Jun-12 - Mar-14 71-E 54

सेवाकरप्रिंसिपलआयुक्तकाकार्यालय
OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX
सेवाकरआयुक्तालय :: एल.बी.स्टेडियमरोड
SERVICE TAX COMMISSIONERATE :: L.B.STADIUM ROAD
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OR No.161/2014-**Adjn(ST)(COMMR)** Date: 31.08.2015

ORDER-IN-ORIGINAL NO. HYD-S.TAX-COM-03/2015
(Passed by Shri SUNIL JAIN, Commissioner of Service Tax, Hyderabad)

प्रस्तावना
PREAMBLE

1. निजीप्रयोगकेलिए इसेजिसव्यक्तिकोजारीकियागया यह प्रतिबिनामूल्यकेदीजातीहै

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

2. कोई भीव्यक्तिजोकेन्द्रीय उत्पाद शुल्कअधिनियम, 1944 कीसंशोधितधारा 35 ख (1) केअधीनआदेशसेदुषप्रभावितहोतो इसनिर्ण यकेखिलाफसीमाशुल्क, उत्पाद शुल्कएवंसेवाकरअपीलीयअधिकरणकेदक्षिणीन्यायपीठ, प्रथमतल, विश्वव्यापारकेंद्र भवन, एफ.के.सी.सी.आई कंप्लेक्स, के.जी. रोड, बेंगलूर 560 009 स्थितराजिस्टीकेपत्तेपरअपनाअपीलप्रस्तुतकरसकताहै

Under Sec.35 B (1) of the Central Excise Act, 1944, as amended, any person aggrieved by this order can prefer an appeal to the South Bench of the Customs, Excise and Service Tax Appellate Tribunal having its Registry at 1st floor, WTC Building, FKCCI Complex, K.G. Road, Bangalore – 560 009.

3. इसआदेशकेप्राप्तहोनेकेदिनसेतीनमहीनोंकेअन्दरकेन्द्रीय उत्पाद शुल्क(अपील) नियमावली 2001 केनियम6(1) केअधीननिर्धारितफार्म ई.ए.3 मेंअपीलदर्ज कीजानीचाहिए ।

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

4. हरएकअपीलकाज्ञापन, पत्याक्षेप, स्थगितआवेदनयाकोई अन्य आवेदन, फुलस्केपपेपरकेएकओरटुगनास्पेससछोडते हुए स्पष्ट रूप मेंटंकितकियाजाएऔर इसेसमयक रूप सेपृष्टोंको कमवारजमाते हुए सूचकसहितएवंहरएककागजपुस्तककीअलगफोल्डरमेंअधिकमजबूतीकेसाथनत्थीकरनाचाहिए ।

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

5. सीमाशुल्क उत्पाद शुल्कएवंसेवाकरअपीलीयअधिकरण कार्यविधिनियमावली, 1982 केनियम 13 केअधीनयथा अपेक्षित यदि अपीलपर प्राधिकृतप्रतिनिधिद्वाराअपीलकर्ता की ओरसे अपील एवं हस्ताक्षर करनेके दस्तावेज सहित अधिकरणक दक्षिणीन्याय पीठ केसहायक रजिस्ट्रार के नामसेराष्ट्रीयकृत बैंक से प्राप्तमूल्यकीरेखितबैंकड्राफ्टकेसाथअपीलप्रस्तुतकीजानीचाहिएएवंबैंककीशाखाबेंगलूरमेंस्थितबैंककेअधीनहोनीचाहिए। केन्द्रीय उत्पादशुल्क अधिनियम 1944 की संशोधित धारा 35 F केअधीन 7.5% की अनिवार्यपूर्व जमाराशिकेसाथ कियाजानाचाहिए अपील मांगकीहै या जुर्माना लगायायादोनोंऔरदेयपूर्वजमाकीगईराशि10 करोड़रुपयेकीसीमाकेअध्यधीनहोगा.

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

* * *

Subject :Service Tax - Non-Payment of Service Tax on Taxable Services rendered by M/s. Alpine Estates - Issue of Orders - Regarding.

Whereas, M/s. Alpine Estates, #5-4-187/3 &4, 2nd Floor, Soham Mansion, MG Road, Secunderabad-500 003 (here in after referred as "M/s Alpine Estates" or "the assessee(s)") are registered Service Tax Assessees having Service Tax Registration No. AANFA5250FST001 and are engaged in providing taxable service falling under "Works Contract Service". The asssessee is a registered partnership firm.

2. The present show cause notice in OR No. 161/2014-Adjn(ST)(Commr) dated 26.09.2014, is a periodical notice, covering the period from 01.07.2012 to 31.03.2014, and falls under the adjudication powers of the Commissioner as per Board's Circular No.80/1/2005-S.T., dated 10-8-2005, asamended. As such I proceed to take up the adjudication proceedings in the show cause notice issued vide OR No.161/2014-Adjn(ST)(Commr) dated 26.09.2014. The said show cause notice has required M/s Alpine Estates to show cause as to why:

(i) an amount of **Rs. 1,23,37,565/-** (Rupees One Crore Twenty Three Lakhs Thirty Seven Thousand Five Hundred and Sixty five only)including Cesses should not be demanded on the "Works Contract" services rendered by them during the period from July, 2012 to March, 2014; and an amount of Rs. 34,32,328/-already paid should not be adjusted against the above demand;

(ii) **Interest should not be demanded under** Section 75 of the Finance Act 1994;

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

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

Brief Facts of the Case :

M/s. Alpine Estates, are registered Service Tax Assessees having Service Tax Registration No. AANFA5250FST001 and are engaged in providing taxable service falling under "Works Contract Service".

