dated 24.04.2012	Rs.27,61,048/-	
Jan 12 to Jun 12	OR No. 81/2013-Adjn. (ST)(ADC) dated 02.12.2013	Rs. 11,87,407/-	
July 2012 to March 2014	OR No.109/2014 Adjn (ST) (JC) dated 24.09.2014	Rs. 38,35,321/-	Settled under Sabka Vishwas Scheme
April 2014 to March 2015	OR No. 25/2016-Adjn (ST) (JC) dated 18.04.2016	Rs. 6,30,349/-	

O. 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).

P. The SCN was issued on 16.04.2018 proposing an amount of Rs. 42,07,65/- and applicable interests with the penalty under sections 75,76 and 77 of the Finance Act 1994. In this regard, the Appellant has replied to the SCN on 14.06.2018.

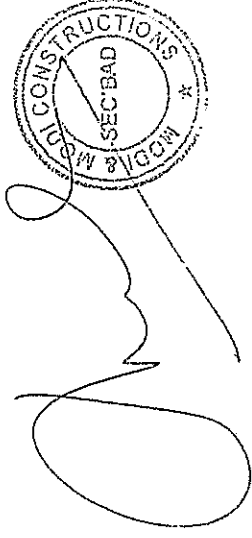
Q. Subsequently, Appellant has attended the personal hearing and submitted the documents such as party-wise ledgers for the period April 2015 to June 2017, copy of sale deeds and copy of completion certificates.

R. Subsequently. Appellant has received the Order in Original No. 09/2021-22 dated 23.12.2021 confirming the following demands



- a) I confirm the demand of an amount of Rs. 42,07,651/- (Rupees Forty-Two Lakhs Seven Thousand Six hundred and Fifty-One only) including Cesses) being service tax payable on the taxable services rendered by them during the period from April, 2015 to June, 2017, in terms of sub-section (2) of Section 73 of the Finance Act, 1994; against M/s. Modi & Modi Constructions; on the grounds discussed supra
- b) In terms of Section 75 of the Finance Act, 1994, I order M/s. Modi & Modi Constructions to pay interest at appropriate rates, on the amount mentioned at (a) above; Penalty should not be imposed on them under Section 76 of the Finance Act, 1994 for the contravention of Rules and Provisions of the Finance Act, 1994 and
- c) I impose a penalty of Rs.4,20,765/- (Rupees Four Lakhs Twenty Thousand Seven Hundred and Sixty Five only) (being 10% of the ST payable) on M/s. Modi & Modi Constructions, under Section 76 of the Finance Act, 1994, for failure to pay Service Tax; and
- d) I impose a Penalty of Rs.10,000/- (Rupees Ten Thousand Only) on M/s. Modi & Modi Constructions under Section 77 of the Finance Act, 1994 for failure to declare the right taxable incomes in their ST-3 return.

Aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to catena of judicial decisions and beset with grave and incurable legal infirmities, the Appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.



GROUND OF APPEAL

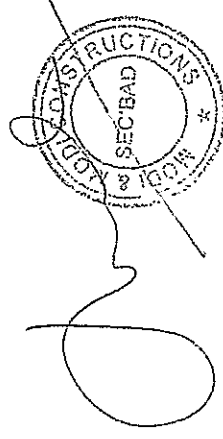
1. Appellant submits that the impugned order is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.
2. Appellant submits that the present proceedings and the issuance of the impugned SCN and Order-in-original were without authority of the law as the provisions of the Finance Act, 1994 which authorizes the levy and collection of Service tax were repealed in terms of Section 19 of Constitution (one hundred and first amendment) Act, 2016 read with Section 173 of CGST Act, 2017. Further, Section 174 of CGST Act, 2017 as amended only saves the proceedings already instituted before the enactment of the CGST Act, 2017 (w.c.f. 01.07.2017) whereas the issuance of the impugned SCN and Order was initiated after 01.07.2017. Therefore, the present proceedings do not sustain. The reference of Section 174(2) of CGST Act, 2017 by the impugned order do not help as it only saves the proceedings already initiated as on 01.07.2017 and not the fresh proceedings initiated after 01.07.2017.

In Re: Impugned order is not valid

Impugned order beyond SCN

3. Appellant submits that the impugned SCN has clearly stated that the services rendered after execution of sale deed against agreement of constructions are taxable and it has never proposed to demand service tax on sale deed values. An extract of the same has been provided for your ready reference:

"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 ii) 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 to their customers under agreement of construction is classifiable under " Works Contract Service" under Section 65 (105) (zzzza) under Service tax as there exists service provider and receiver relationship between them. As there is transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable services under "Works Contract Service".



4. Further, Appellant would like to draw our attention towards the Para 4 of the Show Cause Notice which reads as follows

"As per the information furnished by the assessee vide letter dated 15.02.2018 along with statements, it is seen that "the assessee" have rendered taxable services under the category of "Works Contract Services" during the period April, 2015 to June, 2017. The assessee had rendered services for a taxable value of Rs.750,49,757/- After deduction of VAT of Rs.40,12,405/- the taxable value works out to Rs. 7,10,37,352/- on which service tax (including Education and S & H.E cess) works out to be Rs.42,07,651/- for services rendered during the said period, as detailed in the annexure enclosed to this notice.

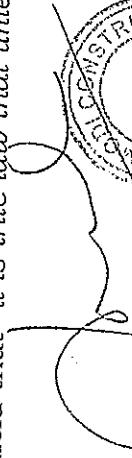
5. On conjoint reading of both the paragraphs, it is clear that on one hand the impugned Show Cause Notice is stating that the Appellant is liable only the construction services rendered by the Appellant post execution of sale deed and on other hand while quantifying the taxable value, it has considered the entire receipts. To be on point, it has not even stated the basis of such value as to where it has derived. The notice has merely mentioned that the values submitted by the appellant which include both value towards sale deed and construction services were considered. Since, the notice is self-contradictory and erroneous, the SCN shall not sustain and the impugned order based on such SCN is not valid.

6. Appellant submits that the impugned order needs to be set aside for more than 1 more as follows:

- a. The SCN itself is erroneous, the order based on such SCN shall not sustain and needs to be set aside.
- b. The findings of the impugned order is not in line with the allegations of the SCN and are beyond the scope of SCN.

c. The SCN has clearly stated that the value of the sale deed is not subjected to the service tax. However, the impugned order has given a finding on the valuation and confirmed the demands on the same.

Therefore, the impugned order has clearly travelled beyond the SCN and hence is not valid to that extent. Relied on Commissioner v. Shital International — 2010 (259) E.L.T. 165 (S.C.) wherein it was held that "it is trite law that unless



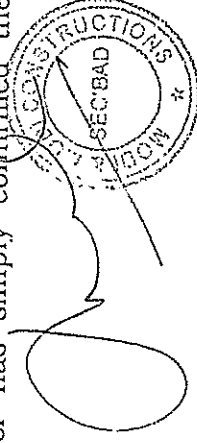
"... continuation of the case is laid in the show cause notice, the revenue cannot be permitted to build up a new case against the assessee."

7. Appellant further submits that likewise the impugned SCN, the impugned order is also self-contradictory. On one hand, it is stating that there are two agreements out of one is with respect to the sale of land which is totally out of purview of service tax and on other hand, it is stating that entire value of contract including the value towards the sale of undivided portion of land are liable to service tax.

"16.8 The undisputed facts of the case are that the noticee had entered in to two agreements with such prospective buyers - one whereby they agreed to transfer undivided share of land relating to the houses to be constructed on works contract basis and the second, whereby they agreed to undertake construction of houses and transfer them to buyers on terms specified which included payment of sums due at different stages of construction of the houses/villas. The total consideration is received in to two parts- one representing the value of undivided share of land and the other the taxable value of construction services provided. The assessee seemed to have determined the taxable value of the works contract services provided to be 40% of the value of such services earmarked (after excluding land value) and claimed it to be in accordance with Rule 2(A) (ii) of the Service tax (Determination of Value) Rules, 2006 and paid service tax accordingly. The allegation in the notice is that they had short-paid service tax in contravention of Rule 2(A) (ii) of the Service Tax (Determination of Value) Rules, 2006 since the noticee did not include the value of the land as part of the total amount charged for the works contract while arriving at the taxable value."

8. Appellant submits that the SCN has never disputed the valuation adopted by the Appellant, however, the impugned order itself has stated that contract value includes the value towards the sale of undivided portion of land. This clearly shows that the impugned order has travelled beyond the SCN to confirm the demand.

9. Appellant submits that the adjudicating authority has not at all made an attempt to understand the transaction undertaken by the Appellant and the scope of different agreements entered with the customer. Without verifying the scope of the agreements, the impugned order has simply confirmed the



demand by extracting various definitions of Finance Act, 1994 and without giving any reasons why the amounts received by the Appellant is taxable. This shows that impugned order is not reasoned order and hence not valid and requires to be set aside. In this regard Appellant wish to rely on

- a. Sant Lal Gupta v. Modern Coop.G.H.Society Ltd. — 2010 (262) E.L.T. 6 (S.C.) wherein it was held that *"The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."*
- b. AC of CTDVs. Shukla and Brothers, 2011 (22) S.T.R. 105 (S.C.)
- c. State of Orissa v. DhaniramLuhar - (2004) 5 SCC 568;

In Re: Flats sold after receipt of Completion Certificate are not leviable to service tax

10.Appellant submits that as stated in background facts, 'Completion certificate' from the Chartered Engineer was obtained on 05.05.2013 for the 33 villas and applied for occupancy certificate on 05.11.2014 and 20 villas were booked after this date and sale deed is being executed for the entire sale value of villas. In such circumstances, no service tax is liable on the amounts received towards said villas since same is 'sale of immovable property' and it was specifically provided in Section 66E(b) of Finance Act, 1994 that service tax is not liable for the villas booked after completion certificate date (Statement showing amounts received towards flats booked after Completion Certificate but with construction agreement is enclosed as Annexure V/1)

11.In this regard, Appellant submits that the impugned order vide Para 29 has stated that *"29 As per the Provisions of Telangana Building Rules 20 12, "Upon completion of the construction, the builder or the developer of the building has to apply for the Completion Certificate to the municipal authority" If the building is constructed as per the building approval plan and if it meets other building standards, the concerned authority will issue completion certificate. As per the law the "competent authority" means the Government authority and it is mandatory to obtain such certificate from the Municipal authorities*

SC & The

...certificates submitted by the assessee are issued by Chartered Engineer / Registered Valuer and not by the Competent authority of the government as specified and as such the completion certificates obtained from the Chartered Engineer/ registered valuer/archited by the assessee are not valid and proper documents for this purpose and thus, they are liable for rejection"

12. In this regard, Appellant submits that the finding of the impugned order that as per the provisions of Telangana Building Rules, 2012, the builder or developer has to apply for the completion certificate to the municipal authority is not correct in as much as there is no such requirement under those rules. Appellant submits that the above referred rules only prescribe that the builder or developer has to obtain "Occupancy Certificate" and not the "Completion certificate". Hence, the confirmation of demand on such ground is not correct and the same needs to be dropped.

