O/C

Hiregange & Associates
Chartered Accountants

Date:14.12.2017
To
The Commissioner (Appeals-II,
7th Floor, L.B Stadium Road,
Basheerbagh,
Hyderabad-500 004

Dear Sir,

Sub: Filing of Appeal against the Order of Additional Commissioner of Service tax, in Order-In- Original No.83/2016-Adjn(ST)(ADC) dated 09.06.2017 pertaining to M/s. Greenwood Estates

With reference to the above, we are authorized to represent M/s. Greenwood Estates and herewith enclosing the appeal memorandum against Order-In-Original No.83/2016-Adjn(ST)(ADC) dated 09.06.2017 passed by Additional Commissioner of Service Tax, Service tax Commissionerate, 11-5- 423/1/A, Sitaram Prasad Tower in form ST-4 along with Condonation of Delay and annexures.

Kindly post the matter for hearing at the earliest.
Thanking You
Yours truly

For Hiregange & Associates
Chartered Accountants

Chartered Accountants Hyderabad

Venkata Prasad P
Partner

O/o Commissioner of Central Excise & GST Appeals-II Commissioner, Hyderabad
14 DEC 2017
I.C. No.....
अपील-II आयुक्तालय, हैदराबाद

14.12.17

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FORM ST-4

Form of Appeal to the Commissioner (Appeals-II)

[Under Section 85 of the Finance Act, 1994 (32 of 1994)]

BEFORE COMMISSIONER (APPEALS-II), 7TH FLOOR, L.B STADIUM ROAD, BASHEERBAGH, HYDERABAD-500 004

(1) Appeal No. _____ of 2017	
(2) Name and address of the Appellant	M/s. GreenwoodEstates,#5-4-187/3 & 4,II Floor, Soham Mansion,MG Road,Secunderabad-500003
(3) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	AdditionalCommissioner of Service Tax,Service Tax Commissionerate,11-5423/1/A,Sitaram Prasad Towers, Red Hills,Hyderabad-500004 [Order-In-Original No. 83/2016-Adjn(ST)/(ADC) dated 09.06.2017]
(4) Date of Communication to the Appellant of the decision or order appealed against	02.10.2017
(5) Address to which notices may be sent to the Appellant	M/s Hiregange & Associates, "Basheer Villa", House No: 8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad – 500 034. **(And also copy to the Appellant)**
(5A)(i) Period of dispute	January 2010 to December 2011
(ii) Amount of service tax, if any demanded for the period mentioned in the Col. (i)	Rs.48,00,391/- for the period Jan'10 to Dec'10 and Rs.46,81,850/- for the period Jan'11 to Dec'11
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	NA
(iv) Amount of Interest	Interest u/s 75 of Finance Act, 1994.
(v) Amount of penalty	Rs.200/-per day under Section76 ofthe Finance Act, 1994.
(vi)Value of Taxable Service for the period mentioned in Col.(i)	Rs.11,65,14,000/- for the period Jan'10 to Dec'10 and Rs.11,36,37,141/- for the period Jan'11 to Dec"11
(6) Whether Service Tax or penalty or interest or all the three have been deposited.	An amount of Rs. 47,80,786/-has been already paid. The same can be adjusted towards mandatory pre-deposit in terms of section 35F of Central Excise Act, 1944 as required (Copy of challans enclosed as Annexures XIII)
(6A) Whether the appellant wishes to be heard in person?	Yes, at the earliest
(7) Reliefs claimed in appeal	To set aside the impugned order to the extent aggrieved and grant the relief claimed.

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Appellant

BRIEF FACTS OF THE CASE:

A. M/s. Greenwood Estates(hereinafter referred to as'Appellant')is mainly engaged in the sale of residential houses to prospective buyers while the units are under construction. For the said purpose,the **Appellant enters into two separate agreements with their customers one is for sale of undivided portion of land together with semi-finished flat (sale deed) and another one is construction agreement for undertaking construction. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.**

B. The details of amounts received from customers is as follows

Jan 2010 to Dec 2010			
Description	**Receipts**	**Non taxable**	**Taxable**
Sum towards sale deed	Rs.4,07,44,617	Rs.4,07,44,617	Nil
sum towards agreement of Construction	Rs.5,32,39,887	Nil	Rs.5,32,39,887
Sum towards other taxable receipts	Rs.13,29,697	Nil	Rs.13,29,697
Sum towards VAT,Regn.charges, etc	Rs.1,11,48,364	Rs.1,11,48,364	Nil
Total	**Rs.10,64,62,565**	**Rs.5,18,92,981**	**5,45,69,584**

Jan 2011 to Dec 2011			
Description	**Receipts**	**Non taxable**	**Taxable**
Sum towards sale deed	Rs.4,28,44,626	Rs.4,28,44,626	Nil
Sum towards agreement of Construction	Rs.5,50,55,881	Nil	Rs.5,50,55,881
Sum towards other taxable receipts	Rs.11,40,800	Nil	Rs.11,40,800
Sum towards VAT,Regn.charges, etc	Rs.96,23,950	Rs.96,23,950	Nil
Total	**Rs.10,86,65,257**	**Rs.5,24,68,576**	**Rs.5,61,96,681**

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C. The liability for the impugned period and the details of payments are summarized as follows

Particulars	Jan'10 to Dec'10	Jan'11 to Dec'11
Gross Receipts	**Rs.10,64,62,565**	**Rs.10,86,65,257**
Less: Deductions		
Sale Deed Value	Rs.4,07,44,617	Rs.4,28,44,626
VAT, Registration charges, stamp duty and other non taxable receipts	Rs.1,11,48,364	Rs.96,23,950
Taxable value	**Rs.5,45,69,584**	**Rs.5,61,96,681**
Abatement @ 60%	Rs.3,27,41750	Rs.3,37,18,008
Net Taxable Value	Rs.2,18,27,833	Rs.2,24,78,672
Service Tax @ 10.3%	Rs.22,48,267	Rs.23,15,303
Actually Paid	Rs.24,69,553	Rs.23,11,233
Short/(Excess) Paid	**(Rs.2,21,286)**	**Rs.4,070**

D. An amount of Rs. 47,80,786/- has already paid towards service tax on the amounts received from customers against the liability of Rs. 45,63,570/- resulting in excess payment of Rs.2,17,216/-.