2. As seen from the records, the assessee entered into 1) sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the assessees thereafter to their customers under agreement of construction are taxable under Service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold are taxable services under "Works Contract Service".

3. As per information furnished by the assessee vide their letter dated 17.09.2014 along with statements, it is seen that "the assessee" have rendered taxable services under the category of "Works Contract Services" during the period July, 2012 to March, 2014.The assessee had rendered services for a taxable value of Rs. 25,86,64,906/- (Rupees Twenty Five Crores Eighty Six Lakhs Sixty Four Thousand Nine Hundred and Six only). After deduction of VAT of Rs.91,18,679/- the taxable value works out to Rs. 24,95,46,227/-on which service tax (including cess) works out toRs. 1,23,37,565/-.As seen from the

challans submitted by the assessee, an amount of Rs. 34,43,562/-was paid leaving an amount of Rs. 88,94,003/-unpaid/short paid for the services rendered during the said period, as detailed in the Annexure enclosed to the show cause notice.

4. The grounds as explained in the show cause cum demand notices issued vide HQPOR No. 82/2010-Adjn(ST) dated 16.06.2010, OR No. 62/2011-Adjn(ST) dated 23.04.2011 and OR No. 51/2012-Adjn(ST)(SDC) dated 24.04.2012 are also applicable to the present case; the legal position insofar as "Works Contract Service" is concerned, the said service and its taxability as defined under Sub-clause (zzzza) of Clause 105 of Section 65 of the Finance Act, 1994 as existed before 01.07.2012 stands now covered by Section 65B(44) whereby the said service, for not being in the Negative List prescribed under Section 66D, continues to be a taxable service under Section 66E(h) of Finance Act, 1994. But for the said changes in legal provisions, the status of Service and the corresponding tax liability remained same. Hence this statement of demand/show cause notice is issued in terms of Section 73 (1A) of theFinance Act, 1994 for the period July, 2012 to March, 2014.

5. In response to the notice issued vide OR No. 161/2014-Adjn(ST)(Commnr) dated 26.09.2014, the assessee vide letter dated 01.03.2015 submitted their reply through M/s Hiregange & Associates (Chartered Accountants), their authorized representative. The submissions made in the said letter is reiterated as under :

WRITTEN SUBMISSIONS OF THE ASSESEE :

FACTS OF THE CASE:

A. M/s Alpine Estates, enters into arrangements with prospective buyers for sale of the residential units contained in the said residential complex while the same is under construction.

B. The Agreement of Sale, is entered for the sale of an apartment which consists of the standard construction, an undivided share in land and reserved parking space. All rights and obligations are cast on the respective parties accordingly. However, 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 Noticee may enter into a sale deed for sale of Apartment in a semi finished state, simultaneously entering into a separate construction contract for completing the unfinished apartment.

C. For the period of the show cause notice i.e. July 2012 to March 2014, 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.

D. 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 Flats for the individuals which is used for residential purpose. However, for the present period, the Noticee are paying Service Tax **under protest** under works contract service for the amount received towards construction agreement.

E. 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.

F. 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 29thApril 2013 for the period July 2012 to 30th September 2012 and vide their letter dated 26thSeptember 2013 for the period October 2012 to March 2013 and vide letter dated 11th November 2013 for the period April 2013 to September 2013 and vide letter dated 8th March 2014 for the period October 2013 to December 2013 and vide letter dated 11th March 2014 for the period January 2014 to March 2014. 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.

G. Noticee submits that the occupancy certificates for M/s Flower Heights was received on 13.04.2010 for Block B, Block A on 04.11.2010, Block C on 23.03.2011.

Further Submissions:

1. For easy comprehension, the subsequent submissions in their reply were made under different heads covering different aspects involved in the subject SCN.
   A. Validity of the show cause notice
   B. No Service tax on sale of semi-finished flat
   C. No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department
   D. Quantification of the tax liability
   E. Benefit of cum-tax
   F. Interest and penalties
   G. Benefit under section 80

In Re: Validity of Show Cause Notice– section 73(1A)

2. Noticee submits that the subject SCN has not at all alleged how and why there is a short payment of service tax in the present case and proceeded with mere assumptions and presumptions without appreciating the fact that Appellant has paid entire amount of service tax to the department on the amount towards agreement of construction.

3. The Noticee submits that the subject show cause notice has been issued by relying on the information submitted by the Noticee vide letter dated 17thSeptember 2014. The Noticee submits that in the said letter, they submitted the amount received towards agreement of construction as follows.

Sl. No.	Period	Total Receipts towards agreement of construction
1	April 2012 to September 2012	Rs.3,65,71,069/-
2	October 2012 to March 2013	Rs.3,77,97,612/-
3	April 2013 to September 2013	Rs.98,82,454/-

4	October 2013 to December 2013	Rs.15,03,313/-
5	January 2014 to March 2014	Rs. 44,84,228/-

However, the annexure to the show cause notice mentioned the details of receipts as follows which is entirely different from the details furnished by the Noticee which are as follows.

Sl. No.	Period	Gross amount received
1	July 2012 to September 2012	Rs.4,11,17,849/-
2	October 2012 to March 2013	Rs.7,61,02,271/-
3	April 2013 to September 2013	Rs.9,05,13,786/-
4	October 2013 to December 2013	Rs.3,78,92,487/-
5	January 2014 to March 2014	Rs.1,30,38,513/-

4. From the above comparison of the information submitted and information considered by the subject show cause notice, it clear that the subject show cause notice is based on wrong understanding of the information submitted by the Noticee. On this ground alone, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

5. The Noticee submits that the subject show cause notice has also proposed demand under the new service tax law, where the activity should be covered under the definition of service to attract service tax liability. However, in the present case, the subject show cause notice has not at all explained how and why the total gross amount received which is inclusive of amount received for sale of semi-finished flat, is covered under the ***definition of service*** as provided under section 65B(44) of Finance Act, 1994. As the subject show cause notice has not proved its burden of proof, the proposition of demand of service tax is not sustainable and accordingly, the same requires to be dropped.

