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

Sub: Index showing documents enclosed to Reply SCN Vide O.R.No.84/2013-Adjn (ST) (ADC) (C.No.IV/16/256/2010-ST (Gr-X)) dated 03.12.2013 issued to M/s Mehta & Modi Homes, 5-4-187/3 & 4, IIIrd Floor, Soham Mansion, M G Road, Secunderabad – 500 003

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BEFORE THE ADDITIONAL COMMISSIONER OF CUSTOMS, CENTRAL EXCISE, SERVICE TAX, HYDERABAD-II COMMISSIONERATE, 11-5-423/1/A, SITARAM PRASAD TOWERS, RED HILLS, HYDERABAD-4

Sub: Proceeding under O.R No.84/2013- Adjn (ST) (ADC) dated 03.12.2013 (C.No.IV/16/256/2010-ST (Gr-X)) issued to M/s. Mehta & Modi Homes.

BRIEF FACTS OF CASE

A. M/s Mehta & Modi Homes a partnership firm, located at 5-4-187/3 & 4, IIIrd Floor, Soham Mansion, MG Road, and Secunderabad-500 003 (hereinafter referred to as 'the noticee') are engaged in providing **"Construction of Complex service and Works Contract Service"**. The assessee is a registered partnership firm and got themselves registered on **17.08.2005** under construction of complex service and under Works contract service on **29.02.2008** with the department vide Service tax registration no. **AANFA5250FST001.**

B. The flow of activity involved is as under:

i. Appellant has out rightly purchased the undivided land it is engaged in development and sale of villas.

ii. In phase I, II & III land was acquired by the firm, sanctions obtained and development taken up thereafter. The lands in the three phases are disjoint. In phase I & II sanction for development of land into plots was obtained. As per rules of the urban development authority the tentative sanction was given and only after completion of all land development works the final sanction / layout was released. Phase I & II land development works were

completed and final layout released on 7.6.2005 and 1.2.2007 respectively. Subsequent to that sanction for individual bungalows were obtained.

iii. Based on the above approvals, the Appellants have started the activities of development of the said residential villas.

iv. However, in the case of phase – III sanction for comprehensive development for both land and construction of bungalows was obtained simultaneously, on 25.3.08 and 28.06.2010 respectively.

v. The exact modus operandi of the arrangement with the prospective buyers is explained hereunder.

a. Whenever an intending buyer wants to purchase a residential unit, he approaches the Appellant. Based on negotiations, he fills up a booking form. **A copy of the booking form is enclosed and marked as Annexure "14".** The key terms and conditions from the booking form are as under:-

(1) NATURE OF BOOKING:

1.1 This is a provisional booking for a bungalow mentioned overleaf in the project known as Silver Oak Bungalows. The provisional bookings do not convey in favour of purchaser any right, title or interest of whatsoever nature unless and until required documents such as Sale Agreement/ Sale Deed/ Work Order etc., are executed.

1.2 The purchaser shall execute the required documents within a period of 30 days from the date of booking along with payment of the 1st installment mentioned overleaf. In case, the purchaser fails to do so then this provisional booking shall stand cancelled and the builder shall be entitled to deduct cancellation charges as mentioned herein.

(2) REGISTRATION AND OTHER CHARGES

1.1 Registration Charges, Stamp Duty and incidental expenses thereto as applicable at the time of registration shall be extra and is to be borne by the purchaser.

1.2 Service Tax & VAT as applicable from time to time shall be extra and is to be borne by the purchaser.

(3) CANCELLATION CHARGES

3.1 In case of default mentioned in clause 1.3 above, the cancellation charges shall be Rs.25, 000/-

3.2 In case of failure of the purchaser to obtain housing loan within 30 days of the provisional booking, the cancellation charges will be NIL provided necessary intimation to this effect is given to the builder in writing along with necessary proof of non-sanction or else cancellation charges shall be Rs.25,000/-

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3.3 In case of request for cancellation in writing within 60 days of this provisional booking, the cancellation charges shall be Rs.50, 000/-

3.4 In all other cases of cancellation either of booking or agreement, the cancellation charges shall be 10% of the agreed sale consideration.

(4) OTHER CONSEQUENCES UPON CANCELLATION

4.1 The purchaser shall re-convey and redeliver the possession of thebungalow/plot in favour of the builder at his/her cost free from all encumbrances, charges, claims, interests etc., of whatsoever nature.

(5) POSSESSION

a. The builder shall deliver the possession of the completed bungalow to the purchaser only on payment of dues to the builder.

b. Once the booking is confirmed, the Appellant enters into an agreement of sale with the intending buyer. **A copy of the Agreement of Sale is enclosed and marked as Annexure "9".** The key aspects of the said Agreement of Sale are as under:-

   i. Preamble A to I of the Agreement explains and demonstrates the Title of the Appellant in the underlying land and the sanction received by the Appellants from HUDA for development of the residential units as per the approved layout plans.

ii. Preamble I highlights that the Appellant has agreed to sell the PLOT together with a deluxe bungalow constructed thereon.

iii. Some important clauses of the Agreement of Sale are as under:-

1. The vendor in the scheme of development of project Silver Oak Bungalows are required to enter into three separate agreements viz. one with respect to sale of land, second with respect to development charges on land and third with respect to construction of bungalow. These are interdependent, mutually co-existing and are inseparable.
2. Agreement for land development charges is entered as the buyer agrees to pay the builder development charges for laying the pucca roads, drainage lines, electrical lines, water lines as per the rules of HUDA.
3. That the Vendor agrees to sell for a consideration and the Buyer agrees to purchase a Standard plot along with bungalow constructed thereon. The construction of the Scheduled bungalow will be as per the specifications given in Annexure-II.
4. That the total sale consideration for the above shall be Rs. /- (Rupees only).

