

ACCOMPANYING DECLARATION TO BE ATTACHED TO ST-5
IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
1st FLOOR, WTC BUILDING, FKCCI COMPLEX, K.G. Road, BANGLORE -
560 017

Appeal No. Of 2013

Between:

**M/s. Paramount Builders,
5-4-187/3&4, 2nd Floor,
M.G Road,
Secunderabad- 500 003**

..... **Appellant**

Vs.

**The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-II Commissionerate,
Central Revenues Building,
L.B.Stadium Road,
Hyderabad – 500 004**

..... **Respondent**

ISSUE INVOLVED IN APPEAL:		TAXABILITY OF SERVICES
1.	Designation and address of the authority passing the order appealed against	: The Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Central Revenues Building, 7 th Floor, L.B.Stadium Road, Hyderabad – 500 004
2.	The number and date of order appealed against	: O-I-A.No.187/2012-Adjn.(ST) (Commr) dated 21.12.2012
3.	Date of communication of the order appealed against	: 10.01.2013
4.	State/Union Territory and the Commissionerate in which the order/decision of assessment/ penalty/fine was made	: Andhra Pradesh, Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate.
5.	Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner	: Additional Commissioner, Hyderabad-II Commissionerate, Kendriya Shulk Bhavan, Basheerbagh, Hyderabad-500 004



	(Appeals).		
6.	Address to which notices may be sent to the Appellant	:	Hiregange & Associates, Chartered Accountants # 1010, 1 st Floor, Above Corporation Bank, 26 th Main, 4 th T Block, Jayanagar, Bangalore – 560 041. Also to Appellant as stated in cause title supra.
7.	Address to which notices may be sent to the Respondent	:	The Commissioner of Customs, Central Excise & Service Tax, Central Revenues Building, Hyderabad-II Commissionerate, L.B.Stadium Road, Hyderabad – 500 004
8.	Whether the decision or order appealed against involves any question having a relation to the value of the taxable service for purposes of assessment; if not difference in tax or tax involved, or amount of interest or penalty involved, as the case may be.	:	Yes
8A(1) (i)	Period of dispute	:	Jan 2010 to Dec 2010 - OR No. 60/2011-Adjn(ST) Jan 2011 to Dec 2011 - OR No. 54/2012- Adjn(ST)
(ii)	Amount of Tax if any demanded for the period mentioned in Item (i)	:	O.R No. 60/2011-Adjn(ST)- Rs.4,46,403/- O.R No. 54/2012- Adjn(ST)- Rs.2,05,658/-
(iii)	Amount of refund if any claimed for the period mentioned in Item (i)	:	NA
(iv)	Amount of interest involved	:	Interest under Section 75 of the Finance Act, 1994.
(v)	Amount of penalty imposed	:	Penalty of Rs.1000 U/s 77 and Rs.200 per day or 2% of Service tax



		whichever is higher U/s 76 provided such amount shall not exceed amount of service tax.
9.	Whether duty or penalty or both is deposited if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	: No
9A	Whether the appellant wishes to be heard in person?	: Yes. At the earliest convenience of this Honorable Tribunal.
10.	Reliefs claimed in appeal	: To set aside the impugned order and grant the relief claimed.



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..... Respondent

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(v)	Amount of penalty imposed	:	Penalty of Rs.1000 U/s 77 and Rs.200 per day of delay of Service tax



		whichever is higher U/s 76 provided such amount shall not exceed amount of service tax.
9.	Whether duty or penalty or both is deposited if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	: No
9A	Whether the appellant wishes to be heard in person?	: Yes. At the earliest convenience of this Honorable Tribunal.
10.	Reliefs claimed in appeal	: To set aside the impugned order and grant the relief claimed.

**For Hiregange & Associates
Chartered Accountants**

**Sudhir V S
Authorised Representative**



For PARAMOUNT BUILDERS
[Signature]
Appellant Partner

STATEMENT OF FACTS

- A. M/s Paramount Builders (Hereinafter referred to as 'Appellant') provides residential construction Services to various customers. Appellant is a partnership firm engaged in the business of construction of residential units.
- B. Appellant had undertaken a venture by name M/s. Paramount Residency having the residential flats which is intended to be sold to be various prospective buyers, the sale is made vide entering into the Agreement of sale for the agreed consideration, however the same is followed by two agreements sale deed for sale of the undivided portion of land for portion and an construction agreement.
- C. Appellant has initially, upto December 2008, when amounts were being received by them they paid service tax in respect of the receipts of construction agreement even though there was a doubt and lot of confusion on the applicability of service tax on construction of complexes. Later, on when the issue was clarified vide the Circular No. 108/02/2009-ST dated 29.01.2009 by the department, the customers of the appellant, stopped paying the service tax and accordingly appellant was forced to stop collecting and discharging service tax liability on the amounts collected in respect of the construction agreement as they were of the bonafide belief that they were excluded vide the personal use clause in the definition of residential complex.
- D. The Department initially issued a show cause Notice No. HQPOR No. 87/2010-Adjn(ST) for the period September 2006 to December 2009



and the same was adjudicated and the Appellant has preferred appeal and the same has been adjudicated and confirmed vide OIO No: 49/2010-ST dated 24.11.2010. Further the Appellant has gone on appeal and the same has been dismissed vide OIA No.09/2011 dated 31.01.2011 by the Commissioner Appeals, Hyderabad.

E. Subsequently, the Additional Commissioner has issued the periodical SCN O.R No. 60/2011 dated 23.04.2011 for the period Jan 2010 to Dec 2010 and SCN O.R No. 54/2012 dated 24.04.2012 for the period Jan 2011 to Dec 2011 as under:

- i. An amount of Rs.4,46,403/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2010 to December 2010;
- ii. An amount of Rs. 2,05,658/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Act for the period January 2011 to December 2011;
- iii. Interest on the above should not be demanded under section 75 of the Act;
- iv. Penalty under sections 76 of the Act should not be demanded from them.
- v. Penalty under Section 77 of the Act should not be demanded from them.

F. Appellant had submitted a detailed reply to the impugned show cause notices and also appeared for personal hearing on 16.08.2012 and reiterated the submissions made along with additional submissions for OR.No.60/2011- Adjn (ST) ADC. **(Copy of the replies is enclosed along with this appeal memo vide Annexure No. __).**

G. Despite of the detailed submissions made vide written reply as well as during the personal hearing, the Additional Commissioner has passed a common order for the both the notices as under:

- i. Confirmed an amount of Rs. 4,46,403/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section 73(2) of the Finance Act, 1994 (hereinafter referred to as the Act) for the period January 2010 to December 2010;
- ii. Confirmed an amount of Rs. 2,05,658/- (erroneously referred as to Rs. 48,33,495/-) payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section 73(2) of the Finance Act, 1994 (hereinafter referred to as the Act) for the period January 2011 to December 2011;
- iii. Demanded Interest at applicable rates on the above should not be demanded under section 75 of the Act;
- iv. Demanded Penalty of Rs. 200 per day or 2% p.m provided penalty shall not exceed the service tax payable under sections 76 of the Act should not be demanded from them.

- v. Demanded Penalty of Rs. 1000 under Section 77 of the Act should not be demanded from them.

H. Appellant submits that a personal hearing was granted on 26.11.2012 where their authorised representative had appeared and stated that a lenient view must be taken against them since the total demand as per their books of accounts is Rs. 3,59,486/- only. He also produced the last few years Income Tax return which showed that the project was under losses and there was financial hardship. However, despite such request the Ld. Commissioner Appeals-II had passed an Order-In-Stay Petition No. 64/2012-ST dated 7.12.2012 to make pre-deposit of total amounts of service tax by 17.12.2012. Thereafter, appellant filed a miscellaneous application for Modification of Stay Petition along with Copy of the Order of the CESTAT Bangalore, wherein the Learned members of the bench asked for a pre-deposit of only Rs. 3 Lakhs against the total demand of Rs. 12 Lakhs which was duly deposited by the appellant on 06.06.2012 (**Copy of the said order is enclosed with the appeal memo vide Annexure -__**), Income Tax returns for the last two A.Y's to reconsider the OISP.