E. The levy of service tax on above arrangements has seen a fair share of litigation and amendments. In 2009, there was no clarity on whether service tax was payable or not. However, the Appellant chose to pay service tax under protest on the amount received towards the "construction agreement" on the basis of law as understood by them. Thereafter, based on Circular No. 108/2/2009 ST dated 29.01.2009,

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the Appellant believed that service tax was not payable and therefore discontinued payment of service tax on the said "Construction agreements".

F. As Appellant has stopped making payment of Service Tax, the Anti Evasion department initiated the proceedings against the Appellant and various statements were recorded. In the above context, a Show Cause Notice (SCN) dated 21.05.2010 for the period from January 2009 to December 2009("First SCN") was issued against the Appellant.

G. Subsequently, periodical SCN's dated 23.04.2011 & dated 24.04.2012 ("Second SCN& Third SCN") was issued for the period from January 2010 to December 2010 and January 2011 to December 2010 (copies enclosed as annexure VII & IX). The said SCN'swere issued after alleging that:

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

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customers to whom the land was already sold vide sale deed are taxable services under "works contract service"

H. The aforesaid Show Cause Notices were adjudicated vide a common Order-in-Original No.51/2012-Adjn (ST)(ADC) dated 31.08.2012wherein vide Para 17 of the impugned Order stated as follows

"Various flats have been sold by them to various customers in two states. First, they have executed a sale deed at semi finished stage by which the ownership of the semi-finished flats was transferred to the customer. Appropriate stamp duty was paid on the sale deed value. No service tax been demanded on the sale deed value in light of Board Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"

I. From the above Para, it is clear that the OIO dated 31.08.2012 accepted that service tax was not demanded on sale deed value however OIO dated 31.08.2012 erred while quantifying the demand as it has included the amounts received towards Sale deeds also.

J. Appellant has filed an Appeal before the Commissioner (Appeals) against the said order along with stay application. The Commissioner (Appeals) vide Order-in-Appeal No.39/2013 (H-II) S. Tax dated 27.02.2013 did not agree on the contentions of personal use but he did find merit in the Appellant plea of re-quantification and therefore remanded the matter back to the Original Authority to re-quantify the value of taxable services after verification of the details.

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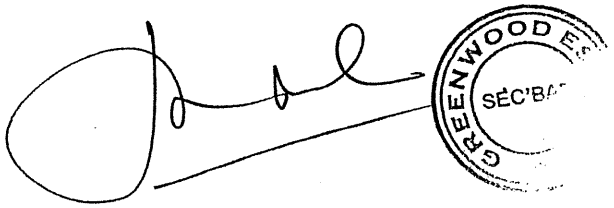
K. Against the above referred OIA, Appellant has filed an appeal before CESTAT and CESTAT vide Final Order No.20401/2014 in ST/Stay/27332/2013 in ST/27017/2013-DB dated 25.03.2014 stated as follows

"It was submitted by the both sided that the issue is not only re-quantification but also verification of certain facts and aspects of law which have already been confirmed by Commissioner (appeals). Instead of going into issue which will result in a decision on a part of appeal, we consider it appropriate that the litigation should be merged into one rather than having separate parallel litigation going on, therefore it was submitted that the matter may be remanded to the original adjudicating authority and he may be directed to decide all the issues in respect of both to show cause notice and also under take re-quantification as directed by the Commissioner (appeals). We find the submission to be reasonable. At the same time, since the observations of Commissioner(appeals) and conclusions have not been accepted and appeals have been filed, it would not be appropriate for us to remind the matter without allowing appellant to present their case again on the aspects which have concluded by the Commissioner (appeals).Therefore, while reminding the matter after setting aside the impugned order, we direct the original adjudicating authority to consider all the issues a fresh and pass a well –reasoned order, as far as re-quantification is concerned whenever there is no dispute , The re-quantification can be done as directed by Commissioner(appeals). Whatever there are dispute the matter can be decided by adjudicating



authority, by passing a well reasoned and detailed order. It is made clear that the amounts already deposited need not refunded just because the impugned order has been set aside till the issue is decided."

L. Subsequently, the adjudicating authority has granted personal hearing wherein the authorised representative requested 10 days time to give the documents for computations and written submissions.

M. The Appellant vide its letter dated 22.12.2015 has given working of receipts and the attribution of the said receipts towards sale deeds, construction agreements and other non-taxable receipts. The details were submitted along with copies of agreements, Financial statements and ledger copies.

N. The details submitted vide the letter dated 22.12.2015 (bifurcation of the total receipts into various heads like sale deed, construction agreemetn etc.,) does not match with the figures submitted during the previous stages due to the following reasons

- Appellant used to maintain the records of receipts from each customer manuallywherein bifurcation of the each receipt towards the sale deed, construction agreement or others heads was accounted manually in the books of accounts. The details submitted during the original proceedings were based on this manual records maintained. However after certain time Appellant started using the customised software which automates the recording of the receipts from the customers as well as

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bifurcation towards different heads (sale deed, construction agreement etc.,) and the details of the amounts submitted vide letter dated 22.12.2015 are based on the updated records done by the above mentioned software.

- Other reason was that during the subject period, few customers paid the ad-hoc amounts wherein there is no consensus among the Appellant and customer regarding the specific flat as well as bifurcation of the amount towards various aforesaid heads (similar to investment). Later both came to consensus and executed the agreements. While the details submitted in original proceedings are based on the ad-hoc amounts (bifurcation of the receipts were also done ad hoc) whereas the details submitted vide letter dated 22.12.2015 are on actual basis. Therefore, there is a difference between the details submitted during the adjudication and details submitted vide the above referred letter.

O. After submission of the above details, there was no response from the Ld. Adjudicating authority. After expiry of nearly 2 years, Appellant received the present Order-in-Original No.83/2016-Adjn (ST)(ADC) dated 09.06.2017 confirming the demands proposed in the Show Cause Notices and rejecting the plea for re-quantification of the demand.