5. That for the purposes of creating a charge in favour of the bank/ financial institutions on the bungalow being constructed so as to enable the Buyer to avail housing loan, the Vendor will execute a sale deed in favour of the Buyer for sale of bungalow in a semi-finished state. In the event of execution of sale deed before the bungalow is fully completed, the Buyer shall be required to enter into a separate construction contract with the Vendor for completing the unfinished bungalow and the Buyer shall not raise any objection for execution of such an agreement.
6. That on payment of the full consideration amount as mentioned above and on completion of construction of the said bungalows, the Vendor shall deliver the possession of the schedule bungalow to the Buyer with all amenities and facilities as agreed to between the parties and the Buyer shall enter into possession of the schedule bungalow and enjoy the same with all the rights and privileges of an owner.
7. That the Vendor shall cause this Agreement of sale to be registered in favour of the Buyer as and when the Buyer intimates in writing to the Vendor his/her/their preparedness with the amount payable towards stamp

duty, registration charges and other expenses related to the registration of this Agreement.

8. That the stamp duty, registration charges and other expenses related to the execution and registration of this agreement of sale and other deeds, or conveyances and agreements shall be borne by the Buyer only.

c. In certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Appellants may enter into a sale deed for sale of bungalow in a semi finished state, simultaneously entering into a separate construction contract for completing the unfinished bungalow. It may be noted that as per para 13 of the Agreement of Sale, the Sale deed, the Agreement for Construction and agreement of land development charges are interdependent, mutually co-existing and inseparable. **(Enclosed are copies of the Sale Deed, Agreement of Development charges and the Agreement for Construction in Annexure-12,11,10)**

d. Some important provisions from the Agreement for Construction (which is the subject matter of the current litigation) are extracted below for ready reference:-

A. The Buyer has purchased a plot of land bearing Plot No.__ admeasuring ___ sq. yds. Under a sale deed dated _____ registered as document no. ___ in the office of the sub-registrar, Uppal.

B. This sale deed was executed subject to the condition that the buyer shall enter into a agreement for construction and agreement for development charges with the builder for construction of a bungalow on plot of land.

C. The Buyer is desirous of getting the construction completed with respect to the scheduled bungalow by the Builder.

D. The Buyer as stated above had already purchased the plot of land bearing no. ___ and the parties hereto have specifically agreed that the construction agreement and the sale deed date _____ referred herein above are and shall be interdependent and co-existing agreements.

E. The Builder shall complete the construction for the Buyer of a deluxe bungalow on plot of land bearing no. ___ as per the plans annexed hereto and the specifications given hereunder for a consideration of Rs. _____/- (Rupees ____Only).

F. The Builder upon completion of construction of the bungalow shall intimate to the Buyer the same at his last known address and the Buyer shall within 15 days of such intimation take possession of the bungalow provided however, that the Buyer

shall not be entitled to take possession if he/she has not fulfilled the obligations under this agreement. After such intimation, the Builder shall not be liable or responsible for any loss, breakages, damages, trespass and the like.

G. The buyer upon taking possession of the bungalow shall own and possess the same absolutely and shall have no claims against the Builder on any account, including any defect in the construction.

H. The Buyer upon receipt of the completion intimation from the Buyer as provided above shall thereafter be liable and responsible to bear and pay all taxes and charges for electricity, water and other services and outgoings payable in respect of the said bungalow.

I. The Builder shall deliver the possession of the completed bungalow to the Buyer only upon payment of entire consideration and other dues by the Buyer to the Builder.

J. The Buyer hereby covenants and agrees with the Builder that if he fails to abide with the terms and conditions of this agreement, the Builder shall be entitled to cancel this agreement without any further action and intimation to the Buyer. The Builder upon such cancellation shall be entitled to forfeit a sum equivalent to 10% of the total agreed consideration as liquidated damages from the amounts paid by the Buyer to

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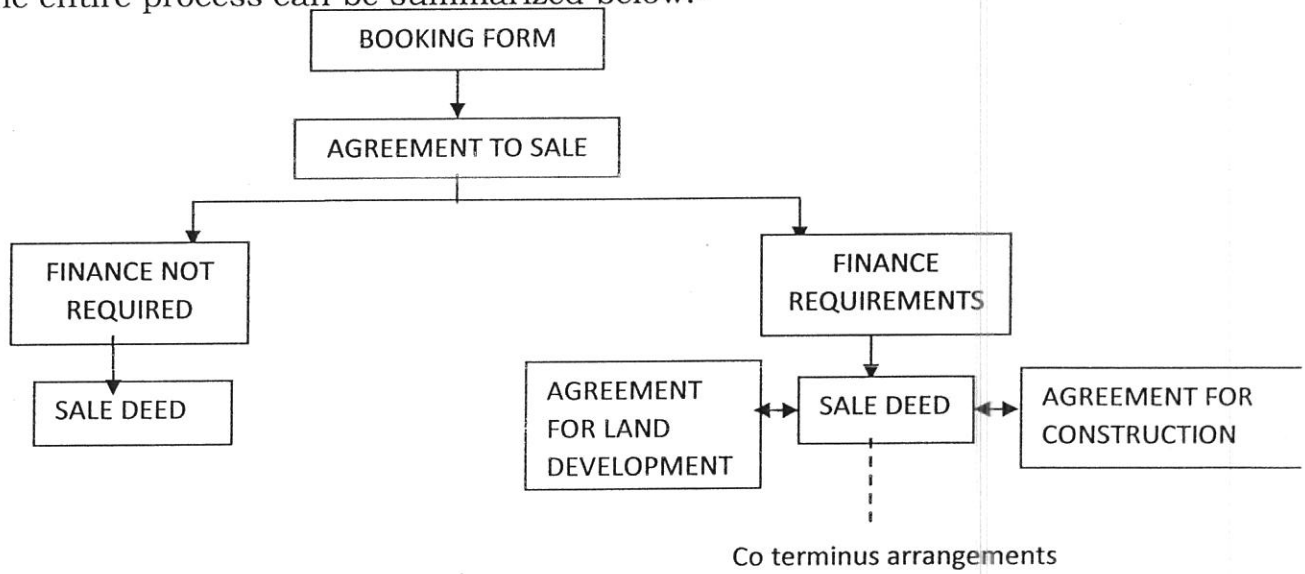
the Builder. The Builder shall further be entitled to allot, convey, transfer and assign the said bungalow to any other person of their choice and only thereafter, the Builder will refund the amounts paid by the Buyer after deducting liquidated damages provided herein.

