



आयुक्त(अपील - II) जीएसटीएवंउत्पाद शुल्कका कार्यालय
OFFICE OF THE COMMISSIONER (APPEALS - II) GST & CENTRAL EXCISE

7 वीं मंजिल,जीएसटीभवन,एल बी स्टेडियम रोड

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अपीलसं : Appeal No:120 / 2017 (STC) S.T

अपीलआदेशसं : ORDER-IN-APPEAL NO: HYD - SVTAX - 000 -AP2- 0273 - 17-18 DATED 26.12.2017

पास करने वाले अधिकारी

: श्री.बी.बी.बी.टी. प्रसादनायक, आयुक्त(अपील- II), हैदराबाद

Passed by

: Sri. B.V.V.T PRASAD NAIK, COMMISSIONER (APPEALS - II) HYDERABAD

प्रस्तावना P R E A M B L E

1. आदेश जिनके नाम जारी किया गया है उस व्यक्ति के निजी उपयोग के लिए यह प्रति मुस्त में दी जाती है।
This copy is granted free of cost for the private use of the person to whom it is issued.
- 2.(a) कोई भी निर्धारिती इस आदेश से असहमत हो तो वे वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत सीमाशुल्क, उत्पाद शुल्क व सेवाकर अपील अधिकरण, क्षेत्रीय बैंच, प्रथम तल, हैदराबाद में जल आपूर्ति और सीवरेज बोर्ड इमारत (पीछे के हिस्से), बैरताबाद, हैदराबाद, तेलंगाना-500004 के समक्ष अपील दायर कर सकते हैं।
Any assessee aggrieved by this order may file an appeal under Section 86 of the Finance Act, 1994 to the Customs, Excise & Service Tax Appellate Tribunal, Regional Bench, 1st Floor, HMWSSB Building (Rear Portion), Khairatabad, Hyderabad, TS-500004.
- 2.(b) केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35 एफ के खंड (iii) के अनुसार, धारा 85 की उप-धारा (5) में संदर्भित आदेश या निर्णय के विरुद्ध अपील के लिए, अपीलकर्ता को निर्णय या जिस आदेश के विरुद्ध अपील की गई हो उसके अनुसरण के लिए कर का, ऐसे मामले में जहां कर या कर और दंड विवादित हो, या दंड का, जहां ऐसा दंड विवादित हो, दस प्रतिशत जमा करना होगा: सेवा कर के मामलों में, एफ ए, 1994 की धारा 83 के प्रभाव से अधिनियम की धारा 35 एफ लागू है।
As per clause (iii) of Section 35F of the CEA, 1944, the appeal against the decision or order referred to in sub-section (5) of section 85, the appellant has to deposit ten per cent of the tax, in case where tax or tax and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against: Section 35F of the Act is applicable to service tax case by virtue of Section 83 of FA, 1994.
3. उप धारा (1) [या उप धारा (2) या उप धारा (2एफ)] के अंतर्गत प्रत्येक अपील जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती द्वारा प्राप्त करने की तारीख से तीन महीने के भीतर (मुख्य आयुक्तों या आयुक्तों की समिति) के समक्ष, जैसे भी मामला हो, दायर किया जाना चाहिए।
Every appeal under sub-section(1) [or sub-section(2) or sub-section(2A)] of Section 86 of FA, 1994 shall be filed within three months of the date on which the order sought to be appealed against was received by the assessee, the [Committee of the Commissioners], as the case may be.
4. पैरा 2 में उल्लिखित अपील एस टी 5/ एस टी 7 प्रोफॉर्मा में चार प्रतियों में जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती के पास पहुँचने की तारीख से तीन महीने के भीतर किया जा सकता है। जिस आदेश के विरुद्ध अपील किया जाना चाहता हो और अपील करने के लिए लिखित मूल आदेश की उस प्रतियाँ संलग्न होने चाहिए (जिसमें से एक प्रति प्रमाणित प्रति होने चाहिए)
The appeal, as referred to in Para 2 above, should be filed in S.T.5/S.T.-7 proforma in quadruplicate: within three months from the date on which the order sought to be appealed against was communicated to the party preferring the appeal and should be accompanied by four copies each (of which one should be a certified copy), of the order appealed against and the Order-in-Original which gave rise to the appeal.
5. अपील के साथ ट्रिब्यूनल के दक्षिणी बैंच के सहायक रजिस्ट्रार के पक्ष में जहां ट्रिब्यूनल स्थित है वहाँ के किसी भी राष्ट्रीयकृत बैंक की शाखा से प्राप्त किए गए रेखांकित मांग ड्राफ्ट संलग्न होने चाहिए और अधिनियम की धारा 86 के अंतर्गत विनिर्दिष्ट शुल्क के भुगतान का प्रमाण भी संलग्न होने चाहिए। देय शुल्क निम्नलिखित है।
The appeal should also be accompanied by a crossed bank draft drawn in favour of the Assistant Registrar of the Tribunal, drawn on a branch of any nominated public sector bank at the place where the Tribunal is situated, evidencing payment of fee prescribed in Section 86 of the Act. The fees payable are as under:-
(क) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख या उससे कम हो तो, रुपये एक हजार;
(a) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;
(ख) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख से अधिक, लेकिन रुपये पचास लाख से कम, हो तो, रुपये पाँच हजार;