6. Noticee further submits that The Commissioner of Central Excise & Service Tax (Appeals - II), Hyderabad and the Hon'ble CESTAT, Bangalore Bench in the previous period has categorically held that service tax should not be levied on sale deed portion and remanded the matter back to the adjudicating authority for re-quantification of the duty liability. (copy of the order has been enclosed as annexure I) However, the subject show cause notice has not considered this aspect and demanded service tax on the Noticee. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding the duty is not sustainable and requires to be dropped.

7. Noticee submits that the subject show cause notice has not made any allegations as to how and why there is a short payment of service tax inspite of detailed submissions made by them through way of correspondence, explaining their method of tax treatment for their activity. Further, the show cause notice merely considered the gross amount shown in the workings submitted by them ignoring the various deductions claimed by them for sale of semi-finished flat, amount received towards stamp duty, corpus fund, maintenance charges, electricity charges etc. As the subject show cause notice has not made any allegations as to how and why the deductions claimed by the Noticee is not applicable, the same is not sustainable and requires to be dropped.

8. Noticee submits that the subject show cause notice in para 5 extracted the provisions of section 73(1A) of the Finance Act, 1994 and in para 7 mentions that the grounds as explained in the show cause notice issued for the earlier period is also applicable for the present case. Hence, this statement of demand / show cause notice is issued in terms of section 73(1A) of Finance Act, 1994, for the period July 2012 to March 2014. For this, Noticee submits that section 73(1A) of the Finance Act, 1994 reads as follows.

> *"(1A)Notwithstanding anything contained in sub-section (1) (except the period of eighteen months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section,* ***a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period,*** *on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person,* ***subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices."***

9. Noticee submits that from the analysis of provisions of section 73(1A), it is clear that to issue show cause notice / statement under this section, the grounds relied upon for the subsequent period should be same in all aspect as mentioned in the previous notices. Further, the subject show cause notice has not mentioned which earlier show cause notice it has referred i.e. show cause notice issued under the old service tax law. However, present show cause notice is issued for the period July 2012 to March 2014 i.e. under new service tax law where there is a substantial changes in the provisions of service tax from positive list based taxation to negative list based taxation, thereby exemption and abatement has also undergone change. Accordingly, the ground of the old period is not at all applicable for the new period.

10. Accordingly, the allegations made in the previous show cause notice for the period upto 31.03.2012 are not applicable and not relevant for the period from 01.07.2012 onwards. As the subject show cause notice has considered various irrelevant and non-applicable grounds provisions of section 73(1A) is not applicable to the present case, which needs to be dropped.

11. Further the basic fundamental dispute for the previous periods (prior to 01.07.2012) was that the classification of the Noticee under "Works Contract Service / Construction of Residential Complex Service". However, since for the present period section 65A is not applicable for the services provided and there is no separate classification of service as works contract service. The present show cause notice has demanded service tax under Works contract service, which is not at all applicable for the present period. Now for the impugned SCN issued for the period after 01.07.2012 in the absence of Section 65A, Section 65(105), the exemption and abatement not based on the any classification of service such allegation in the previous notice is totally irrelevant and hence the notice issues under section 73(1A) of the Finance Act, 1994 is not sustainable and need to be quashed.

12. Noticee submits that the show cause is issued on the wrong assumption that the provisions and allegations of show cause notice issued for the earlier period is applicable to the present case. However, as explained above, as there is a substantial change under new service tax law, the provisions and allegations of earlier show cause notice is not applicable to the present case. As the subject show cause notice is issued on assumptions and presumptions, the same is not sustainable as per the decision of Hon'ble Supreme Court in the case of Oudh Sugar Mills Ltd Vs Union of India 1978(2) ELT (J172) (SC). On the basis of the same, Noticee submits that subject show cause notice is not sustainable and same requires to be dropped.

13. Noticee submits that as the subject show cause notice is issued without any allegations, the same has not proved burden of proof of taxability, which is essential under new service tax law. In this regard to Noticee wishes to rely on the following decisions.
    a. M/s Dewsoft Overseas Pvt. Ltd Vs Commr. Of Service Tax, New Delhi 2008 (12) S.T.R 730 (Tri-Del)
    b. M/s United Telecom Ltd. Vs Commissioner Of Service Tax, Bangalore 2008 (9) S.T.R 155 (Tri-Bang)
    c. In the case of Jetlite (India) Ltd. Vs Commissioner Of C. Ex., New Delhi 2011 (21) S.T.R 119 (Tri-Del)

    In light of the above judgments where the Department alleges that the service is taxable, the burden lies upon the Department to establish the taxability. In the present case, the department failed to discharge the burden as no evidence was placed on record to establish that the service is taxable.

14. Noticee submits that subject show cause notice in para 6 merely extracted the definition of service as provided under section 65B(44) of the Finance Act, 1994, but not at all explained how and why the activity of the Noticee is covered under the definition of service. As the subject show cause notice has not proved the coverage of the activity of the Noticeeunder the definition of service, the same is not sustainable and requires to be dropped.