P. The impugned order was passed on the following grounds

a. Assessees are liable to pay Service Tax on the construction of residential complex undertaken by them since the above mentioned definition of residential complex service is squarely applicable and no exemption whatsoever can be allowed for such

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construction activity as it is not meant for self-use and 'taxable service' means any service provided or to be provided to any person by any other person in relation to construction of complex. I find that the assessees had collected total value from the customers and entered into sale deed agreement and construction agreement simultaneously. I find that the board vide Circular No.108/102/2009-ST dt.29.01.2009 has clarified that "if the ultimate owner enter into contract for construction of a residential definition of residential complex. I find that the exclusion clause would apply to the complex as a whole and not to individual residential unit. In other words, if the entire residential complex is meant for use by one person then it gets excluded from the definition of residential complex. However, this exclusion does not apply to individual residential units as in the instant case.

b. Assessees had obtained Service tax registration and paid Service tax under Work Contract service and stopped payment of S.Tax abruptly by misinterpreting the Circular No. 108/02/2009-STdt.29.01.2009 issued by the board even though they received taxable amount from their customers during the said period, contravening the provision of Works Contract (Composition Scheme for payment of Service Tax) Rules,2007 with an intention to evade payment of duty since the clarification sought by them was negated by the department by issue of the subject show cause notices by not accepting their contention. The fact of non-

payment of Service Tax had come to light only after the department conducted investigation proceeding.

c. Assessees are liable to pay Service Tax on the construction of residential complex undertaken by them since the above mentioned definition of residential complex service is squarely applicable and no exemption whatsoever can be allowed for such construction activity as it is not meant for self-use and 'taxable service' means any service provided or to be provided to any person by any other person in relation to construction of complex. I find that the assessees has collected total value from the customers and entered into sale deed agreements and construction agreements simultaneously. I find that the Board vide Circular No. 108/102/2009-ST dt. 29.01.2009 has clarified that "If the ultimate owner entered into a contract for construction of a residential etc. The assessees have simply mentioned in their written reply dt. 22.12.2015 that an amount of Rs. 11148364/- pertains to VAT Registration charges, stamp duty, etc. and reiterated the same in the Annexure B to the letter in tabular from without support of any evidence. Hence, I am inclined not to extend the said benefit to the assessees. The assessees also claimed that the amount received towards sale deed is not to be included in the gross value. This plea is not tenable as construction under works contract service is taxable on gross receipts basis and considering the scope of construction service, receipts of all amounts are liable for Service Tax, except

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where entire consideration is received after issue of completion certificate. As the completion certificates. As the completion certificate have not been issued by the competent authority, the amount received as consideration towards the taxable activity of semi-finished flats are taxable

d. Assessees have misrepresented the quantum of amounts received before various authorities. The gross receipt of amounts during Jan'10 to Dec'11 was a matter of fact. However , it appears that the assessee during their submissions before various authorities have misrepresented the fact of quantum of receipts. One the amounts are received in previous period (in this case for the period Jan '10 to Dec'11) the factum of quantum of accounts received cannot change. The fact of the quantum of amounts said to have been received during the two periods Jan'10 to Dec'10 and Jan'11 to Dec'11 cannot obviously change during the Show Cause Notices issuance time, during the time of submissions made before the Commissioner (Appeals), again during the time of submissions made before the Hon'ble CESTAT and then again now i.e., on 22.12.2015. Aconfusion or a mis-calculation in respect of change of heads under which the amounts were received can be understood. But, the fact of gross quantum of amount received has to be the same before authorities. In view of the above and as the assessees have not furnished any of their audited Balance sheets/P&L Accounts/Ledger copies/Bank Account statements/VAT returns/Registration charges challans

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for the relevant period in support of the figures claimed / mentioned in their letter dt.22.12.2015, I am not inclined to accept the figures submitted by the assessees vide their letter dt.22.12.2015.

Aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to catena of judicial decisions and beset with grave and incurable legal infirmities, the Appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.

Grounds of Appeal

1. 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. For the ease of comprehension, the submissions in this appeal are made under different heads covering different aspects involved in the subject SCN as listed below

   a. Impugned Order is not valid
   b. Construction Service provided by Builder prior to 01.07.2010 is not taxable
   c. Construction of Residential complex for "Personal Use" is excluded from definition of Residential Complex
   d. No Service tax on sale of semi-finished flat
   e. Other non-taxable receipts (Corpus fund, Electricity deposit, water charges, service tax etc.,) are not liable – hence shall not be included in 'taxable value'
   f. Re-quantification of demand
   g. Interest and penalties should not be imposed

In Re: Impugned order is not valid

Impugned order beyond SCN

3. Appellant submits that the impugned order has confirmed the demand on amounts received towards sale deed value. In this regard, appellant submits that the impugned order went beyond SCN in as much as confirming the demand on sale deed value as the SCN itself has stated

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that demand is not made on amount received towards sale deed value vide Para 3 of the SCN as follows

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

4. Appellant submits that from the above referred observation of the SCN it is clear that it has intended to demand service tax only on amounts received towards construction agreements entered with customer but not on the amounts received towards sale deed value. Therefore from the above referred paragraphs it can be seen that the impugned order has clearly travelled beyond the SCN and hence is not valid to that extent. Relied on Commissioner v. Shital International — 2010 (259) E.L.T. 165 (S.C.) wherein it was held that *"it is trite law that unless the foundation of the case is laid in the show cause notice, the revenue cannot be permitted to build up a new case against the assessee."*.

5. Appellant further submits that even the original Order-in-Original No.51/2012-Adjn (ST)(ADC) dated 31.08.2012 wherein vide Para 17 of the impugned Order stated as follows

"Various flats have been sold by them to various customers in two states. First, they have executed a sale deed at semi finished stage by which the ownership of the semi-finished flats was transferred to the customer. Appropriate stamp duty was paid on the sale deed value. No service tax been demanded on the sale deed value in light of Board Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"

6. From the above Para, it is clear that the Original Order-in-Original itself has accepted that no service tax shall be demanded on sale deed value but in the Denovo Order-in-Original, the adjudicating authority has taken a different view which is contrary to their own findings in the original adjudication order therefore the allegation of the impugned order is not correct and the same needs to be set aside.

