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सीमाशुल्क, केंद्रीय उत्पाद शुल्क व सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX
हैदराबाद II आयुक्तालय HYDERABAAD II COMMISSIONERATE
केंद्रीय शुल्क भवन, एल बी स्टेडियम रोड, बशीर बाग, हैदराबाद-500 004
KENDRIYA SHULK BHAVAN, L B STADIUM ROAD, BASHEER BAGH, HYDERABAAD-500004

O.R.No. 65/2012-Adjn(ST)(Commr.)
C.No.IV/16/179/2011-ST(Gr-III)

Date : 10.04.2012

SHOW CAUSE NOTICE

Sub : Service Tax - "Construction of Complex Service" &
"Works Contract Service" - M/s Mehta & Modi Homes-
Non payment of Service tax on taxable services rendered
- Issue of Show Cause Notice - Reg.

M/s Mehta & Modi Homes, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003 [here in after referred to as 'the assessee'] are engaged in providing **Construction of Complex service** and **Works Contract Service**. M/s Mehta & Modi Homes is a partnership firm and got themselves registered with department on 17.08.2005 under "Construction of Complex Service" and under "Works Contract Service" on 29.02.2008 vide **STC No. AAJFM0647CST001**.

2. On gathering intelligence that M/s Mehta & Modi Homes, is not discharging the service tax liability properly, investigation was taken up by the department. It is found that M/s Mehta & Modi Homes have under taken **3 (three)** projects in the year **2004** viz; **Silver Oak Bungalows (Phase I)** ; **Silver Oak Bungalows (Phase II)** and **Silver Oak Bungalows (Phase III)** at Cherlapally village, Ghatkesar mandal, Ranga Reddy District and received amounts from customers from **April 2006 to December 2010** towards **sale of land**, and **agreements for construction**. In the said projects, they have entered into **sale deed**, and **agreement for construction** with their customers in respect of **290 flats**. They have paid the Service Tax under **Construction of Complex service** availing

abatement under Notification No. 1/2006-ST, dated 1-3-2006 (as amended) and under "Works Contract service" availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. They have informed that they have not availed Cenvat credit during the period 01.04.2006 to 31.12.2010. It is also found that they have stopped payment of Service Tax on receipts from 01.01.2009 by misinterpreting the clarification of the Board vide Circular No. 108/02/2009 - ST dated 29.01.2009. Accordingly, a Show Cause Notice O.R.No. 128/2011-Adjn (ST) Commissioner dt.24.10.2011 was issued to the assessee demanding an amount of Rs. 22,72,979/- towards Service Tax inclusive of Education and Secondary and Higher Education Cess on the Construction of Complex Service for the period from 01.04.2006 to 31.05.2007 and Rs.5,55,04,153/- towards Service Tax inclusive of Education and Secondary Higher Education Cess on the "Works Contract Service" for the period from 01.06.2007 to 31.12.2010. The said notice was issued demanding the Service Tax on the amounts received towards agreement of Construction executed with various customers in respect of the 3 (three) ventures mentioned above.

3. The jurisdictional Superintendent, vide letter C.No IV/16/256/2011-ST.GrIII dated the 31.01.2012, 7.03.2012 and 15.03.2012, called for the details of amounts received from January , 2011 to December 2011 in respect of the three ventures Silver Oak Bungalows (Phase I) , Silver Oak Bungalows (Phase II) and Silver Oak Bungalows (Phase III). The assesseees were also requested to intimate regarding any new ventures that have been taken up by them. The assesseees vide their letter dated. 07.02.2012 submitted the details of amounts received during the period from January , 2011 to December 2011 and also informed that they have computed service tax liability for the period January , 2011 to December 2011 under "Works Contract Service Composition Scheme" on the amounts realized in excess of sale deed value at the rate of 4.12%, which has resulted in a tax liability of Rs.17,74,315/- and that they have remitted Rs.9,23,908/- by way of cash and Rs. 57,635/- by CENVAT and that the balance of Rs.7,92,772/- would be remitted at the earliest. The assessee has submitted the total

details of the amounts received by them from each prospective purchaser, during the period from January, 2011 to December 2011. As stated by the assesses during the said period they received a total amount of is **Rs.6,96,62,033/-**. Out of this an amount of **Rs.1,65,69,000/-** towards Sale Deed; **Rs,1,00,27,134/-** was received towards taxes, other charges, Advances and refunds; and **Rs.4,30,65,899/-towards** Development charges/agreement for construction/additions and alterations and other charges. Since, the projects are own ventures, assesses are required to pay service tax on all the amounts received after execution of sale deed. Thus **Rs,1,00,27,134/-** received towards other charges and **Rs. 4,30,65,899/-** towards construction and development are chargeable to service tax. Therefore assesses are liable to pay Service tax on taxable amount of **Rs.5,30,93,033/-**.