13. Appellant submits that the receipt of 'occupancy certificate' is not relevant for determining the service tax liability and it is only receipt of 'completion certificate' that is relevant to determine the service tax liability under section 66E(b), *ibid* which reads as under:

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation.—For the purposes of this clause,—

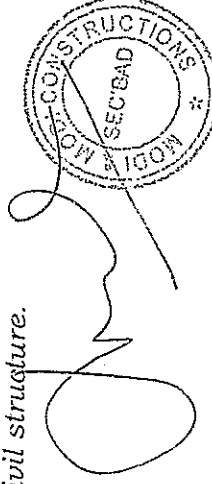
(I) the expression "competent authority" means the Government or any authority authorised to issue **completion certificate** under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure.



14. From the above referred section, it is very clear that if the entire consideration is received after issuance of 'Completion Certificate' by the competent authority, the same is excluded from the purview of Section 66E(b) of Finance Act, 1994. However, the said section has not referred 'Occupancy Certificate' anywhere.
15. Further, explanation - I clarifies that the "competent authority" means the Government or any authority who is authorized to issue **completion certificate** under any law for the time being in force and in case of non-requirement of such certificate from competent authority the same can be obtained from specified persons under Finance Act 1994. In the instant case, completion certificate has been obtained from the chartered engineer who is authorized to issue the same.
16. Appellant would like to submit that the completion and occupancy certificate are two different things and cannot be interchanged. Completion Certificate is the certificate which certifies that the building is completed as per the approved plan and meets other requirements such as distance from road, height of the building etc.
17. However, the Occupancy Certificate is the certificate which certifies that the building has been complied with all the required building standards, local laws and is safe to occupy. Occupancy certificate will be issued by municipal authorities that provide no objection to occupy the building for its specified use. The Occupancy Certificate will be issued only once the building has been completed in all respects and can be occupied.
18. This shows that the completion certificate precedes the occupancy certificate, and both are completely different. Further, Section 66E(b) refers the completion certificate but not the occupancy certificate. In state of Telangana, there is no requirement to obtain completion certificate from any authority and there is only requirement to obtain Occupancy Certificate from GHMC. Since there is no requirement to obtain completion certificate from the government or any authority, Appellant have obtained the same from a Chartered Engineer who is a professional capable of issuing such certificate. Hence, the confirmation of demand by the impugned order is not correct and the same needs to be dropped.

A handwritten signature in black ink is written over a circular official stamp. The stamp contains the text 'REGISTERED' at the top and 'CHARTERED ENGINEER' at the bottom, with a central emblem.

No Service tax on sale of semi-finished flat

19. Appellant submits from the findings of the impugned order; it is clear that the adjudicating authority itself has admitted that there are two agreements out of which one is taxable and the other being not liable to service tax involving the transfer of immovable property. However, the impugned order while confirming the demand has considered the same.

20. In this regard, Appellant submits that the sale of semi-finished flat is *transfer of immovable property which is not leviable to service tax*. In the present case, the agreement of sale deed is entered for sale/register of semi-finished flat which is an immovable property. Accordingly, the amount received for sale of semi-finished flat is not liable to service tax. On the basis of same, Appellant submits that the confirmation of demand by the impugned order is not sustainable and requires to be set aside.

21. Appellant further submits that there is no service tax levy on sale of semi-finished flat as the same was excluded from the definition of 'service' u/s. Section 65B(44) of Finance Act, 1994 ("Transfer of title in goods or immovable property, by way of sale").

22. Appellant submits that the impugned order vide Para 16.6 and vide Para 23 stated that

16.6 In the instant case the assesseees are paying VAT, hence there appears to be a transfer of property involved in the execution of work. Further the contract was for the purpose of construction of complex, which is a declared service. So, the work under taken by the assesseees appear to satisfy the definition specified at Section 658 (541 of Finance Act, 1994 and the same can be termed as "Works Contract service"

23. The noticee took the argument that they are not liable for pay Service tax on those flats sold after completion certificate as per Section 66E(b) of Finance Act 1994 and that after deduction of the same, they have paid the tax @ 40 % abatement on the remaining amounts received towards agreement for construction with customers. This is undisputedly a transaction involving (execution of works contract and accordingly Section 66 E (h) of Finance Act, 1994 ("service portion in the execution of a works contract") read with Rule

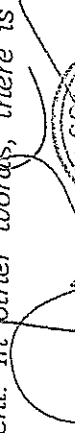


2A(ii) of the Service Tax (Determination of Value) Rules, 2006 are the relevant legal provisions in this instant case."

23. In this regard, Appellant submits that the finding of the impugned order is not at all correct in as much as the sale of flats after receipt of completion certificate becomes an immovable property and will go out of the purview of works contract definition under Section 65B(54) of Finance Act, 1994. Once the same is not a works contract service, there is no liability to pay service tax on the sale of immovable property. Hence, the finding of the impugned order needs to be set aside.
24. Appellant further submits that value of 'agreement of sale' consists of two parts namely 'undivided portion of land' and 'semi-finished flat. The semi-finished flat represents the construction work already done prior to booking of flat by the prospective buyer. The work undertaken till that time of entering 'AOS' is 'nothing but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self-service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be bought into the realm of works contract. In this regard reliance is placed on the following:

a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (303) E.L.T. 3 (S.C.): "115. It may, however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."

b. Jurisdictional CESTAT decisions in case of Modi & Modi Construction Vs CCE, Hyderabad -II 2021 (45) GSTL 398 (Tri-Hyd) wherein it was held that "11. The second question is the nature of the contract on which service tax is proposed to be charged. The SCN itself states that the plots along with semi-finished buildings were sold to the buyers under the sale agreement. Thereafter, a separate agreement was entered into with the individual home owners for completion of the building/structure as per the agreement. In other words, there is no

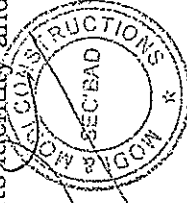


agreement for completion of the entire complex but there are a number of agreements with each individual house owner for completion of their building. In other words, the individual house owner is engaging the appellant for construction of the complex for his personal use as residence. The explanation to Section 65 (91a) categorically states that personal use includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, it does not matter whether the individual buyer uses the flat himself or rents it out. There is nothing on record to establish that the individual buyers do not fall under the aforesaid explanation. For this reason, we find no service tax is chargeable from the appellant on the agreements entered into by them with individual buyers for completion of their buildings as has been alleged in the SCN. Consequently, the demand needs to be set aside and we do so. Accordingly, the demands for interest and imposition of penalties also need to be set aside"

c. CHD Developers Ltd vs State of Haryana and others, 2015 -TIOL-1521-

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

25. Appellant further submits that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi-finished flat is not chargeable to VAT as there is no transfer of property in goods is involved and it is mere sale of immovable property (same was supported by above cited judgments also). Therefore, said sale cannot be considered as works contract and consequently no service tax is liable to be paid. All the goods till the prospective customer becomes owner (i.e. upto entering of 'Agreement of sale') has been self-consumed and not transferred to anybody. Further goods, being used in the construction of semi-finished flat, have lost its identity and



been converted into immovable property which cannot be considered as goods therefore the liability to pay service under works contract service up till the execution of 'Agreement of sale' would not arise.

26. Appellant submits that once it is concluded that the amount received towards sale deed is not taxable then there is no short payment of service tax, therefore, the impugned order needs to be set aside.

27. Appellant submits that the impugned order vide Para 16.8 has given a finding that *"the allegation in the notice is that they had short-paid service tax in contravention of Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006 since the Appellant did not include the value of the land as part of the total amount charged for the works contract while arriving at the taxable value."*

28. In this regard, Appellant submits that the finding of the impugned order is not at all correct in as much as the show cause notice has never disputed the valuation adopted by the Appellant. Therefore, the question of inclusion of sale deed values in the taxable values is not correct and the same needs to be set aside.

29. Appellant further submits that once the sale deed is entered, the right in the semi-finished flat is transferred to the customers and for completion of balance construction, Appellant has been entering into construction agreement on which appropriate service tax has been already paid. In this regard, Appellant submits that the agreement entered with customer involves only transfer of property in goods along with services and does not involve transfer of land as the same was already transferred to the customer by entering into sale deed. Once the transaction does not include land, there is no requirement to include the value of land while calculating the service tax. Hence, the finding of the impugned order that the value of land shall be included for the purpose of valuation is not correct and the same needs to be set aside.

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

30. Appellant further submits that the adjudicating authority while confirming the demand vide Para 32 stated as follows



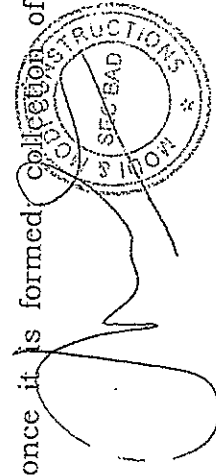
2. I find that the assessee has referred to "nontaxable receipts" in his worksheet which he claims has to be deducted while determining the taxable value. In his submissions, he contends that VAT, registration charges, Stamp duty, electricity charges are to be deducted. I find that the notice itself has not taken VAT and registration charges for purpose of quantification of taxable value. Therefore, it is not a bone of contention between the Department and the assessee. As regards other "non taxable receipts" as claimed by the Appellant, he has not provided any documents except the worksheet. Without any other material facts on record, I am not in a position to examine the nature of the supposed non taxable receipts. The onus is on the Appellant to provide supporting documents to substantiate his contention that these are not to be taken into consideration for determining the taxable value. They have failed to do so. Here, I must point out that under Rule 2A(ii), total amount charged for the work contract is to be taken for abatement and "total amount" has been defined under the said rules as "sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of work contract, whether or not supplied under the same contract or any other contract after deducting

- i) the amount charged for such goods or services, if any
- ii) the value added tax or sales tax, if any levied thereon"

31. Appellant submits that the finding of the impugned order that the Appellant has not submitted any documents is not at all correct in as much as the adjudicating authority has not asked for such documents. If the documents are not available, the department has the liberty to request the documents instead of confirming the demand. In the instant case, no such request is made by the adjudicating authority. It is settled law that the department cannot confirm the demand by merely stating that the documents are not submitted. Hence, the impugned order to that extent needs to be set aside.

32. Appellant submits that the amounts classified as non-taxable receipts includes electricity charges, corpus fund etc. Appellant submits that these receipts towards

- a. Corpus fund which is collected & totally kept in separate bank account and transferred to society/association once it is formed



corpus fund & keeping in separate bank account and subsequent transfer to association/society is statutory requirement;

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

c. Water deposit collected & totally remitted to 'Hyderabad Metropolitan Water Supply & Sewerage Board (HMWSS)' before taking the water connection. This Deposit amount also includes water consumption charges for first two months along with sewerage cess. All these deposits are collected & paid in terms of HMWSS Act, 1989 r/w rules/regulations made thereunder;

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

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

33. Judicially also it was held that above charges are not to be included in taxable value. Relied on ICC Reality & Others Vs CCE2013 (32) S.T.R. 427 (Tri. - Mumbai); Karnataka Trade Promotion Organisation v. CST 2016-TIOL-1783-CESTAT-BANG; hence demand does not sustain to this extent. To evidence the receipt of corpus fund, service tax and electricity charges, Appellant is herewith enclosing the sample copies of ledger accounts of the customers as Annexure (M).