K. It is mutually agreed upon by the parties hereto that all the terms and conditions contained in the booking form as amended from time to time shall be deemed to be the part of this agreement unless otherwise specifically waived and/or differently agreed upon in writing.

C. The entire process can be summarized below:-



D. It has been the belief of the Noticee that irrespective of the mode in which the transactions are undertaken, the Noticee has a singular obligation to deliver a flat hence the substance of the transaction is that of a sale of an immovable property and therefore, no service tax can be attracted.

E. Noticee initially, till December 2008, when amounts were being received by them they paid service tax in respect of the receipts of construction agreement even though there was a doubt and lot of confusion on the applicability of service tax on construction of complexes.

F. Later, on when the issue was clarified by CBEC vide the Circular No. 108/02/2009-ST dated 29.01.2009 by the department, the customers of the Noticee, stopped paying the service tax and accordingly Noticee was forced to stop collecting and discharging service tax liability on the amounts collected in respect of the construction agreement as they were of the bonafide belief that they were excluded vide the personal use clause in the definition of residential complex.

G. Noticee further submits that following show cause notices had been issued by the Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad – II Commissionerate.

Sl.No.	**SCN O.R.No. Date**	**Period**	**Amount of Service tax demanded Rs.**	**Status**
1.	O.R.No.128/2011-Adjn.(S.Tax)(Commr.) dated 24.10.2011	01.04.2006 to 31.05.2007	22,72,979/-	Short payment of Service tax on Construction of Complex Service.
	O.R.No.59/2011-Adjn (ST) dated 23.04.2011	01.06.2007 to 31.12.2010	5,55,04,153/-	Short/Non-payment of service Tax on Works Contract service.
2.	O.R.No. 05/2012.Adjn. (S.Tax) (Commr.) dated 10.04.2012	01.01.2011 to 31.12.2011	54,68,582/-	Short/Non-payment of service Tax on Works Contract service.

A. For the period of the show cause notice i.e. January 2012 to June 2012, for the receipts received towards the Sale Deed, Noticee were/are on the understanding that the transaction is a sale of immovable property (***Which is a subject matter of Stamp Duty)*** and not covered under the purview of Service Tax.

B. For the receipts received/appropriated towards the construction agreement, for the present period, Noticee are under bona fide belief that the same is not liable for Service Tax as they are selling/constructing the Independent houses for the individuals which is used for residential purpose. However, due to recurring issue of show cause notice from the department, for the present period, the Noticee are paying Service Tax under protest under works contract service for the amount received towards construction agreement and also got registered with the department vide Service Tax Registration no. AAKFM7214NST001.

C. While computing the service tax liability on consideration received / for the construction portion, the Noticee has excluded the following from the total receipts.

    a. Receipts towards the value of sale deed.

    b. Receipts towards payment of VAT, Service Tax, Stamp Duty and Registration Charges that were remitted to the government whether in advance or on a later stage.

    c. Receipts that are in excess of the agreed sale consideration which were refunded or liable to refunded to the purchaser.

d. Receipts towards the other charges like corpus fund, maintenance charges, electricity charges etc received on behalf of the Owners Association or the Electricity department which were paid to them in advance or on a later date.

D. After making the payment of Service Tax under protest on the portion of the consideration received for the construction portion, the Noticee has intimated the same to the Superintendent vide their letter dated 22nd July 2012 for the period January 2012 to March 2012 and vide their letter dated 29th April 2013 for the period April 2012 to September 2012. Along with the letter, the Noticee has also submitted the annexure which clearly explains that they have excluded the amount received towards the sale of undivided portion of land and paid applicable service tax ***under protest***on the amount received towards the construction portion.

E. Without appreciating the facts of the case and also without asking / calling for any further documents / information from the Noticee, the subject show cause notice has issued on the notice to show cause as to why:-

F. An amount of Rs.11, 87,407/- (Rupees Eleven Lakhs Eighty seven Thousand Four Hundred and Seven only) including cesses should not be demanded on the "Works Contract" services rendered by them during the period from January 2012 to June 2012 and an amount paid vide challans listed in the assessee's letters dated 22-07-2012 and 08-04-2013 of Rs. 8,40,949/- should not be adjusted against the

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above demand under the proviso to section 73(1A) of the Finance Act, 1994.

G. Interest at applicable rates on the service tax amount demanded as at (i) should not be demanded from them under Section 75 of the Finance Act, 1994.

H. Penalty shall not be imposed on them under Section 76 of Chapter V of the Finance Act, 1994.

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

J. The show cause notice has been issues in terms of Section 73(1A) of the Finance Act, based on the allegation and grounds on the previous show cause notice

K. The Show Cause Notice has proposed demand of the tax based on workings provided in the annexure to the show cause notice whereinit has not excluded the amount received towards the Sale of Land portion and computed the Service Tax under Works Contract on the entire amount which includes consideration received for the Sale of Land/sale deed.

In as much as –

i. As seen from the records, the Noticee entered into

1) A sale deed for sale of undivided portion of land together with semi-finished portion of independent house and

2) An agreement for construction, with their customer.

ii. On execution of sale deed the right in a property got transferred to the customer, hence the construction service rendered by the Noticee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them

iii. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the service rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the semi-finished flats was already sold are taxable under "Works Contract Service".

iv. As per information furnished by the Noticee vide their letters dated 22-07-2012 and 18-04-2013 and also statement received on 22-11-2013, it is seen that Noticee have rendered taxable services under the category of "Works Contract Services" during the period January 2012 to June 2012. The Noticee had rendered services for a taxable value of Rs.2,64,86,914/- on which service tax (including cesses) works out to Rs.11,97,294/-. As seen from the challans submitted by the Noticee along with the letters mentioned above, an amount of Rs.8, 40,949/- was paid leaving an amount of Rs.3, 56, 346/- unpaid for the services rendered during the said period detailed in the Annexure enclosed.

v. The ground and legal position as explained in the show cause – cum demand notices issued except the Point of Taxation Rules, 2011 are equally applicable to the present case, hence this statement of demand /

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show cause notice is issued in terms of Section 73(1A) of the Finance Act, 1994 for the period from January 2012 to June 2012.

