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MODI PROPERTIES PVT. LTD. INWARD No. 782 Date 07/12/16 Sign. SEC'BAD

सीमा शुल्क, केन्द्रीय उत्पाद शुल्क व सेवा कर के प्रधान आयुक्त का कार्यालय
OFFICE OF THE
PRINCIPAL COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
हैदराबाद 1 आयुक्तलाय, बशीरबाग, हैदराबाद - 500 004
HYDERABAD - I COMMISSIONERATE, BASHEERBAGH:: HYDERABAD 500 004

आ.सं/O.R.No. 44/2016-Hyd-I Adjn(S.T) **दिनांक** / Date: 30.12.2016.

मूल आदेश संख्या **048**/2016-(S.T)

(श्री वी। वसुधा प्रसादा राव**,** संयुक्त आयुक्त **द्वारा पारित)**

ORDER-IN-ORIGINAL No. **048** /2016-(S.T)

(Passed by Shri V. Vasudha Prasada Rao, Joint Commissioner)

	प्रस्तावना	PREAMBLE
1	निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति बिना मूल्य के दी जाती है ।	This copy is granted free of charge for the private use of the person to whom it is issued.
2	जो भी व्यक्ति केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 के अंतर्गत धारा 35 (1) संशोधित से दुषप्रभावित हो, इस प्रकार प्राप्त आदेश निर्णय के खिलाफ आदेश की प्राप्ति के 60 दिन के भीतर आयुक्त (अपील), मुख्यालय कार्यालय, 7 वॉ तल, एल.बी. स्टेडियम रोड, बशीरबाग, हैदराबाद 500 004 को अपनी अपील प्रस्तुत कर सकता है ।	Under Section 35 (1) of the Central Excise Act, 1944, as amended, any person aggrieved by this order can prefer an appeal within 60 days from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs., Office, 7th floor, L.B.Stadium Road, Basheerbagh, Hyderabad – 500 004.
3	धारा 35 के उप खण्ड (I) के अंतर्गत आयुक्त (अपील) को की जानेवाली अपील फार्म ई.ए.1 में हो और इसकी जाँच निर्धारित पद्धति के अनुसार की जानी चाहिए।	An appeal under sub-section (!) of Sec.35 to the Commissioner (Appeals) shall be made in form S.T-4 and shall be verified in the prescribed manner.
4	फार्म संख्या ई.ए.1 में निहित अपील के आधार और उसकी जाँच के फार्म पर निम्न के हस्ताक्षर होनी चाहिए ः (क) व्यक्तिगत मामलों में स्वयं व्यक्ति द्वारा या उसके भारत से बाहर रहने पर संबंधित व्यक्ति द्वारा या उसकी ओर से उसके द्वारा प्राधिकृत व्यक्ति द्वारा और व्यक्ति के अवयस्क या मानसिक रूप से विकलांग ऐसे व्यक्ति जो अपने काम स्वयं द्वारा न किए जाने की स्थिति में हो, अपने संरक्षक द्वारा या उसकी ओर से काम करने के लिए किसी सक्षम व्यक्ति द्वारा ; (ख) अविभाजित हिन्दू परिवार के मामले में कर्ता द्वारा और जब कर्ता भारत में उपस्थित न हो या अपने स्वयं के मामले स्वयं द्वारा निपटाने में मानसिक रूप से विकलांग हो तो अपने परिवार के किसी अन्य वयस्क सदस्य द्वारा; (ग) कंपनी या स्थानीय प्राधीकरण के मामले में संबंधित प्रधान अधिकारी द्वारा; (घ) फर्म के मामले में किसी भागीदार के द्वरा जो अवयस्क न हो; (इ.) कसी अन्य संघ के मामले में संघ के किसी सदस्य द्वारा या प्रधान अधिकारी द्वारा.; (च) किसी अन्य व्यक्ति के मामले में उसी व्यक्ति द्वारा या उसकी ओर से कार्य करने के लिए किसी अन्य सक्षम व्यक्ति द्वारा हस्ताक्षरित होना चाहिए;	The grounds of appeal and the form of verification as contained in form No. S.T-4 shall be signed:- a) In the case of individual, by the individuals himself or where the individual is absent from India, by the individual concerned or by some person duly authorized by him on his behalf and where the individual is a minor or is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf; (b) In the case of a HUF, by the KARTHA, and where the KARTHA is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family; (c) In the case of a company or local authority, by the principal officer thereof; (d) In the case of a firm, by any partner thereof, not being a minor; (e) In the case of any other association, by any member of the association or the principal officer thereon; (f) In the case of any other person, by that person or some person competent to act on his behalf;
5	ई.ए.1 फार्म में की गई अपील अनुलिपि में प्रस्तुत की जानी चाहिए और उसके साथ जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उसकी एक प्रति भी संलग्न की जानी चाहिए;	The form of appeal in Form No: EA-I shall be filed in duplicate and shall be accompanied by a copy of the decision or the order appealed against;
6	अपील पर और जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उस आदेश की प्रति पर भी समुचित मूल्य के अदालती टिकट लगाए जाने चाहिए ।	The appeal as well as the copy of the decision or order appealed against must be affixed with court fee stamp of the appropriate amount.

BRIEF FACTS

M/s. Kadakia & Modi Housing having their Registered office at 5-4- 187/3 & 4, II Floor Soham Mansion, M.G.Road, Secunderabad (hereinafter referred to as "M/s KMH" or "the assessee") are engaged in the construction of Villas and are registered with Service Tax Department under STC NO AAHFK8714ASD001 for "Construction of Residential Complex service" and "Works Contract Service"

2. Intelligence received indicated that M/s KMH are Constructing Villas under the project titled "Bloomsdale", and are not discharging Service Tax properly. Documents were called from M/s KMH under Summons and a statement was recorded from the authorized signatory of the Company on 16.11.2015 and 01.02.2016.

2.1 Sri M.Jaya Prakash authorized signatory of the assessee in his statement dated 16.11.2015 and 01.02.2016, inter-alia, submitted that:

- M / s KMH are involved in the activity of Construction of Residential Villas;
- so far there is only one project of Residential Villas known as "Bloomsdale" located at Shamirpet Village;
- they acquired the land by outright purchase and the project consists of 72 Villas out of which 31 Villas were sold upto 2014-15;
- the mode of sale is that they enter into agreement of sale , then execute sale deed (for land Value) and agreement of Construction; that they are first appropriating the amounts received from the Customer towards the sale deed thereafter they appropriate the amounts towards agreement of construction. Amounts received for third parties like Registration Charges, VAT, Service Tax, Electricity deposit ,maintenance charges are excluded for the purpose of estimating service tax liability;
- that they are paying Service Tax under the category of "Works Contract Service" against Agreement of Construction Value only;
- that because of ambiguity on applicability of service tax before the amendment to the act in 2012 they were given to understand that service tax is not applicable for the activity undertaken by them;
- that they are willing to pay the amounts collected under Works Contract Service

2.2 Examination of the documents revealed that M/s KMH had not filed the Statutory ST-3 Returns and not paid any service tax for the period October, 2010 to March, 2011. For the year 2011-12, they had filed the ST-3 returns and self-assessed their service under Construction of Residential Complex service for

the period upto September 2011; and from October 2011 onwards they changed the classification of the service and are discharging duty under Works Contract Service and they filed the returns for the period 2012-13 to 2014-15.