In Re: Re-quantification of demand

34. Appellant submits that it is only sole allegation of SCN (Para 2) that construction agreements are subject to service tax under the category of "works contract", no allegation has been raised to demand service tax on the sale deed value. However, going through the annexure to the SCN, it can be observed that though the allegation is to demand service tax on construction agreements, the quantification is based on gross amounts mentioned above

clearly shows that the finding of the impugned order is not correct and the same needs to be set aside.

35. Appellant submits that it is apparent from the SCN that it represents an error in quantification of the demand. It may be noted that the Appellant have regularly and diligently discharged Service Tax on the value of "construction agreements". The above is explained through a comparative chart provided below:

Particulars	As per Noticee	As per SCN
Gross Receipts	75,049,757	75,049,757
Less Deductions		
Sale Deed Value	66,085,098	0
VAT, Registration charges, stamp duty and other non-taxable receipts	5,365,770	4,012,405
Taxable amount	3,598,889	71,037,352
Abatement @ 40%	1,439,555	28,414,941
Service Tax as applicable	205,803	4,207,651
Actually Paid	205,803	
Balance Demand	0	4,207,651

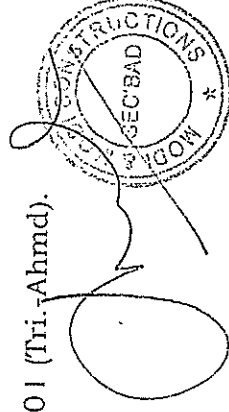
Appellant submits that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

Cum-tax benefit under Section 67 should be extended

36. Appellant submits that assuming but not admitting there is a liability under works contract service for sale of semi-finished flat, then as the Appellant has not collected service tax from the buyer, the benefit of cum-tax requires to be extended to the appellant.

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

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



- b. Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654
Tri.-Del
- c. Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590
- d. BSNL Vs CCE, Jaipur 2011 (24) S.T.R 435 (Tri-Del)

On the basis of above decisions, Appellant submits that the benefit of cum-tax requires to be provided to the Appellant. On the basis of the same, Appellant submits that the cum-tac benefit shall be extended.

In Re: Interest and penalties should not be imposed

38. Without prejudice to the foregoing, Appellant submits that when service tax itself is not payable, the question of interest does not arise. Appellant further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC)
39. Appellant submits that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the impugned order imposing the penalty requires to be set aside.
40. Appellant submits that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It settled position of the law that if the Appellant is under bonafide belief as regards to non-taxability, imposition of the penalties are not warranted. In this regard, wishes to rely on the following judicial pronouncements.
- a. Padmini Products v. Collector —1989 (43)E.L.T. 195 (S.C.)
- b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167)E.L.T. 379 (S.C.);

41. Appellant submits that, when the tax itself is not payable, the question of penalty under Section 76 does not arise. Further, assuming but not admitting, that there was a tax liability, as explained in the previous paragraphs when Appellant were not at all having the intention to evade the service tax and further also there was a genuine doubt about the liability of tax on land value in the industry where the builder pays tax under Rule 2A Valuation (A huge matter of litigation), Appellant is acting in a bona fide belief, that he is not liable to collect and pay service tax, there is no question of penalty under section 76 resorting to the provisions of Section 80 considering it to be a reasonable cause for not collecting and paying service tax.



42. The Appellant submits that penalty is imposable when the Appellant breaches the provision of the statute with an intent to defeat the scheme of the Act when there is a confusion prevalent as to the leviability and the mala fide not established by the department, it would be a fit case for waiver of penalty as held by various tribunals as under

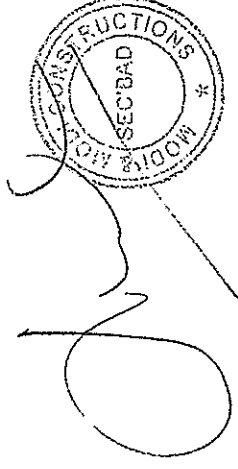
- a. Vipul Motors (P) Ltd. vs Commissioner of C. Ex., Jaipur-I 2008 (009) STR 0220 Tri.-Del
- b. Commissioner of Service Tax, Daman vs Meghna Cement Depot 2009 (015) STR 0179 Tri.-Ahmd

43. Appellant submits that issue involves interpretation and the periodical notices have been issued to the Appellant, the imposition of penalties under Section 76 is not tenable and the same needs to be set aside. In this regard, Appellant relied on M/s. Phoenix IT Solutions Ltd Vs CCE 2017 (52) STR 182 (Tri-Hyd).

44. Without prejudice to the foregoing, Appellant submits that penalty is proposed under section 77. However, the subject order has not provided any reasons as to why how the penalty is applicable under section 77 of the Finance Act, 1994. Further, the Appellant is already registered under service tax under works contract service and filing returns regularly to the department. Accordingly, the penal provision mentioned under section 77 is not applicable for the present case. As the subject order has not considered these essential aspects, the penalty under section 77 is not sustainable and requires to be set aside.

45. The Appellant submits that in the following two cases, M/s Creative Hotels Pvt. Ltd. Vs CCE, Mumbai (2007) (6) S.T.R (Tri-Mumbai) and M/s Jewel Hotels Pvt Limited Vs CCE, Mumbai-1 (2007) (6) S.T.R 240 (Tri- Mumbai) it was held that *"The authorities below have not given any allegation as to why penalty is required to be imposed upon them. Only because penalty can be imposed, it is not necessary that in all cases penalty is required to be imposed. In this case I accept the explanation of the Appellant and therefore dropped the penalty and allow the appeal."*

Benefit of Section 80 should be extended



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

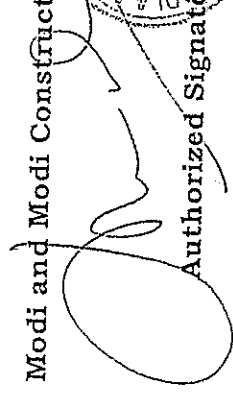
- a. Given understanding that compliance made by Appellant is in accordance with the law.
- b. Whatever believed as taxable was duly paid voluntarily.
- c. There were divergent views of Courts over the classification of indivisible contracts, taxability of transaction involving immovable property etc.,
- d. There was enough confusion prevalent on the applicability of the Service tax among the industry.
- e. Matters were referred to larger bench at various instances.

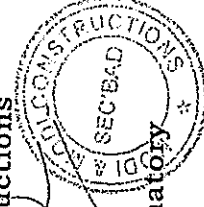
All the above can be considered as reasonable cause and waiver of penalty can be granted in terms of section 80 of Finance Act, 1994. Relied on **CST, Vs Motor World 2012 (27) S.T.R 225 (Kar)**

47. Appellant craves leave to alter, add to and/or amend the aforesaid submissions.

48. Appellant submits that wish to be heard in personal before passing any order in this regard.

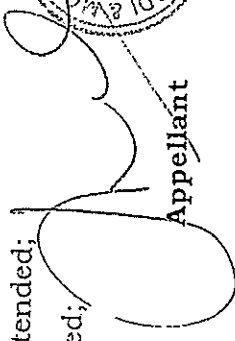
For M/s. Modi and Modi Constructions

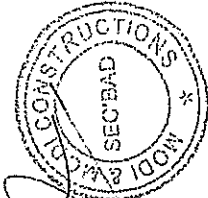

Authorized Signatory



Therefore, it is prayed that

- a. To set aside the impugned order to the extent aggrieved;
- b. To hold that flats/villas sold after receipt of Completion Certificate is not liable to service tax;
- c. To hold that service tax is not applicable on amount received towards Sale Deed;
- d. To hold that demand should be re-quantified;
- e. To hold that no interest and penalties are leviable;
- f. To hold that benefit of section 80 shall be extended;
- g. Any other consequential relief shall be granted;


Appellant

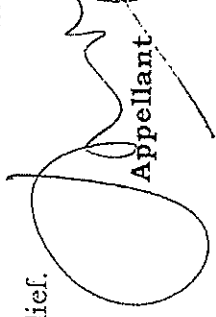


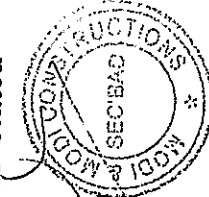
VERIFICATION

I, Soham Modi, Partner of M/s. Modi and Modi
Constructions, Hyderabad, the Appellant herein do declare that what is stated
above is true to the best of our information and belief.

Verified today 29th day of April, 2022

Place: Hyderabad


Appellant



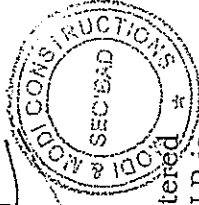
**BEFORE THE COMMISSIONER (APPEALS-II),
07TH FLOOR, GST BHAVAN, L.B. STADIUM ROAD, BASHEER BAGH,
HYDERABAD - 500 004**

Sub: Proceedings under Order-In-Original No. 09/2021-22(S.Tax-Adjn) dated 23.12.2021 issued to M/s. Modi and Modi Constructions.

I, Soham Modi, Partner hereby authorizes and appoint Hiregange & Associates LLP, Chartered Accountants, Bangalore or their partners and qualified staff who are authorized to act as an authorized representative under the relevant provisions of the law, to do all or any of the following acts: -

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

This authorization will remain in force till it is duly revoked by me/us.
Executed this on 29th April 2022 at Hyderabad



Signature

I the undersigned partner of M/s Hiregange & Associates LLP, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates LLP is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Finance Act, 1994. I accept the above said appointment on behalf of M/s Hiregange & Associates LLP. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

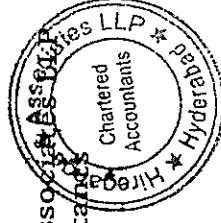
Dated: 29.04.2022

Address for service:

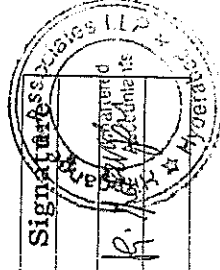
Hiregange & Associates LLP,
Chartered Accountants,
4th Floor, West Block, Anushka Pride,
above Lawrence & Mayo,
Road Number 12, Banjara Hills,
Hyderabad, Telangana 500034

Venkata Prasad P
Partner (M.No. 2365558)

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



Sl No.	Name	Qualification	Mem./Roll No.	Signature
1	Sudhir V S	CA	219109	
2	Lakshman Kumar K	CA	241726	
3	Rasika Kasat	CA	243001	



Sub: Service Tax - M/s Modi & Modi Constructions, Hyderabad - Non-Payment of Service Tax- Issue of Adjudication Order - Regarding.

M/s Modi & Modi Constructions., 5-4-187/3& 4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad -500003 (hereinafter referred to as 'M/s. MMC' or "the Assessee") have registered themselves with the service tax Department vide Registration No.AAKFM7214NST001, for payment of service Tax Under the categories of "Works contract service" and "construction of Residential complex service".

2. As seen from the records, the assessee entered into 1) Sale deed for sale of undivided portion of land together with semi-finished portion of the flat and 2) Agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the 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 transfer of property in goods in execution of the said construction agreements is involved, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable services under "Works Contract Service".