7. Appellant further submits that the Hon'ble Tribunal while remanding the matter to lower authority stated as follows *"It was submitted by the both sides that the issue is not only re-quantification but also verification of certain facts and aspects of law which have already been confirmed by Commissioner (appeals). Instead of going into issue which will result in a decision on a part of appeal, we consider it appropriate that the*

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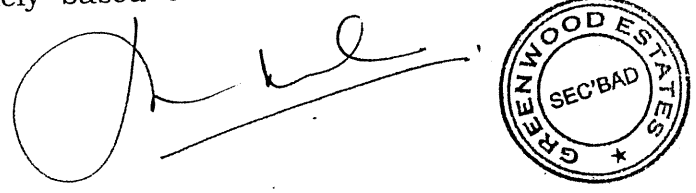
litigation should be merged into one rather than having separate parallel litigation going on, therefore it was submitted that the matter may be remanded to the original adjudicating authority and he may be directed to decide all the issues in respect of both to show cause notice and also under take re-quantification as directed by the Commissioner (appeals). We find the submission to be reasonable. At the same time, since the observations of Commissioner(Appeals) and conclusions have not been accepted and appeals have been filed, it would not be appropriate for us to remand the matter without allowing appellant to present their case again on the aspects which have concluded by the Commissioner (appeals).Therefore, while reminding the matter after setting aside the impugned order, we direct the original adjudicating authority to consider all the issues a fresh and pass a well –reasoned order, as far as re-quantification is concerned whenever there is no dispute, The re-quantification can be done as directed by Commissioner(appeals). Whatever there are dispute the matter can be decided by adjudicating authority, by passing a well reasoned and detailed order. It is made clear that the amounts already deposited need not refunded just because the impugned order has been set aside till the issue is decided."

8. In this regard, Appellant submits that the Hon'ble CESTAT has remanded the matter with specific direction to consider all the issues afresh and directed to pass a well reasoned order but on going through the impugned order it is very clear thatthe adjudicating authority has not considered any issues afresh but has passed the impugned order solely based on the information submitted during the first stage of



adjudication which shows that the authority has not followed the directions of the Tribunal in a reasonable manner. As the impugned order is passed in violation of Tribunal order the same is not valid and the same needs to be set aside.

9. Appellant further submits that the adjudicating authority not made any attempt to consider the issues afresh which shows the revenue biased approach of the department. The submissions regarding re-quantification was rejected solely based on the allegation that the details submitted at the various stages of the adjudication is not matching. In this regard, Appellant submits that while submitting the information during the adjudication proceedings Appellant has submitting the details without availing the deductions of consideration received towards certain amounts. As the tribunal has directed to consider the issues afresh, Appellant while submitting the letter dated 22.12.2015, has availed the said deduction therefore there is a difference between amounts submitted during the CESTAT stage and De-novo adjudication stage.

10. Appellant submits that as the tribunal has ordered to decide the issue afresh it is not proper for the adjudicating authority to compare the figures with first adjudication stage to confirm the demand. As the impugned order is passed ignoring the directions given by the tribunal therefore the impugned order is void and needs to be set aside.

11. Appellant submits that if the adjudicating authority requires any information to decide the case they would have requested the Appellant for the said information but the authority has not made any attempt to obtain any information to consider the issue afresh. As the impugned order has been passed based on limited information the same is not tenable and needs to be set aside.

12. Appellant submits that the adjudicating authority has not at all made an attempt to understand the transaction undertaken by the Appellant and the scope of different agreements entered with the customer. Without verifying the scope of the agreements, the impugned order has simply confirmed the demand by extracting various definitions of Finance Act, 1994 and without giving any reasons why the amounts received by the Appellant is taxable. This shows that impugned order is not reasoned order and hence not valid and requires to be set aside. In this regard Appellant wish to rely on

    a. Sant Lal Gupta v. Modern Coop.G.H.Society Ltd. — 2010 (262) E.L.T. 6 (S.C.) wherein it was held that *"The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is*

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adversely affected must know why his application has been rejected."

b. *AC of CTDVs. Shukla and Brothers*, 2011 (22) S.T.R. 105 (S.C.)

c. *State of Orissa* v. *DhaniramLuhar* - (2004) 5 SCC 568

13. Appellant submits that as the impugned order has not been passed as per the directions of the Hon'ble CESTAT in as much as passing the unreasoned order the same is not valid and needs to be set aside. Appellant further submits that the impugned order has not quantified the service tax liability by alleging that Appellant has submitted different amounts before different authorities but has not discussed why the amounts received by the Appellant towards Sale Deed is taxable. This shows that the impugned order has been passed without examining all the activities undertaken by the Appellant therefore the same is not valid and needs to be set aside.

In Re: Construction Service provided by Builder prior to 01.07.2010 is not taxable

14. Appellant submits that CBEC vide Circular No 151/2/2012 dated 10/02/2012 had clarified the applicability of service tax in light of **various business models**and opined that the activity of builder/developer prior to 01/07/2010 is not taxable. The same is extracted here for ready reference.

(A) *Taxability of the construction service:*

(i) For the period prior to 1-7-2010 : construction service provided by the builder/developer will not be taxable, in

terms of Board's Circular No. 108/2/2009-S.T., dated 29-1-2009 [2009 (13) S.T.R. C33]. The first paragraph of the above referred Circular is extracted here for ready reference.

*"**Many issues** have been referred by the field formations, in the recent past, seeking clarification regarding the levy and collection of service tax on construction services [clauses (zzq),(zzzh) of section 65(105) of the Finance Act, 1994], in the light of **varying business models. Across the country, divergent business models and practices are being followed in the construction sector.** Some of these business models and practices could be region specific."*

15. Appellant submits that the impugned order has not specified any reason why the construction service provided by the builder prior to 01.07.2010 is liable to service tax. As it was specifically given in the above referred circular about the non-taxability of builder prior to 01.07.2010, the contention of the impugned order runs contrary to the clarification of CBEC circular. And it is settled law that CBEC circular binds on revenue department **and it is not open to them to take a different view than the one taken by the Board in the circular**. In this regard wishes to rely on:

    a. Paper Products Ltd. v. Commissioner — 1999 (112) E.L.T. 765 (S.C.);

    b. State of Kerala v. Kurian Abraham Pvt. Ltd. — 2008 (224) E.L.T. 354 (S.C.);

16. Further in case of Krishna Homes v. Commissioner — 2014 (34) S.T.R. 881 (Tri-Del) analysed the issue as to the applicability of levy of service tax on construction of residential complex when the agreements were entered for construction of residential units and possession was handed over on completion of the construction after full payment was made by the customers. The relevant portion is extracted below:

"9. *In view of the above, though in view of the Apex Court judgment in the case of M/s. Larsen & Toubro Limited and Others v. State of Karnataka & Others (supra), the agreements entered into by a builder/promoter/developer with prospective buyers for construction of residential units in a residential complex against payments being made by the prospective buyers in instalments during construction and in terms of which the possession of the residential unit, is to be handed over to the customers on completion of the residential complex and full payment having been made, are to be treated as works contracts, it has to be held that during the period of dispute, there was no intention of the Government to tax the activity in terms of such contracts a builder/developer with prospective customers for construction of residential units in a residential complex. Such works contracts involving transfer of immovable property were brought within the purview of taxable service by adding explanation to Section 65(105)(zzzh) w.e.f. 1-7-2010, and therefore, it has to be held that such contracts were not covered by Section 65(105)(zzzh) during the period prior to 1-7-2010."*

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17. Besides above, there are host of decisions holding that builder/developer are not liable for service tax prior to 01.07.2010 and only contractors/designers are made liable for service tax. Few of the decisions are cited below:

    a. Josh P John v. CST 2014-TIOL-1753-CESTAT-BANG;

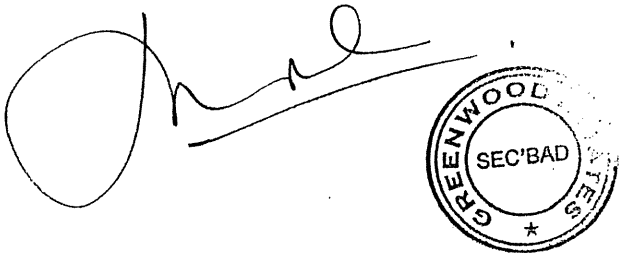
    b. Jain Housing v. CST 2014 (36) S.T.R. 1010 (Mad.);

    c. Sri Aditya Homes Pvt Ltdv. CCE 2014-TIOL-2165-CESTAT-BANG;

    d. Vijay Shanthi Builders Ltd Vs CST2017-TIOL-3845-CESTAT-MAD;

18. It is submitted that in terms of Notification No.36/2010-ST dated 28.6.2010, if value towards any service has been received before 1.07.2010, service tax on such value is exempted. By virtue of agreement with customers the consideration for provision for residential complex service had been received prior to 1.7.2010 even though flats were handed over subsequently.

19. Appellant submits that 2010 amendment(insertion of the explanation) was to expand and tax the builders/developers and till that time it was understood that contractors/designers are alone liable for service tax. This was precisely and concisely the understanding and interpretation can be drawn from the law in vogue at that time and same position was specifically clarified by CBEC vide its circulars (cited supra) and also confirmed in the decisions (supra).



20. Appellant further submits that understanding and interpretation should be drawn from the wordings of statute what is clearly stated and not to speculate upon latent imponderables. Relied on Supreme Court decision in case of Raja Satyendra Narain Singh v. State of Bihar and Others, reported in 1987 B.L.J.R. 477 (Page 481);

In Re: Construction of Residential complex for "Personal Use" is excluded from definition of Residential Complex

21. Without prejudice to the foregoing, assuming but not admitting the same is covered under the tax net. The term "Construction of Complex" is defined under section 65 (30a) as under

(30a) "construction of complex" means —

(a) construction of a new residential complex ***or a part thereof;***

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex

22. Without prejudice to the foregoing, Appellant submits that the construction service of the semi-finished flat is provided for the owner of the semi-finished flat/customer, who in turn used such flat for his personal use therefore the same is excluded from the definition of 'construction of complex service'.

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23. The Appellant submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 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 Ac, 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'...***"

24. Appellant submits that the impugned order vide Para 4.5 stated that *"I find that the assessees had collected total value from the customers and entered into sale deed agreement and construction agreement simultaneously. I find that the board vide Circular No.108/102/2009-ST dt.29.01.2009 has clarified that "if the ultimate owner enter into contract for construction of a residential definition of residential complex. I find that the exclusion clause would apply to the complex as a whole and not to individual residential unit. In other words, if the*

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entire residential complex is meant for use by one person then it gets excluded from the definition of residential complex. However, this exclusion does not apply to individual residential units as in the instant case."

25. In this regard Appellant wishes to highlight that neither in the definition nor in the clarification, there is any mention that the entire complex should be used by **one** person for his or her residence to be eligible for the exemption. The exemption would be available if the sole condition is satisfied i.e. personal use. Hence the allegation of the impugned order is incorrect and needs to be set aside.

26. 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)*

27. 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**. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the notice.

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28. 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)*

29. Appellant submits that the argument is in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been provided based on the examination of the above argument among others. Hence the allegation of the impugned order is against to clarification given has to be set aside. It is settled law that officers of the department should not argue against their own Circulars. In this regard wishes to rely on Chandras Chemical Industries Pvt. LtdVsCollr. Of C. Ex., Calcutta 2000 (122) E.L.T 268 (Tribunal) it was held that "***We also take note of the fact that the Hon'ble Supreme Court has laid down in a number of decisions that the Excise Authorities cannot be heard to argue against the Circular issued by the Board and it is not open to them to take a different view than the one taken by the Board in the Circular"***

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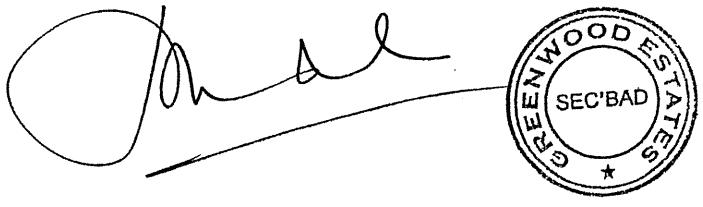
30. The Appellant submits the final clarification was provided by the board based on the preamble and the arguments. The relevant portion of the circular is provided here under for the ready reference.

"... 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)

31. 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.

32. 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.

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

34. Where an exemption is granted through Circular No. 108/2/2009-S.T., dated 29-1-2009, the same cannot be denied on unreasonable

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grounds and illogical interpretation as above. In the definition *"complex which is constructed by* ***a person*** *directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for* ***personal use*** *as residence by* ***such person.***" Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person**....." similar the reference "personal use as residence by **such** person" also cannot be interpreted as "personal use by **ONE persons**" Such interpretation would be totally against the principles of interpretation of law and also highly illogical.