2.3 Examination of the Agreement of Sales indicated that M/s KMH are collecting the agreed value under the following three separate heads

A. Towards Sale of land

B. Towards development Charges of land for laying of roads, drains parks etc

C. Towards Cost of Construction , water and electricity connection and for other amenities.

2.4 The following consideration details in Condition number 1 of the agreement dated 12.11.2009 entered with Major Achyut Ranjan confirms the above mode of receipt of payments:

Sl. No.	Description	Amount (Rs.)
A	Towards sale of land	1,85,000/-
B	Towards development charges of land for laying of roads, drains. Darks, etc.	11,95,000/-
C	Total towards land cost (A+B)	13,80,000/-
D	Towards cost of construction, water & electricity, connection and for other amenities	20,70,000/-
E	Total sale consideration (C+D)	34,50,000/-

2.5 As per Para 13 of agreement of Sale date 12.11.2009 entered with Major Achyut Ranjan reads as under

> *"13 The vendee shall enter into a separate agreement with the vendor for construction of the bungalow as per the specifications and other terms and conditions agreed upon. The vendee shall also enter into separate agreement with the Vendor for payment of development charges on land"*

2.6 Identical conditions forms part of the all other agreements of Sales in respect of other Customers. Accordingly, M/s KMH are entering into separate agreement for development of land and for construction of Villas. M/s KMH vide their letter dated 09.02.2016 informed that in the statement of receipts submitted by them, under Column "Receipts towards agreement of Construction include the receipt towards the land development.

2.7 However, examination of the receipts vis-a-vis the amounts indicated in the Agreement of sales showed that the cost of Land development is not included in the Agreement of Construction in some cases and partially included in some cases. The Cost of land development in some cases is included in the amount indicated in the Sale deed (Cost of land value) and exemption is claimed in this respect

2.8 The activity of land development involves preparing the site suitable for construction, laying of roads, laying of drainage lines water pipes etc. thus it is a separate activity different from construction of Villas

2.9 Upto the period 30.06.2012 As per Section 65 (97a) of the Finance Act 1994 Site formation and clearance, excavation and earth moving and demolition includes

(i) drilling, boring and core extraction services for construction, geophysical geological or similar purposes

(ii) Soil stabilization or

(iii) horizontal drilling for the passage of cables or drain pipes or

(iv) land reclamation work or

(v) contaminated top soil stripping work or

(vi) demolition and wrecking of building structure or road

2.10 Upto the period 30.06.2012 As per Section 65(105) (zzza) of Finance Act, 1994 "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities.

2.11 Thus, it appeared that the activity of development of land fall under the definition of site formation as per Section 65(97a) ibid and the development charges collected are taxable to service tax as per Section 65(105)(zzza) ibid. and with effect from 1.7.2012 it appeared to be a service under Section 65B (44) of the Act and taxable under the provisions of 65B(51) read with Section 66(B) of the Act . Further, the activity does not fall under the negative list mentioned in Section 66D of the Act. Thus, the activity of land development appears to be chargeable to service tax without any abatement.

2.12 Upto the period 30.06.2012, as per Section 65(105)(zzzza) of Finance Act, 1994, "Taxable Service" means *any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*

Explanation.—For the purposes of this sub-clause, "works contract" means a contract wherein,—

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise, installation of electrical and

electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

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

(d) completion and finishing services, repair, alteration, renovation or restoration of or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or

(f) commissioning (EPC) projects; .

From 01.07.2012 onwards, Service portion of Works Contract service is a "declared service" under Section 66E(h) of Finance Act as amended.

2.13 After 01.07.2012, as per Section 66B of Finance Act, 1994 as amended, there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

2.13 As per Section 65B(34) of Finance Act 1994, "negative list" means the services which are listed in section 66D;

2.14 As per Section 65B(51) of Finance Act, 1994, "taxable service" means any service on which service tax is leviable under section 66B;

2.15 As per Section 65B (44) of Finance Act 1994 "service" means *any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*

(a) an activity which constitutes merely,—

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

(ii) a transaction in money or actionable claim;

(b) a provision of service by an Employee to the Employer in the course of or in relation to his Employment;

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

2.16 As per Section 68 of the Finance Act 1994, every person providing taxable service to any person shall pay service tax at the rate specified in section

66 (upto 30.06.2012) and Section 66B (from 01.07.2012 onwards) in such manner and within such period as may be prescribed.

2.17 Section 66D specifies the Negative List of services & Exemption Notification No. 25/2012 dated 20.06.2012 lists the exempted taxable services. "Works Contract Service" does not figure in the negative list or in the said exemption Notification.

2.18 As detailed above, M/s KMH are entering into a Separate agreement of construction with his customers and the activity appears to be taxable under Works Contract service even during the period from October 2010 to September 2011 during which M/s KMH appeared to have erroneously classified the service under construction of Residential Complex Service. The fact that M/s KMH are discharging VAT under Works Contract and are assessing the service under Works Contract confirms the nature of the service that it is "Works Contract Service" Only.

2.19 As mentioned in above the cost of construction includes the cost providing common amenities also. Sri Jaya Prakash in his Statement dated 01.02.2016 in response to Question No 3 submitted that the cost of providing common amenities is between one to one and half lakh rupees and the cost forms a part and parcel of Cost of Construction and they are discharging Service tax for the said amount under works contract providing common amenities is not a Works Contract as there is no transfer of property to the individual. Hence, it appeared that the abatement is not available for the value of Rs 1,50,000/- per Villa (being the higher of the values admitted as M/s KMH failed to arrive at the correct value of common amenities) and chargeable to full rate of Service Tax under other taxable services

2.20 In view of the foregoing, it appeared that M/s KMH are liable to discharge charge service tax for Cost of land development shown in agreement of sales under "Site formation Service". They appeared liable to service tax on the full value of Common amenities without any abatement at full rate. They appeared liable to Service Tax under "Works Contract Service" in respect of the value of construction shown in agreement of sales excluding the value of Common amenities. The cost of land of shown in agreement of sales only appeared exempt from service tax.

2.21 Accordingly, the service tax liability is arrived villa wise.

3. Agreement of Sales indicates that the assessee is collecting the agreed value under the following two heads only.

A. Towards Sale of land

B. Towards Cost of Construction, water and electricity connection and for other amenities.

The consideration details in Condition Number 1 of the Agreement of Sale dated 20.07.2012 entered with Sri Abdul Rahim and another confirms the above mode of receipt of payment.