- I. Despite the above, the Ld. Commissioner (Appeals-II) has passed the said Order-in-Appeal dismissing the appeals for failure to comply with provisions of Section 35F of the Central Excise Act without hearing the case on merits.

Appellant has been aggrieved by the impugned order in as much as, which is contrary to facts, law and evidence, apart from being contrary to



a catena of judicial decisions and beset with grave and incurable legal infirmities, the appellant prefers this appeal on the following grounds to the extent aggrieved by them (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.

GROUND OF APPEAL

1. For easy comprehension, the subsequent submissions in this reply are made under different heading covering different aspects involved in the subject order.
 - A. Validity of the Order
 - B. Disposal of the main appeal for non-compliance of the stay order
 - C. Order-in-Original passed in state of non-application of mind
 - D. Order is a Non-speaking order
 - E. Sale Post-Occupancy Certificate
 - F. Construction of Residential complex for "Personal Use"
 - G. Liability on Builders with effective from 01.07.2010:
 - H. Quantification of Demand
 - I. Interest under Section 75
 - J. Filing of ST-3 Returns
 - K. Penalty under Section 76 & 77
 - L. Benefit under Section 80

In re: Validity of the order

1. The Appellant submits that the impugned order is *ex-facie* illegal and untenable in law since the same is contrary to facts and judicial decisions.
2. The Appellant submits that the adjudication proceeding was rendered a solemn farce and idle formality, and the attitude of the Ld.



Respondent shows that a made-up mind was his approach for confirming the demand and the order was merely a formality to complete the process with wholly irrelevant findings, and the order is therefore untenable.

3. Appellant submits that subject order is passed without understanding the *nature of activity being undertaken, without examining the agreements/documents in its context, bringing out its own theory though the same is not set out in the statutory provisions, without considering the clarifications issued by the Board, without considering the intention of the legislature but confusing with the provisions of Service Tax*, incorrect basis of computation and many other factors discussed in the course of this reply but based on mere assumption, unwarranted inferences and presumptions. Supreme Court in case *Oudh Sugar Mills Limited v. UOI*, 1978 (2) ELT 172 (SC) has held that such orders are not sustainable under the law. On this count alone the entire proceedings under impugned order requires to be dropped.

4. The Appellant submits that as per First Proviso to Section 35F of Central Excise Act, 1944 which is reproduced here for ready reference.

Provided that wherein any particular case the Commissioner (Appeal) or Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such

person, the Commissioner Appeals or as the case may be the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose as to safeguard the interests of the Revenue.

5. The Appellant submits that it is settled position of Law that Ld. Commissioner (Appeals) has to consider the undue hardship faced by the Appellant where he asks to pay the pre-deposit of the taxes. The Ld. Commissioner (Appeals) has not considered the undue hardship faced by the Appellant which is very clear and evident from the bare reading of Order-In-Stay Petition.
6. The Appellant submits that in the order in stay petition Ld. Commissioner (Appeals) in first 3 Paragraphs extracted the facts of the case, in the 4th paragraph authority extracted Section 35F of the Central Excise Act, 1994, and concluded without assigning the reasons that Appellant is not having any prima facie over the case and ordered the Pre-deposit of the 100% of taxes adjudicated in the original order.
7. The Appellant submits that it is evident from the stay order that Ld. Commissioner (Appeals) has not gone through the facts of the case. In the case of Promising Exports Limited Vs Union of India 2009 (243) E.L.T 3 (Cal) it was held that *"Perused the order dated 21st January, 2008 under challenge. Paragraphs 1 to 5 contain the arguments*

advanced on behalf of the petitioner. Paragraph 6 of the order contains the reasons. ***I find that the stay application has not been considered at all. Merely stating in the order that order is being passed after hearing the both sides, after perusing the records and the learned members were satisfied and that the main appellants do not have a prima facie case for waiver of pre deposit, are not sufficient to justify an order. In my view, there should have been deliberation and formation of opinion which should be evident from the order. Since those are absent, the order impugned cannot be sustained***". In the present case also the Ld. Commissioner has not given any deliberation and formation of opinion therefore the stay order passed demanding the 100% of taxes adjudicated in such scenario liable to be vacated.

8. The Appellant submits that Para 4 of impugned stay order states that "A reading of the provisions of Section 35F makes it amply clear that waiver of deposit it is ***discretionary power vested with the Commissioner (Appeals)***." In this regard Lord Mansfield stated in John Wilkes case in classic terms in (1770) 4 Burr, 2528 that "***discretion means sound discretion guided by law and governed by rule, not by humour. The discretion should not be arbitrary, vague or fanciful***." In the present case Ld. Commissioner (Appeals) ordered the pre-deposit of 100% of taxes demanded is not accordance with the Law.



9. The Appellant submits that when the appellate authority has been vested with the discretion to dispense with such pre-deposits, unconditionally or on conditions, then it **has to apply its mind on that question like a quasi judicial authority, taking into consideration all the facts and circumstances of the case, including undue hardship which has been pointed out on behalf of the appellants. Whenever a statutory authority has to form an opinion on question it does not mean that it has to be formed on a subjective or casual basis. That opinion must be formed objectively on relevant consideration. Same is the position in respect of exercise of discretion.** The framers of the Act require such appellate authority to exercise its discretion in a reasonable and rational manner taking into consideration the relevant facts and circumstances of a particular appeal, while considering the question as to whether deposit of the amount of tax be dispensed with unconditionally or subject to conditions.
10. The Appellant submits that discretion must be exercised on relevant materials, honestly, bona fide, objectively and reasonable manner. "Opinion" means something more than mere retaining of gossip or of hearsay, it means judgment of belief, that is a belief or a conviction resulting from what one thinks on a particular question. **Therefore Section 35F of the Central Excises and Salt Act does not curtail the right of appeal as it is not necessary that in each case duty or penalty is to be deposited before entertaining an appeal.**

11. Therefore it is the duty of the Ld. Commissioner (Appeals) to examine the cases relied by the Appellant has to distinguish same and has to examine the applicability of the relied cases to the present case. Hence it is non-speaking stay order in this regard Appellant wishes to rely on Shamken Cotsyn Limited Vs. Commissioner (Appeals), C. Ex., Ghaziabad 2003 (156) E.L.T 452 (All) it was held that ***"In view of the above discussions, it is clear the Commissioner has not considered the merits of the case and the judgments referred for protecting the case of the petitioner. Therefore, the order of the Commissioner Excise, dated 28th June, 2002 is liable to be set aside and is directed to reconsider the entire question under Section 35 of the Act on the prayer of the petitioner with regard to the deposit of the amount in question and after hearing the parties on merits in the light of the observations made above and shall pass, afresh order"***

12. The Appellant submits that it is settled position of the law that Stay Order should be a speaking order. If the authority passes the non-speaking stay order without considering the undue hardship faced by the Appellant and without assigning reasons for pre-deposit is liable for set aside. In this regard Appellant wishes to rely on following judicial pronouncements.

a. In the case of Century Laminating Co. Ltd Vs Union of India 2009 (248) E.L.T 16 (All) it was held that *"We have perused*



*the impugned order and find that **the Commissioner (Appeals) has not adverted to the various plea raised by the petitioner while considering the prima facie case and was swayed away by the findings recorded by the Adjudicating Authority.***

The approach of the Commissioner (Appeals) cannot be justified. The order dated 26th October, 2007 passed by the Commissioner (Appeals) therefore cannot be sustained and is hereby set aside.

