

BEFORE THE COMMISSIONER OF SERVICE TAX, SERVICE TAX
COMMISSIONERATE, 11-5-423/1/A, SITARAM PRASAD TOWERS,
RED HILLS, HYDERABAD - 500004

Sub: Proceedings under OR No.131/2015 Adjn (ST) (Commr) [C.No. IV/16/197/2011 ST Gr. X] dated 21.10.2015 issued to M/s Greenwood Estates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

FACTS OF THE CASE:

- A. Greenwood Estates, Secunderabad (hereinafter referred to as 'The Noticee') 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 Noticee 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

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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 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.

E. 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	135190266	135190266	
Sum of towards agreement of construction	3987512		3987512
Sum of towards other taxable receipts	251919		251919
Sum of towards VAT, Registration charges, etc	5155789	5155789	
Total	144585486	140346065	4239431

F. Accordingly, the value of taxable services constituted 40% of Rs.42,39,431/- i.e. Rs.16,95,772/- and the service tax thereon @ 12.36% constituted Rs.2,09,597/-. It was also explained that the actual payment of service tax amounted to Rs.3,82,643/- which was more than the tax required to be paid.

G. This excess payment is due to that at the time of giving statements the value of sale deed was at times not determined. Sale deed was executed at a later date and an *adhoc* value for sale deed was adopted for purposes of estimating service tax liability. Now the project has been

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completed and there is finality in the value of sale deed. The excess so paid has not been claimed as refund.

H. 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".

- Vide Para 7 of SCN dated 21.05.2010 and Para 13 of the Order adjudicating the said SCN
- Vide Para 7 of Second SCN dated 23.04.2011
- Vide Para 6 of third SCN dated 24.04.2012
- Vide Para 4 of fourth SCN dated 02.12.2013
- Vide Para 4 of fifth SCN dated 25.09.2014

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.

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

Period	SCN	Amount	Status
Jan 09 to Dec 09	HQQR No. 77/2010 Adjn (ST) dated 21-05-2010	Rs.9,47,737/-	CESTAT waived the pre-deposit of the taxes and penalty. Disposal of main appeal is pending
Jan 10 to Dec 10	OR No.61/2011, dated 23-04-2011	Rs.48,00,391/-	CESTAT vide order dated 02.04.2014 and Com(A) vide OIA No. 39/2013 dated 27.02.2013 has sent the matter back to the Adjudicating authority for de-novo consideration for quantification of
Jan 11 to Dec 11	OR No. 52/2012 Adjn (Addl Commr) dated 24-04-2012	Rs.46,81,850/-	

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Jan 12 to June 12	OR No.83/2013 Adjn (ST) ADC dated 02.12.2013	Rs.16,53,853/-	service tax liability. The now the matter is pending before lower authority
January 2012 to December 2013 (referred to in SCN as March 2014)	OR No. 156/2014-Adjn (ST)(Commr) dated:25-09-2014	Rs. 92,38,975/-	Pending before CESTAT for disposal of final hearing (an appeal against Order-In-Original No. HYD-SVTAX-000-COM-02-14-15 dated 20.02.2015 has been filed)

J. 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).

K. 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	144585486
Less: Deductions	
Sale Deed Value	135190266
VAT, Registration charges, stamp duty and other non taxable receipts	5155789
Taxable amount	4239431
Abatement @ 40%	1695772
Service Tax @ 12.36%	209597
Actually Paid	382643
Excess Paid	173046

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Submissions:

1. Noticee submits 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, Noticee 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.”

2. Noticee submits that from the analysis of provisions of section 73(1A), it is clear that to issue show cause notice / statement under this section, the grounds relied upon for the subsequent period should be same in all aspect as mentioned in the previous notices. Further, the subject show cause notice has not mentioned which earlier show cause notice it has referred i.e. show cause notice issued under the old service tax law.

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However, present show cause notice is issued for the period January 2014 to March 2015 i.e. under new service tax law where there is a substantial changes in the provisions of service tax from positive list based taxation to negative list based taxation, thereby exemption and abatement has also undergone change. Accordingly, the grounds of the old period is not at all applicable for the new period due to the following substantial changes.

a. Taxable service list provided under section 65(105) of the Finance Act, 1994 ceases to effect w.e.f. 01-07-2012.

b. Section 65A pertaining to classification of service ceases to effect.

c. There is no concept of classification of service.

d. Definition of service introduced under section 65B(44) **where it contains certain exclusions.**

e. Negative list introduced in section 66D of the Finance Act, 1994.

f. Concept of bundled service introduced in section 66F.

g. New definition of works contract has been introduced under section 65B(90) of the Finance Act, 1994.

h. Mega exemption notification provided under Notification No. 25/2012-ST dated 20.06.2012, which is available irrespective of classification of service. (earlier exemption was subject to classification of service)

i. New Valuation Rule provided vide Rule 2A of The Service Tax (Determination of Value) Rules, 2006 vide Notification 24/2012-ST dated 20.06.2012 for determination of tax liability in case of works contract service.

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j. Abatement for various services issued under notification no 26/2012-ST dated 20.06.2012 is issues based on the nature of the service irrespective of its classification (earlier abatement was subject to classification of service)

3. Noticee submits that from the above it is clear that there is a substantial changes in the service tax law w.e.f. 01-07-2012. Accordingly, the allegations made in the previous show cause notice for the period upto 31.03.2012 is not applicable and not relevant for the period from 01.07.2012 onwards. As the subject show cause notice has considered various irrelevant and non-applicable grounds provisions of section 73(1A) is not applicable to the present case, which needs to be dropped.

4. 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"

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5. Noticee submits 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 to Noticee 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, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

6. Noticee 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.

7. As stated in the background facts, the Noticee started paying service tax on the value of "construction agreements" from July 2012 onwards. Thereafter, the said taxes have been regularly paid. This is also evident from the fact that the current SCN proposes appropriation of taxes

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already paid by them. The details of the taxes paid are also acknowledged in Para 4 of the SCN. On a perusal of the SCN, it is evident that the issue in the current SCNs is therefore limited to the aspect of quantification of demand. On a perusal of Para 4 of the SCN which quantifies the demand, it can be easily inferred that the demand is quantified based on statements submitted by the Noticee. The said statements for the periods are marked as Annexure "A".

8. On going through the statements provided by the Noticee, 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 was provided.

9. 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".

10. 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" after June 2012 onwards. The above is explained through a comparative chart provided below:

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Particulars	As per Noticee	As per SCN
Gross Receipts	144585486	144258486
Less Deductions		
Sale Deed Value	135190266	
VAT, Registration charges, stamp duty and other non taxable receipts	5155789	4417600
Taxable amount	4239431	139840886
Abatement @ 40%	1695772	55936354
Service Tax @ 12.36%	209597	6913733
Actually Paid	382643	0
Balance Demand	(176046)	6913733

11. 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.

12. 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 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.

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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.

13. 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.

14. 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.

Interest and penalties

15. 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).

16. 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

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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)

17. The Noticee submits 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.

18. The Noticee 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 Noticee 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).

Benefit under section 80

19. Noticee submits 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.)

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20. Noticee submits that as explained in above Para's 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.

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

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

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

For M/s Greenwood Estates,

Authorized Signatory