BEFORE THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD-II COMMISSIONERATE, L.B.. STADIUM ROAD, BHASHEERBAGH, HYDERABAD-500 004.

Sub: Proceeding under SCN No.65/2012 (C.No.IV/16/179/2011)-Adjn (ST) (Commr.) dated 10.04.2012 issued to M/s Mehta & Modi Homes., Hyderabad.

We are authorized to represent M/s Mehta & Modi Homes, 5-4-187/3 & 4 IInd Floor, MG Road, Secunderabad – 500 003. (Hereinafter referred to as 'Noticee') vide their authorization letter enclosed along with this reply.

FACTS OF THE CASE:

A. M/s Mehta & Modi Homes (hereinafter referred as the Noticee) is a Partnership firm registered under Partnership Act, 1932 mainly engaged in construction of residential units. They have presently performing the projects "Silver Oak Bungalow – Phase I", "Silver Oak Bungalow – Phase II" & "Silver Oak Bungalow – Phase III"

B. Noticee is registered under Service Tax department vide **ST No. AAJFM0647CST001** for providing construction of complex service and works contract Service.

C. The activity involved in the service provided by the Noticee is as under:

i. Noticee purchases the undeveloped land, develops it into a layout with infrastructure etc.

ii. Noticee enters into an agreement with various customers by entering into a document tilted "Agreement of Sale" (AOS) for an agreed consideration.

iii. Then the ownership of the plot is transferred to the customer by executing a "Sale Deed", which is for the part of above agreed consideration (AOS)

iv. Plan sanction/permission for construction has been applied and obtained by the customer with the GHMC/HUDA in their own names. Then an "Agreement for Development for common amenities" and "Agreement for construction of a bungalow/independent villa" on the land conveyed by executing the above mentioned sale deed.

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vi. They collect the amounts against booking form/agreement of sale and during the course of construction as per the mutually agreed payment schedule.

vii. The amount received initially will be apportioned towards sale deed and then for agreement for the development and thereafter for the agreement of construction.

D. Initially, with effective from 16.06.2005, service tax was paid under the "Construction of Complex Service" after taking the abatement of 33% vide Notification 14/2005-S (later amended vide notification 1/2006-ST dated 01.03.2006)

E. Later there was a written instruction from the Ld. Additional Commissioner of Service Tax Hyderabad – II Commissionerate, given to one of the Noticee's group company seeking them to change the classification to "Works Contract Service" wither effective from 01.06.2007 and hence for the collections from 01.06.2007, service tax was paid at the rate of 2.06% under the composition scheme of works contract.

F. Later a Circular No. 108/2/2009-ST dated 29.01.2009 was issued by TRU, CBEC clarifying that in case the construction is done for the personal use of the customer then no service tax is payable.

G. In view of above, a letter dated 27th January 2009 was written to the Jurisdictional Assistant Commissioner of Service Tax, stating that they understood that service tax is not applicable for their transaction and sough the comment of the Department on the same.

H. A correspondence dated 16th March 2009 was received by the Ld. Assistant Commissioner of Service Tax, Hyderabad – II Commissionerate stating that the circular applies only in case the entire complex is put to use by a single person.

In response to above letter again Noticee clarified vide their letter dated 19th December 2009 their stand that the circular did not intend the same in any of the part and sought clarification, the copy of this correspondence was also sent to The Commissioner of Service Tax, Hyderabad II Commissionerate & The

Member, Central Board of Excise and Customs, New Delhi and sought clarification, however no clarification has been issues till date.

J. However Later investigation has been taken up by the department on the activity of the Noticee for not discharging the Service tax properly.

K. Subsequently, summons has been issued to Noticee vide letter dated 13.01.2010 for submission of relevant records and information.

L. Subsequently, on the basis of information called for , the information was submitted by the Noticee vide letter dated 07.02.2012 under summons and investigation of books of accounts of Noticee a Show Cause Notice was issued by the Commissioner of Customs, Central Excise and Service Tax asking to show cause why

i. An amount of Rs.54,68,582/- should not be demanded from them towards Service Tax inclusive of the cess on the Works Contract Services provided by them during the period of January 2011 to December 2011 under Section 73(1) of the Finance Act,1994.

ii. An amount of Rs.9, 81,543/- already paid by them under protest should not be appropriated against the above payable amount.

iii. Interest should not be paid by them on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994.

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

v. Penalty should not be imposed under Section 76 of the Finance Act, 1994.