SUBMISSIONS

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

   I. Validity of the Show Cause Notice

   II. Validity of demand for the Construction portion which is already paid

   III. The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all.

   IV. In substance also, the transaction is a sale of immoveable property'

   V. Individual bungalows cannot be considered as residential complex and demand of service tax not sustainable

   VI. Land Development neither "construction of complex service" nor "works contract service"

   VII. The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer

   VIII. Composite transaction

   IX. Quantification of demand

   X. Interest under Section 75

XI. Penalty under Section 76

XII. Penalty under Section 77

XIII. Benefit under Section 80

In re: Validity of Show Cause Notice

2. The Noticee submits that the impugned Notice was passed totally ignoring the factual position and also some of the submission made and judicial decisions relied but was based on mere assumption, unwarranted inferences and presumptions. Also subject show cause has issued without understanding the nature of the activities undertaken by the Noticee, without understanding the provisions of the Law and show cause notice has issued merely on the assumption that the ***entire consideration was received towards the Construction Agreement.*** Supreme Court in case ***Oudh Sugar Mills Limited v. UOI*, 1978 (2) ELT 172 (SC)** has held that such impugned order are not sustainable under the law. On this count alone the entire proceedings under impugned Notice requires to be set-aside.

3. Noticee submits that the subject show cause notice even though relied on the letters of the Noticee dated 22-07-2012 and 29-04-2013, not at all appreciated the workings provided in the said letter where they have clearly excluded the amount received towards the sale of the land.

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Accordingly, the proposition of the subject show cause notice is not sustainable and requires to be set aside.

4. Noticee submits that the subject show cause notice has seems to propose service tax on the amount received towards the agreement of construction. But, the show cause notice has not deducted the value towards the sale deed out of the total receipts from the customer, thereby proposing the demand even on the sale deed portion, although in agreement that value towards the same sale deed is not taxable.Since these crucial aspects has not been considered by the show cause notice and also as the show cause notice has not proved the burden of proof as to why the service tax is liable in the instant transaction of sale of immovable property, the same is not sustainable as per the decision of the Delhi CESTAT in the case of M/s ITC Ltd Vs Commissioner of Service Tax, Delhi 2013-TIOL-1394-CESTAT-DEL and also in the case of **Crystic Resins (India) Pvt. Ltd., vs. CCE, 1985 (019) ELT 0285 Tri.-Del**

5. Without prejudice to the foregoing, Noticee submits entire SCN seems to have been issued with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. Therefore the allegation made in the subject SCN is not sustainable.

6. Noticee submits that the previous SCN (which has been relied in the impugned SCN) had not bought out the under which limb, he is liable for the service tax under Works Contract Service. The impugned SCN also not mentioned the definition of the Work Contract Service and extracted the description of the work undertaken by the Noticee and concluded the work undertaken by the Noticee is covered under the Works Contract Service. The subject SCN had never proved beyond the doubt how the particular activity undertaken by the Noticee is covered under the particular portion of the definition of the Works Contract Service. Hence the proceedings under the SCN shall be set aside.

7. Noticee further submits that the SCN should also contain the correct classification of the Service and if in the definition there are more sub-clauses then the correct sub-clause should be indicated. It was held in the case of **United Telecoms Limited vs. Commissioner of Service Tax, Hyderabad-2011 (22) S.T.R. 571 (Tri-Bang)** no demand can be confirmed against any person towards Service Tax liability unless he is put on the notice to its exact liability under the Statute.

"Notice is issued proposing demand under BAS the noticee will not be aware as to the precise ground on which tax is proposed to be demanded from him unless the sub-clause is specified. Under BAS several activities are listed as exigible under that head. Under BSS also several activities are listed as exigible under that head. In the absence of proposal in the show cause

notice as to the liability of the assessee under the precise provision in the Act, the Tribunal found that the demand is not sustainable. The above judgment is squarely applicable and the proceedings under the Order shall be set aside".

Applying the same rationale, in the instance case the SCN does not clearly bring out under the precise provision in the Act is the tax proposed to be demanded. Based on the above judgment the entire proceedings under said SCN should be set-aside.

8. Noticee submits that in the case of **CCE v. Brindavan Beverages (2007) 213 ELT 487(SC)**, it was observed, show cause notice is foundation on which department has to build up its case. If allegations in show cause notice are not specific and on the contrary vague, lack details and/or unintelligible, it is sufficient to hold that the Noticee is not given proper opportunity to meet the allegations indicated in the show cause notice. On this ground alone the impugned SCN is baseless and is liable to be set aside

In re: Validity of demand for the Construction portion which is already paid

9. Noticee submits that the subject show cause notice has demanded the service tax on the amount received for the construction portion of the contract. Noticee submits that they have paid the service tax on the construction portion of the contract within the due date. As the applicable

service tax has been already paid by them on the construction portion, the demand of service tax of Rs.8, 40, 949/- (the workings for the same is enclosed as annexure__) and proposition for appropriation of the same amount is not legally sustainable. Accordingly, the amount of Rs.8, 40, 949/- requires to be dropped without further examination. Further, only for the balance amount liability under service tax should be examined.

10. Noticee submits that they have paid the service tax to the department ***under protest*** and intimated the fact of payment of service tax to the department. Demanding the same by virtue of show cause notice and proposal for appropriation is not proper. On the basis of same, Noticee submits that the proposition of the subject show cause notice is not sustainable and requires to be set aside.

11. Noticee submits that they have paid the service tax for the construction portion ***under protest*** and still they have not accepted the liability for the same. As there is no proposition in the subject to show cause notice for vacation of protest, they are not submitting any grounds for the non-applicability of service tax on the construction portion. Once, they got favorable order for the issue pertaining to their earlier period, they would claim refund of the service tax paid under protest.