In Re: No Service tax on sale of semi-finished flat and Stamp duty, registration charges

15. The Noticee submits that the analysis of the para 2 of the subject show cause notice it is clear that the show cause notice admitted the fact that *only services rendered by the Noticee after execution of sale deed against agreements of construction to each of their customers* is liable for service tax under works contract service and the subject show cause notice has accepted the fact that service tax is not applicable for the sale of semi-finished flat. Inspite of this admittance in para 2, the subject show cause notice in annexure while quantifying the demand has considered the total gross receipts which also includes the amount received for sale of semi-finished flat. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on sale of semi-finished flat is not sustainable and requires to be dropped.

16. Noticee submits that the definition of service provided w.e.f 01-07-2012 reads as follows.

(44)"Service" means any activity carried out by a person for another for consideration, and includes a declared service, ***but shall not include—***

(a)an activity which constitutes merely,—

(i)a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii)such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii)a transaction in money or actionable claim;

(b)a provision of service by an employee to the employer in the course of or in relation to his employment;

(c)fees taken in any Court or tribunal established under any law for the time being in force.

17. Noticee submits that from the above exclusive portion of definition of service it is clear that it specifically excluded the ***Sale / transfer of immovable property.*** In the present case, the agreement of sale deed is entered for sale / register of semi-finished flat which is an immovable property. Accordingly, the amount received for sale of semi-finished flat, stamp duty and registration charges is excluded from the definition of service.

18. Noticee submits that the show cause notice in para2 admitted the fact that there is a sale of semi-finished flat and construction activity has been done on the land of buyers. It substantiates the fact that the activity of sale of semi-finished flat is covered under exclusive portion of definition of service as provided under section 65B(44) of the Finance Act, 1994. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the sale of immovable property is not sustainable and require to be dropped.

19. Noticee submits that the subject show cause notice has computed service tax liability also on the receipts received for sale of semi-finished flat under works contract service. From the analysis of section 67 of the Finance Act, 1994, it is clear that service tax requires to be paid on the value of the ***services rendered.*** In the present case, the subject show cause notice has gone beyond the valuation provisions and demanding service tax even on the amount received for sale of semi-finished flat. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax beyond the provisions of section 67 is not sustainable and requires to be dropped.

20. The Noticee submits that Hon'ble High Court in the decision of GD Builders Vs. Union of India 2013 (32) STR 673 held that in case of a composite contract, the service element should be bifurcated and ascertained and then taxed. In the present case service there are two separate transactions one is sale of semi-finished flat and second one is construction service. Accordingly, the proposition of the above case law can be applicable.

In Re: Sale of Semi-finished flats is not a works contract

21. Noticee submits that para 2 alleges that the liability of service tax is only on the construction agreement and not on the sale deed portion, however the computation of service tax there is no deduction given towards the sale deed and hence without prejudice to the findings of the impugned SCN the submission has been made to justify that the value of sale deed is not a works contract.

22. Noticee submits that the subject show cause notice in para 2 mentions that the Noticee is providing "works contract service" and liable for service tax and extracted the definition of works contract as provided under section 65B(54) of the Finance Act, 1994. For this Noticee submits that the subject show cause notice has not explained how and why, the transaction of the Noticee is liable for service tax under works contract service. As the subject show cause notice has not proved burden of proof, the same is not sustainable and requires to be dropped.

23. Noticee submits that the transaction of sale of semi-finished flat is not covered under the definition of works contract due to the following reasons.

    a. The Noticee has entered two separate transactions with the customer, whereas the definition requires only one contract.
    b. Transaction is for sale of semi-finished flat and not for construction.

    As the present transaction of the Noticee is not covered under the definition of works contract, the proposition of subject show cause notice demanding service tax under works contract service is not sustainable and requires to be dropped.

In Re: No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department

24. Noticee submits that the subject show cause notice also demanded service tax on the amount received towards, corpus fund, electricity charges, maintenance charges, which is received on behalf of the owners association or the electricity department. However, the subject show cause notice has not provided any reasons as to how and why the said amounts were liable for service tax under works contract service. It is settled provision of law that the burden of proof of tax liability is always on the department. As in the present case, as the subject show cause notice has failed to prove its burden, the proposition of the subject show cause notice demanding service tax on the amount received amount received for corpus fund, electricity charges is not sustainable and requires to be dropped.

25. Noticee submits that the definition of works contract as provided under section 65B(54) reads as follows.

    "(54)"works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or

immovable property or for carrying out any other similar activity or a part thereof in relation to such property;

26. Noticee submits that in the present case, they have paid applicable service tax on the construction agreement, which may be liable under works contract service. However, the subject show cause notice without appreciating the voluntarily service tax payment made by the Noticee demanding service tax on the amount received towards corpus fund and electricity charges which is not at all covered under the definition of works contract service. On the basis of same also, Noticee submits that the proposition of the subject show cause notice is not sustainable and requires to be dropped.

27. Noticee submits that in the present case, as they have received the amount towards electricity charges and corpus fund as an agent of the service receiver, the amount received towards to be excluded from the valuation as per Rule 5(2) of Service Tax (Determination of Value) Rules, 2006. As the subject show cause notice has not considered this aspect, the proposition of the subject show cause notice demanding service tax on these items is not sustainable and same requires to be dropped.

28. Noticee further submits that the amount received towards corpus fund and electricity charges can also be considered as reimbursement of expenses collected at actuals. In this regard, they wishes to rely on the decision of Hon'ble Delhi High Court in the case of Intercontinental Consultants &Technocrafts Pvt. Ltd Vs Union of India 2013(29) STR 9 (Del) where it is held that pure reimbursements of expenses is not liable for service tax and also it struck down Rule 5 of Service Tax (determination of value) Rules, 2006, as it is beyond the valuation provisions of service tax. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the Noticee for these reimbursement of expenses is not sustainable and same requires to be dropped.