In as much as-

i. Noticee shall not be extended the benefit of the Composition Scheme in respect of these contracts. Further, as they have not furnished the details of material consumed. In absence of which

the deduction of material cost under Rule 2A of Service Tax (Determination of Value) Rules, 2006 cannot be extended

ii. Further , it appears that Noticee has 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 disclose the relevant details/information.

SUBMISSIONS

1. For easy comprehension, the subsequent submissions in this reply are made under different heading covering different aspects involved in the subject SCN.

   A. Validity of Show Cause Notice

   B. Applicability of Service Tax

   C. Rule 2A of Service Tax (Determination of Value) Rules, 2006

   D. Eligibility of Composition Scheme

   E. Quantification of Demand

   F. Interest under Section 75

   G. Penalty Under Section 76 & Section 77

   H. Benefit Under Section 80

In re: Validity of Show Cause Notice

2. The Noticee submits that with due respects, the SCN is issued has not appropriately considering the nature of activity, the perspective of the same, documents on record, the scope of activities undertaken and the nature of activity involved, creating its own assumptions, presumptions and surmises, ignoring the statutory provisions. Supreme Court in the case of *Oudh Sugar Mills Limited v. UOI,* 1978 (2) ELT 172 (SC) has held

that such show cause notices are not sustainable under the law. On this count alone the entire proceedings under SCN requires to be dropped and the refund has to be granted.

In re: Applicability of Service tax

3. Noticee submits that it has been specifically clarified vide Board ***Circular No. 108/2/2009- S.T. dated 29-01-2009*** that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of residential complex as defined under 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction. The relevant extract of the circular is reproduced here for easy reference:

"Further, if the ultimate owner enters into a Contract for construction if 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 would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of residential complex...."*

Noticee reiterates that the activity undertaken by them is squarely covered by the Board's Circular i.e. they have entered into a construction contract with the Ultimate owner who shall use the said property for his personal use subsequently.

4. The Noticee submits that the argument is in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been provided based on the examination of the above argument among others.

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5. The Noticee submits the final clarification was provided by the board based on the preamble and the arguments. The relevant portion of the circular is provided here under for the ready reference.

"... The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, 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 would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)*

6. The Noticee submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.

a. For service provided until the sale deed has been executed to the ultimate owner.

b. For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

7. The Noticee submits that it is exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore this clarification is applicable to them ibid.

8. The Noticee submits that circular has been very narrowly interpreted by the department without much application of mind and has concluded that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex.

9. Where an exemption is granted through Circular No. 108/2/2009-S.T., dated 29-1-2009, the same cannot be denied on unreasonable grounds and illogical interpretation as above. In the definition *"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.**"* Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person**....." similar the reference "personal use as residence by **such** person" also cannot be interpreted as "personal use by **ONE persons**" Such interpretation would be totally against the principles of interpretation of law and also highly illogical.Noticee submits that with the above exclusion, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

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10. Without prejudice to the foregoing, notice submits that the development and construction of a bungalow/Villa is done for the owner of the plot, who in turn used such bungalow/Villa for his personal use. Further it is very important that for each such land/plot owner an agreement has been executed independently and also permission for construction of bungalow/Villa is been independently applied by the owner of the land/plot and hence the same makes is independent by itself.

11. Without prejudice to the foregoing, Noticee submits that the independent house will not come under the ambit of the definition of residential complex. The definition of the residential complex as defined under section 65(91a) of the Finance Act is extracted 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,

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;

12. Noticee submits that from the above, definition it is clear that all the conditions has to be satisfied cumulatively that is the complex would be having 12 residential units, there should be a common area to be shared and common facilities.

13. Noticee submits that each agreement/contract entered with the customer is for a residential bungalow/villa, which is independent, covered by a separate plan sanction having separate ownership and in such bungalow/villa there is no 12 units, no common area has been shared and no common facilities has been shared, therefore the same is not a residential complex and no question of payment of service tax on such independent bungalow/Villa.

14. Without prejudice to the foregoing, Noticee submits that Board had specifically clarified that independent bungalow or houses would not attract service tax vide Circular F. No. 332/35/2006-TRU, dated 1-8-2006 extracted in the foregoing paragraph.

15. Noticee further submits that Supreme Court in *Commissioner of Customs, Calcutta & Others* v. *Indian Oil Corporation Limited & Another,* (2004) 3 SCC 488, after examining the entire case law, culled out the following principles:

"Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

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2. *Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.*

3 ***.A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.***

4. *It Is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."*

In the Instant case, the show cause notice has been issued contrary to the directions of the **CBEC Circular 108/02/2009 S.T. dated 29.01.2009.** Based on the above judgment the entire proceedings under the subject SCN is void abinitio and should be quashed.