3. Accordingly, for the period covering upto March 2015, the following Show Cause Notices and orders had been issued to the Assesee for non-payment of service tax :

SL. NO.	SCN OR NO. & date	Period	Amount of Service Tax demanded (Rs.)	OIO NO. Date
1	HQPOR No.34/2010-Adjn(ST) dated 12.04.2010	2009	6,04,187/-	45/2010-ST Dt.29.10.2010 (Confirmed)
2	OR No. 59/2011-Adjn (ST) Gr.X Dt.23.04.2011	2010	12,06,447/-	48/2012-Adjn(ST) ADC Dt.31.08.2012 (Confirmed)
3	OR No.53/2012-Adjn (ADC) Dt.24.04.2012	2011	27,61,048/-	06/2020-Adjn(ST) DC Dt.03.08.2020 . The noticee opted for SVLDR Scheme, 2019. The designated Committee issued discharge certificate for full and final settlement of tax dues under Sec 127 of the Finance (No.2) Act, 2019 read with Rule 9 of the Sabka Viswas (Legacy Scheme, 2019).
4	OR No.81/2013-Adjn (ST) (ADC) Dt.02.12.2013	01/2012 to 06/2012	11,87,407/-	07/2020-Adjn(ST) DC Dt.03.08.2020 . The noticee opted for SVLDR Scheme, 2019. The designated Committee issued discharge certificate for full and final settlement of tax dues under Sec 127 of the Finance (No.2) Act, 2019 read with Rule 9 of the Sabka Viswas (Legacy Scheme, 2019).
5	OR No.109/2014 Adjn (ST) (JC) Dt.24.09.2014	07/2012 to 03/2014	38,35,321/-	07/2020-Adjn(ST) DC Dt.03.08.2020 . The noticee opted for SVLDR Scheme, 2019. The designated Committee issued discharge certificate for full and final settlement of tax dues under Sec 127 of the Finance (No.2) Act, 2019 read with Rule 9 of the Sabka Viswas (Legacy Scheme, 2019).

6	OR No. 25/2016-Adjn (ST) (JC) Dt. 18.04.2016	04/2014 to 03/2015	6,30,349/-	05/2020-Adjn(ST) DC Dt.04.08.2020 . The noticee opted for SVLDR Scheme, 2019. The designated Committee issued discharge certificate for full and final settlement of tax dues under Sec' 127 of the Finance (No.2) Act, 2019 read with Rule 9 of the SabkaViswas (legacy Scheme, 2019).
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4. As per the information furnished by the Assessee along with statements vide their letter dated 15.2.2018 received on 16.2.2018, it was observed that "the Assessee" have rendered taxable services under the category of "Works Contract Services" during the period April, 2015 to June, 2017. The Assessee had rendered services for a taxable value of Rs. 7,50,49,757/- (Rupees Seven Crores Fifty Lakhs Forty Nine Thousand Seven hundred and Fifty Seven only). After deduction of VAT of Rs. 40,12,405/- the taxable value works out to Rs. 7,10,37,352/- (Rupees Seven Crores Ten Lakhs Thirty Seven Thousand Three hundred and Fifty Two only) on which service tax (including Cesses) worked out to Rs.42,07,651/-, as per the relevant annexure to the notice.

5. Vide Finance Act, 2012, sub section (1A) was inserted in Section 73 which read as under:

SECTION 73(1A) – Notwithstanding anything contained in sub-section (1), 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 refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

6. The section 65B, 66B, 66D as inserted in the Finance Act, 1994 by the Finance Act, 2012 w.e.f. 01.07.2012 are reproduced below:

6.1. SECTION 65B (44): "service" means any activity carried out by person for another for consideration, and includes a declared service, but shall not include – (a) an activity which constitutes merely,- (i) a transfer of title in goods or immovable property, by way of Sale, gift or in any other manner; or(ii) a transaction in money or actionable claim; (b) a provision of service by an employee to the employer in the course of or in relation to his employment; (c) fees taken in any Court or tribunal established under any law for the time being in force. .

6.2. SECTION 66 B.- There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person another and collected in such manner as may be prescribed.

6.3. SECTION 66 D: Contains the negative list of services. It appears that services provided by the Assessee are not covered under any of the

covered under 66E(h) of the Finance Act, 1994.

6.5. Further, Notification No.25/2012-ST, dated 20.06.2012, as amended specified services which were exempt from payment of Service Tax. It appears that services provided by the Assessee are not covered under any of the services listed therein.

7. The grounds as explained in the Show Cause.cum demand notices issued earlier are also applicable to the present case; the legal position in so far as, 'Works Contract Service' is concerned, the said service and its taxability as defined under Sub -clause(zzzza) of Clause 105 of Section 65 of the Finance Act,1994 as existed before 01.07.2012 stands now covered by 65B (54) whereby the said Service being declared service under Section 66E(h) of Finance Act, 1994 and for not being in the Negative List prescribed under 66D, continues to be a taxable service. But for the said changes in legal provision, the status of Service and the corresponding tax liability remained same. Hence, notice is issued in terms of Section 73(1A) of the Finance Act, 1994 for the period April, 2015 to June, 2017.

8. In view of the above, M/s. Modi & Modi Constructions, Hyderabad were issued with a Show Cause Notice vide C.No.V/24/15/02/2018-Adjn. dt.16.04.2018 requiring them to reply to the Assistant Commissioner of Central Tax, Central Excise and Service Tax, Office of the Assistant Commissioner of Central Tax, Central Excise and Service Tax, Secunderabad GST Division, Secunderabad GST Commissionerate, D. No. 2-4-416&417,1st Floor, Salike Senate, Ramgopalpet, M.G Road, Hyderabad, within 30(thirty) days of receipt of the notice as to why: -

i) an amount of Rs. 42,07,651/- (Rupees Forty-Two Lakh Seven Thousand Six hundred and Fifty One only) (including Cesses) should not be demanded from them towards "Works Contract Service "rendered by them during April, 2015 to June,2017, in terms of Section 73 (1) of the Finance Act, 1994; on the grounds discussed supra; and

ii) Interest should not be demanded on the amount at (i) above, under Section 75 of the finance Act, 1994; and

iii) Penalty should not be imposed on them under Section 76 of the Finance Act, 1994, for the contravention of Rules and Provisions of the Finance Act, 1994; and

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

9. REPLY TO THE SHOW CAUSE NOTICE:

9.1 The assessee furnished reply to the Show Cause Notice vide their letter dated 14.6.2018 and made the following submissions :

9.2 The assessee stated that during the disputed period for which present notice has been issued, the assessee has undertaken the following type of transactions:

i. Sale of Flats after receipt of Completion Certificate (CC) : The assessee stated in these transactions, in most of the cases sale deed is executed for the entire sale consideration without entering into any construction agreement and in some cases sale deed is being executed for semi-finished constructions along with an agreement of construction and said that the flats sold after CC is not leviable to service tax, he has not paid any service tax on the same but paid service tax only on amounts received towards construction agreements.

ii. Sale of Flats before receipt of Completion Certificate (CC): In these transactions, the assessee said that he is executing sale deed for semi-finished flat along with an agreement of constructions and said that Sale deed is registered and appropriate "Stamp Duty" has been discharged on the same and is discharging service tax on agreement of constructions value after availing deduction towards sale deed value and non-taxable receipts.

9.3 The assessee submitted details of Villas booked before CC and after CC as follows :

Particulars		No. of Villas
No. of Villas booked before receipt of CC (Taxable as the villas are booked before CC)		11
No. of Villas booked after receipt of CC (Not-Taxable as the villas are booked after CC)		16
No. of Villas booked after receipt of CC but with Construction Agreement (Taxable only to the extent of Agreement of Constructions)		4
Total		31

9.4 The assessee further submitted that Completion certificate from the "Chartered engineer" for 33 Villas was obtained on 05.05.2013 and applied for Occupancy Certificate (OC) on 05.11.2014 and same is under process. 20 villas were booked after this date and sale deed is being executed for the entire sale value of villa. In such circumstances, no service tax is liable on the amounts received towards said villas since same is "sale of immovable property" and it was specifically provided in Section 66 E(b) of Finance Act, 1994 that service tax is not liable for the villas booked after completion certificate date. Hence proposal of present Show Cause Notice to demand service tax on the villas booked after Completion Certificate (CC) date is not sustainable and required to be dropped.

9.5 The assessee said that as seen from the operative part of Show Cause Notice, it is clear that it is only sole allegation of Show Cause Notice (para 2) that construction agreements are subject to service tax under the category of "works contract" and no allegation has been raised to demand service tax on the sale deed value. Assessee however alleged that while calculating the demand of service tax on constructions agreements, the quantification is based on gross amounts mentioned for all the activities including amounts received towards the "sale deeds". So, the Show Cause Notice represents an error in quantification of the demand and stated that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the Department on this ground and the following quantification of the amounts is submitted by the assessee in this regard:-

GROSS RECEIPTS	13049131	13049131
Less deductions:		
Sale Deed Value	66085098	0
VAT, Registration charges, stamp duty and other non taxable receipts	5365770	4012405
Taxable amount	3598889	71037352
Abatement @ 40%	1439555	28414941
Service Tax as applicable	205803	4207651
Actually paid	205803	0
Balance Demand	0	4207651

9.6 The following broad lines of argument are submitted by the assessee:-

- a) In all cases, the "sale deed" is entered into after the completion of the building and therefore the demand cannot be justified under the same 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.

9.7 The assessee submitted that similar to the claim for exclusion of sale deed value, the value attributable to stamp duty, electricity etc., need to be reduced and stated that once the above deductions are allowed, the demand would be reduced to NIL.

9.8 The assessee had made mention of the following case laws in support to his claim:-

- i. Commissioner of Central Excise (Appeals) and the Hon'ble CESTAT, Bangalore in the previous period has remanded the matter back to the adjudicating authority for re-quantification of the duty liability. However, the subject Show Cause Notice has not considered this aspect and demanded service tax and submitted that the proposition of the subject Show Cause Notice demanding the duty is not sustainable and requires to be dropped.
- ii. The assessee alleged that the grounds of the old period is not at all applicable for the new / subsequent period due to the substantial changes took place in the provisions of service tax and submitted that once SCN raises allegation/demand based on inapplicable provisions then such allegation/demand cannot sustain and relied on Maharashtra Industrial Development Corporation Vs CCE, Nasik 2014 (36) S.T.R. 1291 (Tri. - Mumbai) wherein it was held that "With regard to the show cause notice in Appeal No. ST/85267/14 we find that the period involved is 1-10-2011 to 30-9-2012. In the said case, the demand is for two periods

- one from 1-10-2011 to 30-6-2012 and the second is from 1-7-2012 to 30-9-2012 when the negative list came into effect but the show cause notice has been issued on the basis of definition of Management, Maintenance and Repair service has stood prior to 1-7-2012. Therefore, as post-1-7-2012 the provisions are not existing therefore, the demands for the period post-1-7-2012 are not maintainable”

9.9 The assessee stated that the subject SCN is issued without any allegations, the same has not proved the burden of proof of taxability, which is essential under new service tax law. Relied on United Telecom Ltd. Vs CST 2008(9) S.T.R. 155 (Tri-Bang); Jetlite (India) Ltd. Vs CCE 2011 (21) S.T.R. 119 (Tri-Del).