4. 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 space, 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.

Explanation:- For the removal of doubts, it is hereby declared that for the purpose 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.

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

4.2. As per the **exclusion** provided in **Sec 65(91a)** of the Finance Act,1994 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 a person. It is clarified in **para 3** of the **Circular No.108/02/2009-ST dated 29th January 2009** that if the ultimate owner enters into a contract for construction of a **residential complex** with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for a single person for personal use as residence by such person would not be subjected to service tax. Normally, a builder/promoter/developer constructs residential complex consisting of number of residential units and sells those units to different customers. So, in such cases the construction of complex is not meant for one individual entity. Therefore, as the whole complex is not constructed for single person

the exclusion provided in **Sec 65(91a)** of the Finance Act, 1994 doesn't apply. Further, the builder/promoter/developer normally enters into construction / completion agreements after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/developer and the stamp duty is paid on the value consideration shown in the sale deed. As regards the agreements / contracts against, which they render services to the customer after execution of sale deeds, there exists service provider and service recipient relationship between the builder/promoter/developer and the customer and such services are leviable to service tax.

5. CBEC vide Circular No.128/10/2010-ST dated 24/08/2010 has clarified as under:

*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. As regards applicability of composition scheme, the material fact would be whether such a contract satisfies **rule 3(3) of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007**. This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract. Once such an option is made, it is applicable for the entire contract and cannot be altered. Therefore, in case a contract where the provision of service commenced prior to 01.06.2007 and any payment of service tax was made under the respective taxable service before 01.06.2007, the said condition under rule 3(3) was not satisfied and thus no portion of that contract would be eligible for composition scheme. On the other hand, even if the provision of service commenced before 01.06.2007 but no payment of service tax was made till the taxpayer opted for the composition scheme after its coming into effect from 01.06.2007, such contracts would be eligible for opting of the composition scheme".*

5.1 As clarified by the above Board Circular, the service rendered by **M/s. Mehta & Modi Homes** during the period **01.04.2006 to 31.5.2007** are classifiable under **"Construction of Complex Services"** and services rendered during the period from **01.06.2007** are classifiable under **"Works Contract Services"**, as the said project is a continuous **long term contract / project**.

6. Service tax payable under **"Works Contract Service"**:
(Period from January 2011 to December 2011).

6.1 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 (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

6.2. An **optional Composition scheme** for payment of Service Tax in relation to **Works Contract Service** has been framed by the Notification **No.32/2007-ST** dated **22.5.2007**, effective from **01.06.2007**, under **'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007**. Under the said scheme, an assessee has to pay an amount equivalent to **two percent** of the gross amount charged for the Works Contract, excluding the **Value Added Tax (VAT) or Sales Tax** paid on transfer of property of goods involved in the execution of Works Contract. With effect from **01.03.2008** onwards, the said rate of **2 %** has been changed to **4%** vide **Notification No.7/2008-S.T. dated 01.03.2008**.

6.3. In terms of Board **Circular No.128/10/2010-ST** dated **24.08.2010**, the amounts received towards construction agreement **after 0.1.06.2007** are classifiable under **"Works contract services"**. **M/s. Mehta & Modi Homes** have executed works in respect of three projects **3 (three)** projects during the period **01.01.2011 to 31.12.2011** viz; **Silver Oak Bungalows (Phase I) Silver Oak Bungalows (Phase II) Silver Oak Bungalows (Phase III)** and all the **three** projects were started in the year **2004** and hence are classifiable as **ongoing Works Contracts**. As clarified vide Board Circular dated **24.8.2010**, the subject projects are **ongoing Works contracts** and assesseees **have paid service tax** under **"Construction of Complex services"**, hence these projects are not eligible for **Composition Scheme** under **'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007**.

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

6.5. **M/s. Mehta & Modi Homes** have not furnished the particulars of **value of transfer of property of goods** involved in the execution of the **Works contract**. Hence, the deduction of value of materials as envisaged under **Rule 2A of Service Tax (Determination of Value) Rules, 2006** can not be done. Thus the gross value received is taken as the value of the taxable service quantified under **Rule 2A of the Service (Determination of Value) Rules, 2006**. Hence the value of the amounts received towards **agreement of constructions from January 2011 to 31.12.2011** are taken as the value of the taxable service quantified under **Section 67 of the Act and Rule 2A of the Service (Determination of Value) Rules, 2006** and service tax is calculated @ **10.30%**.