16. Without prejudice to the foregoing, Noticee submits the decision of Chennai tribunal in case of Macro Marvel Projects Ltd. vs Commr. of Service Tax, Chennai 2008 (012) STR 0603 Tri.-Mad which specifically held that individual houses are not taxable. ***The view of the tribunal has been affirmed by the Supreme Court which has held as under:***

"The Appellate Tribunal in its impugned order had held that the appellants constructed individual residential houses, each being a residential unit, which fact is also clear from photographs. The law makers did not want construction of individual residential units to be subject to levy of Service tax. ***Appellant's plea that, from 1-6-2007, impugned activity can be covered under Works Contracts service, not acceptable. Works Contract service includes residential complex and not individual residential units."***

In re: Rule 2A of Service Tax (Determination of Value) Rules, 2006

17. Without prejudice to the foregoing, assuming but not admitting Service Tax, if any is payable under the head Works Contract, the value of works contract must be determined as per Rule 2A of Service Tax

(Determination of Value) Rules, 2006. Noticee submits that Para 9 of the impugned SCN has been passed with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. It is unreasonable to hold that material value is nil in any construction activity merely on the ground that material value has not been furnished by noticee in his correspondence dated 07.02.2012, the same was not furnished as it was not asked for by the department, therefore it does not lead to a conclusion that the same is nil without being given an opportunity of being heard. Noticee submits that material Consumption for the period January 2011 to December 2011 is Rs.2,98,60,284/- **(A detailed statement showing month-wise consumption of materials has been enclosed)**

18. Noticee submits that the impugned SCN should be quashed and set-aside as it has been passed without following the Principles of Natural Justice. It is a well known Principle of Natural Justice - Audi Alteram Partem – as the maxim denotes that no one should be condemned unheard. Noticee submits that impugned SCN has been passed without giving the opportunity to be heard by the Ld. Adjudicating authority. For this purpose, it is pertinent to refer Circular No. 65/2000-Cus dated 27.07.2000 which reads as under:

"In addition to the provisions of the Act, the Principles of Natural Justice need to be adopted and followed by all quasi-judicial authorities as these are one of the Fundamental Principles of the Rule of the Law"

19. Without prejudice to the foregoing, Noticee submits that Value of Work Contract Service shall be determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006 which is 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 co the instant case, Value of Works Contract is Rs.4,30,65,899/- ε of Material involved in execution of Work Contract is Rs.2,98, Therefore, in view of rules ibid the taxable amount Rs.1,32,05,615/- on which tax @ 10.30% is Rs.13,60,178/- only. However, notice has already discharges an amount of Rs.9,23,908/- prior to issue of SCN which also been acknowledged therein, Rs.7,92,772/- was paid vide challan on 21.02.2012 and Rs.57,635 was utilized from available Cenvat Balance.

20. Noticee further submits that where the Value of Work Contract Service shall is determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, he shall also be entitled to utilize Cenvat Credit on Inputs, Input services and Capital goods which is Rs.57,635 and Rs. 2,98,60,284/- Goods consumed in enhance of Work Contract.

21. Noticee hence submits that service tax is to be levied on Rs.4,30,65,899/-. Thus the service tax liability shall amount to Rs.17,74,315/-. Out of the said amount, Rs. 9,23,908/- was paid earlier to the issuance of notice and acknowledged the same in the subject notice and the balance of Rs. 7,92,772/- was paid vide Challan dated 21.02.2012. Therefore, the entire liability has been discharged by the Noticee and hence the notice is required to be set aside. (copies of the challans are enclosed along with this reply)

22. Noticee submits that in so far as levying service tax on the value of materials involved in the said Works Contract is concerned, it is Ultra-Vires the constitution as Article 265 of Constitution of India clearly stated that *No tax can be collected without the authority of law.* In the present case, Department has no authority to levy service tax on the materials portion involved in the contract.

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23. Noticee further submits that the question came for consideration in *Builders' Association of India & Ors.* v. *Union of India & Ors.* [(1989) 2 SCC 645] and *M/s. Gannon Dunkerley & Co. & Ors.* v. *State of Rajasthan & Ors.* [(1993) 1 SCC 364]. It has expressly been laid down therein that the effect of amendment by introduction of clause 29A in Article 366 is that by legal fiction, certain indivisible contracts are deemed to be divisible into contract of sale of goods and contract of service. In *Gannon Dunkerley* case (supra), it had been held :

"Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services."