Sl. No.	Description	Amount (Rs.)
A	Towards sale of land	18,00,000/-
B	Towards cost of construction, water & electricity connection and for other amenities.	26,83,000/-
C	Total sale consideration (A+B)	44,83,000/-

3.1 M/s KMH are not entering into any land development agreement in respect of these customers. In his Statement dated 01.02.2016, Sri M.Jaya Prakash authorized signatory of the Company in response to question number 4 why there is no separate agreement for development of land in respect of some customers, submitted that these booking were done after development of the land, that is why there is no separate agreements for land development charges in respect of them.

3.2 Condition No 1 of the sale deed dated 10.09.2012 entered with Sri Abdul Rahim and another indicates the following details:

> *"The Vendor do hereby convey, transfer and sell the Plot No. 9. admeasuring 183 sq. yds., along with semi-finished construction having a total built-up area of 1849 sft, forming part of Sy. No. 1139 situated at Shamirpet Village, Shamirpet Mandal, Ranga Reddy District, which is herein after referred to as the Scheduled Property and more particularly described in the schedule and the plan annexed to this Sale Deed in favour of the Vendee for a consideration of Rs. 18,00,000/- (Rupees Eighteen Lakhs Only) financed by HDFC Ltd., Hyderabad. The Vendor hereby admit and acknowledge the receipt of the said consideration in the following manner"*

3.3 Further, Annexure 1-A of the above cited sale deed dated 10.09.2012 indicated the following details

ANNEXURE-1-A

1. *Description of the Building* : *ALL THAT PIECE AND PARCEL OF SEMI-FINISHED HOUSE on bearing Plot No. 09 in the project known as "BLOOMDALE" forming part of Sy. No. 1139 OF Shamirpet Village, Shamirpet Mandal, Ranga Reddy District*
   - *(a) Nature of roof* : *R.C.C (G+1)*
   - *(b) Type of Structure* : *Framed Structure*
2. *Age of the Building* : *Under Construction*

3.3 Identical details are incorporated in all other Sale deeds in respect of other Customers.

3.4 In view of the above facts, it appeared that what is transferred by way of sale deed is a semi- finished construction and not merely land. However, it was observed that M/s KMH had erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi-finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands.

3.5 As mentioned in Para 3(detailed in annexures enclosed to the notice) above, the cost of construction includes the cost of providing common amenities also. The cost of common amenities had to be arrived at as detailed in Para 2.19(detailed in annexures enclosed to the notice) above and appeared chargeable to full rates of Service Tax.

3.6 In view of the foregoing, in respect of Customers mentioned in Enclosure WS-2 to the notice, it appeared that M/s KMH were liable to discharge service tax for Cost of construction in respect of value of semi-finished houses shown in the "Sale deed" and value shown in agreement of Construction, under Works Contract Service. They appeared liable to service tax on the full value of Common amenities without any abatement at full rate. The cost of land arrived proportionately based on identical lands of customers appeared exempt from service tax.

3.7 Accordingly, the service tax liability was arrived villa wise and detailed in Annexures enclosed to the notice. Further the villa wise Year wise and Service wise liability' was detailed in Enclosure WS-3 & WS-4 to the notice.

3.8 The total service tax payable for both Enclosure WS-1 and Enclosure WS-2 customers together worked out to Rs 14,35,330/- in respect of site formation service Rs 40,80,581/- in respect of works contract service Rs 7,01,784/- in respect of other taxable services totalling to Rs 62,17,785/-M/s KMH had paid an amount of Rs 19,00,736/- during the period from October, 2010 to March, 2015 and the differential amount payable worked out to Rs 43,17,049/-.

4. Service Tax under Works Contract Service has been arrived @4.12% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued vide Notification No.32/2007-ST dated 22.5.2007 for the period 01.10.2010 to 31.03.2011 as the value of goods and materials consumed in the

project could not be arrived as provided under Rule 2A and 3 of the Service Tax (Determination of Value) Rules, 2007.

4.1 Service Tax under Works Contract was arrived @40% of the consideration received for rendering the services for the period from 01.04.2012 to 31.03.2015 as per the provisions of Section 2A[(ii)(A)] of the Service Tax (Determination of Value) Rules, 2007 as the value of the goods and materials consumed in the project could not be provided by the declarant.

5. By their acts of omission and commission as above, it appeared that M/s. KMH had contravened the various provisions of Finance Act, 1994 and the Service Tax Rules, 1994, with an intent to evade payment of Service Tax as follows

- Section 73A(1) of the Finance Act 1994 (hereinafter referred to as the Act) inasmuch as they had not paid the service tax collected from the customers completely.
- Section 65A(2)(a) of the Finance Act, 1994 inasmuch as they had not classified their services of construction of villas under "Works Contract service" during the period from October, 2010 to September, 2011 under Section 65(105)(zzzza) and not classified the service of land development under Site formation Service under Section 65(105)(zzza) from October, 2010 to 30.06.2012.
- Section 67 of the Finance Act, 1994 read with Rule 2A of the Service Tax (Determination of Value) Rules, 2006, inasmuch as they had not assessed correct values and not paid proper service tax on amounts received pertaining to the "Works Contract Service" during the period October, 2010 to March, 2015 and on site formation service from October 2010.
- Section 68 (1) of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994 inasmuch as they had not paid appropriate Service Tax under "Works Contract Service", "Site formation Service and Other taxable service on the considerations received for the services rendered.
- Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 inasmuch as they had not filed the statutory Returns under "Works Contract Service" during the period October, 2010 to March, 2012. And under Site formation Service from October, 2010 and not assessing the taxable values correctly.

6 The assessee have been rendering taxable services under the category of "Works Contract Services" and site formation service however they

have not paid the service tax charged and collected from the customers to the account of the Central Government properly during the period from October, 2010 to March, 2015. They had not discharged service tax on site formation service and they had not discharged service tax on works contract service by undervaluing the services they had not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation conducted. Therefore, it appeared that the assessee had intentionally suppressed the facts to evade the payment of service tax. Hence, it appeared that the period of limitation under proviso to Section 73(1) was invokable to recover the short paid/not paid service tax along with interest under Section 75 of the Finance Act, 1994. The assessee appeared liable for penalty under Section 78 of the Finance Act, 1994 for suppression of facts, with an intent to evade payment of Service Tax.