In Re: Quantification of the tax liability

29. Noticee submits that assuming but not admitting they are liable for service tax under works contract service and also as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then Noticee submits that as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then the value of the land involved in the project should be excluded from the determination of service tax liability. Noticee humbly request the adjudicating authority to exclude the value of land from determination of service tax liability.

In Re: Benefit of cum-tax

30. Noticee submits that assuming but not admitting there is a liability under works contract service for sale of semi-finished flat, then as the Noticee has not collected service tax from the buyer, the benefit of cum-tax requires to be provided to the Noticee. As the subject show cause notice has not extended such benefit, the same is not sustainable and requires to be dropped.

a. M/s P. Jani& Co. vs. CST, Ahmedabad 2010 (020) STR 0701 Tri.-Ahmd.

b. M/sMunicipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del
c. M/s Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590
d. In the case of BSNL Vs CCE, Jaipure 2011 (24) S.T.R 435 (Tri-Del)

On the basis of above decisions, Noticee submits that the benefit of cum-tax requires to be provided to the Noticee.

In Re: Interest and penalties

31. Without prejudice to the foregoing, noticee submits that when service tax itself is not payable, the question of interest does not arise.

32. Noticee further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC)

33. Without prejudice to the foregoing, Noticee submits that penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as to why how penalty is applicable under section 77 of the Finance Act, 1994. Further, the Noticee is already registered under service tax under works contract service and filing returns regularly to the department. Accordingly, penal provisions mentioned under section 77 is not applicable for the present case.

34. Noticee submits that in the following two cases, M/s Creative Hotels Pvt. Ltd. Vs CCE, Mumbai (2007) (6) S.T.R (Tri-Mumbai) and M/s Jewel Hotels Pvt Limited Vs CCE, Mumbai-1 (2007) (6) S.T.R 240 (Tri-Mumbai) it was held that " The authorities below have not given any finding as to why penalty is required to be imposed upon them. Only because penalty can be imposed, it is not necessary that in all cases penalty is required to be imposed. In this case I accept the explanation of the appellant and therefore set aside the penalty and allow the appeal." In the present case, as the subject show cause notice has not provided any reason for imposition of penalty under section 76, the subject show cause notice is not sustainable and requires to be dropped.

35. Noticee submits that, they may not interpret the Law as interpreted by the Authority that does not mean that they have an intention to evade the payment of service tax. The dispute regarding the taxability of service tax on land owner share is pending before various Appellate forums. Accordingly, it always involves the interpretation of legal provisions and judicial pronouncements. It is a settled position of Law that when there is an issue of interpretation of the provisions of the Finance Act, 1994 there is no question of imposition of the penalty under Section 76 of the Finance Act, 1994. In this regard Appellant wishes to rely on the following judgments pronouncements:
    a. M/sSuprasesh G.I.S. & Brokers P. Ltd Vs CST, Chennai 2009 (013) S.T.R 641 (Tri-Chennai)
    b. M/s Ispat Industries Ltd Vs CCE, Raigad 2006 (199) E.L.T 509 (Tri-Mumbai)

c. M/s Haldia Petrochemicals Ltd Vs CCE, Haldia 2006 (197) E.L.T 97 (Tri-Del)
d. M/s Itel Industries Pvt. Ltd Vs CCE, Calicut 2004 (163) E.L.T 219 (Tri-Bang)

On the basis of the above judgments it is clear that whenever due to bonafide interpretation of law service tax not paid (assuming but not admitting service tax may be liable on the constructional services for public infrastructure) penalty is not leviable under section 76 and 77 of the Finance Act, 1994.

36. Without prejudice to the foregoing, Noticee submits that suppression or concealing of information with intent to evade the payment of tax is a requirement for imposing penalty. 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 Badruddin Jaiwani 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.

In Re: *Benefit under section 80*

37. In the present case, the assessee was under bona fide belief that the activities sought to be taxed by the impugned SCN are not liable for the service tax in as much as such activities are not covered under provisions of Finance Act, 1994 and therefore it is the right case for waiver of the penalty, under Section 80 of the Finance Act, 1994.

38. Noticee submits that when there is a confusion prevalent as to the leviability and the mala fide not established by the Department, it would be a fit case for waiver of penalty as held by various tribunals. Further there cannot be intent to evade payment of duty in such cases and just because the Noticee has interpreted the law differently, it cannot be said that there is intent to evade payment of tax. This does not prove the malafide intent at all, as was decided in -

i. Vipul Motors (P) Ltd. vs Commissioner of C. Ex., Jaipur-I 2008 (009) STR 0220 Tri.-Del
ii. Commissioner of Service Tax, Daman vs Meghna Cement Depot 2009 (015) STR 0179 Tri.-Ahmd.

39. Noticee submits that in so far as Section 80 of the Act is concerned, it overrides provisions of Sections 76, 77, 78 of the Act and provides that no penalty shall be imposable (assuming but not admitting) even if any one of the said provisions are attracted if the assessee proves that there was reasonable cause for failure stipulated by any of the said provisions. Whether a reasonable cause exists or not is primarily a question of fact.

40. Noticee submits that they have established the reasonable cause for the nonpayment of service tax. Once reasonable cause is established the authority has the discretion to hold that no penalty is imposable. The provision does not say that even upon establishment of reasonable cause, penalty is imposable. The provision only says no penalty is imposable.

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

Personal Hearing :

A personal hearing was conducted on 29.07.2015, Sri V.S.Sudhir, Chartered Accountant, Authorized Consultant and Sri M.Jayaprakash, Manager (F&A), M/s Alpine Estates, appeared before me. They reiterated the submissions made in their written reply and highlighted in para 2 of the show cause notice. They submitted that on 23.03.2011 they have received Occupancy Certificate and hence sales thereafter should not be subjected to Service Tax. Further requested a week's time to furnish re-computation statement.