9.10 The assessee said that an amount of Rs.79,835/- has already paid towards service tax on the amounts received towards constructions agreements and requested the Adjudicating authority to consider the same while passing the order and also to exclude the value of land from determination of service tax liability.

9.11 The assessee mentioned that as they have not collected service tax from the buyer, the benefit of cum-tax u/s. 67(2) of Finance Act, 1994 requires to be given and claimed that when service tax itself is not payable, the question of interest does not arise and stated that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC). Similarly stated that penalty also cannot be imposed in absence of the any short payment as alleged in the SCN.

9.12 Assessee submitted that for the penalty proposed under section 77, the subject Show Cause Notice has not provided any reasons as to why how penalty is applicable under section 77 of the Finance Act, 1994. Further stated that the he is already registered under service tax under works contract service and filing returns regularly to the Department, penal provisions mentioned under section 77 is not applicable for the present case and said that as the subject Show Cause Notice has not considered these essential aspects, the proposition of levying penalty under Section 77 is not sustainable and requires to be dropped. They further requested to give them an opportunity to be heard in person.

10. In terms of Para 1(ii) of CBEC Circular No.1028/16/2016-CX dated 26.4.2016, as the previous Show Cause Notices issued to M/s. Modi & Modi Constructions were kept in Call Book, hence the present Show Cause Notice also transferred to Call Book.

10.1 On 30.07.2019, M/s. Hiregange & Associates, Chartered Accountants (authorized by the assessee to represent their case) have informed that with respect to Show Cause Notice No.O.R.No.81/2013-Adjn(ST)(ADC) dated 2.12.2013 (covering the period 01/2012 to 06/2012) and OR No.109/20140-Adjn.(ST)(JC) dated 24.9.2014 (covering the period 07/2012 to 03/2014) pertaining to M/s. Modi & Modi Constructions, they would like to settle the case under Sabka Viswas (Legal dispute Resolution) Scheme as proposed in Finance Bill, 2019 (Chapter VI).

CBEC Circular No.1053/02/2017 vide para 11.5, the file related to the present Show Cause Notice was transferred to the Adjudication Section, Hqrs. Office on 31.12.2019 on the ground that all pending notice should be adjudicated by the highest authority with whom any of the notices is pending.

10.3 P.H. intimation letter dt 01.03.2021 was sent to the assessee to attend P.H. on 15.03.2021 before the Additional Commissioner, Central Tax & Central Excise, Secunderabad GST Commissionerate. On 31.3.2021, the consultant appeared P.H. on Virtual Mode and reiterated the submissions made in their reply dated 14.6.2018. He stated that the proposal to demand Service Tax on Villas booked after completion certificate is not sustainable and is required to be dropped. He further stated that when Service Tax itself is not liable to be paid, the question of interest and penalty does not arise.

10.4 Subsequently, on 9.4.2021, the file was returned to Secunderabad GST Division as the adjudication proceedings in earlier Show Cause Notice No.53/2012-Adjn (ADC) dated 24.4.2012 (denovo) were closed on 16.6.2020 and there is no case against M/s. Modi & Modi Constructions pending for adjudication in Head Quarters and to initiate adjudication proceedings in respect of subject notice to be conducted by the Assistant Commissioner, Secunderabad GST Division as the notice falls in the monetary limits of Assistant Commissioner.

11. In view of the above directions, the subject Show Cause Notice was taken up for consideration. P.H. intimation letter dated 15.7.2021 was sent to the assessee to appear before the Assistant Commissioner of Central Tax, Secunderabad GST Division on 28.7.2021. A mail was received from Karthik Bharatha, Executive, Hiregange & Associates LLP on 28.7.21 wherein it was mentioned that they were authorized to represent M/s. Modi & Modi Constructions and have received the P.H. intimation scheduling the hearing on 28.7.2021 at 12.00 PM. But unfortunately, it missed their attention. Hence requested for one more opportunity of being heard through virtual mode.

12. Another P.H. was fixed on 3.8.2021. The consultant appeared for P.H. in Virtual mode and reiterated the submissions made in their reply dated 14.6.2018. On enquiry regarding details of party-wise receipts, he assured to submit copies of party wise ledgers along with bank statements and also copies of sale deeds / agreements in respect of all the Villas and requested time for submitting the same.

13. On 24.8.2021, the consultant requested for some more time to submit the documents as assured during the P.H. on 3.8.21. On 4.10.21, they again requested for some more time to submit the documents.

14. During the P.H. held on 22.10.21 they submitted party-wise ledgers for the period April 2015 to June 2017, copy of Sale Deeds and Copy of completion certificates for flats sold after receipt of occupancy certificate and reiterated the submissions made in the earlier reply. A Final P.H. was held on 16.12.2021, wherein the assessee was asked to clarify the discrepancy about the payments made by them. They informed that they will

submit the required challans in a day. However, no documents were submitted till date.

Discussions and Findings :

15. I have carefully gone through the records of the case, the allegations made in the Show Cause Notice, written submissions made by the noticee and the submissions made during personal hearing held in the case. This periodical notice pertains to the period April, 2015 to June, 2017. Since the issue is a periodical notice issued under Section 73(1A), firstly I would like to briefly state the issue under dispute. The issue has been there since 2009 wherein the assessee enters into i) sale deed for sale of undivided portion of land together with semi finished portion of the house and ii) agreement for construction, with the customers. On execution of the sale deed the right in a property gets transferred to the customer, thereby the Department contended that the construction service rendered by the assessee to their customers under agreement of construction was classifiable under "Works Contract Service" as there exists service provider and receiver relationship between them and the sale deed value plus value w.r.t agreement for construction are taken for quantification of value for service portion of the works contract under the relevant rules.

16. 'Works Contract Service' was brought under the Service Tax net with effect from 01.06.2007 vide Notification No. 32/2007-ST, dated 22.05.2007. The relevant provisions of law with regard to this service are reproduced hereunder:

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

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

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out—
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof; or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of or similar services in relation to a building or

construction or commissioning (EPC) projects;

16.2 Section 65 of the Finance Act, 1994 as existed before 01.07.2012 stands now covered by 65B (54) .

As per Section 65 B(54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, improvement, repair, renovation, alteration of any building or structure on land or for carrying out any other similar activity or a part thereof in relation to any building or structure on land;

16.3 Further, the definition for CONSTRUCTION OF RESIDENTIAL COMPLEX SERVICE under Finance Act is as follows;

(i) "Construction of Complex" means —

(a) construction of a new residential complex or a part thereof; or
(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or
(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;

(Section 65(30a) of the Finance Act, 1994)

(ii) "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;

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

16.4 Definition of Residential complex have gone a sea change after the introduction new service tax law w.e.f 01.07.2012. With effect from 01.07.2012 under the new service tax regime "Residential complex" means any complex comprising of a building or buildings, having more than one single residential unit; "single residential unit" means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family; The following construction constitutes service. 1. Construction of complex 2. Construction of building 3. Construction of civil structure 4. Construction of

complex or building which is a) intended for sale to a buyer, b) wholly or partly, and c) where whole or part consideration is received before issuance of Completion Certificate by Competent authority. It covers construction of residential, commercial and industrial complex or building etc. Therefore, there's a substantial change took place after 01.07.2012 with regard to the definition of residential complex. Thus, residential complex has been redefined by replacing twelve (12) residential units by one residential unit. It means w.e.f. 01.07.2012 any construction of residential complex or Buildings having more than one residential unit are chargeable to service tax. Therefore, construction of residential, industrial and commercial complex or building are being charged to service tax under this declared services. The period covered under the present SCN/issue is much later than the changes occurred in the definition and as such the consideration in dispute is wholly is chargeable to service tax after availment of necessary abatements..

16.5 After 01.07.2012 'Construction of Complex' is a declared service under Section 66E of the Finance Act, 1994. As per Section 66E(b) of the Finance Act, 1994 'construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority' is a declared service. Further as per Section 66E(h) of the Finance Act, 1994 'service portion in the execution of Works Contract' is also a declared service.

16.6 In the instant case the assessee is paying VAT, hence there appears to be a transfer of property involved in the execution of work. Further the contract was for the purpose of construction of complex, which is a declared service. So, the work under taken by the assessee appear to satisfy the definition specified at Section 65B (54) of Finance Act, 1994 and the same can be termed as "Works Contract" service.

16.7 Further, as seen from the brochure placed in the assessee's website in respect of this project i.e. "NILGIRI HOMES", the following common amenities are being provided by them to the prospective villa owners, namely 1) Clubhouse 2) fully equipped air conditioned gymnasium 3) Recreation room with pool and TT table 4) Air conditioned banquet hall with projection TV 5) Lawns for banquets 6) creche 7) Tennis court 8) Open Air badminton court 9) Basketball court 10) Beach volleyball court, 11) Children's park, 12) Landscaped gardens 13) Amphitheatre 14) Cement concrete roads and street lighting.

16.8 The undisputed facts of the case are that the noticee had entered in to two agreements with such prospective buyers - one whereby they agreed to transfer undivided share of land relating to the houses to be constructed on works contract basis and the second, whereby they agreed to undertake construction of houses and transfer them to buyers on terms specified which included payment of sums due at different stages of construction of the houses/villas. The total consideration is received in to two parts- one representing the value of undivided share of land and the other the taxable value of construction services provided. The assessee seemed to have determined the taxable value of the works contract services provided to be 40% of the value of such services earmarked (after excluding land value and

allegation in the notice is that they had short-paid service tax in contravention of Rule 2(A) (ii) of the Service Tax (Determination of Value) Rules, 2006 since the noticee did not include the value of the land as part of the total amount charged for the works contract while arriving at the taxable value.

17 Section 67 of Finance Act, 1994, which governs valuation of taxable services, is as under:

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,-

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

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

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

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.-"For the purposes of this section,-

(a) "Consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b)

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

18 Rule 2A of Service Tax (Determination of Value) Rules, 2006, has been substituted with effect from 01.07.2012 vide Notification 24/2012-Service Tax dated 06.06.2012. Rule 2 A is as under:

"2A. Determination of value of service portion in the execution of a works contract.- Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Explanation- For the purposes of this clause-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

- (i) labour charges for execution of the works;
- (ii) amount paid to a sub-contractor for labour and services;
- (iii) charges for planning, designing and architect's fees;
- (iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;
- (v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;
- (vi) cost of establishment of the contractor relatable to supply of labour and services;
- (vii) other similar expenses relatable to supply of labour and services; and
- (viii) profit earned by the service provider relatable to supply of labour and services;

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on **forty per cent.** of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on **seventy percent.** of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property, service

for the works contract;

Explanation 1.- For the purposes of this rule-

(a) "original works" means-

- (i) all new constructions;
- (ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
- (iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(d) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

- (i) the amount charged for such goods or services, if any; and
- (ii) the value added tax or sales tax, if any, levied thereon:

Accordingly value has to be determined for 'Works Contract' under Rule 2A of Service Tax (Determination of Value) Rules, 2006 substituted w.e.f. 01.07.2012 vide Notification 24/2012-Service Tax dated 06.06.2012.