35. Appellant submits that with the above exclusion, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the impugned order is invalid.

36. Without prejudice to the foregoing, Appellant further submits that non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio. Relevant Extract is reproduced below:

"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***

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

37. Without prejudice to the foregoing, 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, dated 1-8-2006.

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

38. Without prejudice to the foregoing, assuming but not admitting that when the entire residential complex is meant for a person for his personal use, then such complex falls under excluded category is to

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be considered as interpreted by the impugned order, then the entire section 65(91a) gets defeated as in case complex belonging to single person there would be nothing called as a common area, common water supply etc, the word "common" would be used only in case on multiple owner and not in case of single owner, therefore the interpretation of the department is meaningless.

39. 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-TIOL–1106-CESTAT–Bang,
    b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,
    c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)
    d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang
    e. Mohtisham Complexes Pvt. Ltd. VsCommr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang
    f. Shri Sai Constructions Vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

In Re: No Service tax on sale of semi-finished flat

40. Appellant submits that the Para 3of SCN dated 24.04.2012 reads as follows.

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

41. Appellant submits that from the Plain reading of the above Para it is clear that the Subject SCN itself admitted the fact that ***only services rendered by the Appellant after execution of sale deed against agreements of construction to each of their customers*** is liable for service tax under works contract service *qua*accepted that service tax is not applicable for the sale of semi-finished flat. Inspite of this admittance in Para 3, the subject SCN in annexure while quantifying the demand has considered the total gross receipts which also includes the amount received for sale of semi-finished flat. On the basis of the same, Appellant submits that the proposition of the subject show cause notice demanding service tax on sale of semi-finished flat is not sustainable and requires to be dropped.

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42. Appellant further submits that the adjudicating authority while confirming the demand vide Para 17 of the Order-in-Original No.51/2012-Adjn (ST) (ADC) dated 31.08.2012 stated as follows

"Various flats have been sold by them to various customers in two states. First, they have executed a sale deed at semi finished stage by which the ownership of the semi-finished flats was transferred to the customer. Appropriate stamp duty was paid on the sale deed value. No service tax been demanded on the sale deed value in light of Board Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"

43. Appellant submits that from the above referred Para it is clear that the order dated 31.08.2012 has categorically accepted that service tax was not demanded on sale deed value but while quantifying the demand it has included the amounts received towards Sale deeds.

44. Appellant further submits that while confirming the demand during the first adjudication stage the above referred Order-in-Original has clearly stated that demand should be restricted only to construction agreement and the demand on sale deed value is not sustainable. But surprisingly during the denovo proceedings, impugned order has taken a completely different view and held that amounts received towards sale deeds value is also taxable. As the adjudicating authority itself has accepted the non-taxability of sale deed value the same

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during the original proceedings and impugned order is not permitted to take different view in the denovo-proceedings. This shows that the impugned order has been issued on revenue bias and the U-turn taken by the adjudicating authority to confirm the demand is not tenable and the same needs to be set aside.

45. Appellant submits that the sale of semi-finished flat is ***transfer of immovable property which is not leviable to service tax.*** In the present case, the agreement of sale deed is entered for sale/register of semi-finished flat which is an immovable property. Accordingly, the amount received for sale of semi-finished flat is not liable to service tax. On the basis of same, Appellant submits that the proposition of subject show cause notice demanding service tax on the Appellant is not sustainable and requires to be dropped.

46. Appellant submits that the above referred SCN admitted the fact that there is a sale of semi-finished flat and construction activity has been done on the land of buyers. It substantiates the fact that the activity of sale of semi-finished flat is a transaction in immovable property which is not leviable to service tax under Finance Act, 1994. On the basis of the same, Appellant submits that the proposition of the subject show cause notice is not sustainable and requires to be dropped.

47. Appellant submits that sale deed is executed for semi-finished flat represents the construction work already done prior to booking of flat

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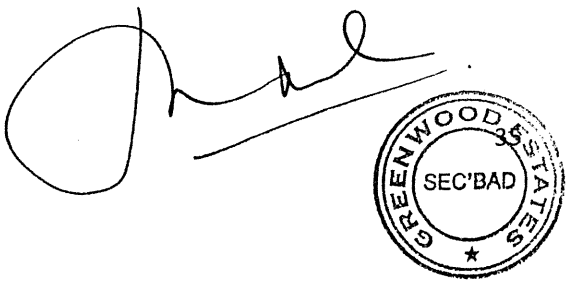
by the prospective buyer. The work undertaken till that time of booking flat is nothing but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be bought into the realm of works contract. In this regard, reliance is placed on the following:

a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.)wherein it was held that***"115.*** *It may, however,* ***be clarified that 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****. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."*

b. CHD Developers Ltd vs State of Haryana and others, 2015 –TIOL-1521-HC – P&H-VAT wherein it was held that *"45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is*



to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property."

48. It is further submitted that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi finished flat is not chargeable to VAT and it is mere sale of immovable property (same was supported by above cited judgments also). Therefore said sale cannot be considered as works contract and consequently no service tax is liable to be paid. All the goods till the prospective customer become owner have been self consumed and not transferred to anybody. Further goods, being used in the construction of semi-finished flat, have lost its identity and been converted into immovable property which cannot be considered as goods therefore the liability to pay service under 'works contract service' on the portion of semi-constructed villa represented by *'sale deed'* would not arise.

49. Appellant further submits that there is no service tax levy on sale of semi-finished flat as the same was excluded from the definition of 'service' u/s. section 65B(44) of Finance Act, 1994 ("Transfer of title in goods or immovable property, by way of sale").

In Re: Other non-taxable receipts (Corpus fund, Electricity deposit, water charges, service tax etc.,) are not liable – hence shall not be included in 'taxable value'

50. Appellant submits that the impugned order has confirmed the demand on VAT, Registration charges, Stamp duty, Corpus Fund etc by alleging that Appellant has not provided any proof or evidence that

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said amount pertains to VAT, registration charges, electricity charges.