Applying the same rationale, in the present case service tax should be collected on charges which appertain to the contract for supply of labour and services and should not be levied on the value of goods involved in the execution of the Works Contract.

In re: Eligibility of Composition Scheme

24. With respect to long term works contract entered into prior to 01-06-2007 i.e. (the day on which the Works Contract Service came into effect) and were continued beyond that date the board had clarified certain issues vide its Circular No. 128/10/2010-ST dated 24-08-2010.

The following extract of Circular 128/108/2010 dated 24-08-2010 has been extracted below for easy reference:

"As regards applicability of composition scheme, the material fact would be whether such a contract satisfies rule 3(3) of the Works Contracts (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 1-6-2007 and any payment of service tax was made under the respective taxable service before 1-6-2007, the said condition under rule 3(3) was not satisfied and thus no portion of that contract would be eligible for composition scheme."

25. Noticee submits that the clarifications provided by the said circular is totally illogical in as much as it is concerned with payment of service tax in relation to contract entered prior to 01-06-2007. Works Contract Service was introduced under the service tax regime only on 01-06-2007. Notification 32/2007 dated 22.05.2007 provided an option to the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two per cent of the gross amount charged for the works contract. Noticee further submits that an assessee does not have a super natural power to foresee the introduction of new service and pay service tax under the schemes introduced therein. Therefore, the option to pay under composition scheme could be exercised by him on or after the date of issue of the Notification and not at any time before that.

26. Without prejudice to the foregoing provisions, Noticee submits that assuming the benefit of composition scheme is available as articulated by Rule 3(3) *of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 is* available only where an option has been exercised prior to payment of service tax in respect of a particular works contract. In this regards, it is pertinent to discuss what a contract is.

Can it be said that entire project of Gulmohar Gardens is a Contract? According to Section 2 sub-section (7) of The Indian Contract Act, 1872, Contract is defined as

"an agreement enforceable by law". In this regards, it is important to note that the noticee enters into an individual agreement to sell for each unit in the Project Gulmohar Gardens. Later, a sale deed is executed to enforce each such agreement to sell. A sale deed is governed by 'The Registration Act, 1908' and is an important document for both the buyer or the transferee and the seller or the transferor. ***A sale deed is executed after the execution of the agreement to sell***, and after compliance of various terms and conditions between the seller and the purchaser mutually. Therefore, each contract (sale deed) entered into with each owner is a separate works contract and benefit of composition should be given to each contract entered into on or after 01.06.2007 and where payment has not been made otherwise than for composition scheme. Out of Rs. 4,30,65,899/- an amount of Rs.409.56 Lakhs is received towards consideration for individual construction contracts with customers that were executed only after 01.06.2007.

27. Noticee further submits that in so far as finding in Para 5.1 is concerned the conclusion *as to the said project is continuous long term contract/project goes to* shows the confused state of mind of the authority passing the order. It is important that while interpreting statue or any circular no word should be added or deleted, so assuming or substituting long term contract with long term project is unwarranted and not justified.

28. Without prejudice to the foregoing, assuming but not admitting that amount erroneously paid if considered service tax, Noticee wishes to draw attention to the Rule 3 (1) of the said rules extracted as under

of (1) the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, ***instead of paying service tax at the rate specified in section 66 of the Act,*** *by paying an amount equivalent to two percent* of the gross amount charged for the works contract"*

** [presently four per cent.]*

29. Noticee further submits that for the purpose of gross amount rule ibid prescribes that amount of VAT and other taxes paid on goods involved in contract shall be excluded. Therefore, Rs.100.27 Lakhs was received from customers towards service tax, VAT & registration charges. Hence, even for arriving at value as per works contract out of receipts of Rs.43.65 lakhs Rs.100.27 should be excluded.

29. Noticee also wishes to draw attention to Rule 3 (3) of the said rules extracted as under

"The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to ***payment of service tax in respect of the said works contract*** *and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract"*

30. Without prejudice to the foregoing, Noticee submits that on close reading of Rule 3 (1) and Rule 3(3) it clearly specified that instead of paying service tax at the rate specified under section 66 composition rate may be opted and such option can be opted before paying service tax in respect of the said works contract, therefore the service tax so referred in Rule 3(3) is only the service tax paid at normal rates under works contract service only and not under any other service.