19 In this case after 01.07.2012 the provisions of clause (i) of Rule 2A of Service Tax (Determination of Value) Rules, 2006 as amended w.e.f. 01.07.2012 cannot be followed as the assessee have not segregated the actual value of property in goods transferred in the execution of the works contract while paying VAT. Therefore clause (ii) of Rule 2A of Service Tax (Determination of Value) Rules, 2006 as amended w.e.f. 01.07.2012 shall be followed in this case.

As per clause (ii) (A) service tax shall be payable on forty percent of the total amount charged for the works contract for execution of original works. In the instant case the assessee have constructed a new residential complex and is the original works, hence Service Tax is payable on forty percent of the total amount charged.

20 In this regard, I am inclined to rely on the Hon'ble CESTAT, Chennai order in ISHA Homes (I) Pvt Ltd Vs Commissioner of Service Tax, Chennai, reported vide 2012 (25) S.T.R. 465 (Tri. - Chennai) wherein the Hon'ble Tribunal observations are reproduced hereunder;

"We have carefully considered the submissions from both sides and perused the records including sample sale deed executed for sale of plot in connection with one of the villas.

6.2 Prima facie, we find the following :-

(a) The 97 "independent houses" referred to as villas are part of a gated community built as per the layout of the property approved by the local municipal authority. The common area and the common facilities make the 97 villas as part and parcel of "residential complex". They are horizontally spread over unlike in the case of flats in a residential complex which are vertically spread. It is also noticed that each of the villa owners is required to make payments towards life time club membership and corpus funds for maintenance of overall complex.

Further, the villa owners are required to share the cost of repairs and maintenance and all common amenities on pro rata basis.

(b) The definition of "residential complex" reads as under :-

"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.

(iv) 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.

(v) Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, - (a) "person 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 residence"

From a close reading of the above, it is noticed that the residential complex can comprise of "a building" or "buildings". This shows that the residential complex envisaged for taxing purpose can consists of more than one building. Further, the Explanation of "residential unit" refers to "a single house" or "single apartment" which implies that independent houses can form part of the residential complex.

(c) We find that service tax on "construction of complex services" is in vogue w.e.f. 16-6-2005 and, therefore, service tax is payable under the said category w.e.f. 16-6-2005. This position stands notwithstanding the introduction of "Works Contract Service" w.e.f. 1-6-2007.

(d) The amendment introduced to Section 65(105)(zzzh) w.e.f. 1-7-2010 and the explanation of the Board in this case appears to cover a situation when payments are received "even before completion certificate" the same should be treated as towards services deemed to have been rendered. This amendment could not be treated to imply that no service tax at all was payable on a specific service of construction of complex service prior to 1-7-2010 merely on the ground that the amounts were received in advance.

(e) The decision in the case of CST v. Shrinandnagar basically dealt with the issue whether a housing society could be held to have rendered services to the members. Further, the decision has been rendered in the facts of the said case and the Hon'ble High Court did not find any question of law arising for their consideration. The decision of the Tribunal in the case of Macro Marvel Projects Ltd. deals with a case involving construction of individual residential house and, in the present case, it involves a case of gated community consisting of 97 villas with common areas and common facilities and bound together by agreement to pay common expenses.

contract with the customers that applicable service tax as shall be indicated and demanded by the builder/promoter shall be paid" and their furnishing the relevant details latest by 15-7-2009, go to show that the SCN dated 15-1-2010 may not be time-barred.

In view of the above, we hold that the applicant has not made out strong case.

21 The ratio of the above case squarely applies to the case on hand. Further, in the case of C.S.T., New Delhi Vs Gandharva Infrastructure & Projects Ltd, reported in 2017 (6) G.S.T.L. 431 (Tri. - Del.) the Hon'ble Tribunal has observed that;

"For the activity to be covered by the definition of residential complex, the complex should comprise of more than 12 residential units. This can be situated within one building or more than one building. Further requirement is that these residential units should have a common order and further one or more facilities such as parking, lift, community hall, common water supply, etc. From the records, we find that the respondent is engaged in the construction of individual independent residential houses. Each such house will be a residential unit for use at the place of residents. The important question to decide the issue is whether these individual independent residential units are situated as part of a complex with common area and one or more facilities. We have perused the layout plan submitted by the ld. Counsel of OMICRON-I layout. We find that the entire area is divided into several clusters of plots on which individual houses have been built for the respondent. We note that each house shares a wall with the houses on either side as well as the one in front/behind. We also find that there are common facilities such as parks, community hall, etc. and note that the layout plan of each house is provided by the GNIDA which is also one of the requirements for governing residential complex. In view of the above, we are of the view that each of these clusters of houses will form a residential complex comprising of several individual residential houses with common area and various facilities. Consequently, these will be covered within the definition of construction of complex and liable to service tax. The adjudicating authority's interpretation that more than 12 residential units should be part of one building situated in one plot of land is without any basis. However, we note that the layout plan of only one of the layouts constructed has been submitted. Before concluding on the service tax demand it will be necessary to go through the layout plan of all the layouts constructed by the appellant with a view to examine the factual position in the case. We also note that the nature of construction carried out by the appellant is of composite nature involving supply of materials as well as verification of services. In terms of the decision of Hon'ble Supreme Court in the case of Larsen & Toubro - 2015 (39) S.T.R. 913 (S.C.) such composite construction are liable to service tax only w.e.f. 1-6-2007 under the category of works contract services"

22 As seen from the above judgement, it was categorically affirmed by the tribunal that the assessee's contention that more than 12 residential units should be part of one building situated in one plot of land is devoid of any merits as such the total consideration received by them before issuance of the completion certificate by the municipal authorities is taxable.

23 The noticee took the argument that they are not liable for payment of Service tax on those flats sold after completion certificate as per Section 66 E(b) of Finance Act 1994 and that after deduction of the same, they have paid the tax @ 40 % abatement on the remaining amounts received towards agreement for construction with customers. This is undisputedly a transaction involving execution of works contract and accordingly Section 66 E (h) of Finance Act 1994 ("service portion in the execution of a works contract") read with Rule 2A (ii) of the Service Tax (Determination of Value) Rules, 2006 are the relevant legal provisions in this instant case.

24 In this regard as per Section 66E(b) of the Finance Act, 1994
Explanation

(1) "the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-

- (A) Architect registered with the Council of Architecture constituted under the Architect Act, 1972 (20 of 1972); or
- (B) Chartered engineer registered with the Institution of Engineers (India); or
- (C) Licensed surveyor of the respective local body of the city or town or village or development or planning authority;

25 As seen from the above explanation, it is observed that only in case of non-requirement, the chartered engineer or Architect or Licensed surveyor can issue such certificates. However, these certificates are mandatorily required to the residential complex builders to produce before the local body authorities for getting necessary approvals/permissions. The completion certificate contains all the required details including the identification of the land, the location, the organization/builder, if the building has adhered to the building plan, and met all the standards of safety and regulation, distance from the road, distance from surrounding buildings, height and other criteria set by the municipal authorities. In essence, the Completion certificate certifies that the building has not violated any rules and norms in that locality. According to The Apartment/residential complex ownership Acts in various states across the country, CC is a compulsory document for an owner or builder in order to avail water and electricity supply. When an owner purchases an apartment from the builder, he should obtain a copy of the CC from the builder when he is taking possession of the said unit.

26 A completion certificate demonstrates that the building has been constructed as per the laid down norms and that it has been inspected by the authorities. In addition, this certificate is a pre-requirement for applying to water and electricity connection for a building. However, having a completion certificate is beneficial in more than one ways and is a mandatory requirement for the following reasons

- Sense of security that the building has been constructed in line with the approved plan
- Only after the completion or possession of home can you claim Income tax benefits.

- A requirement while selling your home
- Completion Certificate forms a pre-requisite for obtaining Occupancy Certificate. Without an occupancy certificate, it is illegal to reside in a particular building.

27 As per the Rules issued under Andhra Pradesh State Government Gazette Notification issued by the MUNICIPAL ADMINISTRATION & URBAN DEVELOPMENT DEPARTMENT vide G.O. MS. No. 168 Dated: 07/04/2012, the Definition for Competent Authority is given in the para 2. a) of the said G.O wherein it was clearly mentioned Definitions: In these rules;

2. a) 'Competent authority' means:

- (i) The Metropolitan Commissioner, Hyderabad Metropolitan Development Authority in HMDA area exclusive of Greater Hyderabad Municipal Corporation (GHMC) Area,
- (ii) The Commissioner, Greater Hyderabad Municipal Corporation (GHMC)
- (iii) The Vice Chairman of the respective Urban Development Authority.
- (iv) The Director of Town & Country planning in case of Municipal Corporations, Municipalities, Nagara Panchayats not covered in Urban Development Authorities and Gram Panchayat areas covered in Master plans/General Town Planning Schemes notified under Andhra Pradesh Town Planning Act, 1920.

28 Further, as per the Provisions of Telangana State Gazette Notification issued by the MUNICIPAL ADMINISTRATION & URBAN DEVELOPMENT (M1) DEPARTMENT vide G.O. MS. No. 152 Dated: 02/11/2015, the Definition for Competent Authority is given in the para 2. 2 of the said G.O wherein it was clearly mentioned

2.2 "Competent Authority" means

the Municipal Commissioner in case of areas falling in the Municipal Corporation and Municipal limits; the Metropolitan Commissioner, Hyderabad Metropolitan Development Authority / the Vice Chairman of the Urban Development Authority in case of areas falling outside Municipal Corporation or Municipality in the Hyderabad Metropolitan Development Authority / Urban Development Authority area.

29 As per the Provisions of Telangana Building Rules 2012, "Upon completion of the construction, the builder or the developer of the building has to apply for the Completion Certificate to the municipal authority" If the building is constructed as per the building approval plan and if it meets other building standards, the concerned authority will issue Completion Certificate. As per the law the "competent authority" means the Government authority and it is mandatory to obtain such certificate from the Municipal authorities

The completion certificates submitted by the assessee are issued by Chartered Engineer / Registered Valuer and not by the Competent authority of the government as specified and as such the completion certificates obtained from the Chartered Engineer/registered

22

valuer/architect by the assessee are not valid and proper documents for this purpose and thus, they are liable for rejection.

30 Hence, M/s Modi & Modi constructions are liable to pay service tax on the Villas/houses sold by them before the issuance of Completion certificate by the competent authority of the Government. Further, as per clause (ii) of Rule 2(A) of Service Tax (Determination of Value) Rules, 2006, service tax shall be payable on forty percent of the total amount charged for the works contract for execution of original works. Here the total amount charged (after deduction of VAT amount) is Rs.7,10,37,352/- and the 40% value is Rs.2,84,14,941/- and Service tax liability is Rs.42,07,651/-

31 M/s Modi & ModiConstructions have been rendering various taxable services but they have not discharged their tax liability as detailed in the above sections / Rules. The short payment or non-payment would not have come to light but for the details called for vide this office letters cited. Therefore, it appears that the assessee have intentionally suppressed the fact of rendering taxable services to avoid service tax liability. Hence, extended period under proviso to Section 73(1) appears to be invokable to recover the short paid / not paid service tax.