Appellant submits that these receipts consists of

a. Corpus fund which is collected & totally kept in separate bank account and transferred to society/association once it s formed; collection of corpus fund & keeping in separate bank account and subsequent transfer to association/society is statutory requirement;

b. Electricity deposit collected & totally remitted/deposited with the 'electricity board' before applying electricity connection to the villa and Appellant does not retain any amount out of it; this deposit is collected & remitted as per the statutory provisions of AP Electricity Reform Act 1998 r/w rules/regulations made there under;

c. Water deposit collected & totally remitted to 'Hyderabad Metropolitan Water Supply & Sewerage Board (HMWSS)' before taking the water connection. This Deposit amount also includes water consumption charges for first two months along with sewerage cess. All these deposits are collected & paid in terms of HMWSS Act, 1989 r/w rules/regulations made thereunder;

d. Service tax collected & remitted to the Central government as per the provisions of Finance Act, 1994;

As seen from the above, all these charges collected 'other non-taxable receipts' are statutory charges/deposit and received as mere reimbursements of expenses/charges incurred/paid on behalf of customers and does not involve any provision of service. Hence same

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shall be excluded from the taxable value *inter alia* in terms of Rule 5(2) of Service tax (determination of value) Rules, 2006.

51. Judicially also it was held that above charges are not to be included in taxable value. Relied on ICC Reality & Others Vs CCE2013 (32) S.T.R. 427 (Tri. - Mumbai); Karnataka Trade Promotion Organisation v. CST 2016-TIOL-1783-CESTAT-BANG; hence demand does not sustain to this extent.

52. Appellant submits that the impugned order vide Para 4.7 stated that *"The assessees have simply mentioned in their written reply dt. 22.12.2015 that an amount of Rs. 11148364/- pertains to VAT Registration charges, stamp duty, etc. and reiterated the same in the Annexure B to the letter in tabular from without support of any evidence. Hence, I am inclined not to extend the said benefit to the assessees."*

53. In this regard, Appellant submits that documents evidencing that above referred amounts are towards VAT, registration charges, Stamp Duty,electricity charges, corpus fund is already submitted during the denovo proceedings in 2015 itself therefore the allegation of the impugned order is not correct and the same needs to be set aside.

In Re: Re-quantification of demand

54. Without prejudice to above, in case any tax demand stands confirmed for the subject period, it is submitted that the amounts received towards construction agreement only should be taxed and not the

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total amount received. The same was in line with the SCN OR No.52/2012-Adjn (ADC) dated 24.04.2012 vide Para 3 for the period January 2010 to December 2010 and SCN OR No.61/2011-Adjn(ST) dated 23.04.2011vide Para 6 for the period January 2011 to December 2011 which was further confirmed by the common Order-in-Original No.51/2012-Adjn(ST)(ADC) dated 31.08.2012 vide Para 17. The details of the same are as follows

Jan 2010 to Dec 2010			
Description	**Receipts**	**Non taxable**	**Taxable**
Sum towards sale deed	Rs.4,07,44,617	Rs.4,07,44,617	Nil
sum towards agreement of Construction	Rs.5,32,39,887	Nil	Rs.5,32,39,887
Sum towards other taxable receipts	Rs.13,29,697	Nil	Rs.13,29,697
Sum towards VAT,Regn.charges, etc	Rs.1,11,48,364	Rs.1,11,48,364	Nil
Total	**Rs.10,64,62,565**	**Rs.5,18,92,981**	**5,45,69,584**

Jan 2011 to Dec 2011			
Description	**Receipts**	**Non taxable**	**Taxable**
Sum towards sale deed	Rs.4,28,44,626	Rs.4,28,44,626	Nil
Sum towards agreement of Construction	Rs.5,50,55,881	Nil	Rs.5,50,55,881
Sum towards other taxable receipts	Rs.11,40,800	Nil	Rs.11,40,800
Sum towards VAT,Regn.charges, etc	Rs.96,23,950	Rs.96,23,950	Nil
Total	**Rs.10,86,65,257**	**Rs.5,24,68,576**	**Rs.5,61,96,681**

55. The details of service tax liability and payments made by Appellant are as follows

Particulars	**Jan'10 to Dec'10**	**Jan'11 to Dec'11**
Gross Receipts	**Rs.10,64,62,565**	**Rs.10,86,65,257**
Less: Deductions		
Sale Deed Value	Rs.4,07,44,617	Rs.4,28,44,626
VAT, Registration charges, stamp duty and	Rs.1,11,48,364	

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other non taxable receipts		Rs.96,23,950
Taxable value	**Rs.5,45,69,584**	**Rs.5,61,96,681**
Abatement @ 60%	Rs.3,27,41750	Rs.3,37,18,008
Net Taxable Value	Rs.2,18,27,833	Rs.2,24,78,672
Service Tax @ 10.3%	Rs.22,48,267	Rs.23,15,303
Actually Paid	Rs.24,69,553	Rs.23,11,233
Short/(Excess) Paid	(Rs.2,21,286)	Rs.4,070

56. Appellant submits that as brought in background facts, an amount of Rs. 47,80,786/- has already paid towards service tax on the amounts received from customers against the liability of Rs. 45,63,570/- resulting in excess payment of Rs.2,17,216/- therefore no further payment is required towards service tax. Appellant humbly request Hon'ble Commissioner (Appeals) to consider the same while passing the order.

57. Appellant submits that above referred details are submitted by the Appellant to the adjudicating authority vide letter dated 22.12.2015 along with documentary evidence supporting their claim in CD form and requested to re-quantify the demand but the same was not considered while confirming the demand. As the impugned order is passed without considering the information submitted by the appellant the same is not valid and the same needs to be set aside.

58. Rebutting to the above submission the impugned order vide Para 4.8 stated that *"the assessee during their submissions before various authorities have misrepresented the fact of quantum of receipts. One the amounts are received in previous period (in this case for the period Jan*

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'10 to Dec'11) the factum of quantum of accounts received cannot change. The fact of the quantum of amounts said to have been received during the two periods Jan'10 to Dec'10 and Jan'11 to Dec'11 cannot obviously change during the Show Cause Notices issuance time, during the time of submissions made before the Commissioner (Appeals), again during the time of submissions made before the Hon'ble CESTAT and then again now i.e., on 22.12.2015. A confusion or a mis-calculation in respect of change of heads under which the amounts were received can be understood. But, the fact of gross quantum of amount received has to be the same before authorities. In view of the above and as the assessees have not furnished any of their audited Balance sheets/P&L Accounts/Ledger copies/Bank Account statements/VAT returns/Registration charges challans for the relevant period in support of the figures claimed / mentioned in their letter dt.22.12.2015, I am not inclined to accept the figures submitted by the assessees vide their letter dt.22.12.2015."