- b. In the case of Saurabh Suryakant Mehta Vs CCE, Raigad 2009 (243) E.L.T 709 (Tri-Mum) it was held that **"any order passed on an application for stay/waiver of pre-deposit has to be a speaking order. The reasons for directing pre-deposit have to be stated. According to the ruling of the Hon'ble Supreme Court, prima facie case, balance of convenience and irreparable loss are the sine qua non of an order for waiver of pre-deposit and stay of recovery."**
- c. In the case of Sakhee Dyeing & Printing Mills Pvt. Ltd Vs Union of India 2005 (184) E.L.T 26 (Guj) it was held that **"A bare look at the impugned common order dated 26-3-2004 passed by the Tribunal, it is clear that no reasons whatsoever were assigned by the learned Tribunal while dismissing the stay applications.**

In view of the above discussion, both these petitions are allowed and impugned common order dated 26-3-2004

passed by the learned Tribunal dismissing both the stay applications i.e. stay application Nos. E/S/2112 and 2113/03 filed in Appeal Nos. E/3067 & 3068/03 is hereby quashed and set aside and the matter is remanded to the learned Tribunal with a request to decide both the stay applications by a brief reasoned order dealing with all the contentions raised by the petitioners in it.

- d. In the case of G.M. Mittal Stainless Steels Ltd Vs CCE, Bhopal 2010 (120) E.L.T 523 (Tribunal) it was held that "Apart from this, he did not state any reason for the finding that no *prima facie* case was made out by the party. The interim stay order is, therefore, unsustainable in law inasmuch as it is not a speaking order and not in accordance with the principles of natural justice. The final order under challenge was also issued by the Commissioner (Appeals) without affording any opportunity of personal hearing to the party. The appeal was rejected on the sole ground of non-compliance with the interim stay order, which itself was an illegal order as already held. The final order also, therefore, requires to be set aside.

13. The Appellant submits that in light of the above judicial pronouncements since the stay order passed by the Ld. Commissioner

(Appeals) is non-speaking one is liable for set aside in the hands of Hon'ble Tribunal.

In re: Disposal of the main appeal for non-compliance of the stay order.

14. The Appellant submits that Para 7 of impugned order in appeal is reproduced here ready reference.

"As the Appellant failed to discharge the pre deposit, which was mandatory under section 35F of CEA, I hold that the Appeal is liable for the dismissal for non-compliance of the condition under Section 35F of CEA."

15. The Appellant submits that even if the Applicant is unable to comply with the conditions of the stay order, the main appeal has to be done duly considering the information on record. In the instant case, various submissions were made by the Appellant as to how the appellant is eligible for the credit. However while disposal of the main Appeal the Commissioner (Appeals) has not even considered as single submission made by the Appellant, but has proceeded only based on the allegation of the SCN/OIO, without further examination of the correctness of such allegation and hence such order was totally short sighted and void. Order passed for non-compliance of such void order would not sustain and hence the same has to be set aside by Hon'ble Tribunal.



16. The Appellant submits that Ld. Commissioner has failed to pass the order based on the merits, which is improper, reliance is placed on the decision in case of Ameya Packaging Vs Commissioner of Central Excise, Meerut-I 2009 (247) ELT 0656 Tri.-Del wherein it was held *"that Instead of merely dismissing appeal for non-compliance of Section 35F ibid, Commissioner (Appeals) to deal with matter on merits"*

17. The Appellant submits that the impugned order was passed without considering the merits of case and merely for non-compliance of the stay order which is nonspeaking one. This is a clear violation of principles of Natural Justice reliance has been placed on the following decisions

a. Pure Helium (India) Ltd. Vs Commissioner of C. Ex., Mumbai-III 2004 (163) ELT 0122 Tri.-Bom wherein it was held *"Order of the Commissioner (Appeals) dismissing the appeal for non-compliance with the direction of pre-deposit set aside and directed to hear the appeal on merits"*

b. In the case of Bharukha Industries Pvt Limited Vs CCE, 1990 (45) E.L.T 460 it was held that *"We have gone through the records of the case and the arguments advanced by the learned counsel before us. We are convinced that passing of the impugned order by the Collector (Appeals) **without granting personal hearing to the appellants for non-compliance of the provisions of Section 35F of the Central Excises and Salt Act, 1944, as resulted in gross***

*violation of principles of natural justice. Since on this ground the impugned order deserves **to be set aside**, we dispensed with the pre-deposit, as prayed in this stay application"*

- c. Shivosu Watch (P) Ltd. Vs Commissioner of Central Excise, Chennai 2001 (137) ELT 1364 Tri.-Mad wherein it was held "*Commissioner (Appeals) order dismissing the appeal before him for non-compliance of stay order set aside and matter remanded back to decide on merits*" therefore on the basis of the above judgments proceedings under the impugned order requires to be quashed.
- d. In the case of Flemingo Duty Free Shop Pvt. Ltd. Vs Commissioner of Customs, Goa 2011 (272) E.L.T 547 (Tri-Mum) it was held that "***Thus, both ways, the stay order dated 16-6-2010 passed by the Commissioner (Appeals) is bad in law on account of non-consideration of case on merits and of the plea of hardships apart from negation of natural justice. As rightly pointed out by the learned SDR, the final order passed by the Commissioner (Appeals) is consequential to non-compliance, by the appellant, with the stay order passed earlier. Though it was pointed out to the Commissioner (Appeals) that the stay order was challenged before the Tribunal, the appellate authority proceeded to dismiss the appeal on the ground of non-compliance. There is nothing on record to show that any opportunity***

of being heard was given to the appellant before dismissing their appeal on the said ground.

18. The Appellant submits that in light of above judicial pronouncements since the Ld. Commissioner (Appeals) disposed the appeal without considering the merits of case is liable for set aside by Hon'ble Tribunal.

In re: Order-in-Original passed in state of non-application of mind

19. Without prejudice to the foregoing, the appellant submits the merits in their case. Appellant submits that Para 14 of Page 8 of the order-in-original states that ***"The demand for the past period was confirmed vide OIO No. 49/2010-ST dated 24.11.2010 and the same was also upheld by Commissioner (Appeals) vide OIA No. 09/2011-(H-II) dated 31.01.2011. Respectfully following the decision of the Commissioner (A), I hold that demand of Service Tax is sustainable"***.

Appellant submits that from the above it is evident that the order has been passed with a presumed attitude and not considering the facts involved. Appellant submits that the order passed in such a state has to be kept aside and therefore the Stay petition ordering the pre-deposit of amounts based on such unreasoned order is void and therefore dismissal of appeal for non-compliance of pre-deposit should be relooked upon by the Hon'ble Tribunal else the very faith of the assessee in our nation in the judicial system would be gone.

20. Appellant draws support from the case of Uflex Ltd. v. CCE 2010 (19) S.T.R. 666 (Tri. - Del.) wherein it was held as-***"Plain reading of the above para of the impugned order discloses that the Commissioner (Appeals) instead of analyzing materials on record to ascertain whether the findings arrived at by the original adjudicating authority are born out from the record or not, proceeded solely on the basis of certain findings arrived at in the earlier decision ignoring the fact that the said decision was based on the materials which were available on the record in the earlier appeal and not in the matter in hand.*** Undoubtedly, the records in the said case did justify the findings arrived at in the said case. However, the same cannot be the sole basis to decide the appeal in the present case. The Commissioner having totally ignored the facts of the case and decided the matter on the basis of the findings in the decision in relation to the earlier impugned order, the same cannot be sustained and is liable to be set aside and the matter needs to be remanded to the Commissioner (Appeals) to decide afresh in accordance with provisions of law." Therefore, the facts of the present case being exactly similar to the said order of the Hon'ble Tribunal the order of the adjudicating authority confirming the demand based on the previous order of Commissioner (Appeals) without proper examination and reasoning should be set-aside.

