



सेवाकरप्रधान आयुक्ताकायालय, हैदराबाद

OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX, HYDERABAD

11-5-423/1/A:: सीतारामप्रसादटवरः रेडहिलसः हैदराबाद- 4

11-5-423/1/A:: SITARAM PRASAD TOWER:: RED HILLS:: HYDERABAD- 4

OR. No. 131/2015 Adjn (ST) (Commr)

Dated: 15.12.2016

ORDER-IN-ORIGINAL NO. HYD-SVTAX-000-COM -144-16-17

(Passed by Shri Dr. D. Purushotham, Commissioner of Service Tax, Service Tax Commissionerate, Hyderabad)

प्रस्तावना

PREAMBLE

1. निजीप्रयोगकेलिए इंजिनियर्यव्यक्तिकोजीकियागया यह प्रतिविनामूल्यकेबीजानौहै

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

- 2 कोई भीव्यक्तिनोजेकेन्द्रीय उत्पाद शुल्क अधिनियम 1944 कोशांशविधयाग 35 य ह्याह केअधीनआदेअमुदुपप्रामाथिनहोतो इतिनिर्णयकीजालाफगीमाशुल्क उत्पाद शुल्कएवंसंगवाकर अपीलियअधिकरणकेक्षेत्रीयपीठहैदराबाद प्रथमतलएच.एम.बी.औरएम.बी. इमारतकेपीछे. खैरताबाद हैदराबाद : 500004 स्थितजिस्टीकेपलेपरअपनाअपीलप्रस्तुतकरगकनौहै5

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

3. इसआदेशकेप्राप्तहोनेकेदिनसेतोमहीनोकेअन्दरकेन्द्रीय उत्पाद शुल्कह्याअपीलह नियमावली 2001 के नियम6ह्याह केअधीननिर्धारितफर्म ई ए. 3 मेंअपीलदर्ज कीजानीचाहिए ।

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

- 4। हएएकअपीलकाज्ञापन प्रयाक्षेपरस्थित आवेदनयाकोई अन्य आवेदनफुलकंपेपरकेएकआंगुडानासंगछाडते हुए स्पष्ट रूप मेंटिक्निकियाजाएऔर इंगेसमयक रूप सेपृष्ठोंको क्रमवारजमाने हुए

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

- 5। मीमाशुल्क उत्पाद शुल्कएवंसंगवाकर अपीलियअधिकरण कार्य विधिनियमावली 1982 केनियम 13 केअधीनयथाअपेक्षितयदिअपीलपरप्रतिकृतपुनितिनिधियागअपीलकर्ता

कीओरमेंअपीलएवंहस्ताक्षरकरनेकेदस्तावेजमाहितअधिकरणकेक्षेत्रीयपीठहैदराबादकेनायकजिस्टारकेनामसेराष्ट्रीयकृतवैक्रेमोप्राप्तमूल्यकोरिखितवैकड्राफटकेसाथअपीलप्रस्तुतकीजानीचाहिएवैककीशाखाहैदराबादमेंस्थितवैककेअधीनहोनीचाहिए । केन्द्रीय उत्पादशुल्कअधिनियम 1944 कोशांशविधयाग 35 प

कीअनिवार्यपूर्वजमाराशिकेसाथकियाजानाचाहिएअपीलमांगकीहैयाजुर्मानालगायायादोनोऔरदेयपूर्वजमाकीगई राशि10 करोडरुपयेकीसीमाकेअध्यधीनहोगा.

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

Sub::Service Tax – Non-Payment of Service Tax by M/s. Greenwood Estates, Hyderabad– Issuance of Order-in-Original - Reg.

M/s. Greenwood Estates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad-500 003 (here-in-after referred as “M/s Greenwood” or “the assessee”) are engaged in providing “Works Contract Service”. The assessee is a registered partnership firm and got themselves registered with the department vide Service Tax Registration Number AAHFG0711BST001.