In re: The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all

12. The Noticee submits thaton execution of the sale deed for the sale of undivided portion of the land together with semi-finished portion of the flat, they have paid the applicable stamps duty which is governed by the law. When there are no allegations in the show cause notice on non / short payment of stamp duty, the proposition of demand of service tax on this transaction is not sustainable and requires to be dropped.

13. The Noticee submits that the activity of sale of undivided portion of land together with the semi-finished flat is leviable to Stamps Duty and ***Central is not having power to tax the same.*** When the Central Government is not having the Constitution power to taxing this transaction, the demand of service tax from the Noticee on the activity of Sale of Land together with semi-finished flat is not legally sustainable and requires to be dropped.

14. The Noticeesubmits that they need to emphasize on the following documents:

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i. The Booking Form signed by the intending buyer, which is the first document governing the relationship between the Noticee and the intending buyer.

ii. The Agreement to Sell, which formalizes the said relationship between the Noticee and the intending buyer.

iii. A set of two co-terminus agreements, viz. the Sale Agreement and an Agreement for Construction, which are executed only to enable the transfer of title in semi-finished construction in cases where there is a financing requirement for the buyer.

iv. Sale Agreement, without a corresponding Agreement for Construction in cases where there is no financing requirement for the buyer.

15. It may be noted that the said set of co-terminus agreements do not result in any exchange of consideration between the parties but are entered into so as to effectuate the objectives of the Agreement to Sell. Therefore, in that sense, the entering into the said set of co-terminus agreements cannot be considered as an economic transaction resulting in any tax consequence.

16. Further, the substance of the transaction continues to be that of sale of immoveable property. Merely because the buyer is interested in defending

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the title to the property in the interim does not change the transaction to be that of a rendition of service.

17. In the case of **Hindustan Shipyard Ltd. vs. State of Andhra Pradesh [2000] 119 STC 0533 (SC),** the Supreme Court held that a contract for construction of ship as per the specifications of the buyer with specific stipulations is a sale contract and not a works contract. The Supreme Court also observed that the clause in the contract providing for passing of property in goods as and when the said goods are used in the contract is not important in deciding the issue. The relevant extracts from the said decision are as under:

"22. Reverting back to the facts of the contract under consideration before us, a few prominent features of the transaction are clearly deducible from the several terms and conditions and recitals of the contract. The contract is for sale of a completely manufactured ship to be delivered after successful trials in all respects and to the satisfaction of the buyer. It is a contract for sale of made to order goods, that is, ship for an ascertained price. Although the plans and specifications for the ship are to be provided by the customer and the work has to progress under the supervision of the classification surveyor and representative of the buyer, the components used in building ship, all belong to the Noticee. The price fixed is of the vessel completely built up although the payment is in a phased manner or, in other words, at certain percentages commensurate with the progress of the work. The

payment of 15 per cent of the price is to be made on satisfactory completion of the dock trials, that is when the vessel is ready to be delivered and strictly speaking excepting the delivery nothing substantial remains to be done. Twenty per cent of the price is to be paid upon delivery of the vessel. Thus 65 per cent of the price paid before the trials is intended to finance the builder and to share a part of the burden involved in the investments made by the builder towards building the ship. It is a sort of an advance payment of price. The "title and risk clause" quoted as sub-para (14) above is to be found in 6 out of 8 contracts in question. So far as these 6 contracts are concerned they leave no manner of doubt that property in goods passes from seller to the buyer only on the ship having been built fully and delivered to the buyer. In all the contracts the ultimate conclusion would remain the same. ***The ship at the time of delivery has to be a completely built up ship and also seaworthy whereupon only the owner may accept the delivery****. A full reading of the contract shows that the chattel comes into existence as a chattel in a deliverable state by investment of components and labour by the seller and property in chattel passes to the buyer on delivery of chattel being accepted by the buyer. Article 15 apparently speaks of property in vessel passing to the buyer with the payment of first instalment of price but we are not to be guided by the face value of the language employed; we have to ascertain intention of the parties. The property in machines, equipment's, engine, etc., purchased by the seller is not agreed upon to pass to the buyer. The delivery of the ship must be*

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preceded by trial run or runs to the satisfaction of the owner. ***All the machinery, materials, equipment, appurtenances, spare parts and outfit required for the construction of the vessel are to be purchased by the builder out of its own funds.Neither any of the said things nor the hull is provided by the owner nor in none of these the property vests in the owner.*** *It is not a case where the builder is utilizing in building the ship, the machinery, equipment, spares and material, etc., belonging to the owner, whosoever might have paid for the same. The builder has thereafter to exert and invest its own skill and labour to build the ship. Not only the owner does not supply or make available any of the said things or the hull of the ship the owner does not also pay for any of the said things or the hull separately. All the things so made available by the builder are fastened to the hull belonging to the builder and become part of it so as to make a vessel. What the owner pays to the builder in instalments and in a phased manner are all payments at the specified percentage which go towards the payment of the contract price, i.e., the price appointed for the vessel as a whole. 65 per cent payment of the price is up to the stage of the main engine having been lowered in position on board the vessel, i.e., the stage by which the building of the vessel is complete. 15 per cent payment is to be done on satisfactory completion of the trial and 20 per cent upon delivery of the vessel.* ***Giving maximum benefit in the matter of construction and interpretation of this clause in favor of the Noticee it can be said that it is the property in vessel which starts passing***

gradually to the buyer proportionately with the percentage of payments made and passes fully with the payment of last instalment on delivery of vessel having been accepted.

Based on the above observations, the Supreme Court concluded that the contracts in question ***involve sale of the respective vessels within the meaning of clause (n) of the Andhra Pradesh General Sales Tax Act, 1957 and are not merely works contract as defined in clause (t) thereof.***

18. A similar view has been taken by the Supreme Court in the case of State of **Andhra Pradesh Vs. Kone Elevators (India) Ltd. [2005] 140 STC 0022 (SC)**, wherein it has been held that a contract for construction and supply of a lift is a sale contract and not a works contract. The relevant tests laid down in the said decision are reproduced below:

5. It can be treated as well-settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main

object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale"; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a "sale" or a "works contract"

Applying the ratio of the above decisions, Noticee submits that in the present case, the demand of service tax on the Sale of undivided portion of land together with semi-finished flat and also on the amount received towards the construction portion. Accordingly, the

proposition of the show cause notice demanding service tax on the Noticee is not sustainable and requires to be set aside.