In re: Order is a Non-speaking order:

21. Appellant submits that on perusal of the order-in-original it reveals that the Id. Appellate Authority had not dealt with the submissions made by the appellants during the replies to the SCN. Hence, the order has been issued with revenue bias without appreciating the statutory provision, the relevant case laws cited by them and also the objective of the transaction/activity/agreement. Appellant submits that the order has failed to examine the submissions which were made vide the reply to the notice which were meritorious.. The case laws on which reliance was placed and the various decisions that have been rendered relying on the Circular 108 which is the crux of the entire issue are as under:

- a. M/s Classic Promoters and Developers, M/s Classic Properties
v/s
CCE Mangalore 2009-TIOL-1106-CESTAT-Bang,
- b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May
3
2010) 2010-TIOL-1142-CESTAT-MAD,
- c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. -
CESTAT)
- d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010
(019) STR 0546 Tri.-Bang
- e. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore
2009 (016) STR 0448 Tri.-Bang



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

22. Appellant further submits that the reliance placed on circular no. 108/02/2009 -ST dated 29.02.2009 which was also clarified in two other circulars as under:

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

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

Appellant submits that from the above it is clear picture of revenue bias and hence order passed in such a state is required to be kept aside.

23. Appellant submits that in the case of *CCE, Indore v. Engineers Combine 2009 (15) S.T.R. 473 (Tri-Del)* it was aptly held as – “It is necessity of law that the **quasi-judicial authorities should pass a reasoned and speaking order so that the orders shall see the light of the day and meet scrutiny. It is needless to mention that reason is heart beat of justice.** Therefore this matter has to go back to the learned adjudicating authority to clearly lay down in the order as to charges leveled against the respondent, factual aspects including the **nature of activity carried out by the respondent, pleadings of the respondent, manner of examination, evidence tested, reason of decision** and the decision of that Authority by a speaking order.” Therefore, the findings of the Id. Adjudicating authority in the impugned



order without taking into consideration the pleadings of appellant in their SCN reply, Various statutory provisions and Case Laws cited therein is a non-reasoned order which does not have the required sanctity and is liable to be quashed.

24. Appellant submits that authority has the duty to refer the facts of the cases relied by the Appellant and the facts of the appellant case, applicability of judgment of cases relied by Appellant to the present case. But it has not happened in the present case. In this regard Appellant wishes to rely on a case law *Parle International Ltd Vs CCE, Raigad 2011 (22) S.T.R 255 (Tri-Mum)* it was held that *"However, it is not discernible from his order as to in what manner he was convinced. He also states that he has gone through the case law referred to by the respondents. However, **there is nothing to indicate that he examined the applicability of the case law.** In his conclusion, he merely states that he does not find reason to uphold the show-cause notice. We have got to deprecate this kind of an order. We set aside the Commissioner's order and allow these appeals by way of remand directing the lower authority to pass a speaking order on all issues in de novo adjudication of the case, after giving the respondents a reasonable opportunity of being heard".* In the present case also the authority has not examined the applicability of cases relied by the Appellant, and therefore it can be rightly concluded that order passed is non speaking order therefore liable be set aside.

25. Appellant submits that the order has been passed without application of mind as is evident that the issue involved in the instant case is whether the appellants are out of service tax levy since the ultimate consumer has put the same for personal use and covered vide Circular 108 and other circular. However in the subject order the discussion is restricted only to the classification of the service provided which was not an issue relevant to the present case. Both the notice and the Appellant are in consensus that the service provided is 'works contract services'. Hence, in such a situation the reliance on Circular No. 128/10/2010-ST dated 24.08.2010 is undesirable and out of context.

26. Appellant submits that the order-in-original has relied on the decision of the authority on advance ruling in the case of Hare Krishna Developers 2008 (10) S.T.R. 357 (A.A.R). It is pertinent to note the facts of the case are entirely different from facts of the present case and does not support the contention of the adjudicating authority.

27. Appellant further submits that the advance ruling is not binding on other parties. Appellant places reliance on the case of Caliron Power Corporation Ltd. v. Comm. Of Customs 2008 (222) E.L.T. 528 (Tri. - Chennai) wherein it was held as - *we note that advance ruling given by the above authority is binding only on the party applying to that authority for such ruling and also that it is binding on the Commissioner*

of Customs concerned only in respect of that party. Further in the case of Zee Tele films Limited v. CCE 2006 (4) S.T.R. 349 (Tri. - Mumbai) it was held as *Precedent - Rulings of Advance Authority - They are binding only on parties and not as a precedent on persons not party therein.* Hence from the above, it is evident that classification of service is not a matter of dispute in the present case and hence the reliance on the Circular 128/10/2010 and judgment of Hare Krishna Developers is unwarranted and out of context.

28. Appellant further submits that nowhere in the findings in the order there was a discussion regarding whether the appellants are covered vide the Circulars 108 and other relevant circulars since there service is to ultimate customer who puts the flats for personal use and thus are out of service tax levy. In this regard, Appellant resubmits the entire discussion for the kind perusal of the Learned Commissioner (Appeals) in the subsequent paragraphs.

In re: Sales post Occupancy Certificate

29. Appellant submits that the occupancy certificate **(Copy of the Certificate enclosed vide Annexure - __)** was issued for all the blocks and hence all the sales made thereafter, in other words flats on which no advances received prior to obtaining the occupancy certificate is not liable for service in terms of explanation to section 65(105)(zzzh) of the Finance Act extracted here under for the ready reference.

6[Explanation.—For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;]

30. From the above it is clear that all sales made post obtaining occupancy is out of the service tax purview and hence the liability has to be recomputed

In re: Liability on Builders with effective from 01.07.2010:

31. Appellant is not liable to pay service tax in as much as the demand raised for the period prior to the date of the explanation is inserted. The explanation is inserted with effective from 01.07.2010 but the demand raised in the instant case is for the period 08.05.2010 and therefore the demand raised is bad in law. The clarification issued by board TRU vide D.O.F No. 334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in tax treatment among different practices, the said explanation of the same being prospective and also clarifies that the transaction between the builder and buyer of the flat is not taxable until the assent was given to the bill. Hence this shows

that the transaction in question is not liable to service tax for the period prior to 01.07.2010.

32. Further Notification No. 36/2010-ST dated 28.06.2010 and Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010 exempts advances received prior to 01.07.2010, this itself indicates that the liability of service tax has been triggered for the construction service provided after 01.07.2010 and not prior to that, hence there is no liability of service tax during the period of the subject notice.

33. Without prejudice to the foregoing, Appellant submits that Trade notice F.No VGN(30)80/Trade Notice/10/Pune dated 15.02.2011 issued by Pune Commissionerate, has specifically clarified that no service tax is payable by the builder prior to 01.07.2010 and amounts received prior to that is also exempted. Since part of the period in the issue involved is prior to such date the order to that extent has to be set aside.