2. As seen from the records, the assessee entered into i) 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”.

3. Accordingly, the following Show Cause Notices had been issued to the assessee:

Sl. No.	SCN O.R. No. Date	Period	Amount of Service Tax demanded in Rs.	Status
1	HQPOR No. 77/2010-Adjn (ST), dated 21-5-2010	Jan-Dec, 2009	9,47,737	Confirmed vide OIO No. 47/2010-ST, dt. 24-11-2010. Party's appeal was dismissed vide OIA No. 11/2011 (H-II) S.Tax, dated 31-1-2011. CESTAT Granted Stay on 25.04.2012 vide stay Order No.666 & 667/2012 without pre deposit condition. Vide Misc Order No.21860-21877/2014 dt.31.07.2014 extended stay for six months from 31.07.2014.
2	OR No. 61/2011, dt. 23-4-2011	Jan-Dec, 2010	48,00,391	Confirmed vide OIO No. 51/2012-Adjn (ST)(ADC), dated 31-8-2012. Ordered <i>de novo</i> by the Commissioner (Appeals) vide OIA No. 39/2013 (H-II) S.Tax for re-quantification of the Service Tax

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

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

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

taxable value of Rs. 14,42,58,886/- (Rupees Fourteen Crores, Forty two Lakhs Fifty eight Thousand Eight Hundred and eighty six only). After deduction of VAT of Rs.44,17,600/- the taxable value works out to Rs.13,98,40,886/- on which service tax (including Education and S & H.E cess) works out to Rs. 69,13,733/-. An amount of Rs. 69,13,733/-, unpaid for the services rendered during the said period, is detailed in the Annexure enclosed.

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

SECTION 73 (1A) - *Notwithstanding anything contained in sub-section (1) (except the period of eighteen months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously 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 grounds as explained in the show cause cum demand notices issued above are also applicable to the present case. Hence, this statement of demand/show cause notice is issued in terms of Section 73 (1A) of the Finance Act, 1994 for the period January, 2014 to March, 2015.

7. In view of the above, M/s Greenwood Estates, 5-4-187/3 & 4, II floor, Soham Mansion, M.G. Road, Secunderabad-500 003, were asked to show cause to the Commissioner of Service Tax, Office of the Principal Commissioner of Service Tax, Hyderabad-Service Tax Commissionerate, 11-5-423/1/A, Sitaram Prasad Tower, Red Hills, Hyderabad- 500004, within 30 (thirty) days of receipt of this Notice as to why:-

(i) An amount of Rs.69,13,733/- (Rupees Sixty nine Lakhs thirteen Thousand Seven Hundred and thirty three only) including Education and S & H.E cess, should not be demanded from them on the "Works Contract Services" rendered by them during the period January, 2014 to March, 2015;

(ii) Interest on the amount at Sl. No. (i) above at appropriate rates should not be demanded under Section 75 of the Finance Act 1994;

(iii) Penalty should not be imposed on them under Section 76 of the Finance Act 1994; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (ii) *a common area; and*
- (iii) *any one or more of facilities or services such as park, lift, parking pace, community hall, common water supply or effluent treatment system.*

located within the premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

8.3. M/s Greenwood Estates registered with the service tax department and not discharging the service tax liability properly and also not filing the ST-3 returns, which are mandatory as per Service Tax Rules made there under. On verification of the records, it is found that M/s Greenwood Estates have undertaken a single venture by name M/s Greenwood Estates located at Kowkur Village, Malkajigiri Mandal, R.R District and received amount from customers towards sale of land and agreement of construction for the said period. Further, it is found that they have not filed ST-3 returns for the said period.

8.4. Further it is made clear on 01.02.2010 by Sri A. Shanker Reddy, Deputy General Manager(Admn) authorized representative of the assessee , that the activities undertaken by the company are providing services of construction of residential complexes and also stated that initially, they collected the amounts against booking form/agreement of sale. At the time of registration of the property, the amounts received till then will be allocated towards Sale Deed and Agreement of Construction. Therefore, service tax on amount received against Agreement of Construction portion of the amounts towards agreement of construction is paid on receipt basis. The Agreement of Sale constitutes the total amount of the land/semi finished flat with undivided share of land and value of construction. The sale deed constitutes a condition to go for construction with the builder. Accordingly, the construction agreement will also be entered immediately on the same date of sale deed. All the process is in the way of sale of constructed unit as per the agreement of sale but possession was given in two phases one is land/semi finished flat with undivided share of land and other one is completed unit. This is commonly adopted procedure as required for getting loads from the banks”.

8.5. As per the exclusion provided in Section 65(91a) of the Service Tax Act, the residential complex does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the

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

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

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 vide sale deed are taxable services under works contract service.