2. In response to their commitment on 04.08.2015, they submitted re-computation statement and claimed that they have paid excess amounts towards service tax in as much as the flats were sold after issue of occupancy certificate in which case there is no service tax liability.

Findings and Discussions :

The assessees were issued a show cause notice vide HQPOR No. 82/2010-Adjn(ST) dated 16.06.2010 for the period January'09 to December'09. The demand was confirmed vide Order in Original No.44/2010-ST dated 15.10.2010 and the appeal filed by the assessee was dismissed vide Order in Appeal No.08/2011(H-II) dated 31.01.2011. Aggrieved by the said order, assessee preferred appeal before Hon'ble CESTAT and operation of Order in Original was stayed vide Misc.Order No.21860-21877/2014 dated 31.04.2014.

2. Further, M/s Alpine Estates, were issued two show cause notices vide OR No. 62/2011-Adjn(ST) dated 23.04.2011 and OR No. 51/2012-Adjn(ST)(SDC) dated 24.04.2012 covering subsequent period viz., January'10 to December'10 and January'11 to December'11 respectively. Both the notices were taken up for adjudication and a common order was passed, confirming the demand raised in the said notices. The said Order in Original No. 49/2012-Adjn(ST)(ADC) dated 31.08.2012 was appealed against, before the appropriate appellate authority. The Commissioner (Appeals) while upholding the confirmation of demand, remanded the case to the lower authority, for re-quantification of service tax payable vide OIA No. 38/2013 (H-II)S.Tax dated 27.02.2013.

3. In view of the above, I take up the adjudication proceedings for the notice issued vide OR No. 161/2014-Adjn(ST)(Commr) only.

4. I find that these notices are periodical show cause notices. The demand for the past period was confirmed vide OIO No.44/2010-ST dated 15.10.2010 and the same was also upheld by Commissioner (Appeals) vide OIA No.08/2011 H-II dated 31.01.2011 and OIA No. 38/2013 (H-II)S.Tax dated 27.02.2013.

5. The assessee has contended that the notice has not alleged as to how and why there is a short payment of service tax in the present case. It is pertinent to note that the subject notice is periodical in nature and the notice is ssued as per Section 73(1A) of the Finance Act, 1994. Hence, the observations and implications discussed in the earlier notices alleging non payment of service tax need not be reiterated in the notices issued periodically.

6. The assessee in their correspondence with the department, vide letters dated 26.09.2013 and 29.04.2013, claimed certain deductions viz., Receipts towards value of sale deed; Receipts towards payment of VAT, Stamp duty etc. In respect of taxable service provided by the assessee, the valuation is governed by the provisions of Rule 2(A) of the Service Tax (Determinatin of Value) Rules, 2006 issued vide Notification NO. 24/2012-ST dated 20.06.2012. As seen from the notice, the value arrived at for demanding service tax is in consonance with the provisions mentioned above.The issue has been discussed in subsequent discussions. Hence, assessees claim that the amounts have been wrongly arrived cannot be accepted.

7. The assessee has contested on the various aspects of taxability of service described under old provisions and new provisions. In view of the apprehensions expressed with regard to description and classification of service, it would be pertinent to express or interpret the intention of the Law makers to tax services under the Act. Therefore, I prefer to take up and discuss the activity from its inception into the tax net as a taxable service under 'Works Contract'.

8. At the outset, it is evident that the assessee is engaged in the activity of construction, and there is no dispute about it. Admittedly, the assessee has executed a residential complex project having more than 12 flats and layout of the project was approved by the civic authorities. Therefore, the project satisfies the definition of 'residential complex' as defined in the statute.

9. Various flats have been sold by them to various customers in two steps. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customer. Appropriate stamp duty was paid on sale deed value. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats.

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

"2. The matter has been examined. As regards the classification, with effect from 01.06.2007 when the new service 'Works Contract' service was made effective, classification of aforesaid services would undergo a change in

case of long term contracts even though part of the service was classified under the respective taxable service prior to 01.06.2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date."

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

Advance Ruling (Service tax) - Works Contract service - Sale of plots to prospective buyers and construction of residential units under works contract - Applicant contesting liability on the ground that impugned works contract is for construction of individual residential unit and not for residential complex - Condition on transfer of property in goods leviable to sales tax satisfied - Records indicating construction of at least 12 residential units with common facilities and same covered under 'residential complex' as per provisions - Works contract not for construction of isolated house but for common facilities also - Impugned activity covered under Works Contract service - Sections 65(9la), 65(105)(zzzza) and 96D of Finance Act, 1994. - Individual houses built through works contract have to be viewed as parts of a residential complex rather than as stand alone house.

12. It is not in dispute that the venture undertaken by them satisfied all the ingredients of the definition of the residential complex i.e., more than 12 residential units, common area and the layout of such project approved by the civil authorities. The same have been sold to various customers by executing two agreements. A sale deed was executed at semi finished stage and stamp duty was paid for the undivided portion of the land along with semi finished construction. Thereafter, another agreement was entered for completion of the flat. On this issue, the Board vide circular 108/02/2009 – ST dated 29.01.2009 has clarified as under:-

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.

13. In terms of the said circular of the Board, service tax is not chargeable up to the stage of sale deed. However, service tax is chargeable on the construction agreement which is undertaken after execution of sale deed. The assessee have mis-interpreted the said Board's clarification dated 29.01.2009.