31. Noticee further submits that it is also a well settled principle of law that the law does not compel a man to do that which he cannot possibly do and the said principle is well expressed in legal maxim *"lex non cogit ad impossibilia"* which is squarely attracted to the facts and circumstances of the present case. The unforeseen circumstances beyond the control of the noticee if resulted in payment of service tax under taxable service as existed at that point of time, substantial benefit extended under another service introduced at later point of time cannot be denied.

32. Noticee further placed reliance on the Special Bench decision in Sundram Fasteners Ltd. v. Collector of Central Excise, Madras reported in 1987 (29) E.L.T. 275. In the said case, the maxim "lex non cogit ad impossibilia" was referred to. The contention that when conditions were not possible to be fulfilled, the performance of these is understood to be dispensed with. In the present case, it was not possible for assessee prior to 01-06-2007 i.e. (the day on which the Works Contract Service came into effect) to fulfill the condition laid down under Rule 3(3) of Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 which reads as under

"The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract." Noticee submits as to how be it humanly possible for him to opt to pay service tax under these rules prior to introduction of the said service. Therefore the benefit of composition scheme should be extended on or after 01-06-

2007 in respect of contracts entered prior to such date and classifiable as "Works Contract".

In re: Interest Under Section 75

33. Without prejudice to the foregoing Noticee submits that when service tax itself is not payable, the question of interest and penalty does not arise. Noticee 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).

In re: Penalty Under Section 76 and Section 77

34. Without prejudice to the foregoing, assuming but not admitting the levy of service tax the Noticee submits that the penalty is not imposable on them and their case is a fit case for waiver of penalty on the following grounds.

a. Reasonable Cause

b. Bona fide Belief

c. Confusion, Interpretation issues involved

35. Noticee further submits that *mens rea* is an essential ingredient to attract penalty. The Supreme Court in the case of *Hindustan Steel v. State of Orissa [1978 (2) E.L.T. J159 (S.C.)* held that an order imposing penalty for failure to carry out the statutory obligation is the result of quasi - criminal proceedings and ***penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contentious or dishonest or acted in conscious disregard of its obligation.*** Penalty will not also be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on consideration of the relevant circumstances. Even if a minimum penalty

in refusing to impose penalty, when there is a technical or judicial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

36. Noticee further no evidence has been brought on record by the lower authority to prove contravention of various provisions of Finance Act, 1994 by the noticee only with intent to evade the payment of service tax. In this scenario, imposition of penalties upon them is not justified. In this regard Appellant places reliance on the following decisions;

a. In *Eta Engineering Ltd.* v. *Commissioner of Central Excise, Chennai* - 2006 (3) S.T.R. 429 (Tri.-LB) = 2004 (174) E.L.T. 19 (Tri.-LB). CESTAT, Northern Bench, New Delhi (Larger Bench] held - Appellants ***being under bona fide doubt regarding their activity whether covered by Service tax or not, there exists reasonable cause on their part in not depositing Service tax in time*** - penalty not imposable in terms of Section 80 of Finance Act, 1994.

b. In the case of *Ramakrishna Travels Pvt Ltd- 2007(6) STR 37(Tri-Mum)* wherein it was held that in the absence of any records as to suppression of facts, then bona fide belief is a reasonable cause under section 80 of the Finance Act, 1994.

37. Noticee further submits that where the interpretation of law is required, penal provisions cannot be invoked. Also in the case of *CCE vs. Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (New Delhi – CESTAT)* it was held that: *"It is settled position that when there is a dispute of interpretation of provision of law, the penal provisions cannot be invoked. Therefore, the Commissioner (Appeals) rightly set aside the penalty."* Hence penalty is not applicable in the instant case where there have been confusions as to

applicability of service tax, classification of service etc. and law has very much been unsettled.

In re: Benefit under Section 80

38. Without prejudice to the foregoing, assuming but not admitting that service tax on said service is payable, Noticee further submits that Penalty under Section 77 and Section 76 of the Finance Act, 1994 should not be imposed as there was a reasonable cause for the said failure. Noticee further submits that Section 80 reads as follows:

"Notwithstanding anything contained in the provisions of section 76, section 77 or first proviso to sub-section (1) of] section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure.". Thus, noticee submits that there is a fit case for waiver of penalty under Section 80.

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

40. The Noticee wish to be personally heard before any decision is taken in this matter.

For Hiregange & Associates

Hiregange & Associates Chartered Accountants

Sudhir V.S. (Partner)

For M/s Mehta & Modi Homes

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Authorised Signatory