8.7. M/s Greenwood are well aware of the provisions and of liability of service tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly with an intention to evade payment of Service Tax. They have intentionally not filed the ST-3 returns for the said period. Hence, the service tax payable by M/s Greenwood appears to be recovered under Sub-Section (1) of Section 73 of the Finance Act 1994.

8.8. From the foregoing, it appears that M/s Greenwood Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad-3 have contravened the provisions of Section 68 of the Finance Act 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have not paid the appropriate amount of service tax on the value of the taxable services and Section 70 of the Finance Act 1994 read with Rule 7 of the Service Tax Rules 1994 in as much as they have not filed statutory returns for the taxable services rendered and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details/information, with an intent to evade payment of service tax and are liable for recovery under provisions to the Section 73(1) of the Finance Act 1994 and thereby they have rendered themselves liable for penal action under Section 77 & 76 of the Finance Act 1994.

9. Assessee Reply to the Show Cause Notice.

The assessee M/s Greenwood filed their reply letter dated 22.06.2016, to the Show Cause Notice. The gist of the reply is reproduced as follows:

A. M/s. Greenwood Estates, Secunderabad (hereinafter referred to as 'The Assessee') is mainly engaged in the sale of residential flats to prospective buyers during and after construction. However in case of flats for which occupancy certificate (OC) was received and booked after OC, sale deed is executed for the entire sale consideration in most cases. Only in some cases Sale deed is being executed for semi-finished construction along with an agreement of construction. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.

B. Various charges are recovered under the said agreements 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.

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

D. In July 2012, the service tax law underwent a paradigm shift and importantly, the exemption for personal use available for construction of residential complexes was removed. Accordingly, it became evident that service tax was payable on the construction agreement as per valuation prescribed under Rule 2A of the Service Tax (Determination of Value) Rules, 2012 i.e. on a presumed value of 40% of the contract value. The Assessee regularly discharged the service tax on the said value in normal course. They also discharged service tax on other charges. However, they did not discharge service tax on sale deed value, which is in the nature of immovable property and on the value of taxes collected.

E. Previously several SCN's were issued covering the period upto December 2013 with sole allegation that *"services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under "works contract service"*.

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

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

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

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."

9.2. The assessee submitted that once SCN raises allegation/demand based on inapplicable provisions then such allegation/demand cannot sustain. In this regard reliance is placed 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"*.

9.3. The assessee submitted that 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. In this regard Assessee wishes to rely on the following decisions.

- a. United Telecom Ltd. Vs CST 2008 (9) S.T.R 155 (Tri-Bang)
- b. Jetlite (India) Ltd. Vs CCE 2011 (21) S.T.R 119 (Tri-Del)

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

9.4. The assessee submits that undoubtedly they are discharging service tax on construction agreements thereby paying service tax on activity as proposed by impugned SCN read with earlier SCN's. SCN included the value of sale deeds only at the time of quantifying the demand. 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.

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

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

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

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

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

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

10. Interest and penalties

10.1. Without prejudice to the foregoing, assessee submits that when service tax itself is not payable, the question of interest does not arise. Assessee 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 Pratibha Processors Vs. UOI, 1996 (88) ELT 12 (SC).

10.2. Without prejudice to the foregoing, the assessee submitted 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 Assessee 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. Reliance is placed on 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).

10.3. The assessee submitted that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the proposal of the show cause notice imposing the penalty requires to be set aside.

10.4. The assessee submitted 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 Assessee is under bonafide belief as regards to non taxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.

- CCE-II Vs Nita Textiles & Industries 2013 (295) E.L.T 199 (Guj).
- CCE, Bangalore-II Vs ITC Limited 2010 (257) E.L.T 514 (Kar).
- Larsen & Toubro Ltd Vs CCE., Pune-II 2007 (211) E.L.T 513 (S.C).
- Centre For Development Of Advanced Computing Vs CCE, Pune 2002 (141) E.L.T 6 (S.C).

11. Benefit under section 80 of Finance Act 1994.

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

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

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

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

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

12. PERSONAL HEARING.

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

what is required. He finally requested to drop further proceedings in the matter.

13. DISCUSSIONS AND FINDINGS

I have gone carefully through the details of the case of the assessee, M/s Greenwood Estates, and the Written and oral submissions made by the assessee, during the personal hearing, before the adjudicating authority.