7. In view of the above, a Show Cause Notice in O.R.No. 99/2016-Adjn.(ST)(Commr) HQPOR No. 10/2016-ST-AE-VIII dated 22.04.2016 was issued to M/ s. Kadakia & Modi Housing, asking them to show cause to the Commissioner of Service Tax, Hyderabad Service Tax Commissionerate, as to why:

(i) An amount of Rs. 14,35,330 /- (Rupees Fourteen lakhs thirty five thousand three hundred thirty Only) (including all cesses) being the service tax payable on Site formation Service (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(ii) An amount of Rs. 40,80,581 /-(Rupees Forty lakhs eighty thousand five hundred and eighty one Only) (including all cesses) being the service tax payable on Works Contract Service (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(iii) An amount of Rs. 7,01,874/-(Rupees seven lakhs one thousand eight hundred and seventy four Only) (including all cesses) being the service tax payable on other taxable Services (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October, 2010 to March, 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(iv) an amount of Rs 19,00,736/- (Nineteen lakhs seven hundred and thirty six only) paid towards service tax (as per Enclosure WS-5 to the notice) should not be appropriated towards the service tax demanded at SI No (i) to (iii) above;

(v) Interest as applicable, on an amount at Sl.No. (i) to (iii) above should not be paid by them under Section 75 of the Finance Act, 1994;

(vi) Penalty should not be imposed on the amount at SL No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;

(vii) Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for delayed Registration.

8. The Show Cause Notice O.R.No. 99/2016-Adjn.(ST)(Commr) HQPOR No. 10/2016-ST-AE-VIII dated 22.04.2016 was assigned for adjudication to the Joint Commissioner, Hyderabad-I Commissionerate vide letter C.No. IV/16/156/2065-CC(HZ) Tech dated 07.12.2016 by the Chief Commissioner, Hyderabad Zone in terms of Notification No. 06/2009-ST dated 30.01.2009. Accordingly, corrigenda dated 20.10.2016 and 05.12.2016 were issued asking the assessee to show cause to the adjudicating authority for the subject notice.

PERSONAL HEARING

9. Personal hearing was granted to the assessee on 28.12.2016. Shri Venkata Prasad, Chartered Accountant, on behalf of M/s. Kadakia & Modi Housing, appeared for the personal hearing and filed their written submissions dated 28.12.2016 and reiterated the same. He further submitted that an amount of Rs.19,00,736/- was paid by them before issue of the Show Cause Notice. Hence, he requested the same may be considered while imposing penalty.

10. In their written submissions dated 28.12.2016, the assessee, interalia, submitted as under:-

(i) They denied all the allegations made in Show Cause Notice (SCN) as they were not factually/legally correct;

(ii) Service Tax is not at all payable by builder on the contracts entered with individual buyer involving the sale of land component in absence of proper mechanism for identification of service component therein and placed reliance on the decision of the Hon'ble High Court of Delhi in the case of Suresh Kumar Bansal Vs. UOI 2016 43 S.T.R. 3 (Del.);

(iii) Construction of villas cannot be subjected to service tax *inter alia* due to:

- Villas cannot be treated as residential complex defined under Section 65(91a) of Finance Act, 1994 since villa is not a building containing more than 12 units. Consequently same does not fall under the category of 'Works contract service (WCS)' qua Section 65(105)(zzzza) of Finance Act, 1994;
- Further, judicially also it was held that construction of villas cannot be treated as 'construction of complex' and placed reliance on the decision of the Hon'ble Tribunal in the case of Macro Marvel Projects Ltd. v. Commissioner - 2008 (12) S.T.R. 603 (Tribunal) maintained by the Hon'ble Supreme Court as reported in 2012 (25) S.T.R. J154 (S.C.);
- Further, Villas constructed are being used for his personal use and falls under exclusion portion of the definition of the "Residential complex" defined under Section 65(91a), ibid. hence no service tax and relied on the CBEC circular 108/2/2009-S.T., dated 29.01.2009 and the decision of the Hon'ble Tribunal in the case of M/s Virgo Properties Pvt Limited Vs CST, Chennai 2010-TIOL-1142-CESTAT-MAD;
- For period 01.07.2012 onwards, same is exempted under entry No. 14(b) of Notification No. 25/2012 ST dated 20.06.2012 as amended;

(iv) Mere paying service tax or filing of ST-3 returns under self-assessment system does not alter the taxability of the impugned activity as self-assessment cannot be considered as final/decisive and further there is no restriction for claim of the refund of the duty so self-assessed. In this regard reliance was placed on the following case laws:

- Central Office Mewar Palaces Org. v. UOI 2008 (12) S.T.R. 545 (Raj.)
- Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553 (Tri. - Bang.)

(v) Therefore, notwithstanding payment of service tax by them during the subject period, there is no service tax liability at all on the entire transaction of villa sale that being a position there is no question of any short payment and entire demand fails on this count itself;

(vi) Charges for 'land development' were collected towards development of the layout into plots by laying roads, drainage lines, electrical lines,

water lines etc., as per the rules of HUDA. Both materials, labour are involved in laying of said roads, drainages etc. For instance, murrum, concrete were being incorporated in the laying of roads apart from exerting the labour therein. Similarly while laying of electrical lines, they incorporates goods namely electrical poles, wire etc;

(vii) The impugned proposes to tax the 'land development' charges collected after alleging (vide Para 2.3.8) that same is classifiable under the category of 'site formation' under Section 65(105)(zzza) of Finance Act, 1994;

(viii) The definition of the *"Site Formation and Clearance, Excavation and Earthmoving and Demolition Services"* on one hand and reference to description of on another hand, concluded the liability of the service tax on the same activities without proving how the particular activity is covered under the provisions of Finance Act, 1994. Notice had not recorded any reasons for concluding the liability of service tax on the impugned activities. Authority has not discharged its onus on proving the liability without any doubt and hence the Notice is not valid. The Notice has been just issued in air and without proper examination and hence the same has to be set aside. In this regard, reliance was placed on the decision of the Hon'ble Tribunal (The Special Bench of Tribunal consisting of three members) Crystic Resins (India) Pvt. Ltd., Vs CCE, 1985 (019) ELT 0285 Tri.-Del;

(ix) The impugned SCN has merely extracted the entire provision under Section 65(97a) of Finance Act, 1994 and alleges that service tax is liable to be paid on the 'land development charges' under the category of 'site formation' under Section 65(105)(zzza) of Finance Act, 1994 but fails to specify under which clause of 'Site formation' is taxable more specifically when 'Site formation' contains several clauses covering different activities. Therefore, such SCN is invalid and infirmity incurable therefore requires to be quashed. Reliance in this regard was placed on United Telecoms Limited v. CCE, Hyderabad-2011 (21) S.T.R. 234 (Tri-Bang);

(x) First sub-clause covers drilling, boring and core extraction services and in the instant case of 'land development' there was no such activities were undertaken and therefore same is not covered under this sub-clause;

(xi) Second sub-clause covers the cases of soil stabilization and the instant case of 'land development' does not require any such type of 'soil stabilization' i.e. improving or changing the soil of surface. Therefore the not covered under second sub-clause too;

(xii) Third sub-clause covers the cases of 'horizontal drilling' whereas 'land development' does not require such kind of drilling works hence not covered here also;

(xiii) Similarly, further sub-clause covers requires 'Land reclamation' works which involves the converting unusable/disturbed land into usable form whereas in the instant case of 'land development' land is in very well usable form before Noticee carried the development work and development work only for laying of infrastructure as required by M/s.HUDA. Resultantly same is not covered under this sub-clause also;