7. For the period from **01.01.2011 to 31.12.2011**, **M/s Mehta & Modi Homes.**, have collected an amount of **Rs.5,30,93,033/-** against **agreements of Construction, development and other charges** related to **on-going works contracts**. The Service Tax liability on these amounts works out to **Rs.54,68,582/-** (Service Tax of **Rs.53,09,303/-**, Education Cess of **Rs.1,06,186/-** and Secondary & Higher Education Cess of **Rs.53,093/-** as detailed in **Annexure** to this notice). However, **M/s. Mehta & Modi Homes** have paid an amount of **Rs.9,23,908/-** by cash and **Rs.57,635/-** by **CENVAT** , totaling to **Rs.9,81,543/-** towards service tax during the period **01.01.2011 to 31.12.2011**. Thus they have **short paid** an amount of **Rs. 44,87,039/-** on the **"Works Contract services"** provided by them during this period.

8. **M/s Mehta & Modi Homes** are well aware of the provisions and of liability of Service tax on receipts agreements for Construction and have not assessed and paid service tax properly as per **Section 68 of Finance Act, 1994**. Hence, short paid service tax payable by **M/s Mehta & Modi Homes** appears to be recoverable under **Sub Section (1) of Section 73 of the Finance Act, 1994**, along with interest under **Section 75 of the Finance Act, 1994**.

9. From the foregoing it appears that **M/s Mehta & Modi Homes**, **5-4-187/3 & 4, III Floor, MG Road, Secunderabad - 500 003** 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 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 shown the amounts received for the taxable services rendered in the statutory Returns and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details / information, thereby have rendered themselves liable for penal action under **Section 77 and 76 of the Finance Act, 1994**.

10. Therefore, **M/s Mehta & Modi Homes, 5-4-187/3 & 4, III Floor, MG Road, Secunderabad - 500 003**, are hereby required to show cause to the **Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, 3rd floor, Shakkar Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad-500 004**, within 30 (thirty) days of receipt of this Notice as to why:

- (i) an amount of Rs. 54,68,582/- (Rupees Fifty four lakhs sixty eight thousand five hundred and eighty two only) towards Service Tax inclusive of cesses) on the "Works Contract Services" provided by them during the period 01.01.2011 to 31.12.2011 should not be demanded under Section 73(1) of the Finance Act, 1994; and an amount of Rs. 9,81,543/- (Rupees Nine lakh eighty One thousand Five hundred and Forty Three only) already paid towards Service Tax, inclusive of cesses, during the period 01.01.2011 to 31.12.2011 should not be appropriated against the above payable amount.
- (ii) interest should not be paid by them on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994
- (iii) penalty should not be imposed on them under Section 77 of the Finance Act, 1994
- (iv) penalty should not be imposed on them under Section 76 of the Finance Act, 1994, for failure to pay service tax, in contravention of Section 68, ibid.

11. They are also required to produce at the time of showing cause, all the evidence upon which they intend to rely in support of their defense. They are also required to state whether they would like to avail of opportunity to be heard in person before the case is adjudicated. If they do not reply to the Show Cause Notice within **30 (thirty) days** or do not appear in person when the case is posted for personal hearing, it would be presumed that the Noticee does not have anything to state in their defense or they do not prefer any personal hearing and case will be decided on merit based on the evidence available on record.

12. This show cause Notice is issued without any prejudice to any other action that may be taken against the recipients of this Notice or any other persons concerned with the Finance Act or any other law time being in force.

13. The above Notice is issued by placing Reliance on the following Records:

(1) Letter dated 07.02.2012, submitted by M/s Mehta & Modi .


10.04.2012
(P.N.RAO)
COMMISSIONER

To
M/s Mehta & Modi Homes,
5-4-187/3&4, II Floor, MG Road,
Secunderabad - 500 003.

(By Regd.Post/Speed Post Ack.Due)

Copy to:

1. The Additional Commissioner, Service Tax, Anti-Evasion, Hyderabad-II Commissionerate, Hyderabad.
2. The Assistant Commissioner, Service Tax, Anti Evasion Hyderabad-II Commissionerate, Hyderabad.
3. The Superintendent, Service Tax Gr.III, Hyderabad-II Commissionerate, Hyderabad (w.r.t. file C.No.IV/16/179/2011-ST (Gr-III) with a direction to serve the copy of the notice on M/s. Mehta & Modi Homes and forward a copy of the dated acknowledgement obtained from them)
4. The Superintendent of Service Tax, Gr.III, Hyderabad-II Commissionerate.

Master Copy / Office Copy.

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