In view of the above discussions and findings, invoking extended period of limitation under Section 73 of the Finance Act, 1994 is sustainable.

32 I find that the assessee has referred to "non taxable receipts" in his worksheet which he claims has to be deducted while determining the taxable value. In his submissions, he contends that VAT, registration charges, Stamp duty, electricity charges are to be deducted. I find that the notice itself has not taken VAT, registration charges for purpose of quantification of taxable value. Therefore it is not a bone of contention between the Department and the assessee. As regards other "non taxable receipts" as claimed by the noticee, he has not provided any documents except the worksheet. Without any other material facts on record, I am not in a position to examine the nature of the supposed non taxable receipts. The onus is on the noticee to provide supporting documents to substantiate his contention that these are not to be taken into consideration for determining the taxable value. They have failed to do so. Here, I must point out that under Rule 2A (ii), *total amount* charged for the work contract is to be taken for abatement and "total amount" has been defined under the said rules as "*sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of work contract, whether or not supplied under the same contract or any other contract after deducting*

- i) the amount charged for such goods or services, if any*
- ii) the value added tax or sales tax, if any levied thereon"*

Going by the above explanation under the Rules, gross amount has to be taken into consideration. It is not in dispute these amounts were in the course of execution of works contract and I therefore hold that such receipts are to be treated as part of the gross amount charged and thus ought to be taken into account for quantification of taxable value under Rule 2A(ii).

33. Moreover, the bone of contention between the department and the assessee was the value to be taken for ascertaining the Tax payable by them on

the amounts received before the issuance of Completion Certificate from the Competent authority. Even after several reminders, intimations, the assessee have neither submitted any Completion Certificates from the Municipal authority nor given any data / documents which were very essential for arriving the taxable value. Therefore, it appears that the assessee have not submitted the requisite data/documents only with a clear intent to evade the payment of Tax and as such they have suppressed the gross consideration from the department. After constant persuasion, they have finally submitted some work sheets , documents like P & L Account, ST-3 returns on 15.2.2018. Immediately after submission of the above said documents, the department has scrutinized the same and based on the above, issued a Show Cause Notice.

34 Further, I find that the assessee has placed reliance on the decision by Hon'ble Tribunal in the case of Maharashtra Industrial Development Corporation Vs CCE, Nasik 2014 (36) S.T.R. 1291 (Tri. - Mumbai) where in it was held that notice was issued on the definition of Management Maintenance and Repair Service as it existed prior to introduction of negative list and with the provisions no longer existing post 01.07.2012, the demand requires to be set aside. I find that there is a reference to classification under Works Contract Service under Section 65(105) (zzza) in this notice which post negative list has been included under declared Services in terms of Section 66 E(h) of Finance Act 1994. Therefore, it cannot be said to be on the same footing as the case referred above by the noticee.

35 As per Section 75, of the Finance Act, 1994, "Every person, liable to pay the tax in accordance with the provisions of Section 68, or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed shall pay simple interest at applicable rate.

In the present case, the assessee has not paid the applicable service tax. They failed to credit the tax or any part thereof within the period prescribed. Hence, they are liable to pay interest on the taxable value at applicable rate as per Section 75 of the Finance Act, 1994.

36 Coming to the issue of imposing penalty, this issue is no more res integra in view of the Judgements of the Hon'ble Supreme Court in the case of Union of India and others Vs. Dharmendra Textile processors and Others., 2008 (231) EL (3) (SC) and Union of India Vs Rajasthan Spinning & Weaving Mills - 2009 (238) ELT 3 (SC). The Apex Court has held that penalty is Civil liability and the ratio of the same is applicable in all cases of tax evasion.

37 As regard the proposal for penalty under Section 76 of Finance Act, 1994, I must mention that the then prevailing legal position has been that in terms of Rule 2(A)(ii) of the Service Tax (Determination of Value) Rules, 2006 service tax was payable on the total amount charged for the works contract subject to permissible deductions. The law had not, in any case, specified that the total amount charged for the execution of works contract could exclude the value of undivided share of land. Inspite of this legal position prevailing then as well (even without amendment), the noticee is found to have attempted to undervalue taxable value of the service portion of works contract executed by

them by arbitrarily assigning some part of total consideration received for a composite service to the value of land share resulting in short payment of tax. I therefore hold that the noticee is liable for penalty under Section 76 of Finance Act 1994.

38 Further, in the light of the charges specified in the notice which are based entirely on facts on record and in the light of each of such contravention of Section 67, 68 and 70 of the Act, 1994 as has been specified, they are liable for penalty under Section 77 of the Finance Act, 1994.

In the light of above discussions and findings, I pass the following order :

ORDER

(a) I confirm the demand of an amount of Rs. 42,07,651/- (Rupees Forty-Two Lakhs Seven Thousand Six hundred and Fifty One only) (including Cesses) being service tax payable on the taxable services rendered by them during the period from April, 2015 to June, 2017, in terms of sub-section (2) of Section 73 of the Finance Act, 1994; against M/s. Modi & Modi Constructions; on the grounds discussed supra

(b) In terms of Section 75 of the Finance Act, 1994, I order M/s. Modi & Modi Constructions to pay interest at appropriate rates, on the amount mentioned at (a) above;

(c) I impose a penalty of Rs. 4,20,765/- (Rupees Four Lakhs Twenty thousand Seven Hundred and Sixty Five only) (being 10% of the ST payable) on M/s. Modi & Modi Constructions, under Section 76 of the Finance Act, 1994, for failure to pay Service Tax ; and

(d) I impose a Penalty of Rs. 10,000/- (Rupees Ten Thousand Only) on M/s. Modi & Modi Constructions under Section 77 of the Finance Act, 1994 for failure to declare the right taxable incomes in their ST-3 return.

OCW-184/2021

(श्री. जेविणभावा / Dr. J VIDYABHAR PAO)
सहायक आयुक्त / Assistant Commissioner
सिंदरानगर मंडल / Secunderabad Division

M/s Modi & Modi Constructions., 5-4-187/3& 4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad - 500 003

Copy to:

- (i) The Commissioner of Central Tax and Central Excise, Secunderabad GST Commissionerate, GST Bhavan, Opp.L.B.Stadium, Hyderabad. (Review Section)
- (ii) Copy to the Superintendent of Central Tax, Ramgopalpet - II Range, Secunderabad GST Division, Secunderabad GST Commissionerate with a direction to serve the OIO on the assessee and submit the dated acknowledgement to this office.

Office copy/Master file

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Annexure - II

BEFORE THE DEPUTY / ASSISTANT COMMISSIONER OF CENTRAL TAX
AND CUSTOMS, SECUNDERABAD GST DIVISION & SECUNDERABAD
COMMISSIONERATE, SALIKE SENATE, D. NO. 2-4-416 & 417,
RAMGOPALPET, MG ROAD, SECUNDERABAD-500003

Sub: Proceedings under C. No. V/24/15/02/2018-Adjn. dated 16.04.2018 issued to M/s Modi & Modi Constructions, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

FACTS OF THE CASE:

A. M/s.Modi & Modi Constructions, Secunderabad (hereinafter referred to as 'Noticee') is mainly engaged in the sale of residential villas to prospective buyers during and after construction.

B. During the disputed period, Noticee has undertaken the following type of transactions

i. Sale of Flats after receipt of Completion Certificate (CC) without any agreement of construction: In these transactions, sale deed is executed for the entire sale consideration without entering into any construction agreement. As the flats sold after CC is not leviable to service tax, Noticee has not paid any service tax on the same (Statement showing flats booked after CC and amounts received towards sale deeds is enclosed as Annexure II and copy of Completion Certificates is enclosed as Annexure VII).

Eg: For instance, the villa No. 85 was booked on 28.05.2016 with agreed price of Rs.38,00,000 + taxes and registration charges. The copy of the booking form is enclosed as annexure VIII and for the entire amount the sale deed dated 04.08.2016 was executed which is enclosed as annexure VI and as seen from the receipts statements, Noticee received Rs.40,81,851/- which consists of

a. Rs.38,00,000 towards sale deed (Rs.50,000/- was not received during the subject period);



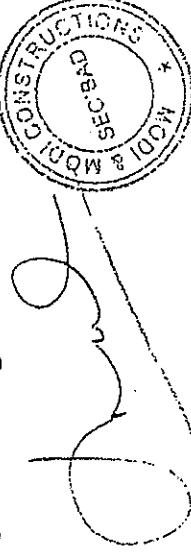
b. Rs.2,81,300 towards VAT & registration charges and

c. Rs.50,544/- towards water & electricity connection/deposits;

As the above referred flat is sold after OC, Noticee had not paid any service tax on the same. Further, the amounts received towards VAT, registration charges, water and electricity connections are not leviable to service tax therefore Noticee had not paid any service tax on the same.

ii. Sale of Flats after receipt of Completion Certificate (CC) with agreement of construction: In these cases, Noticee is selling the villas by entering into sale deed but the customers is asking to make extensive changes to the villas therefore Noticee is entering into agreement of construction to make changes. In most of the cases sale deed is executed for the entire sale consideration and in some cases Sale deed is being executed for semi-finished construction along with an agreement of construction. As the flats sold after CC is not leviable to service tax, Noticee has not paid any service tax on sale deed value but paid service tax only on amounts received towards construction agreements (Statement showing flats booked after CC and amounts received towards sale deeds, construction agreements and service tax paid on construction agreements and other taxable receipts is enclosed as Annexure III and copy of Completion Certificates is enclosed as Annexure VII).

iii. Sale of Flats before receipt of Completion Certificate (CC): In these transactions, Noticee is executing sale deed for semi-finished flat along with an agreement of construction. Sale deed is registered and



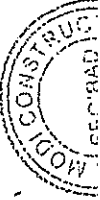
appropriate 'Stamp Duty' has been discharged on the same. Noticee is discharging service tax on agreement of construction value after availing deduction towards sale deed value and non-taxable receipts [Statement showing flats booked before receipt of CC along with amounts received towards sale deed, agreement of construction and service tax paid on agreement of construction and other taxable receipts is enclosed as Annexure IV]

Eg: For instance, the Villa No. 74 was booked in the year 2012 wherein the agreement of sale was entered for total consideration of Rs.43,05,000 + taxes + registration charges etc., and the sale deed dated 28.02.2013 was executed for Rs.15,00,000 conveying the title of the land as well the semi-finished flats and balance consideration was agreed towards the construction work to be undertaken as on that date (Rs.28,05,000 vide construction agreement dated 28.02.2013). Copy of the sale deed and construction agreement is enclosed as annexure VI.

C. The details of no of flats booked before OC and after OC are as follows

Particulars	No of Flats
No of Villas booked before receipt of CC (Taxable as the flats are booked before CC)	11
No of Villas booked after receipt of CC (Not-taxable as the flats are booked after CC)	16
No of Villas booked after receipt of CC but with Construction Agreement (Taxable only to the extent of Agreement of Constructions)	4
Total	31

D. Completion certificate from the 'chartered engineer' for 33 villas was obtained on 05.05.2013 and applied for Occupancy Certificate (OC) on 05.11.2014 and same is under process.