- 5.(i) (b) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees; (ग) जिस मामले से अपील संबंधित हो उस मामले में मांगा गया सेवा कर और ब्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड, रुपये पचास लाख से अधिक हो तो, रुपये दस हजार; (c) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees; उसी की धारा 86 की उप धारा (4) के अंतर्गत बताए गए कुल आपत्तियों के ज्ञापन के संबंध में कोई शुल्क देय नहीं है। No fee is payable in respect of the Memorandum of Cross Objections referred to in Sub-Section (4) of Section 86 ibid.

6. अपीलीय ट्रिब्यूनल के समक्ष प्रस्तुत किए गए सभी आवेदनपत्र के साथ:

Every application made before the Appellate Tribunal:

- (क) रोक की मंजूरी के लिए अपील या गलती को सुधारने के लिए अथवा किसी अन्य प्रयोजन के लिए आवेदन पत्र; या (a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or (ख) किसी अपील या आदेश को पुनः स्थापित करने के लिए उसके साथ रुपए पाँच सौ का शुल्क देने चाहिए। (b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees.

- 6.(i) इस उप धारा के अंतर्गत आयुक्त द्वारा दायर किए गए आवेदन के मामले में कोई शुल्क देय नहीं है। इस उप धारा के अंतर्गत आयुक्त द्वारा दायर किए गए आवेदन के मामले में कोई शुल्क देय नहीं है। No fee is payable in case of an application filed by Commissioner under this sub-section. केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 और केन्द्रीय उत्पाद शुल्क नियमावली, 2002 तथा सीमाशुल्क, केन्द्रीय उत्पाद शुल्क व सेवा कर अपीलीय ट्रिब्यूनल (प्रक्रिया) नियमावली, 1982 में शामिल इससे और अन्य संबंधित मामलों को नियंत्रित करने वाले प्रावधानों की ओर ध्यान आकर्षित किया जाता है। Attention is invited to the provisions governing these and other related matters, contained in the Central Excise Act, 1944 and Central Excise Rules, 2002 and the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

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This appeal is filed by M/s Alpine Estates, 5-41-187/3 & 4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad - 500003 (hereinafter referred to as the “**appellant**”), against the **Order-in-Original No.37 / 2016 ADJ (ST) (AC) dated 30.12.2016** in [O.R. No. 22/2016 – Adjn. (S.T) (JC) (AC)] (hereinafter referred to as the “**impugned order**”) passed by the Assistant Commissioner of Service Tax, Division – II, Service Tax Commissionerate, Secunderabad (Presently Secunderabad Division, Secunderabad Commissionerate), (hereinafter referred to as the “**Adjudicating Authority**”).