(xiv) Fifth sub-clause covers the cases of *'contaminated top soil stripping work'* involving the carrying out measures for preventing/correcting the soil contamination. Whereas in the instant case of 'land development' there is neither 'soil contamination' nor measures for prevention/correction. Therefore, not covered under this sub-clause also;

(xv) Last sub-clause covers the cases of 'demolition and wracking services' and the instant case of 'land development' does not require any such kind of 'demolition/wrecking' resultantly not covered under this sub-clause also;

(xvi) In view of the above, it is clear that impugned case of 'land development' would not fit into any sub-clauses of 'site formation' category *qua* Section 65(105)(zzza), ibid. Hence, demand is not sustainable;

(xvii) Taxability under 'site formation' attracts only when those specified activities were undertaken independently and not as part of any other composite work. This is because if such works are held to be taxable under the site formation service irrespective of whether carried our independently or part of composite work, then every such construction work would involve the activity of site formation, which is separately taxed in other category. Same position was clarified by CBEC vide its Circular No. 123/5/2010-TRU, dated 24.5.2010;

(xviii) In the instant case, 'land development' activity was not carried out independently and part of composite contract for carrying out the villa

construction/sale. This fact was fortifies from the Para 'E' of Agreement of sale (AOS). Therefore, 'land development is not taxable under the category of 'site formation';

(xix) Judicially also it was held that carrying out the activities that may cover under the category of 'site formation' if taken as part of any composite work then same cannot be taxed under the category of 'site formation' *qua* Section 65(105)(zzza), ibid. few of judgments are as follows:

- M. Ramakrishna Reddy v. CCE & Cus, Tirupathi 2009 (13) S.T.R. 661 (Tri.-Bang.)
- Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553 (Tribunal)

(xx) Before going into the discussion as to whether impugned activity is works contract or not, it is worthwhile to keep in the mind the fundamental principle of works contract is that it is an composite agreement for transfer of property in goods by accretion together with rendition of labour/service. And further it is well recognised naturally, lawfully and explicitly so in Central and State legislation as well that Works contract is a composite, indivisible, distinct and insular contractual arrangement, a specie distinct from a contract for mere sale of goods or one exclusively for rendition of services. And the above principles are flown from unvarying series of Apex court rulings *inter alia* the following:-

- State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd — (1958) 9 STC 353 (SC);
- Gannon Dunkerley & Co. and others v. State of Rajasthan and others (1993) 088 STC 0204;
- Builders Association of India v. Union of India — (1989) 2 SCC 645;
- Bharat Sanchar Nigam Ltd. v. Union of India — 2006 (2) S.T.R. 161 (S.C.);
- Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.);
- Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu — 2014 (34) S.T.R. 641 (S.C.)
- CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.);

(xxi) In view of the above principles laid down by the Apex court and invariable factual position that they are incorporating the various goods namely murrum, concrete, electrical poles, electrical wiring etc., in the execution of impugned activity of *'land development'* apart from exertion of labour, the impugned activity shall be treated as species of works contract;

(xxii) It is settled law that in case of execution of works contract property in goods involved therein would get transferred through accretion. And in the instant case Noticee incorporated the goods namely murrum, concrete, electrical poles, electrical wiring etc., therefore it is clear case that Noticee transferred the property in goods to their customer while undertaking the impugned activity and undisputedly exerted the labour for execution of impugned activity thereby satisfying the species of works contract viz., supply of goods and services/labour;

(xxiii) Value assessed for VAT also includes the *'land development charges'* collected which further fortifies that 'land development' is species of works contract;

(xxiv) From the provisions of 'Works Contract Service' in the Finance Act, 1994 it is clear that only specified activities of 'works contract' are intended to tax and not every contract of 'works contract' like therein VAT provisions. Hence in order to tax under the category of 'works contract', activity shall fall in the list of works specified therein. And the instant case of 'land development' is not falling under any of such specific works since:-

- It does not involve any work of 'erection, commissioning or installation' etc., accordingly sub-clause (a) fails;
- 'Land development' does not involve any construction of building/civil structure accordingly sub-clauses (b), (c) & (d) fails on this count;
- Similarly sub-clause (e) also fails in the instant case as there is no execution of any turnkey projects/EPC contracts;

(xxv) Therefore, the impugned activity is not liable under the category of 'WCS';

(xxvi) Composite contracts can be taxed only under the category of 'Works contract service' *qua* Section 65(105)(zzzza), ibid and not under any other categories including 'site formation'. Reliance in this regard was placed on Hon'ble Supreme court decision in CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.). That means service element in the works contracts other than those covered under the specified category of 'Works Contract Services (WCS)' is not taxable;

(xxvii) Since there is a specific category for 'works contract' but Parliament has in its wisdom not covered the works contract in relation to 'land development', the same cannot be taxed under any other category of services. In this regard, reliance was placed on the decision of the Hon'ble Tribunal in the case of Dr. Lal Path Lab Pvt. Ltd. Vs Commissioner of C. Ex., Ludhiana 2006 (004) STR 0527 Tri.-Del and

same was Affirmed in 2007 (8) STR 337 (P&H.) wherein it was held that *"What is specifically kept out of a levy by the legislature cannot be subjected to tax by the revenue administration under another entry"*. Therefore, demand of service tax on 'land development charges' is not sustainable;

(xxviii) As stated in background facts, from 2012, they stopped entering separate agreement for 'land development' since land was already developed by that time and villas are in semi-constructed/finished stage (including villas not booked at that time). Accordingly, sale deed was being entered covering the both portion of land & semi-constructed villa/house and stamp duty was paid;

(xxix) The impugned SCN does not dispute the above fact that sale deed was entered conveying the title of semi-finished villa/house along with land but proposes to tax component of semi-constructed component after alleging that (vide Para 3.2) *"It appears what is transferred by way of sale deed is a semi-finished construction and not merely land. However it is observed that M/s. KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi-finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands."*;

(xxx) Semi-finished villa/house represents the construction work already done prior to booking of villa/house by the prospective buyer. The work undertaken till that time of booking villa/house 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:

- Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.)
- CHD Developers Ltd vs State of Haryana and others, 2015 – TIOL-1521-HC – P&H-VAT

(xxxi) 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 villa/house 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 villa/house, 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;

(xxxii) Without prejudice to the foregoing, there is no service tax levy on sale of semi-finished villa/house as the same was excluded from the definition of 'service' itself;

(xxxiii) To be covered under the above exclusion the following ingredients shall be satisfied:

a. There should be transfer of title:

Transfer of title means "change in ownership". And in the instant case there is change in ownership from Noticee to their customer since after execution of 'sale deed' customer is the owner of "said immovable property" thereby this condition is satisfied.

b. Such transfer should be in goods or immovable property:

What constitutes immovable property was nowhere defined in the provisions of Finance Act, 1994 or rules made thereunder. It is pertinent to refer the definition given in section 3 of Transfer of property act 1882 which reads as follows:

"Immovable property" does not include standing timber, growing crops or grass"

Further section 3 of General clauses act, 1897 which reads as follows:

"Immovable property" shall ***include land****, benefits to arise out of land, and* ***things attached to*** *the earth, or permanently fastened to anything attached to the earth.*

Reading of the above, undisputedly "land along with semi-finished villa/house" is immovable property thereby this condition was also met.

c. It is by way of sale, gift or other manner

In the instant case execution of 'sale deed' & payment of applicable stamp duty itself evidences that there is sale. Further it is pertinent to consider the definition given under section 54 of Transfer of property Act, 1882. In absence of definition of "sale" in the provisions of Finance Act, 1994 and relevant extract reads as follows:

"Sale" is a ***transfer of ownership in exchange for a price paid or promised or part-paid and part promised.*** *Sale how made — Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing,* ***can be made only by a registered instrument****.*

In the instant case also there is transfer of ownership and price was also paid (part of the price is promised to pay) and transfer was made by executing 'sale deed' which is validity registered with stamp authorities. Therefore, undoubtedly there is sale thereby this condition was also met.

d. Merely

Undoubtedly 'sale deed' was executed to transfer the title in immovable property only and such transaction (sale of immovable property) does not involve any other activity namely construction activity as the same done entering separate agreement Mis-constructed by the impugned SCN.

(xxxiv) Therefore, all the above conditions were satisfied in the instant case thereby making the transaction falling under said exclusion and hence amounts received towards 'agreement of sale' are not subjected to service tax;

(xxxv) If two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words, the discernible portion of the transaction, which constitutes a transfer of title in immovable property would be excluded from the definition of service by operation of the said exclusion clause while the service portion would be included in the definition of service. In the instant case, it was well discriminated the activity involved & amounts received towards Sale of "land along with semi-finished villa" ('sale deed' separately) and Construction activity (by executing construction agreement);

(xxxvi) Whatever the activity involved & amounts received towards construction agreement was suffered service tax and again taxing the associated transaction alleging that construction was involved is not warranted under the Finance Act, 1994 more so in case when there is clear separation/bifurcation/vivisection of activity involved & amounts received towards such associated transactions from the activity of construction;

(xxxvii) Without prejudice to the foregoing, even assuming 'land development' activity is liable for service tax, it humbly request to allow the benefit of paying tax @4.8% in terms of 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 – as it is specie of works contract;

(xxxviii) Even assuming 'land development charges' taxable, it is submitted that for the period 01.07.2012, adopting the principles of 'Bundled service' u/s. 66F of Finance Act, 1994, same shall be construed as 'works

contract' and tax shall be levied only @40% on the amount received in terms of Rule 2A of Service tax (determination of value) Rules, 2012;

(xxxix) Construction agreement is being entered for the construction work to be undertaken including construction of common amenities/facilities like club house, CC roads, street lighting, landscaped gardens etc., and there is no bifurcation on the amounts towards common amenities/facilities. And Noticee is paying service tax on the amounts received towards this agreement adopting the taxable value as per Rule 2A of Service tax (determination of value) Rules, 2006. All these facts are undisputed in SCN also;

(xl) Construction of common amenities like club house, CC roads, street lighting, landscaped gardens etc., requires both materials/goods (Murrum/clay, cement, concrete, rocks etc.,) and also the labour exertion in executing the said construction. The Common amenities/ facilities constructed would be transferred to society/ association that is being formed by all owners of villa in the impugned project. As the society/association (which is in turn owned by all customers) is owner of the same, the cost incurred for the construction is being recovered from each & every customer;

(xli) The impugned SCN propose to deny the abatement citing that transfer of property is not to individual and hence not a 'works contract'. In this regard, it is submitted that common amenities/faculties constructed are being transferred to society/association which is in turn owned by customers/individuals only and they does not have any ownership over it. Further, it is well settled principle that society/association formed by group of people are not different and both are one & same. That being a case, whatever the transfers made to society/association is nothing but transferred to individual customers. Hence SCN averment that property in goods is not transferred to individual customers is not correct;

(xlii) The entire definition of 'works contract' (either before 01.07.2012 or thereafter) does not provide that transfer should to individual/ customer/contractee and what all it requires only the transfer of property that may be to customer/contractee or any third person and such transfer should be leviable to VAT, all these ingredients are satisfied in the instant case inter alia property in goods incorporated was transferred

to society/association and VAT was levied & paid also. Hence SCN averment is not correct;

(xliii) Further, 'residential complex' construction falls within the realm of 'WCS' and the expression "residential complex' was defined under Section 65(91a), ibid to include 'common amenities/facilities'. On conjoint reading of this, it is clear that construction of 'common amenities/facilities' also specie of 'works contract'. Therefore, averment of SCN goes contrary to this and hence not valid;

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

a. Corpus fund which is collected & totally kept in separate bank account and transferred to society/association once it is 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 Noticee does not retain any amount out of it; this deposit is collected & remitted as per the statutory provisions of AP Electricity Reform Act 1998 read with rules/regulations made thereunder;

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;

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

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

(xlvi) Judicially also it was held that above charges are not to be included in taxable value and placed reliance on ICC Reality & Others Vs CCE 2013 (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;

(xlvii) With regard to invocation of larger period of limitation, they submitted that suppression means not providing information which the person is legally required to state, but intentionally or deliberately not stated. As stated in factual matrix there was continuous intimation (from year 2010) regarding the compliance being made from time to time and repeated requests were made asking to confirm their understanding. Letters were filed giving the detailed breakup of amounts collected, amounts offered to tax & not offered (excluded) to tax. At no point of time, Department responded/rebutted to the above intimations/ requests;

(xlviii) What is believed to be not taxable/leviable as backed by their legal understanding was well put forth before the authorities in the year 2010 i.e. at the time of beginning their compliance itself and subsequently also. Thus, full facts of subject SCN were voluntarily disclosed by them without any enquiry/request from the Departmental authorities and they had never hidden any fact from the officers of Department and subject matter of present SCN was known to the Department before the beginning of SCN period itself as evident from the corresponded referred above;

(xlix) Not objecting/responding at that time which gave vehement belief that understanding & compliance made is in accordance with the law and but now that is after expiry of nearly 5 years coming out with the present SCN with illusory & baseless allegation to invoke larger period of limitation and proposing to punish them for the failure of Departmental authorities is not valid in the eyes of law. In this regard reliance was placed on the decision of the Hon'ble Supreme Court in the case of Pushpam Pharmaceuticals Company Vs Collector Of C. Ex., Bombay 1995 (78) E.L.T 401 (S.C);

(l) Most of the builders/developers across the country are not at all paying service tax (especially on villas constructions) and there were serious doubts expressed on the applicability of service tax and customers are also very reluctant to reimburse citing the above practice of non-payment by other similar builders. Judicially also it was held that construction of villas are not subjected to service tax as submitted supra;