19. We therefore have to submit that the transaction is essentially a transaction for sale of immoveable property and the relationship between the Noticee and the prospective flat owner is that of seller & buyer of an immoveable property. We submit that the said proposition is not altered even in cases where the set of co-terminus agreements are entered into.

20. The levy of service tax requires that there should be some rendition of service. In the instant case, there is a sale of immoveable property and therefore the provisions of the service tax law do not apply at all.

21. The view that the builders are not liable for service tax is confirmed by the Ministry of Finance *vide* its letter number F. No. 332/35/2006-TRU, dated 1st August 2006; wherein it is acknowledged that the relationship between a builder and the purchaser is not that of a "service provider" and "service recipient"[1].

22. The Noticee submits that the subject show cause notice in para 2 mentions that *"on execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the*

*Noticee **thereafter** to their customers under agreement of construction are taxable under Service Tax as there exists service provider and receiver relationship between them".* Noticee submits that from the analysis of the allegations made in the subject show cause notice, it clears that the Noticee has alleged only on the aspect of taxability aspect of the Construction Agreement. Further, the show cause notice has nowhere made allegations on taxability of the amount received for the sale of flats. When there is no allegation and the transaction is sale of flats, proposition of the show cause notice to tax the portion of it or the full portion as actually proposed,has no grounds for taxation.

In re: In substance also, the transaction is a sale of immoveable property

23. It is an accepted principle that before characterizing a transaction, one has to carefully examine the exact legal nature of the transaction and other material facts. Not only the form but also the substance of transaction must be duly taken into account. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of charging does not in itself determine whether the service provided is a single service or multiple services

24. Further, in the following cases it has been held that substance of the transaction prevails over the form:

- Venus Jewel Vs. Commr of S.T. -I, Mumbai 2012 (285) E.L.T. 167 (Guj.)
- BhootpurvaSainik Society Vs. Commr of C. EX. & S.T., Allahabad 2012 (25) S.T.R. 39 (Tri. - Del.)
- Commr. OF S.T., Bangalore Vs. Karnataka State Beverages Corp.Ltd. 2011 (24) S.T.R. 405 (Kar.)

25. Noticee submits that by applying the ratio of the decisions to the present case, the activity of Sale of undivided portion of land together with semi-finished flat and also the activity of construction of flat after the execution of sale deed is Even in commercial& legal parlance, the transactions are not in the nature of the Works Contract Services.

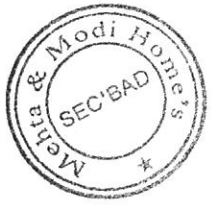
26. When one looks at the substance of the transaction in the fact matrix as explained earlier, the issue is crystal clear, the essential feature of the transaction is that the Noticee sell immoveable properties. That being the case, the only place where the tax can be examined is under the Explanation to Section 65(105)(zzzh) as a deemed service and not under Section 65(105)(zzzza).

27. The Noticee submit that the activity of construction is for self and as a part of the obligation to deliver a developed immoveable property. Notwithstanding the same, even if it is presumed that the transaction contains elements of works contract services as alleged, the same are

subsidiary and do not lend the essential characteristic to the transaction. For example, the Buyer has little wherewithal of the quality, quantity, brand or the price of most of the building materials used. Similarly, the Buyer is not concerned with the extent to which the labour or the services are required for the purpose of the completion of the unit. For both the Noticee as well as the Buyer, the linkage with works contracts is very remote and laborious.

28. From the above clarifications and distinctions, it is more than evident that commercially and legally, the transaction does not represent the characteristics required of the alleged categories of taxable services.

29. We submit that in a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance i.e. "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". Such words must be understood in their 'popular sense'. The particular terms used by the legislature in the denomination of articles are to be understood according to the common, commercial understanding of those terms used and not in their scientific and technical sense "for the legislature does not suppose our merchants to



be naturalists or geologists or botanists". This is referred to as the common parlance test[2].

30. Based on the above common parlance test, we have to submit that in common parlance, no one would treat us as a works contractor but would consider us as sellers of immoveable properties and therefore, the transaction cannot be classified as Works Contract Services. For the said purpose, we rely on the following decisions:

i. The expression "fish" is not wide enough to include prawns since If a man were to ask for fish in the market and if prawn is provided or in the vice versa, he would not accept the same[3]

ii. Steam generated from water cannot be considered as chemical in common parlance[4]

31. The Noticee therefore submit that the essence of the transaction is not the same as alleged and therefore cannot be made liable for payment of service tax under the said categories of taxable services. The Noticee therefore submit that since the transaction in substance is that of sale of immoveable property and not one of construction, the same is not liable for payment of service tax.

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[2]Mukesh Kumar Aggarwal & Co vs. State of Madhya Pradesh 2004 (178) ELT 3 (SC)
[3] Commissioner of Customs vs. Edhayam Frozen Foods 2008 (230) ELT 225 (Mad HC)
[4]GopalanandRasayan vs. State of Maharashtra 2011 (263) ELT 381 (Bom HC)

In re: Individual bungalows cannot be considered as residential complex and demand of service tax not sustainable

32. Noticee submits that in the case between Commissioner Vs. Macro Marvel Projects Pvt. Ltd. 2012 (25) S.T.R. J154 S.C it was held by Hon'ble Supreme Court as –

"The Appellate Tribunal in its impugned order had held that the Noticees 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. Noticee'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."

33. The Hon'ble Tribunal has already considered the above argument in the case of A.S. Sikarwar. The Ld. Department representative has taken the stand (Para 3 of judgment). The Hon'ble Tribunal has not considered that argument. In the A.S. Sikarwar Vs. CCE, Indore 2012 (28) S.T.R 479 (Tri-Del) wherein they have built 15 independent housesit was held as under-

"We further note that Revenue being aggrieved by the decision of the Tribunal in the said matter had filed appeal with the Hon'ble Supreme Court and the Hon'ble Supreme Court has dismissed the appeal filed as

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reported at 2012 (25) J514 (SC). So we consider that this matter is no longer res integra and service tax can be demanded under section 65(105)(zzzh) only if the building concerned has more than 12 residential units in the building and such levy will not apply in cases where in one compound has many buildings, each having not more than 12 residential units. Therefore, we set aside the impugned order and allow the appeal."