59. In this regard, Appellant submits that as explained in the background facts it is clear that the difference between the amounts submitted at the stage of adjudication and with the letter dated 22.12.2015 is due to following reasons

   - Appellant used to maintain the records of receipts from each customer manually wherein bifurcation of the each receipt towards the sale deed, construction agreement or others heads was accounted manually in the books of accounts. The details submitted during the original proceedings were based on this

manual records maintained. However after certain time Appellant started using the customised software which automates the recording of the receipts from the customers as well as bifurcation towards different heads (sale deed, construction agreement etc.,) and the details of the amounts submitted vide letter dated 22.12.2015 are based on the updated records done by the above mentioned software.

- Other reason was that during the subject period, few customers paid the ad-hoc amounts wherein there is no consensus among the Appellant and customer regarding the specific flat as well as bifurcation of the amount towards various aforesaid heads (similar to investment). Later both came to consensus and executed the agreements. While the details submitted in original proceedings are based on the adhoc amounts (bifurcation of the receipts were also done adhoc) whereas the details submitted vide letter dated 22.12.2015 are on actual basis. Therefore, there is a difference between the details submitted during the adjudication and details submitted vide the above referred letter.

60. Further, Ld. Adjudicating authority should have sought clarification from the Appellant on the differences and in case, Appellant has not responded or not given any satisfactory explanation. Without that passing the impugned order after almost 2 years from the hearing date with surmise allegation that there is difference in the figures submitted is not valid in the law and requires to be set aside.

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61. Appellant further in case Ld. Adjudicating authority department has doubt over the authentication of information submitted with the above referred letter they should have atleast considered the amounts which will be beneficial to the revenue but the impugned order has not done the same instead out-rightly rejecting the amounts submitted Appellant is not correct therefore the allegation of the impugned order is not correct and the same needs to be set aside.

Cum-taxbenefit under Section 67 should be extended

62. Appellantsubmits that assuming but not admitting there is a liability under works contract service for sale of semi-finished flat, then as the Appellant has not collected service tax from the buyer, the benefit of cum-tax requires to be extended to the appellant.

63. Appellant submits that in light of the statutory backup as mentioned above and cases where it was held that when no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis

a. P. Jani & Co. vs. CST 2010 (020) STR 0701 (Tri.-Ahmd).

b. Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del

c. Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590

d. BSNL Vs CCE, Jaipure 2011 (24) S.T.R 435 (Tri-Del).

On the basis of above decisions, Appellant submits that the benefit of cum-tax requires to be provided to the Appellant. On the basis of the same, Appellant submits that the proposition of the subject show

cause notice demanding service tax on the Appellant is not sustainable and requires to be dropped.

In Re: Interest and penalties should not be imposed

64. Without prejudice to the foregoing, Appellant submits that when service tax itself is not payable, the question of interest 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)

65. Appellant submits that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the impugned order imposing the penalty requires to be set aside.

66. Appellant submits that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It settled position of the law that if the Appellant is under bonafide belief as regards to non taxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.

   a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)
   b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

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Benefit of Section 80 should be extended

67. Appellant submits that alleged short/non-payment of service tax was due to various reasons *inter alia*

a. Given understanding that compliance made by Appellant is in accordance with the law.

b. Whatever believed as taxable was duly paid voluntarily.

c. There were divergent views of Courts over the classification of indivisible contracts; taxability of transaction involving immovable property etc.,

d. There was enough confusion prevalent on the applicability of the Service tax among the industry.

e. Matters were referred to larger bench at various instances.

All the above can be considered as reasonable cause and waiver of penalty can be granted in terms of section 80 of Finance Act, 1994. Relied on **CST, Vs Motor World 2012 (27) S.T.R 225 (Kar)**

68. Appellant craves leave to alter, add to and/or amend the aforesaid submissions.

69. Appellant submits that wish to be heard in personal before passing any order in this regard.

For M/s. Greenwood Estates

Authorized Signatory

GREENWOOD ESTATES SEC'BAD

PRAYER

Therefore it is prayed that

a. To set aside the impugned order to the extent aggrieved;

b. To hold that service tax is not applicable on builders prior to 01.07.2010;

c. To hold that service tax is not applicable on amount received towards Sale Deed;

d. To hold that service tax is not applicable on Other receipts

e. To hold that demand should be re-quantified;

f. To hold that cum-tax benefit under Section 67 should be extended;

g. To hold that no interest and penalties are leviable;

h. To hold that benefit of section 80 shall be extended;

i. To hold that service tax already paid should be appropriated;

j. Any other consequential relief shall be granted;

Appellant

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VERIFICATION

I, Soham Modi, Partner of M/s. Greenwood Estates, Hyderabad, the Appellant herein do declare that what is stated above is true to the best of our information and belief.

Verified today 14th day of December, 2017

Place: Hyderabad

Appellant

GREENWOOD ESTATES SEC'BAD

BEFORE COMMISSIONER OF SERVICE TAX (APPEALS),
7th Floor, L.B. Stadium Road, Basheerbagh,Hyderabad – 500 004

Sub: Appeal against the Order-In-Original No. 83/2016-Adjn(ST)/(ADC) dated 09.06.2017pertaining to M/s. Greenwood Estates

I, Soham Modi, Partner of M/s. Greenwood Estates, Hyderabad or their partners and qualified staff who are authorized to act as authorized 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 authorized 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 on 14th day of December2017 at Hyderabad

GREENWOOD ESTATES SEC'BAD

Signature

I the undersigned partner of M/s Hiregange& Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange& Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings. 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: 14.12.2017

Address for service:
Hiregange& Associates,
Chartered Accountants,
"Basheer Villa" H.No.8-2-268/1/16/B,
2nd Floor, Sriniketan Colony,
Road No.3, Banjara Hills,
Hyderabad-5000034

For Hiregange& Associates
Chartered Accountants

Hiregange & Associates Chartered Accountants Hyderabad

Venkata Prasad R
Partner (M. No.236558)

I partner/Employee/associate of M/s Hiregange & Associates duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

Sl No.	Name	Qualification	Membership No.	Signature
01	Sudhir VS	CA	219109	
02	Lakshman Kumar K	CA	241726	

Hiregange & Associates Chartered Accountants Hyderabad

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