(li) There was lot of confusion on the liability of builders on the applicability of service tax and was challenged before various courts and courts also expressed different views and most of the cases in favour of tax payer. For instance, recently the Hon'ble High court in case of Suresh

Kumar Bansal v. UOI 2016-TIOL-1077-HC-DEL-ST held that construction contracts are not subjected to service tax;

(iii) Further, taxability of contracts involving immovable property was also subject matter of dispute during the subject period. There were contrary judgments of the Supreme Court at such point of time and which was finally settled by larger bench of Supreme Court in the year 2014 as reported in Larsen & Toubro Ltd. v. State of Karnataka -2014 (34) S.T.R. 481 (S.C.). The issue of classification of indivisible contracts under 'COCS'/'WCS' was in dispute. Courts expressed different views, referred to larger bench and finally settled by Supreme Court in the year 2015 in favour of tax payer as reported in Commissioner v. Larsen & Toubro Ltd. — 2015 (39) S.T.R. 913 (S.C.). Apart from the above difficulties, construction industry was in slump (especially in erstwhile state of Andhra Pradesh due to state bifurcation issue) and builders were facing huge financial problems/difficulties;

(iii) Despite above challenges/doubts/confusion, they voluntarily paid all service tax dues within the due date before the intervention of revenue department. There is no evasion of tax. Therefore, in the above background, intension to evade or delay the payment cannot be attributed. Further differentiation shall be made between the assessee who is voluntarily complying with the law and paying all dues despite of doubts/confusion/challenges etc., and assessee who is not at all complying with the law despite knowing his liability. Giving equal punishment for errant assessee and non-errant assessee shall be best avoided. Hence in view of above factual & legal matrix, larger period of limitation is not invokable;

(iv) The present SCN arises due to difference of interpretation of provisions between them & revenue. Further, various letters were filed before Department authorities, who never objected/responded on the compliance made by them. Not objecting the compliance made & taking nearly 6 months time after investigation to arrive their view/conclusion fortifies that subject matter_is plausible for different interpretations and involves in complexities in the determination of taxability. Thus it is pure case of interpretational issue under which circumstances larger period of limitation cannot be invoked. In this regard reliance was placed on the decision of the Hon'ble High Court of Gujarat in the case of CCE v. Poonam Plastics Industries 2011 (271) E.L.T 12 (Guj);

(lv) Merely because they chooses an interpretation beneficial to him, malafide intension to evade payment of service tax cannot be attributed to them. Accordingly, larger period of limitation is not invokable. In this regard reliance was placed on the decision of the Hon'ble Tribunal in the case of Rangsons Electronic Solutions (P) Ltd v. CCE 2014 (301) E.L.T. 696 (Tri. - Bang.);

(lvi) They regularly paid service tax and duly filling ST-3 returns showing the all these particulars as required/permitted in the format prescribed in this behalf (Form ST-3 specified by CBEC). If they wants to suppress the fact with intent to evade the payment of taxes, they might not have disclosed the same in ST-3 returns. Further, allegation of impugned SCN that they had not disclosed the relevant details/information to the department was not factually correct and requires to be set aside. In this regard, they placed reliance on the following case laws:

- Shree Shree Telecom Pvt Ltd., Vs. CCE Hyderabad [2008 (232) E.L.T. 689 (Tri. - Bang.)
- Sopariwala exports pvt. Ltd v. CST 2014 (36) S.T.R. 802 (Tri. - Ahmd.)
- Bajaj Hindusthan Ltd v. CCE 2014 (33) S.T.R. 305 (Tri. - Del.)

(lvii) As stated supra various matters involved in the issue were referred to larger bench. When the matter(s) were referred to larger bench, extender period of limitation cannot be invoked. Reliance was placed on the following case:-

- Continental Foundation Jt. Venture v. CCE, Chandigarh-I [2007 (216) E.L.T. 177 (S.C.)
- J.R. Construction CO. v. CCE & ST 2016 (41) S.T.R. 642 (Tri. - Del.)
- Megafine Pharma Pvt Ltd Vs CCE & ST 2014-TIOL-1312-CESTAT-AHM
- CCE v. Mapro India Ltd 2015-TIOL-2554-CESTAT-MUM

(lviii) When the issue was disputable and at one point of time, the view of the courts was in favour of the assessee, question of invocation of extended period of limitation does not arise. Reliance in this regard was placed on the decision of the Hon'ble High Court of Ahmedabad in the case of CCE v. Saurashtra Cement Ltd 2016-TIOL-365-HC-AHM-CX;

(lix) Long list of familiar judicial pronouncements holding impugned two grounds of non-payment of Service Tax and failure to file correct ST-3 returns by themselves totally inadequate to sustain allegation of wilful

misstatement/suppression of facts and placed reliance on the decision of the Hon'ble Tribunal in the case of Punj Lloyd Ltd. V. CCE & ST 2015 (40) S.T.R. 1028 (Tri. - Del.);

(lx) The averment of SCN that, lapse would not have come to light but for the investigation of department, standing alone cannot be accepted as a ground for confirming suppression, Mis-statement or mis-declaration of facts. More so considering the fact that the very objective of conducting the Audit of records of an assessee is to ascertain the correctness of payment of duty, availment of CENVAT credit, etc., any shortcomings noticed during the course of Audit, itself cannot be reasoned that the deficiency was due to mala fide intention on the part of assessee. In this regard, reliance was placed on the decision of the Hon'ble Triubnal in the case of Landis + GYR Ltd. v. CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata);

(lxi) They are under bonafide belief that compliance made by them not in accordance with the law and whatever believed to be paid was paid. It is well settled legal position that suppression of facts cannot be attributed to invoke longer period of limitation if there is bonafide belief. Same was flown from the following case laws:-

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

(lxii) Further, they placed reliance on the following case laws:

- Continental Foundation Jt. Venture CCE, 2007 (216) E.L.T 177 (S.C)
- CCE, Chemphar Drugs & Liniments 1989 (40) E.L.T 276 (S.C)
- Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)
- Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.)