2. The appellant is registered with the Department for payment of Service Tax for the services ‘works contract services’ and ‘Construction of Residential Complex Service’. Intervention of the Department revealed that the appellant had entered into

1. Sale deed for sale of undivided portion of land together with the semi-finished portion of the flat;
2. agreement for construction.

The Department contended that on execution of the sale deed the right in the property got transferred to their customers and hence the construction service rendered by the appellant thereafter to their customers under agreement was taxable service as there existed service provider to service



receiver relationship between them and this service rendered by them was taxable under 'Works Contract Service'.

3. Five Show Cause Notices involving the period from 01/2009 to 03/2014 were issued earlier. The present notice [a periodical one] which has been adjudicated by the Lower Authority involves the period from 04/2014 to 03/2015. The details were received from the appellant regarding the receipts for the service rendered during 04/2014 to 03/2015 [detailed in para 4 of the notice] based on which it was worked out that the net taxable value was Rs.1,29,52,889/- on which the Service Tax worked out to Rs.6,40,391/-. Invoking the relevant sections of the Finance Act, 1994, demand was issued in terms of Section 73(1A) of the Finance Act, 1994 for the aforementioned period demanding tax along with interest and proposing to impose penalty under Section 76 & 77 of the Finance Act, 1994.

4. The appellant contended during adjudication that for the purpose of computing Service Tax liability, the value of sale deed was included which was not legally tenable and that they had paid the Service Tax for the relevant period for which there was no proposal for the appropriation of the said amount and that the tax paid may be appropriated against the demand confirmed if any.

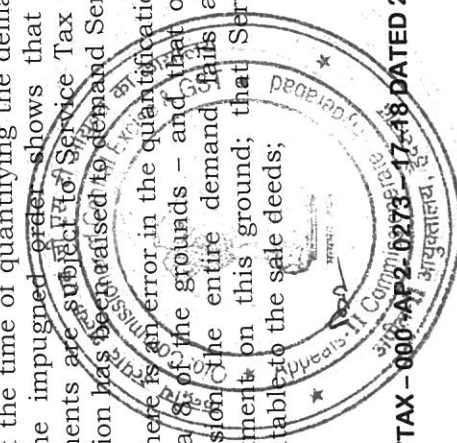
5. The Adjudicating Authority after hearing the appellant and going through the submissions made, held that it was not in dispute that the appellant was engaged in the activity of construction and had executed a residential complex project having more than 12 flats and the layout of the project was approved by the civic authorities; that various flats had been sold to the customers in two steps: first they executed a sale deed at the semi finished stage by which the ownership was transferred to the customer on payment of appropriate stamp duty on the sale value. Secondly, they have entered into an agreement with the customer - (written or oral) - involving supply of material and labour to bring the semi-finished flat to a stage of completion; that as it is a composite contract involving labour and material, it clearly satisfied the definition of works contract service and in view of the clarification of the Board's circular No. 28/10/2010 - GST dated 24.08.2010, the Adjudicating Authority held that the impugned activity was rightly classifiable under works contract service and that the same had also been



upheld by the Commissioner(Appeals) in the orders mentioned in the impugned order in para 10 & 11. Discussing the provisions in the Finance Act, 1994 and the Valuations Rules regarding the valuation of the taxable services, it was held that the activity performed was rightly classifiable under works contract service and valuation to be adopted was to be as per the Service Tax (Determination of Value) Rules 2006; that in view of the absence of the documentary evidence to segregate the service value portion, the correct method to be followed would be the composite method and the tax liability to be calculated on 40% of the Gross value. The Adjudicating Authority also did not accept the submission of the appellant regarding the payment of appropriate tax holding that the appellant had not arrived at the taxable value in the manner prescribed under law and had deliberately attempted to vivisect the composite service into different instances to exploit the description of service under law. The Adjudicating Authority also held that the appellant was well aware of law and that the plea of bonafide belief was wrong and imposed penalty under Section 76 & 77 of the Act. The demand was therefore confirmed along with interest and the impugned order passed imposing penalty.