34. Appellant further submits that the Honorable Tribunal of Bangalore in the case of Mohtisham Complexes (P) Ltd. vs Commissioner of C. Ex., Mangalore 2011 (021) STR 0551 Tri-Bang stating that the explanation inserted to Section 65(105)(zzzh) from 01.07.2010 is prospective in nature and not retrospective. The relevant extract of the subject case is reproduced here under:



"In other words, the present case is covered by the situation envisaged in the main part of the Explanation, thereby meaning that the appellant as a builder cannot be deemed to be service provider vis-a-vis prospective buyers of the buildings. The deeming provision would be applicable only from 1-7-2010. Our attention, has also been taken to the texts of certain other Explanations figuring under Section 65(105). In some of these Explanations, there is an express mention of retrospective effect. Therefore, there appears to be substance in the learned counsel's argument that the deeming provision contained in the explanation added to Section 65(105)(zzq) and (zzzh) of the Finance Act, 1994 will have only prospective effect from 1-7-2010. Apparently, prior to this date, a builder cannot be deemed to be service provider providing any service in relation to industrial/commercial or residential complex to the ultimate buyers of the property. Admittedly, the entire dispute in the present case lies prior to 1-7-2010. The appellant has made out prima facie case against the impugned demand of service tax and the connected penalty." Appellant submits from the above, it is evident that there shall be no liability for the receipts received for the period prior to 01.07.10 and since the subject period involved is prior to 01.07.10, the demand to that extent shall be liable to be quashed.

35. Appellant further submits the Honorable Tribunal of Delhi in the case of Ambika Paints Ply & Hardware Store vs Commissioner of Central Excise, Bhopal 2012 (27) STR 71 (Tri-Del) has held as under: "Hon'ble



Gau. High Court in the case of Magus Construction Pvt. Ltd. v. Union of India (supra) has held that construction of residential complex by a builder/developer against agreement for purchase of flat with the customers is not service, but is an agreement for sale of immovable property. Hon'ble Punjab & Haryana High Court in the case of G.S. Promoters v. Union of India (supra) cited by the learned SDR has only upheld the validity of the explanation added to Section 65(zzzh) by the Finance Act, 2010. Moreover, we find that it is only w.e.f. 1-7-2010, that explanation was added to Section 65(zzzh) of the Finance Act, 1994 providing that for the purpose of this sub-clause, construction of a complex which is intended for sale; wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authorized competent to issue such certificate under any law for the time being in force, shall be deemed to be service provided by the builder to the buyer. ***This legal fiction introduced by explanation to Section 65(zzzh) has not been given retrospective effect. Therefore, for the period prior to 1-7-2010, the appellant's activity cannot be treated as service provided by them to their customers. In respect of the period prior to 1-7-2010 same view has been expressed by the Board in its Circular No. 108/2/2009-S.T., dated 29-1-09.*** We are, therefore, of prima facie view that the impugned order is not correct."



In re: Construction of Residential complex for "Personal Use"

36. Appellant submits that they are rendering works contract service as defined in Section 65 (105) (zzzza) of the Finance Act, 1994. Appellant submits that this was also accepted by the subject order. In this regard, Appellant submits that the works contract service is provided in relation to construction of a new residential complex. The phrase 'residential complex' has been defined in Section 65 (91a) of the Finance Act, 1994 which is reproduced as under for ready reference:

65(91a) "*residential complex*" means any complex comprising of—

(i) *a building or buildings, having more than twelve residential units;*

(ii) *a common area; and*

(iii) *any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,*

*located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, **but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.***

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause,—

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

37. Appellant submits that from the above it is evident that definition excludes construction of complex which is put to personal use by the customers. Appellant submits in the instant case, the flats constructed were put to personal use by the customers and hence outside the purview of the definition and consequently no service tax is payable. Without prejudice to the foregoing Appellant submits that the same was clearly clarified in the recent circular no. 108/02/2009-ST dated 29.02.2009. This was also clarified in two other circulars as under :

- a. F. No. B1/6/2005-TRU, dated 27-7-2005
- b. F. No. 332/35/2006-TRU, dated 1-8-2006

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

Relevant Extract

"13.4 However, residential complex having only 12 or less residential units would not be taxable. Similarly, residential complex constructed by



an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is also not covered under the scope of the service tax and not taxable”

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

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



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

Relevant extract:

"...Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'..."

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

*"...Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for **selling a dwelling unit in a residential complex** at*



any stage of construction (or even prior to that) and who makes construction linked payment..." (Para 1)

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

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

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

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

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

45. Appellant submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.

- a. For service provided until the sale deed has been executed to the ultimate owner.
- b. For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

46. Appellant submits that it is exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore this clarification is applicable to them *ibid* and with the above exclusion from the definition, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN itself is void abinitio.

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

- a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009 (015) STR 0077 (Tri-Bang)
- b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,



- c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)
- d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang
- e. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang
- f. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

In re: Quantification of Demand

48. Appellant submits for the period January 2010 to December 2010, the SCN had claimed that entire receipts of Rs.1, 08, 35, 016 are taxable. However, appellant is unable to understand how the said figures have been arrived at by the Adjudicating Authority. As per the statement submitted, the total receipts during the period are Rs. 1, 49, 44,040. Out of the said amount Rs.17, 92, 773 is received towards land value and Rs.47, 77, 999 towards value of sale deed net of land value and Rs.15, 55, 307 is towards taxes and other charges which shall not be leviable to service tax. The appellant has given breakup of such amounts along with the documentary proof for all such amounts which are Rs.2, 00,000 or above. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.68, 17, 961 and not on the entire amount as envisaged in the order and in such case the liability of service tax is Rs.2,80,900.

49. Appellant submits for the period January 2011 to December 2011, the SCN had claimed that entire receipts of Rs.49, 91, 705 are taxable without providing the permissible deductions. Out of the said amount Rs.9, 08, 000 is received towards land value and Rs.15, 99, 000 towards value of sale deed net of land value and Rs.5, 68, 550 is towards taxes and other charges which shall not be leviable to service tax. The appellant has given breakup of such amounts along with the documentary proof for all such amounts which are Rs.2, 00,000 or above. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.19,16,155 and not on the entire amount as envisaged in the order and in such case the liability of service tax is Rs.78, 946.

In re: Interest under Section 75

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

51. Appellant further submits that in the case of *CCE v. Bill Forge Pvt. Ltd.* 2012 (279) E.L.T. 209 (Kar.) it was held that the-“*Interest is*

compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest." Therefore, the appellant submits that where there is no liability of tax on them due to reasons mentioned aforesaid, there cannot be a levy of interest.

In re: Filing of ST-3 Returns

52. Appellant submits that the impugned order has alleged that they have not filed the ST-3 returns. However, appellant submits that the same is not true and appellant have filed the Nil returns for all the periods. They have filed Nil returns since they believed that the activity carried out by them was not a taxable service and therefore not leviable to service tax. However, the appellants have constantly corresponded with the department and submitted all the information asked for by the department.

53. Appellant submits that the impugned order intends to levy penalty under Section 77(2) for not furnishing the true and complete facts in the statutory returns. Appellant submits that what is true and complete facts is a 'subjective issue' and there cannot be levied any penalty under the act for it, as what is true and complete for the appellant may not be so for the adjudicating authority. In this regards, reliance is placed on Godavari Khore Cane Transport Co. P. Ltd

v.CCE, Aurangabad 2012 (26) S.T.R. 310 which stated that- "Penalty Imposition of Mis-representation of facts in ST-3 returns No penalty was imposable under Section 77 of Finance Act, 1994, which could be invoked only for failure to furnish Service tax return in due time."

54. Appellant submits that in the case of Cement Marketing Co. India Pvt. Ltd. v. Assistant Commissioner of Sales Tax 1980 (6) E.L.T. 295 (S.C) held that- "If the assessee entertained belief that he was not liable to include the amount of freight in the taxable turnover, it could not be said to be mala fide or unreasonable nor it can be dubbed as frivolous contention taken up merely for the purpose of avoiding liability to pay tax. What the law requires is that the assessee should not have filed a false return. A return cannot be said to be 'false' unless there is an element of deliberation in it. It is true that where the incorrectness of the return is claimed to be due to want of care on the part of assessee and there is no reasonable explanation forthcoming from him for such want of care, the court may in a given case infer deliberateness and the return may be treated as a false return. **But, where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to brand the return as a 'false return' inviting penalty**" Therefore, appellant submits that when there is a bonafide belief on their part that the service tax is not attracted on a particular activity that they have filed returns under NIL Category.