14. The Board vide said circular dated 29.01.2009 has clarified that service tax is not chargeable till the execution of sale deed, as it is in the nature of self service and that if the 'residential complex' is meant for 'personal' use of a person, the same falls under exclusion clause. Till the execution of sale deed, the ownership remains with the Builder/Developer and it is transferred to the customer after the execution of sale deed. After the execution of sale deed of a flat at semi-finished stage, if further construction is undertaken for completion, the same is chargeable to service tax as it amounts to rendering of construction service to the customer. The said service no longer remains self service as the ownership of the flats stands transferred to the customer after execution of sale deed at semi-finished stage.

15. The argument of 'personal use' is of no avail in this case, as the exclusion clause is applicable only when the 'entire residential complex' is constructed for personal use of one person, which is not the case here. Even the Circular No.151/2/2012-ST dated 10.2.2012 does not come to the rescue of the asessee as it clarifies that the builder/developer would not be taxable in terms of Board's Circular No.108/02/2009-ST dated 29.01.2009 only. As discussed above, the circular dated 29.01.2009 only clarifies that service tax is not chargeable till the execution of sale deed, as it is in the nature of self service.

16. In view of the above, I hold that the impugned activity is classifiable under Work Contract Service' and it is also pertinent to mention that the aspect of taxability under Works Contract has been upheld by the Commissioner (Appeals) in his orders in Appeal mentioned above.

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

18. They have also contested the qualification of demand. They have submitted that taxes and other charges need to be deducted. The assesses have also submitted that in respect of certain flats, there is no tax liability as

the same were sold after occupancy certificate has been issued. They have also submitted a re-calculation statement. The occupancy certificate has been issued on 23.03.2011 for some of the constructions though no proof has been submitted. But in the statement it is observed that certain amounts have been received towards agreement of construction even after issuance of occupancy certificate and no service tax liability is shown against such receipts. The assessee has not maintained complete transparency with regard to their activities.

19. With effect from 01.07.2012, certain changes were made in the provisions and definitions of the Service Tax Act 1994, which are relevant in the present case are reiterated as under :

Section 65B (44) : *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-*

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

SECTION 66B. - *There shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

SECTION 66D : *Contains the negative list of services. It appears that services provided by the assessee are not covered under any of the services listed therein.*

SECTION 66E : Contains declared service which includes service pertain in the execution of works Contract.

20. As per Section 66(E)(b) Works Contract means : construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of **completion-certificate** by the **competent authority**.

Explanation.— For the purposes of this clause,—

(I) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:— (A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (B) chartered engineer registered with the Institution of Engineers (India); or (C) licensed surveyor of the respective local body of the city or town or village or development or planning

authority; (II) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure;

Section 67 : Valuation of taxable services for charging Service tax –

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,—

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

21. Further, Notification No. 25/2012-ST, dated 20-06-2012, as amendedspecified services which were exempt from payment of Service Tax. It appears that services provided by the assessee are not covered under any of the services listed therein.

SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006 *:*

Rule 2A. *Determination of value of service portion in the execution of a works contract.- Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-*

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract. Explanation.- For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services;

(viii) profit earned by the service provider relatable to supply of labour and services;

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

22. In view of the above provisions and the discussions, it is evident that the activity performed by M/s Alpine Estates, is rightly classifiable under 'Works Contract Service' and the valuation has to be adopted as per the provisions of Service Tax (Determination of Value) Rules 2006. Further in the absence of documentary evidence to segregate the service value portion, the correct method is to follow composite method and the tax liability is to be calculated on 40% of the Gross value. I have gone through the urgings put forth by the assesse under various heads and also the citations quoted therein.

23. The assessee has sought cum tax benefit as they have not collected service tax from the buyer. Such claims, without documentary evidence to establish that the service tax has not been collected, does not hold good, especially when certain amount of tax is paid. It appears that all types of beneficial claims are put forth without understanding the provisions of Law and without any logical application. Such claims deserve to be abandoned. Under such circumstances, the analysis of Tribunal pronouncements cannot be called for in support of the benefits and exemptions claimed. Hence the case laws relied upon fail to support the contentions of the assessee.

24. I have gone through the records and submissions made by the assessee. The show cause notice has clearly discussed the activitiy of the

assessee which necessitated invocation of provisions of Sub-Section (1) of Section 73 of the Finance Act,1994 attracting demand for extended period. The assessee in his correspondence has submitted that they have paid service tax on the amounts, as calculated by them after deducting certain amounts. Such voluntary compliance would have been appreciated if the taxable value has been arrived as per the prescription of Law. The assessee has deduced their own methods to arrive at the tax liability without following the provisions of Service Tax (Determination of Value) Rules 2006.

25. The assesses contention that the department was in the know how of methods adopted by the assessee for tax compliance and that provisions of Sub-Section (1) of Section 73 of the Finance Act,1994 are not invokable in such cases. Mere knowledge of the activity performed by the assessee does not absolve the department from invoking extended period, when the intent to evade has been enumerated in the notice. I place my reliance on the following case laws and hold that the extended period in rightly invokable.