6. The appellant is aggrieved by the impugned order and is on appeal on the grounds:

- That during the subject period, all flats (except flat No. 305 in block A, 202 & 410 in block B and 404 in block C) were booked after the date of occupancy certificate and sale deed is being executed for the entire value that is being a case, no Service Tax is liable on the amounts received towards said flats since the same is 'sale of immovable property' and it was specifically provided in Section 66E(b) of the Finance Act, 1994 that Service Tax is not liable for flats booked after OC date; that the proposal of the present notice to demand the Service Tax of the flats booked after OC date is not sustainable and required to be dropped;
- That the impugned order was passed in violation of principles of natural justice as the submissions made by the appellant have not been adverted to or rebutted and the Adjudicating Authority ignored the same while passing the impugned order;
- That the sole allegation in the impugned notice was to demand Service Tax on construction agreements and while quantifying, the sale deed value also has been included – which was brought to the notice of the Department specifically at the time of appearance before the Adjudicating Authority; that they rely on the case laws cited in para 3 of the grounds;
- That they accept that they are liable to discharge Service Tax on the construction agreements thereby accepting Service Tax on activity as proposed by the impugned notice read with earlier notices and as confirmed by the impugned order; however they contend that the notice and the impugned order both included the value of sale deeds only at the time of quantifying the demand; that the operative part of both the notice and the impugned order shows that the sole allegation is that the construction agreements are subject to Service Tax under the category of works contract, but no allegation has been raised to demand Service Tax on the sale deed value;
- That there is an error in the quantification of the demand – represented in tabular form in para 3 of the grounds – and that once the apparent error is taken to its logical conclusion, the entire demand fails and there is no cause of grievance by the Department on this ground; that Service Tax cannot be demanded on the value attributable to the sale deeds;

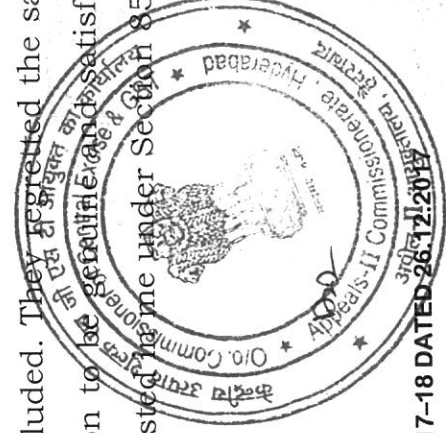


- That when the ST is itself not payable, there is no question of payment of interest and penalty;
- That regarding payment of penalty under Section 76 & 77 was not impossible as the appellant was registered under ST under works contract service and filing returns regularly; further when the main demand fails, there was no question of penalty; that the returns clearly showed the total amounts received by the appellant from the customers and clearly bifurcating the amounts received towards sale deed value as amounts received for exempted service and amounts received towards construction agreements towards taxable amounts; details of computation have also been submitted to the department voluntarily;
- That they had not paid Service Tax on bonafide belief that **the same was not liable to be paid in view of exclusion part of Section 65B(44) of the Finance Act, 1994, specifically excluding the sale of immovable property from levy of Service Tax**
activity performed till the execution of the sale deed was in the nature of self service,
that the activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser and not prior to that and
the earlier demands on total amounts received after deduction of sale deed value.
- Therefore they have established the reasonable cause for nonpayment of Service Tax and once the same have been done, the authority has the discretion to hold that no penalty is impossible under Section 80 of the Finance Act, 1994;
- That there is bonafide litigation is going on and issue was also debatable which itself can be considered a reasonable cause for failure to pay Service Tax and they placed reliance on the case law cited in para 21 of the grounds;
- They pray that the impugned order may be set aside to the extent aggrieved and to hold that the Service Tax was liable only on the value of the construction agreement as alleged in the Show Cause Notice and therefore the order needs to be dropped;

7. I have heard the appellant on 17.07.2017, represented by Shri. P. Venkata Prasad, Chartered Accountant, who reiterated the submissions made in their grounds of appeal and requested for consequential relief.