55. Therefore, appellant submits that the order is not presenting the true facts of the present case and Penalty under Section 77 is not leviable in as much as they have filed the ST-3 returns for all the periods in the present order. (Copy of ST-3 returns enclosed for reference).

In re: Penalty under Section 76 & 77

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

57. Appellant further submits that it was held in the case of Collector of Customs v. Unitech Exports Ltd. 1999 (108) E.L.T. 462 (Tribunal) that- "***It is settled position that penalty should not be imposed for the sake of levy. Penalty is not a source of Revenue.*** Penalty can be imposed depending upon the facts and circumstances of the case that there is a clear finding by the authorities below that this case does not warrant imposition of penalty. ***The respondent's Counsel has also relied upon the decision of the Supreme Court in the case of M/s. Pratibha Processors v. Union of India reported***



in 1996 (88) E.L.T. 12 (S.C.) that penalty ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the particular statute." Hence, Penalty cannot be imposed in the absence of deliberate defiance of law even if the statute provides for penalty.

58. Appellant submits that penalty is not imposable on them as there was confusion regarding the interpretation of law. In this regards appellant wishes to rely on HUL Ltd. v. CCE 2010 (250) E.L.T. 251 (Tri. - Del.) wherein it was held as-"As regards the issue relating to penalty, as rightly pointed out by the learned advocate for the appellants, ***the dispute related to the interpretation of statutory provisions and it did not disclose intension to evade the payment of duty and, therefore, there was no justification for imposition of penalty in the matter.*** Hence, the penalty imposed under the impugned order is liable to be set aside." Therefore, the penalty is liable to be set aside.

59. 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



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

under the provisions of Section 76.

In re: Benefit under Section 80

60. Appellant submits that Para 23 of the impugned order has made a finding that the appellant's have made out a reasonable cause so as to exonerate them from the penalties by invoking Section 80. Further, the order has relied on certain case laws in support of their contention.

Case law relied upon	Relevancy to the facts of the present case
Guardian Leisure Planners Pvt. Ltd. 2007 (6) S.T.R. (Tri-Kolkata)	In the said case, the appellant did not accept the notice. Further, they obtain adjournment for PH and did not appear on such adjourned date. Thereafter, they made a plea of financial crisis for non-payment of service tax. It is evident that the facts of the present case are entirely different and assessee has always been co-operative and submitted the data. Reliance on such case is not warranted to the facts of present case.
Trans (India) Shipping Pvt. Ltd. 2005 (188) E.L.T. 445 (Tri-Chennai)	In the said case, appellant made a plea of cash crisis to exonerate appellants from penal liability. It was held that this was not sufficient ground to absolve them from liability under

	Section 76. Reliance on such case is not warranted to the facts of present case. The appellant has not a financial crisis plea. They have not paid service tax due to meritorious grounds which form reasonable cause in the present case.
SPIC & SPAN Security and Allied Services 2006 (1) S.T.R.	Appellant submits that the facts of the said case to an extent support them in their contention. The said case was decided against the revenue. Therefore, placing reliance on such case is of not any help to the present case.

61. Appellant further submits that under Section 80 of the Finance Act, 1994 which reads as under :

"Notwithstanding anything contained in the provisions of section 76, section 77 or first proviso to sub-section (1) of section 78 no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure." On this ground the proceedings in the subject order in so far as imposition of penalties is concerned should be dropped taking recourse to the Section 80 *ibid*.



62. Appellant submits that it was under bonafide belief that there activity was a works contract. There was confusion as to interpretation of the words in different taxing statues differently, Appellant had a reasonable cause for the failure to pay the service tax. Therefore, penalties under various sections should be set-aside. This chaos in the interpretation is well-depicted by the table above.

63. In such cases where the interpretation of law is required, penal provisions cannot be invoked. Also in the case of CCE vs. Ess Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (NewDelhi – CESTAT) it was held that: *"It is settled position that when there is a dispute of interpretation of provision of law, the penal provisions cannot be invoked. Therefore, the Commissioner (Appeals) rightly set aside the penalty."* Hence penalty is not applicable in the instant case.

64. Appellant places reliance on cases where the penalty has been waived in case there being a confusion

a. ABS Inc. vs Commr. of C. Ex., Ahmedabad 2009 (016) STR 0573 Tri.-Ahmd wherein it was held confusion led to non-payment of Service tax - Mala fide absent - Service tax liability accepted and tax paid with interest - Fit case for invocation of Section 80 of Finance Act, 1994



- b. Jay Ganesh Auto Centre vs Commr. of C. Ex. & Cus., Rajkot 2009
(015) STR 0710 Tri.-Ahmd, where in it was held confusion on liability of authorized service station on amounts received as incentive from financial institutions - Bona fide belief on non-liability for commission confirmed by issue of clarification by C.B.E. & C. - Service tax contended as paid voluntarily with interest before issue of show cause Order - Penalty under Section 78 of Finance Act, 1994 waived.
- c. Raj Auto Centre vs Commissioner of C. Ex., Ahmedabad-II 2009
(014) STR 0327 Tri.-Ahmd - Confusion prevalent on impugned issue - Fit case for waiver of penalty - Penalties set aside
- d. Kamdhenu Air Services vs Commissioner of Cus. & C. Ex., Jaipur 2009 (015) STR 0317 Tri.-Del - Confusion regarding levy - Penalties set aside - Section 76 of Finance Act, 1994
- e. Commissioner of Service Tax, Daman vs Meghna Cement Depot 2009 (015) STR 0179 Tri.-Ahmd - Impugned order setting aside penalty containing finding that ingredients of Section 78 of Finance Act, 1994 absent - No evidence produced to show willful suppression by assessee to avoid payment of Service tax - Confusion prevalent during relevant period - Mala fide not indicated by Revenue - Impugned order sustainable.



65. Appellant craves leave to alter, add to and/or amend the aforesaid grounds.

66. Appellant wishes to be heard in person before passing any order in this regard.

**For Hiregange & Associates
Chartered Accountants**

**Sudhir V S
Partner**

For M/s Paramount Builders



Authorised Signatory

PRAYER

Wherefore it is prayed that this Honorable CESTAT be Pleased to hold:

- a. Set aside the impugned order of the Respondent.
- b. The activity of construction is not taxable.
- c. Service tax and Interest is not imposable.
- d. Service Tax, if any applicable re-quantification of demand
- e. No Penalty is imposable under Section 76 & Section 77
- f. Any other consequential relief is granted.

**For Hiregange & Associates
Chartered Accountants**

**Sudhir V S
Partner
(Authorised Representative)**



**For PARAMOUNT BUILDERS
Partner
Appellant**

VERIFICATION

I/We Soham Modi, Managing Partner of M/s Paramount Builders, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today the 28th of March, 2013

Place: Hyderabad

**For PARAMOUNT BUILDERS
Partner
Appellant**

**STAY APPLICATION UNDER SECTION 35F OF THE CENTRAL EXCISE
ACT, 1944.**

**BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL BANGALORE**

Service Tax Appeal No. _____ Of 2013

Stay Application No. _____ Of 2013

Between:

**M/s Paramount Builders
5-4-187/3 & 4, 2nd Floor,
MG Road,
Secunderabad- 500 003**

.....Appellant

Vs

**The Commissioner (Service Tax)
Basheerbagh
Hyderabad- 500 004**

.....Respondent

Application seeking waiver of pre-deposit and stay of recovery of
Adjudication levies under section 35F of the Central Excise Act, 1944

1. The Appellants submit that for the reasons mentioned in the appeal it would be grossly unjustified and inequitable and cause undue hardship to the Appellants if the amount the amount of demand raised is required to be paid.
2. The Appellant submits that they are entitled to be granted an order staying the implementation of the said order of the Respondent pending the hearing and final disposal of this appeal viewed in the light of the fact that the order is one which has been passed without considering the various submissions made during the adjudication. It has been held by

the Calcutta High Court in *Hooghly Mills Co. Ltd., Vs. UOI* 1999 (108) ELT 637 that it would amount to undue hardship if the Appellant were required to pre-deposit when they had a strong prima facie case which in the instant case for reasons stated above is present directly in favour of the Appellant.