The issue before me to decide is whether the assessee M/s Greenwood Estates, are required to pay the service tax on the services provided by them under the category of Works Contract services.

13.1. I find that the assessee M/s Greenwood has executed a residential complex project having more than 12 flats and layout of the project was approved by the civic authorities. Therefore, the project satisfies the definition of 'residential complex' as defined in the statute.

13.2. I find that various flats have been sold by the assessee to various customers. Firstly, the assessee had executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customer. Appropriate stamp duty was paid on sale deed value. No service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, the assessee had entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement.

13.3. I find that the second agreement, (written or oral) and by whatever name is called, involve supply of material and labour to bring the semi-finished flat to a stage of completion. As it is a composite contract involving labour and material, it clearly satisfies the definition of 'Works Contract Service'. Therefore, the classification under work contract service and the same shall be preferred in view of the Section 65 A of the Act. The Board vide Circular No.128/10/2010-ST dated 24.08.2010, at para 2 has also clarified as under,

"2. The matter has been examined. As regards the classification, with effect from 01.06.2007 when the new service 'Works Contract' service was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 01.06.2007. This is because 'works contract' describes the nature of the activity more

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

13.4.

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

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

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

13.5.

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

13.6.

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

amount, nor they have furnished before me any evidence that they have paid VAT. Accordingly, their contention is rejected.

13.7. I find that the Penalty is a preventive as well as deterrent measure to defeat recurrence of breach of law and also to discourage non-compliance to the law of any wilful breach. Of course, just because penalty is prescribed that should not mechanically be levied following Apex Court's decision in the case of *Hindustan Steel Ltd. v. State of Orissa* reported in 1978 (2)ELT (J159) (S.C.) = AIR 1970 S.C. 253. Section 80 of the Act having made provision for excuse from levy of penalty under section 76 if the assessee proves that there was a reasonable cause for failure under that section no other criteria is mandate of Law to exonerate from penalty. The submission of the assessee does not constitute reasonable cause so as to exonerate them from the penalties by invoking section 80 of the Act. Reliance is placed on the following case laws:-

- (i) 2007 (6) S.T.R. 32 (Tri. - Kolkata) -CCE., KOLKATA-I Versus GURDIAN LEISURE PLANNERS PVT. LTD.
- (ii) 2005 (188) E.L.T. 445 (Tri. - Chennai) -TRANS (INDIA) SHIPPING PVT. LTD. Versus CCE., CHENNAI-I.
- (iii) 2006 (1) S.T.R. 320 (Tri. - Del.)- SPIC & SPAN SECURITY & ALLIED SERVICE (I) P. LTD. Versus C.C.E., NEW DELHI

14. Accordingly, I find that penalty under section 76 is imposable on the assessee, as they had contravened the provisions of law.

15. Accordingly, I pass the following order :-

ORDER

(i) **I confirm the demand of an amount of Rs.69,13,733/-** (Rupees Sixty nine Lakhs thirteen Thousand Seven Hundred and thirty three only) being the service tax payable by the assessee, M/s Greenwood Estates for the services rendered under the category of "Works Contract Services" during the period from January 2014 to March 2015.

(ii) **I demand the interest at the applicable rates** on the amount mentioned at Sl. No. (i) from the assessee, M/s Greenwood Estates, above under Section 75 of the Finance Act 1994;

(iii) **I impose penalty of Rs. 6,91,373/-** (Rupees Six Lakhs Ninety One Thousand Three Hundred and Seventy Three only)(being 10% of the Service Tax payable) on the assessee, M/s Greenwood Estates, under Section 76 of the Finance Act 1994. I also give the opportunity of

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

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



(DR. D. PURUSHOTHAM)
COMMISSIONER

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

(By RPAD)

Copy submitted to:

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

Copy to:

- (i) The Assistant Commissioner of Service Tax, Division-II, Service Tax Commissionerate, Hyderabad.
- (ii) The Superintendent of Service Tax, Service Tax Range II A, Service Tax Commissionerate, Hyderabad. (He is directed to serve a copy to the assessee and obtain acknowledgement)
- (iii) The Sr. PS to Commissioner, Service Tax Commissionerate, Hyderabad.
- (vii) Master Copy/File Copy/Spare Copy.