FINDINGS:

8. I have carefully perused the notice, impugned order and the submissions made by the appellant. I find that the appeal has been filed with a delay of one day for which the appellant has submitted that they had a problem in interpreting the number of days from the date of reckoning which they presumed was to be excluded. They regretted the same and requested for condonation. I find the reason to be generally satisfactory to condone the same in view of the powers vested in me under Section 85 (3A) of the Act.



9. Perusal of the records show that the appellant is registered with the Department for payment of Service Tax for the services 'works contract services' and 'Construction of Residential Complex Service'. Intervention of the Department revealed that the appellant had entered into Sale deed for sale of undivided portion of land together with the semi-finished portion of the flat and thereafter, an agreement for construction with the buyer of the flat.

10. The Department contended in para 2 of the notice that on execution of the sale deed the right in the property got transferred to their customers and hence the construction service rendered by the appellant thereafter to their customers under agreement was taxable service as there existed service provider to service receiver relationship between them and this service rendered by them after execution of the sale deed against the agreement of construction to each of their customers to whom the land was already sold was taxable under 'Works Contract Service'. This being the case, Service Tax was arrived at in para 4 of the notice deducting VAT amount from the Gross receipts and arriving at the taxable value of Rs.1,29,52,899/- which included the gross sale deed value. Based on the above, the Service Tax liability was worked out and the demand raised for the period 04/2014 to 03/2015. The appellant is aggrieved by this and protest against the inclusion of the sale deed value for the purpose of demand. They accept that they are liable to discharge Service Tax on the construction agreements thereby accepting Service Tax on activity as proposed by the impugned notice and as confirmed by the impugned order. It is therefore not in dispute that the demand has been made for the activity after the sale deed has been executed under the category of Works Contract Service. It is not disputed by both parties regarding the classification of the service rendered but only regarding the valuation to arrive at the taxable value.

11. The appellant in para 8 of the grounds of appeal has submitted that the quantification of demand was erroneous and in their view the demand (after the deduction of the sale deed value, VAT and other charges - as illustrated) would amount to Rs.10,130/- on a taxable amount of Rs.2,04,900/-. Considering the service covered under Section 65B (44) of the Act, the relevant portion of the same is reproduced hereunder for reference:



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) 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.

Explanation 1. —

Explanation 2. -

Explanation 3. —

Explanation 4. —

12. It is obvious that the activity of the sale of the semi finished flat after occupancy certificates were issued were not liable for Service Tax. For the activity carried out by the appellant after the sale of the flat under agreement, the same are taxable under the category of Works contract which is also the contention of the appellant and hence, as alleged in the notice, the Service Tax is required to be paid only on the service provided under works contract for the agreements entered into with the owners of the flats. The **Adjudicating Authority also in his impugned order in para 18 & 19 held that the impugned activity was classifiable under works contract and the same is upheld.** However, while arriving at the valuation of the works contract, the Adjudicating Authority in para 23 held that in the absence of the documentary evidence to segregate the service value portion, the tax liability was to be calculated on 40% of the gross value and proceeded to calculate the liability on the gross value received inclusive of the sale deed portion and confirmed the tax amount as in para (i) of the ORDER portion in the impugned order. When the relevant portion of the Service Tax (Determination of Value) Rules, 2006, as reproduced by the Adjudicating Authority in para 22 (Rule 2A) is perused, the same is to be determined in terms of clause 2(A)(ii)(A) which reads as:

(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).....