Therefore, even in the present case where "Niligiri Homes" are independent houses it cannot be said that there has been construction of complex and hence all amounts paid by them ought to be refunded to the Noticee and there is no question of paying any further service tax to the Government.

34. Noticee submits that in the case of Arihant Constructions Vs. CCE, Jaipur that 2012 (25) taxmann.com 540 (New Delhi-CESTAT) they constructed several quarters for Kendriya Vidyalaya. These residential quarters were distributed in different buildings in the same compound. None of the buildings had more than 12 flats in each building. In view of the Macro Marvel Projects Ltd. the Hon'ble Tribunal held that –

"We find that the explanation pointed out by the AR has nothing to do with the dispute in hand because that explanation defines 'residential unit' and the definition in dispute is that of 'residential complex'. The explanation can mean only that the building should have 12 residential units. So the explanation is not for interpreting the meaning of 'residential

complex'. Since the Hon. Supreme court has already confirmed the interpretation in favour of the Noticee, we find it proper to waive the requirement of pre-deposit of dues arising from the impugned order and stay collection of such dues during the pendency of the appeal."

In re: Land Development neither "construction of complex service" nor "works contract service"

35. In this regard it is submitted that the land was acquired by the Noticee outright and the same was developed into a layout at its own cost and has obtained the completion certificate for the same and there after the agreement to sell a house on such developed layout. The cost of such development was recovered from the buyer, such recovery is not for proving any service at all.

36. Further such activity of development is not covered under the definition of construction of complex since the activity was to make the land in to equal level, make roads, sewage line, electrical pole etc. which cannot be considered as residential complex and hence the liability under both "construction of complex service" and "works contract service" fails.

In re: The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer

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37. Notice submits that from the above it is evident that definition excludes construction of complex which is put to personal use by the customers. Noticee submits in the instant case, the flats constructed were put to personal use by the customers and hence outside the purview of the definition and consequently no service tax is payable.

38. Without prejudice to the foregoing Noticee submits that the same was clearly clarified in the recent circular no. 108/02/2009 –ST dated 29.02.2009. This was also clarified in two other circulars as under:

a. F. No. B1/6/2005-TRU, dated 27-7-2005

b. F. No. 332/35/2006-TRU, dated 1-8-2006

39. Noticee submits that non-taxability of the construction provided for an individual customer intended for his personal was clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 (mentioned above) during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio.

Relevant Extract

"13.4 However, residential complex having only 12 or less residential units would not be taxable. ***Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service***

provider, is also not covered under the scope of the service tax and not taxable"

40. Noticee further submits that the board in between had clarified in an indicative manner that the personal use of a residential complex is not liable for service tax in the Circular F. No. 332/35/2006-TRU (mentioned above), dated 1-8-2006.

2.	*Again will service tax be applicable on the same, in case he constructs commercial complex for himself for putting it on rent or sale?*	*Commercial complex does not fall within the scope of "residential complex intended for personal use". Hence, service provided for construction of commercial complex is leviable to service tax.*
	Will the construction of an individual house or a bungalow meant for residence of an individual fall in purview of service tax, is so, whose responsibility is there for payment?	*Clarified vide F. No. B1/6/ 2005-TRU, dated 27-7-2005, that residential complex constructed by an individual, intended for personal use as residence and constructed by directly availing services of a construction service provider, is not liable to service tax.*

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41. Noticee further submits that the Board Circular No. 108/2/2009-S.T., dated 29-1-2009 states that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction.

Relevant extract

*"...**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'..."***

42. The Noticee submits the preamble of the referred circular for understanding what issue exactly the board wanted to clarify. The relevant part of the said circular (Para 1) is extracted hereunder for ready reference.

*"....Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for **selling a dwelling unit in a residential complex** at any stage of construction (or even prior to that) and who makes construction linked payment..." (Para 1)*

43. The Noticee submits that from the above extract, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the notice.Hence, where a residential unit in a complex is for personal use of such person it shall not be leviable to service tax.

44. Without prejudice to the foregoing, noticee further submits the various decision that has been rendered relying on the Circular 108 are as under

a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL–1106-CESTAT–Bang,

b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,

c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)

d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

e. Mohtisham Complexes Pvt. Ltd. vsCommr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

f. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

In re: Amounts received prior to entering of sale deed not taxable as in nature of 'Self Service'

45. The Noticee submits that it is important to consider what arguments are considered by board for providing this clarification. The relevant part as applicable in the context has been extracted as under for ready reference.

*"...It has also been argued that even if it is taken that service is provided to the customer, **a single residential unit bought by the individual customer** would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax..." (Para 2)*

46. 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

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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)*

47. 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.

48. 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.

49. Noticee submits that this clarification is applicable to them for the period January 2012 to June 2012 also since the demand has been raised under the 'Works Contract Service' and no explanation has been added to 'Works Contract Service' with regards to prospective buyer as was added to the 'Construction of Complex Service'.

In re: Composite Transaction

50. Noticee submits that assuming but not admitting their transaction is in the nature of service in the *'Sale of Land together with semi-finished flat'*, then they submits that as the activity is also involves a sale of land and there is no bifurcation provided in the agreement for sale of land portion and sale of semi-finished goods portion. Accordingly, as held by the Hon'ble Supreme Court in the case of Nagarjuna Constn Co Ltd Vs GOI 2012 (28) S.T.R 561 (S.C), the it was not permissible to vivisect single composite service to classify it under two different taxable services. On the basis of the same, Noticee submits that proposition of the subject show cause notice is not sustainable and requires to be dropped.