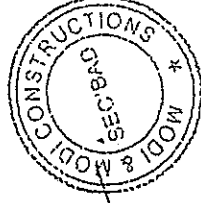
E. The amount charged from the customers are as under:

- a. Value towards the sale deed
- b. Value towards the construction agreement
- c. Other Charges like electricity charges, etc.
- d. Collection of taxes like VAT, Service Tax, Stamp Duty and Registration Charges from the buyer

F. The levy of service tax on such arrangements has seen a fair share of litigation and amendments. The Noticee is also a party to the litigation process and matters for earlier periods are pending at various adjudication/judicial forums.

G. 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 and also the condition of having more than 12 residential units was dispensed with. 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 Noticee regularly discharged the service tax on the said value in normal course. It also discharged service tax on other charges. However, it did not discharge service tax on sale deed value, which is in the nature of immovable property and on the value of taxes collected.

H. The detailed working of the receipts and the attribution of the said receipts was already provided to the Department authorities, identified receipt wise and flat wise. The summary of the same is provided hereunder:



Description	Receipts	Non taxable	Taxable
Sum of towards sale deed	66,085,098	66,085,098	0
Sum of towards agreement of construction	3,426,600	0	3,426,600
Sum of towards other taxable receipts	172,289	0	172,289
Sum of towards VAT, Registration charges, etc	5,365,770	5,365,770	0
Total	75,049,757	71,450,868	3,598,889

I. Accordingly, the value of taxable services constituted 40% of Rs.3,598,889/- i.e. Rs.1,439,555/- and the service tax thereon @ 12.36%/14%/14.5%/15% constituted Rs.205,803/-. It was also explained that the actual payment of service tax amounted to Rs.205,803/-.

J. Previously several SCN's were issued covering the period upto March 2015 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"".

- Vide Para 3 of SCN dated 12.04.2010 and Para 2 of the Order adjudicating the said SCN
- Vide Para 3 of Second SCN dated 23.04.2011
- Vide Para 2 of third SCN dated 24.04.2012
- Vide Para 2 of fourth SCN dated 02.12.2013
- Vide Para 2 of fifth SCN dated 24.09.2014
- Vide Para 2 of sixth SCN dated 18.04.2016

In all the above SCN's, there is error in as much including the value of sale deeds within the ambit taxable value while alleging service tax is liable only after execution of sale deed i.e. on construction agreements.

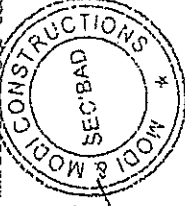



K. The present status of SCN's as referred above is as follows:

Period	SCN	Amount	Status
2009	HQPQR No. 34/2010 Adjn (ST)(ADC) dated 12.04.2010	Rs.6,04,187/-	Matter pending with CESTAT, Bangalore
2010	OR No.59/2011-Adjn (ST) Gr. X,dated 23.04.2011	Rs.12,06,447/-	Commissioner (Appeals) ordered denovo for re- quantification of service tax payable
2011	OR No. 53/2012 Adjn (ADC) dated 24.04.2012	Rs.27,61,048/-	Commissioner (Appeals) ordered denovo for re- quantification of service tax payable
Jan 12 to Jun 12	OR No. 81/2013-Adjn. (ST)(ADC) dated 02.12.2013	Rs. 11,87,407/-	Pending Adjudication
July 2012 to March 2014	OR No.109/2014 Adjn (ST) (JC) dated 24.09.2014	Rs. 38,35,321/-	
April 2014 to March 2015	OR No. 25/2016-Adjn (ST) (JC) dated 18.04.2016	Rs. 6,30,349/-	

L. 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).

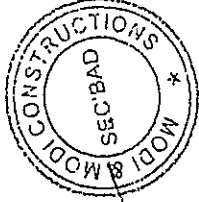
M. The liability for the impugned period and the details of the payments is summarized in the below mentioned table for ready reference:



Particulars	Amount (Rs.)
Gross Receipts	7,50,49,757
Less: towards flats booked after completion certificate date ()	0
Less: Deductions	
Sale Deed Value	6,60,85,098
VAT, Registration charges, stamp duty and other non taxable receipts	53,65,770
Taxable amount	35,98,889
Abatement @ 40%	14,39,555
Service Tax as applicable	2,05,803
Actually Paid	2,05,803

N. The present SCN C. No. V/24/15/02/2018- Adjn dated 16.04.2018 was issued as to why

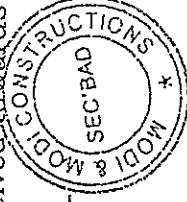
- i. An amount of Rs. 42,07,651/- should not be demanded as per Para-4 above towards "Works Contract Service" rendered by them during April, 2015 to June, 2017 in terms of Section 73(1) of the Finance Act, 1994; on the grounds discussed supra; and
- ii. Interest should not be demand at (i) above under Section 75 of the Finance Act, 1994; and
- iii. Penalty should not be imposed on them under Section 76 of the Finance Act, 1994 for the contravention of Rules and Provisions of the Finance Act, 1994 and
- iv. Penalty should not be imposed on them under Section 77 of the Finance Act, 1994



Submissions:

1. Noticee submits that as stated in background facts, 'Completion certificate' from the Chartered Engineer was obtained on 05.05.2013 for the 33 villas and applied for occupancy certificate on 05.11.2014 and 20 villas were booked after this date and sale deed is being executed for the entire sale value of villa. In such circumstances, no service tax is liable on the amounts received towards said villas since same is 'sale of immovable property' and it was specifically provided in Section 66E(b) of Finance Act, 1994 that service tax is not liable for the villas booked after completion certificate date. Hence proposal of present SCN to demand service tax on the villas booked after Completion Certificate (CC) date is not sustainable and required to be dropped (Statement showing amounts received towards flats booked after Completion Certificate but with construction agreement is enclosed as Anenxure III)

2. As seen from the operative part of SCN, it is clear that it is only sole allegation of SCN (Para 2) that construction agreements are subject to service tax under the category of "works contract", no allegation has been raised to demand service tax on the sale deed value. However, going through the annexure to the SCN, it can 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".



3. It is therefore apparent that the SCN represents an error in quantification of the demand. It may be noted that the Noticee have regularly and diligently discharged Service Tax on the value of "construction agreements". The above is explained through a comparative chart provided below:

Particulars	As per Noticee	As per SCN
Gross Receipts	75,049,757	75,049,757
Less Deductions		
Sale Deed Value	66,085,098	0
VAT, Registration charges, stamp duty and other non taxable receipts	5,365,770	4,012,405
Taxable amount	3,598,889	71,037,352
Abatement @ 40%	1,439,555	28,414,941
Service Tax as applicable	205,803	4,207,651
Actually Paid	205,803	
Balance Demand	0	4,207,651

The Noticee submit that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

4. 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 Noticee 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 all 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.



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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.

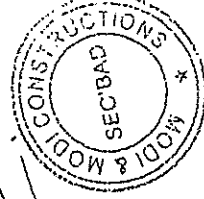
5. The Appellants also reserve their right to make additional arguments as felt necessary on this aspect of service tax on value of "sale deeds" if it is ultimately held that this aspect could be taken up without an allegation in the SCN.

6. Similar to the claim for exclusion of sale deed value, the value attributable to 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

7. Without prejudice to the above, Noticee further submits that the

a. Commissioner of Central Excise (Appeals) and the Hon'ble CESTAT, Bangalore in the previous period has remanded the matter back to the adjudicating authority for re-quantification of the duty liability. However, the subject show cause notice has not considered this aspect and demanded service tax on the

Noticee. On the basis of the same, Noticee submits that the

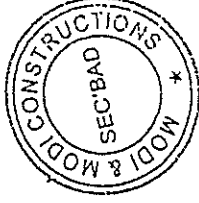
proposition of the subject show cause notice demanding the duty is not sustainable and requires to be dropped.

b. the grounds of the old period is not at all applicable for the new period due to the substantial changes took place in the provisions of service tax.

c. Once SCN raises allegation/demand based on inapplicable provisions then such allegation/demand cannot sustain. Relied on Maharashtra Industrial Development Corporation Vs CCE, Nasik 2014 (36) S.T.R. 1291 (Tri. - Mumbai) wherein it was held that “*With regard to the show cause notice in Appeal No. ST/85267/14 we find that the period involved is 1-10-2011 to 30-9-2012. In the said case, the demand is for two periods - one from 1-10-2011 to 30-6-2012 and the second is from 1-7-2012 to 30-9-2012 when the negative list came into effect but the show cause notice has been issued on the basis of definition of Management, Maintenance and Repair service has stood prior to 1-7-2012. Therefore, as post-1-7-2012 the provisions are not existing therefore, the demands for the period post-1-7-2012 are not maintainable*”

d. As the subject SCN is issued without any allegations, the same has not proved the burden of proof of taxability, which is essential under new service tax law. Relied on United Telecom Ltd. Vs CST 2008 (9) S.T.R 155 (Tri-Bang); Jetlite (India) Ltd. Vs

CCE 2011 (21) S.T.R 119 (Tri-Del)



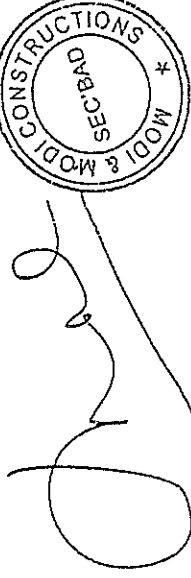
e. Noticee submits that as brought in background facts, an amount of Rs. 79,835/- has already paid towards service tax on the amounts received towards construction agreements. Noticee humbly request Ld. Adjudicating authority to consider the same while passing the order.

f. The value of the land involved in the project should be excluded from the determination of service tax liability and Noticee humbly request the adjudicating authority to exclude the value of land from determination of service tax liability.

g. As the Noticee has not collected service tax from the buyer, the benefit of cum-tax u/s. 67(2) of Finance Act, 1994 requires to be given.

8. Without prejudice to the foregoing, noticee submits that when service tax itself is not payable, the question of interest does not arise. Noticee further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC). Similarly the penalty also cannot be imposed in absence of the any short payment as alleged in the SCN.

9. Without prejudice to the foregoing, Noticee submits that penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as to why how penalty is applicable under section 77 of the Finance Act, 1994. Further, the Noticee is already registered under service tax under works contract service and filing

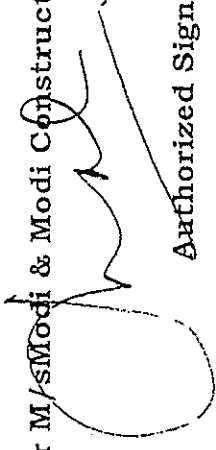


returns regularly to the department. Accordingly, penal provisions mentioned under section 77 is not applicable for the present case. As the subject show cause notice has not considered these essential aspects, the proposition of levying penalty under section 77 is not sustainable and requires to be dropped.

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

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

For M/s Modi & Modi Constructions,



Authorized Signatory