1. M/S Union Quality Plastic ltd & OTHERS VsCCEx& SERVICE TAX,VAPI, CCEx& SERV ICE TAX, DAMAN----*Extended period of limitation can be legitimately invoked even if Revenue has knowledge of suppression: the issue is no longer res- integra in view of the decision of the jurisdictional, High Court of Gujarat in Commissioner of Central Excise, Surat -I Vs. Neminath Fabrics Pvt Ltd reported in (2011-TIOL-10-HC-AHM-CX.). The High Court ruled that whenever there is non-levy or short levy of duty with an intention to evade payment of duty, or any of the circumstances enumerated in the Proviso to Section 11A (i) of the Central Excise Act, 1944; such suppression or willful omission is either admitted or demonstrated, invocation of the extended period of limitation would be justified; and that the proviso cannot interpreted to mean that since Revenue has knowledge of suppression, the extended period of limitation cannot be legitimately invoked.*

2. COMMISSIONER OF CENTRAL EXCISE SURAT-I*Vs*NEMINATH FABRICS PVT LTD-----2011-TIOL-10-HC-AHM-CX-----*Central Excise – Limitation under Section 11 A – Show cause notice issued beyond one year from the date of knowledge of the Department - The concept of knowledge by the departmental authority is entirely absent in the provisions of Section 11 A - If one imports such concept in sub-section (1) of section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court – If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal - The reasoning that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of section 11A would be applicable is fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated – The order passed by the Tribunal is quashed.*

26. Bonafide belief as claimed by the assessee is not sustainable. The assessee is not new to the taxation and the provisions relating to Service Tax Law. The assessee has executed several construction projects and is well aware of Law. In spite of having knowledge about valuation under Works Contract Service, the assessee has deliberately attempted to vivisect the composite service into different instances and tried to exploit the illustrative description of service under Law. Such an act cannot be classified as

Bonafide in nature. I rely on the following pronouncement by the Hon'ble Tribunal :

> *TANZEEM SCREENARTS vs COMMISSIONER OF CENTRAL EXCISE, MUMBAI-2006 (196) E.L.T. 209 (Tri. - Mumbai)- Belief - Bona fide belief - Blind belief - A blind belief that what one is doing is right does not make it a bona fide belief. [para 7]*

27. With regard to interest and penalty, the notice has elaborately provided the grounds for invoking penal provisons under Section 75, 77 and 78 of the Finance Act, 1944. The acts and omissions discussed above has rendered the assessee liable for penal action. Penalty is a preventive as well as deterrent measure to defeat recurrence of breach of law and also to discourage non-compliance to the law of any willful breach. Of course, just because penalty is prescribed that should not mechanically be levied following Apex Court's decision in the case of *Hindusthan Steel Ltd.* v. *State of Orissa* reported in 1978 (2)ELT (J159) (S.C.) = AIR 1970 S.C. 253. Section 80 of the Act having made provision for excuse from levy of penalty under section 76 if the assessee proves that there was a reasonable cause for failure under that section no other criteria is mandate of Law to exonerate from penalty. The submission of the assessee does not constitute reasonable cause so as to exonerate them from the penalties by invoking section 80 of the Act. Reliance is placed on the following case laws:-

(i) 2007 (6) S.T.R. 32 (Tri. - Kolkata) -CCE., KOLKATA-I Versus GURDIAN LEISURE PLANNERS PVT. LTD.

(ii) 2006 (1) S.T.R. 320 (Tri. - Del.)- SPIC & SPAN SECURITY & ALLIED SERVICE (I) P. LTD. Versus C.C.E., NEW DELHI

(iii) 2010 (18) S.T.R. 492 (Tri. - Del.)- GORA MAL HARI RAM LTD.VsCOMMISSIONER OF SERVICE TAX, NEW DELHI-----*Reasonable cause not shown and penalty waiver not grantable - Impugned case being one of abuse of process of law, impugned order sustainable - Sections 75, 76 and 80 of Finance Act, 1994. [para 5].*

28. Accordingly, I hold that penalty under section 76 is imposable as they have contravened the provisions of law despite adverse order passed by Commissioner (Appeals).

29. The assessee has also claimed benefit under Section 80 of the Act. In my opinion when the intent has been discussed, established and concluded in any proceedings and the assessee is well aware of the Law and is legally responsible for his acts and omissions, the provisions of Section 80 of the Act are not attracted. I place my reliance on the following case law :

1. ASSISTANT COMMISSIONER OF CENTRAL EXCISE Vs KRISHNA PODUVAL---2006 (1) S.T.R. 185 (Ker.)---*Penalty (Service tax) - Sections 76 and 78 of Finance Act, 1994 - Incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or arise out of same act, penalty imposable for ingredients of both offences - Person who is guilty of suppression deserve no sympathy under Section 80 ibid - Order of Single Judge withdrawing penalty under Section 76 ibid, set aside.[para 11].*

30. In view of the findings and discussions detailed above, I pass the following order :

ORDER

(i) I confirm an amount of Rs. 1,23,37,565/- (Rupees One Crore Twenty Three Lakhs Thirty Seven Thousand Five Hundred and Sixty five only) including Cesses on the "Works Contract" services rendered by them during the period from July, 2012 to March, 2014 in terms of sub-section (2) of Section 73 of the Finance Act 1994; and also appropriate an amount of Rs. 34,32,328/- already paid by them against the above demand;

(ii) I demand interest at the applicable rates on the amount demanded at (i) above under Section 75 of the Finance Act, 1994

(iii) I impose a penalty of 10% of service tax amount demanded at (i) above, under Section 76 of the Finance Act, 1994, provided that where service tax and interest is paid within a period of thirty days of the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of Section 73, the penalty payable shall be 25% of the penalty imposed in that order, only if such reduced penalty is also paid within such period.

(iv) I impose Penalty of RS. 10,000/- on them under Section 77 of the Finance Act, 1994.

31/8/15

(SUNIL JAIN)
COMMISSIONER

ORNo 161/14-Adjn (ST) Comm

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

(By SPEED POST)

Copy submitted to the Chief Commissioner, Customs & Central Excise, Hyderabad Zone, Hyderabad.

Copy to:
1. The Assistant Commissioner, Service Tax, Division II, Service Tax Commissionerate, Hyderabad.
2. The Superintendent, Service Tax, Range II A, Service Tax Commissionerate, Hyderabad with a direction to serve the order on the assessee and submit a copy of dated acknowledgement.
3. Master Copy/Spare Copy/File Copy