3. Appellant submits that the occupancy certificate (**Copy of the Certificate enclosed vide Annexure -__**) was issued for all the blocks and hence all the sales made thereafter, in other words flats on which no advances received prior to obtaining the occupancy certificate is not liable for service in terms of explanation to section 65(105)(zzzh) of the Finance Act extracted here under for the ready reference.

6[Explanation.—For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;]

4. Without prejudice to the foregoing, appellant further submits the various decision that has been rendered relying on the Circular 108 are as under
 - g. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009 (015) STR 0077 (Tri-Bang)

- h. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,
 - i. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)
 - j. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang
 - k. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang
 - l. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang
5. Appellant further submits the Honorable Tribunal of Delhi in the case of Ambika Paints Ply & Hardware Store vs Commissioner of Central Excise, Bhopal 2012 (27) STR 71 (Tri-Del) has held as under: *"This legal fiction introduced by explanation to Section 65(zzzh) has not been given retrospective effect. Therefore, for the period prior to 1-7-2010, the appellant's activity cannot be treated as service provided by them to their customers. In respect of the period prior to 1-7-2010 same view has been expressed by the Board in its Circular No. 108/2/2009-S.T., dated 29-1-09. We are, therefore, of prima facie view that the impugned order is not correct."*
6. Appellant submits that where the Service Tax itself is not payable, the question of paying of Interest/Penalty on the same does not arise as held



by the Supreme Court in *Prathiba Processors Vs. UOI*, 1996 (88) ELT 12 (SC).

7. Appellant submits that demands raised will not stand the test of appeal as correct legal and factual position were not kept in mind while passing the adjudicating Order. It is judicially following across the country when the demand has no leg to stand it is right case for 100% waiver of the pre deposit of the service tax.
8. In the case of *Silliguri Municipality and Ors. v. Amalendu Das and Ors.* (AIR 1984 SC 653) it was held that *"It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that **the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand.** There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief **may lead to public mischief,***

grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given".

9. The appellants also plead financial hardship due to the reason that the service tax has not been reimbursed by the recipient and also that the Appellant is not a business entity as is required to pay out a portion of their earnings.
10. The Appellants crave leave to alter, add to and/or amend the aforesaid grounds.
11. The Appellants wish to be personally heard before any decision is taken in this matter.

**For Hiregange & Associates
Chartered Accountants**

**Sudhir V S
Partner**



For M/s Paramount Builders

Authorised Signatory



PRAYER

WHEREFORE, the Appellants pray that pending the hearing and final disposal of this appeal, an order be granted in their favor staying the order of the Respondent and granting waiver of pre-deposit of the entire amount.

For PARAMOUNT BUILDERS

Signature of the Applicant

VERIFICATION

I/We Soham Modi, Managing Partner of M/s Paramount Builders, the Appellant herein do declare that what is stated above is true to the best of our information and belief.

Verified today the 28th day of March, 2013

Place: Hyderabad

For PARAMOUNT BUILDERS

Signature of the Applicant
Partner

**BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE 1st FLOOR, WTC BUILDING, FKCCI COMPLEX, K.G. Road, BANGLORE -
560 017**

Sub: Proceedings under Appeal against the O-I-A.No.187/2012-(H-II) S.Tax dated 21.12.2012

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

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

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

Executed this 28th day of March 2013 at Hyderabad.


Signature
For PARAMOUNT BUILDERS
Partner

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

Dated: 28.03.2013

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


For Hiregange & Associates
Chartered Accountants
Sudhir V.S.
Partner. (M. No. 219109)

ST PMA



51

OFFICE OF
THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX (APPEALS-II)
7th FLOOR, KENDRIYA SHULK BHAVAN, L.B. STADIUM ROAD,
BASHEER BAGH, HYDERABAD - 500004.

Appeal No.201/2012 (H-II)STax

Date: 21.12.2012

ORDER- IN -APPEAL No. 187/2012 (H-II) S.Tax
(Passed By Dr. S.L. Meena Commissioner of Customs, Central Excise &
Service Tax (Appeals-II), Hyderabad)

PREAMBLE

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

2. 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, South Zonal Bench, 1st Floor, WTC Building, FKCCI Complex, Kemp Gowda Road, Bangalore-560 009.
3. Every appeal under the above Para (2) shall be filed within three months of the date on which the order sought to be appealed against is received by the assessee, the Board or by the [Commissioner] of Central Excise, as the case may be.
4. 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 is 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. 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:
 - (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;
 - (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;
 - (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;No fee is payable in the case of Memorandum of Cross Objection referred to in Sub-Section 4 of Section 86 ibid.
- 5A. Every application made before the Appellate Tribunal,
 - (a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or
 - (b) for restoration of an appeal or an application shall be accompanied by a fee of five hundred rupees;No fee is payable in case of an application filed by Commissioner under this sub-Section.
6. The appeal should be filed within three months from the date of communication of the order.
7. 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.

The subject appeal along with stay petition filed by M/s Paramount Builders, 5-4-187/3&4, 2nd Floor, M.G.Road, Secunderabad-500 003 (hereinafter referred to as Appellants) against Order-in-Original No. 50/2012-Adjn.(ST) dated 31.08.2012 passed by the Additional Commissioner of Service Tax, Hyderabad-II Commissionerate (hereinafter referred to as Respondent), wherein the lower authority confirmed the demand of service tax of Rs. 4,46,403/- for the period Jan., 2010 to Dec., 2010 in respect of SCN O.R.No. 60/2011-Adjn.(ST) dt. 23.04.2011 under Section 73(2) of the Finance Act, 1994 (FA); confirmed demand of applicable interest under Section 75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, for the period of default till the date of payment, under Section 76 and also imposed a penalty of Rs. 1,000/- under Section 77 of the FA. Further in respect of SCN O.R.No. 54/2012-Adjn.(ST) dt. 24.4.2012, the lower authority confirmed the demand of service tax of Rs. 46,81,850/- for the period Jan., 2011 to Dec., 2012 under Section 73(2) of the Finance Act, 1994 (FA); confirmed demand of applicable interest under Section 75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, for the period of default till the date of payment, under Section 76 and also imposed a penalty of Rs. 1,000/- under Section 77 of the FA. A corrigendum C.No. IV/16/35/2012-S.Tax(Gr.X), O.R. Nos. 60/2011-Adj.(ST)ADC & O.R.No. 54/2012-Adjn(ST)ADC dt. 18.9.2012 was issued correcting the amount demanded under O.R.No. 54/2012 as Rs. 2,05,658/-.