(C)

Therefore, the valuation of the works contract in this case should be on the agreement value (charged for the works contract) entered into by the appellant with the purchaser of the flat and the Service Tax shall be paid on



40% of the amount as the appellant could not furnish the details to segregate the service portion of the contract.

13. The appellant has furnished in the grounds, his calculations of the liability, after deducting the 'non-taxable' amounts and accepted the liability of Rs.10,130/- as payable on a taxable value of Rs.2,04,900/-. As there is a variance in the deductions in the data furnished by the appellant and the data provided by the Department in the Show Cause Notice, **it will be in the interest of justice to remand the matter back to the Adjudicating Authority only for the express purpose of arriving at the value of the portion of the works contract as discussed supra and then arrive at the demand to be confirmed. Therefore para (i) of the ORDER portion is set aside and remanded to the Adjudicating Authority with the direction for quantification supra.** I rely upon the rulings pronounce in the case of CCE, Panchkula vs Goel International Pvt Ltd [2015(39) STR 330 (Tri Del)] and CST vs Associated Hotels Limited [2015 (37) STR 723 (Guj)] in ordering the remand. It is further observed in para 24 of the impugned order that the Adjudicating Authority has mentioned that the appellant has submitted that they have paid Service Tax on the amounts after deducting certain amounts. Therefore the same also has to be taken into consideration during the reworking of the demand.

14. Regarding the submission of the appellant that as the demand does not arise, attendant interest does not arise, the same cannot be accepted in view of the presence of a demand in view of the discussions above. **Therefore the attendant interest arises automatically on the modified demand arising in denovo adjudication; and para (ii) of the order portion is also required to be modified and is to be calculated on the basis of the demand arising in the denovo adjudication.** Regarding the protest of the appellant against imposition of penalty on the basis of bonafide belief, the same cannot be considered in view of the appellant being registered with the Department under the category of works contract service and being aware of the contingencies of law. Post 01.07.2012, there has been no doubt regarding the payment of Service Tax under the category of works contract, and the appellant cannot hide behind the excuse of the disputed issue being under litigation. **I therefore have no doubt in upholding the penalty imposed in para (iii) of the order portion and the penalty under Section 77 of the Act**



in para (iv) of the Order portion. However, penalty under Section 76 imposed by the Adjudicating Authority also requires to be modified on the demand arising in denovo adjudication. In view of the above discussions, I am also not inclined to consider the plea for benefit of waiver under Section 80 of the Finance Act, 1994 as the appellant is aware of the facts and cannot be held to be under bonafide belief as they have been on appeal at higher forum also against the earlier orders passed in the matter. Furthermore, Section 80 has been omitted from the statute as on the date of adjudication, without saving / repeal in respect of the existing impositions, by Section 116 of the Finance Act, 2015. The waiver provision is therefore not available for invocation.

15. In view of the above, the following order is passed.

ORDER

The impugned order is modified to the extent discussed supra and the matter remanded to the Adjudicating Authority for the purpose discussed supra. The appeal is disposed accordingly.



By SPEEDPOST to

1. **M/s Alpine Estates**, 5-41-187/3 & 4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad - 500003.

2. **M/s. Hiregange & Associates**, "Basheer Villa", H.No.8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad - 500034.

Copy Submitted to

The **Chief Commissioner**, Central Tax & Customs, Hyderabad Zone, Hyderabad.

Copy to

1. The **Commissioner of GST, Secunderabad Commissionerate**, (Erstwhile **Service Tax Commissionerate**), GST Bhavan, L B Stadium Road, Basheerbagh, Hyderabad, TS-500004. [Jurisdictional Commissioner]

2. The **Deputy Commissioner of GST, Secunderabad Division, Secunderabad Commissionerate**, (Erstwhile **Division - II of Service Tax Commissionerate**), Queen's Plaza Building, 3B and part of 4B, Part of Plot Nos. 1-8-386/388/389/436/443, S. P. Road, Begumpet, Secunderabad, TS-500001. [Respondent]

3. Master copy.