In re: Quantification of Demand

51. Noticee submits that the subject SCN has in Para 4 stated that the assessee had rendered services for taxable value of Rs.2,64,86,914/- on which service tax works out to Rs.11, 97, 294/-. However, Noticee submits that these figures do not tally with their books of accounts. Noticee submits that while submitting their letters dated 08.04.2012 & 22.07.2012 there were certain computational errors due to the pressure for the year ending on 31.03.2013 which occurred pre-year ending audit, however the same were rectified when they were noticed during the course of audit. Subsequently, liabilities have been recomputed and the differential taxes was also paid at the time of self-assessing ourselves in the ST-3 returns filed for the concerned period as per the revised figures **(Copies of the letters are enclosed as Annexure-5,6).**

52. Noticee submits that the receipts for the period January 2012 to June 2012 is Rs.40,967,983/- Out of which an amount of Rs.14, 871,000 /- is towards Sale Deed value and Rs.22,974,344/- is towards Construction Agreement and Rs.6,06,499/- is towards other taxable receipts, Rs. 25,16,140/- is towards VAT and other taxes and non-taxable receipts, Therefore, only an amount of which is towards construction agreement and other taxable receipts Rs.23,580,843/- and the service tax there on would

be Rs.10,92,809/-. The same is also presented in the tabular format for easy understanding

Particulars	**Amount**
Total receipts for the period from January 2012 to June 2012	40,967,983
Receipts towards Construction agreement (only which is alleged to be taxable in SCN)	22,974,344
Service Tax @ 4.12% (upto 31.03.2012) and @ 4.944% (from 01.04.2012)	10,92,809/-
Total Service Tax Paid vide Challans and CENVAT	Rs.8,66,714
Service Tax (Short Paid)/Excess Paid	2,26,095/-

In re: Interest under Section 75

53. Noticee submits from the above submissions, it is clear that their transaction is not liable for service tax. Accordingly, the proposition for demand of interest under section 75 is not sustainable and requires to be set aside.

54. Noticee further submits that it is well-settled position in law that the interest is compensatory in character and it has to be paid by a party, who has withheld the payment of principal amount payable to the person to whom he has to pay the same. This basic concept about 'interest' should

be borne in mind. This difference between 'tax', 'interest' and 'penalty' has been expounded by the Supreme Court in the case of A. C. C. v. Commercial Tax Officer. Hence where the Service Tax itself is not payable, the question of paying of interest on the same does not arise as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

55. The Noticee further submits that in the case of CCE v. Bill Forge Pvt. Ltd. 2012 (279) E.L.T. 209 (Kar.) it was held that the-"*Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest.*"Therefore, the Noticee submits that where there is no liability of tax on them due to reasons mentioned aforesaid, there cannot be a levy of interest.

In re: Penalty under Section 76

56. Without prejudice to the foregoing, Noticee submits that service tax liability on the builders till date has not been settled and there is full of confusion as the correct position till date. With this background it is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be intention

of evasion and penalty cannot be levied. In this regard we wish to rely upon the following decisions of Supreme Court.

(i) Hindustan Steel Ltd. V. State of Orissa – 1978 (2) ELT (J159) (SC)

(ii) Akbar BadruddinJaiwani V. Collector – 1990 (47) ELT 161(SC)

(iii) Tamil Nadu Housing Board V Collector – 1990 (74) ELT 9 (SC)

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 76.

57. Noticee further submits that they have paid the applicable stamp duty for the sale of land together with semi-finished flat. Accordingly, when they have paid the applicable tax which is levied under the State law, they are on the understanding that their transaction is not liable for service tax. Further, their understanding is substantiated by the many circulars issued by the department. On the basis of the same, Noticee submits that proposition of the subject show cause levying penalty under section 76 is not sustainable and requires to be dropped.

In re: Penalty under Section 77

58. Noticee submits that the impugned notice has in Para 7 intended to impose penalty under Section 77 of Finance Act, 1994. In this regards, it is pertinent to note that Penalty under Section 77 is in nature of miscellaneous penalty, it has clauses (a) to (e) and two sub-sections, however, the subject notice has not mentioned anywhere in the notice as

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to for what has the SCN imposed penalty under Section 77. In view of this, the penalty imposed is not correct and should be quashed.

59. Noticee further submits that when they are already registered under service tax, regular in filing of Service Tax returns and also already registered under the category of Works Contract service, penalty proposed under section 77 of the Finance Act, 1994 is not sustainable and requires to be set aside.

In re: Benefit under Section 80

60. Further section 80 of Finance Act provides no penalty shall be levied under Section 76, 77 or 78 if the assessee proves that there is a reasonable cause for the failure. The notice in the instant case was under confusion as to the service tax liability on their transaction, therefore there was reasonable case for the failure to pay service tax, hence the benefit under section 80 has to be given to them.

61. Noticee crave leave to alter, add to and/or amend the aforesaid grounds.

62. Noticee wish to be heard in person before passing any order in this regard.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner

For M/s. Mehta & Modi Homes

Authorised Signatory

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BEFORE THE OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD-II COMMISSIONERATE, 3rd FLOOR, SHAKKAR BHAVAN, L.B.STADIUM ROAD, BASHEERBAGH, HYDERABAD-500004

Sub: Proceeding under O.R No.84/2013- Adjn (ST) (ADC) dated 03.12.2013 (C.No.IV/16/256/2010-ST (Gr-X)) issued to M/s. Mehta & Modi Homes.

I Soham Modi, Partner of, M/s Mehta& Modi Homes, hereby authorise and appoint Hiregange & Associates, Chartered Accountants, Bangalore or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

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

This authorization will remain in force till it is duly revoked by me/us.

Executed this 27th day of January, 2014 at Hyderabad.

For Mehta & Modi Homes

Partner

Signature

I the undersigned partner of M/s Hiregange & Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 35Q of the Central Excises Act, 1944. I accept the above said appointment on behalf of M/s Hiregange & Associates. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated: 27.01.2014

Address for service:
Hiregange & Associates,
"Basheer Villa", 8-2-268/1/16/B,
2nd Floor, Sriniketan Colony,
Road No. 3 Banjara Hills,
Hyderabad – 500 034.

For Hiregange & Associates
Chartered Accountants

Sudhir V. S.
Partner. (M. No. 219109)