2. Brief facts of the case are that the appellants are engaged in providing works contract service. Verification of their records revealed that they had undertaken a single venture by name M/s Paramount Residency located at Nagaram Village, Keesara Mandal R.R. District and received amount from customers towards sale of land and agreement of construction of 122 flats for the period Jan., 2010 to Dec., 2010. It was also found that the appellant had not filed ST.3 returns for the said period. The subject venture of M/s Paramount Builders qualified to be a residential complex as it contained more than 12 residential units with common area and common facilities like park, common water supply etc. and the lay out was approved by HUDA. From the records verified it was found that the appellant entered into a sale deed for sale of undivided portion of land together with semi-finished portion of the flat and an agreement for construction with their customers. On execution of sale deed the right in a property got transferred to the customer, hence the construction service rendered by the appellant thereafter to their customers under agreement of construction were taxable under service tax as there existed service provider and receiver relationship between them. The total amount received by the appellant towards such service was Rs. 1,08,35,016/- during the period Jan., 2010 to Dec., 2010 and the service tax including cess worked out to Rs. 4,46,403/-. Therefore it appeared that the appellants in spite of being well aware of the provisions and liability of service tax did not assess and pay the service tax with an intention to evade payment of service tax and also did not file ST.3 returns for the said period, thereby become liable for recovery under sub-section(1) of Section 73 of the FA. Therefore two show cause notices were issued to the appellants covering the period Jan., 2010 to Dec., 2010 vide O.R.No. 60/2011-Adj(ST)Gr.X dt. 23.4.2011 for Rs. 4,46,403/- along with interest and proposing penal action and for the period Jan., 2011 to Dec., 2011 vide O.R.No. 54/2012-Adj(ST)Gr.X dt. 24.4.2012 for Rs. 2,05,658/- along with interest and proposing penal action. As the issue involved was same, the lower authority took up disposal of both the SCNs and confirmed them vide the impugned order and later issued a corrigendum dt. 18.9.2012, as

mentioned in para 1 above. Aggrieved by the impugned order, the appellant filed the subject appeal along with stay petition.

3. A Personal hearing was granted on 26.11.2012. CA Sudhir V.S. along with Shri M.Jaya Prakash, Manager, Accounts & Finance appeared and reiterated the submissions made in the grounds of appeal. Further submitted that the total demand for two SCNs of Rs. 6,52,061/- is as per the impugned OIO but the same should be Rs. 3,59,486/- as per their books of accounts. Requested to take lenient view with regard to pre-deposits. After going through grounds put forth by the appellants regarding waiver of pre-deposits in their grounds of stay petition as well as during personal hearing, an Order-in-Stay Petition No. 64/2012(H-II)S.Tax dated 07.12.2012 was issued directing the appellants to deposit the total tax amounts as confirmed i.e. Rs. 4,46,403/- and Rs. 2,05,858/- vide the impugned order by 17.12.2012. However pre-deposit of the interest and penalties were waived. It was also categorically mentioned in para 5 of OISP that if they do not comply with the conditions of pre-deposit, the appeal will be disposed of without any further opportunity of hearing. The appellants have not complied with the conditions of the Order in Stay Petition instead they have filed a petition seeking modification of the above mentioned stay order.

4. I have gone through the records of this appeal, the OISP issued. The point for determination before me is whether or not the appeal filed by the appellants is liable for dismissal for non-compliance of conditions OISP is correct or not?

4.1. Before deciding the issue on hand, it is pertinent to examine the following relevant statutory provisions

SECTION 35F: Deposit, pending appeal, of duty demanded or penalty levied. — Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the [Commissioner (Appeals)] or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the [Commissioner (Appeals)] or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

4.3 I find that as per the above statutory provisions, it is clear and evident that waiver of deposit is a discretionary power vested with the Commissioner (A). By exercising the power vested in Section 35F of CEA, 1944 and also taking into consideration the facts and circumstances of the case, the stay petition has to be disposed of on its own merit. I also find that there is no scope of modification in case of stay order passed by the same authority. Therefore by taking note of the statutory provisions, it is to be construed that Section 35 F is a provision stipulating condition for maintaining of appeal.

4.4. In addition to the above, I also hold that in each case a balance between the interest of the exchequer and what is just and fair, has to be drawn keeping in view the nature of the controversy. Therefore directions to deposit the tax amount as confirmed by the lower authority

in the impugned order and waiver of interest and the penalty is as per the discretionary powers vested in Section 35F. In this regard, I rely and draw support from the following judgement rendered by the jurisdictional Hon'ble High Court in the case of Sri.Chaitanya Educational Committee vs CCE, Guntur reported in 2011 (22) STR 135 (AP) wherein it was held that 7 principles to be kept in mind while considering stay applications or dispensing with pre-deposit and the same is reproduced hereunder:

4.5 From the judicial decisions analyzed as above, the following principles would emerge which have to be kept in mind while considering the applications for stay or for dispensing with the requirement of pre-deposit under Section 35F of the Central Excise Act, or under Section 129E of the Customs Act, or other similar provisions.

- (1) The applications for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand;
- (2) Three aspects to be focused while dealing with the applications for dispensing of pre-deposit are : (a) *prima facie* case, (b) balance of convenience, and (c) irreparable loss;
- (3) Interim orders ought not to be granted merely because a *prima facie* case has been shown;
- (4) The balance of convenience must be clearly in favour of making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the interest of public revenue;
- (5) While dealing with the applications twin requirements of consideration i.e., consideration of undue hardship, and imposition of conditions to safeguard the interests of revenue have to be kept in view;
- (6) When the Tribunal decides to grant full or partial stay, it has to impose such conditions as may be necessary to safeguard the interests of the revenue. This is an imperative requirement; and
- (7) An appellate Tribunal, being a creature of the statute, cannot ignore the statutory guidance while exercising general powers or expressly conferred incidental powers.

The above case law has been relied by the jurisdictional Hon'ble High Court in the case of M/s.Sanghi Polymers Pvt Ltd vs CCE, Hyderabad reported in 2011-TIOL-858-HC-AP-CX wherein it was held that no infirmity is discernable with the impugned order passed by the Commissioner (A) directing for pre-deposit of certain amounts.

5. Therefore it is evident that the appellant has failed to comply with the conditions of the stay petition. They also failed to produce any evidence in support of deposit of tax amount. The appeal is therefore, liable to be dismissed for non-compliance under Section 35F of the Central Excise Act, 1944.

6. In this regard, I place reliance on the ratio of the following decisions :

(i) 2011 (271) E.L.T. 75 (Tri. - Mumbai)- LIZER TECHNOLOGIES LTD. vs COMMISSIONER OF C. EX., BELAPUR

It is duty of appellant-assessee to deposit amount demanded under order passed by adjudicating authority - Waiver thereof or part thereof is in discretion of appellate authority

to be exercised judicially based on facts pleaded by party - Section 35F of Central Excise Act, 1944. [para 6]

(II)2009 (243) E.L.T. 420 (Tri. - Del.)- IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI
D.K. MISHRA vs COMMISSIONER OF CENTRAL EXCISE, ALLAHABAD

When statute regarding pre-deposit mandates that failure in that regard shall result in dismissal of appeal or that obligation regarding pre-deposit is a pre-condition for hearing the appeal on merits, the authorities constituted under the statute cannot travel beyond the statutory provisions -

7. Having regard to the above discussion and facts, I dismiss the appeal filed by the appellants for failure to comply with the provisions of Section 35F of CEA without further going into merits.

(Dr.S.L.Meena)

Commissioner(Appeals-II)
 Customs Central Excise & Service Tax
 Hyderabad

To

1. ✓ M/s Paramount Builders, 5-4-187/3&4, 2nd Floor, M.G.Road, Secunderabad-500 003
2. The Additional Commissioner of Service Tax, Hyderabad-II Commissionerate.
3. CA Sudhir V.S., M/s. Hiregange Associates, Basheervilla, H.No. 8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Rd. No. 3, Banjara Hills, Hyderabad-500 034.

Copy to:

1. The Chief Commissioner of Customs & Central Excise, Hyderabad Zone, Hyderabad.
2. The Commissioner of Central Excise, Hyderabad II Commissionerate, Hyderabad.
3. Master Copy.