(lxiii) All the entries are recorded in books of accounts and financial statements nothing is suppressed hence the extended period of limitation is not applicable and placed reliance on the following case laws:

- LEDER FX Vs DCTO 2015-TIOL-2727-HC-MAD-CT
- Jindal Vijayanagar Steel Ltd. v. Commissioner — 2005 (192) E.L.T. 415 (Tri-bang)

(lxiv) In case demand stands confirmed, same shall be re-quantified after allowing the benefit of cum-tax under Section 67(2) of Act, ibid since they

had not collected service tax from the buyer to the extent of alleged short/non-payment of service tax. 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. Reliance in this regard was placed on the following case laws:-

- P. Jani & Co. vs. CST 2010 (020) STR 0701 (Tri.-Ahmd).
- Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del
- Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590
- BSNL Vs CCE, Jaipur 2011 (24) S.T.R 435 (Tri-Del)

(lxv) Without prejudice to the foregoing, Noticee submits that all the grounds taken for extended period of limitation above is equally applicable for penalty as well;

(lxvi) There is no intention to evasion of tax and what are all believed to be payable was paid (Rs.19,00,736/-) within time, which is undisputed. Hence, no penalty shall be imposed to that extent;

(lxvii) The impugned show cause notice had not discharged burden of proof regarding the imposition of the penalty under Section 78 of the Finance Act, 1994. No penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner prescribed by the statute. Reliance in this regard was placed on the following case laws:-

- Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All)
- Hindustan Steel Ltd. v. State of Orissa —1978 (2) E.L.T. (J159) (S.C.)
- CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.L.T 661 (S.C)
- Commissioner v. R.K. Electronic Cable Network — 2006 (2) S.T.R. 153 (Tribunal)
- Sundeep Goyal and Company v. Commissioner — 2001 (133) E.L.T. 785 (Tribunal)

(lxviii) With regard to proposal to impose penalty under Section 77 of Finance Act, 1994, they submitted that they had registered with Department vide STC No. AAHFK8714ASD001 w.e.f. 25.04.2010 and submitted copy of the same and now it is settled law that builders/developers are not liable for service tax upto 30.06.2010 and same position was clarified by CBEC in its circulars & confirmed judicially also. That being a case, they registered well within the time

limit as per Section 69 of Finance Act, 1994 in fact before they become liable. Therefore, no penalty can be imposed under Section 77, ibid;

(lxix) The alleged short/non-payment of service tax was due to various reasons *inter alia*:

a. Given understanding that compliance made by Noticee is in accordance with the law;
b. Whatever believed as taxable was duly paid voluntarily;
c. Various letters/disclosures were made to the department informing their compliance and requested for confirmation also;
d. There were divergent views of Courts over the classification of indivisible contracts, taxability of transaction involving immovable property etc.,;
e. There was enough confusion prevalent on the applicability of the Service tax among the industry;
f. Matters were referred to larger bench at various instances;

(lxx) 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 and placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of CST, Vs Motor World 2012 (27) S.T.R 225 (Kar);

(lxxi) All grounds are without prejudice to one another and reliance in this regard was placed on the decision of the Hon'ble High Court of Bombay in the case of Bombay Chemicals Pvt Ltd Vs Union of India 1982 (10) E.L.T 171 (Bom);

(lxxii) In view of the above, they requested to drop the proceedings initiated in the Show Cause Notice.

DISCUSSIONS & FINDINGS

11. I have examined the notice issued under O.R.No.99/2016 dated 22-4-2016, relied upon documents, case records and also the written submissions made by the assessees at the time of personal hearing. The issues to be decided before me are that whether

- The demand of service tax on the services " works contract services" and "site formation services" is proper and the services are properly classified and the assessees are liable to pay the same or not
- The extended period is invokable or not
- The interest and penalties are payable by the assessees or not
- The cum tax benefit can be extended or not

12. It is alleged in the notice that the assessees failed to assess tax properly and misclassified the services under " residential complex services" instead of

classifying the same under "works contract services" during the year 2011-12 and later they classified the same under " Works Contract services" and paid tax liability accordingly. It was further alleged that they failed to file return for the period Oct,2010 to Mar,2011 and thus not paid service tax liability during this period. It was alleged that the assessees entered into agreements with the buyers for sale of land, development charges for laying of roads, drains, and parks etc.. and towards cost of construction that include water and electricity connection and for other amenities. It was alleged in the notice that the cost of "Land development charges" were not included in the cost of construction in some cases and partially included in some cases. It was alleged in the notice that the assessees failed to classify " Land development charges" under any of the category of services and hence the same are classified under " site formation services". It was alleged in the notice that the cost of land development charges are not included in the cost of construction in respect of some of clients/customers and included in some cases. The activity involved, inter-alia, in the land development is preparation of site suitable for construction , for laying of roads, drainage and for water pipes etc.. Thus it was alleged as a separate activity different from construction of villas. It was alleged in the notice the activity was classified under " site formation" services for the reason that the activity did not involve transfer of property and from the insertion of negative list in terms of Section 66B of the Finance Act,1994 the services relating to Land development charges were not listed in the negative list and thus taxable. It was further alleged that under the guise of sale of land , semi-finished villas were also sold by claiming exemption by treating these type of transactions as sale of land and underpaid the service tax on these transactions. The amount of service tax is alleged to be payable in this type of transactions and demand was made accordingly. It was further alleged that service tax on other services provided in connection with construction of villas was also not paid by the assessees. They contravened various sections of Finance Act,1994 and each contravention is specified in the notice. Hence service tax liability of Rs 14,35,330/- under site formation services, 40,80,581/- under works contract services and 7,01,874/- under other taxable services was arrived at and demanded in the notice.

13. Assesses/M/s KMH in their written reply submitted at the time of personal hearing made the following submissions:

13.1 They contested that sale of land in the absence of proper mechanism for identification of service element is not taxable and relied on the case Suresh Kumar Bansal Vs. UOI 2016 43 S.T.R. 3 (Del.) and contested that construction of villas can not be subjected to Service tax at all as the construction of villas can not be treated as residential complex as villa is not a building containing more than 12 units.

13.2 Further it was contested that the Villas constructed are being used for personal use and falls under exclusion portion of the definition of the "Residential complex" defined u/s 65(91a), ibid. hence no service tax. Relied on CBEC circular 108/2/2009-S.T., dated 29.01.2009 and M/s Virgo Properties Pvt Limited Vs CST, Chennai 2010-TIOL-1142-CESTAT-MAD; For period 01.07.2012 onwards, same is exempted under entry No. 14(b) of Notification No. 25/2012 ST dated 20.06.2012 as amended; and referred Macro Marvel Projects Ltd. v. Commissioner — 2008 (12) S.T.R. 603 (Tribunal) maintained by SC in 2012 (25) S.T.R. J154 (S.C.); and CBEC circular 108/2/2009-S.T dated 29.01.2009.

It is observed from the definition of "Residential complex" that M/s KMH misconstrued the definition in his favour and trying to overlook the definition for the benefit service tax. Extracts of the definition are reproduced here under

> **Section 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;
>
> (b) "residential unit" means a single house or a single apartment intended for use as a place of residence;]

It is clear from the above definition that residential unit means a single house or a single apartment intended for use as a place of residence and as per the

definition the project "Bloomsdale" met all the parameters of the definition such it consisted more than 12 units with common areas and facilities such as parking places, parks and water supply etc... It is evident that M/s KMH are falsely contesting the issue for the sake of escaping the service tax liability on the construction activities undertaken by them in "Bloomsdale" project. The case laws relied upon by them are not factually applicable as the facts are different and distinguishable with the facts of the present issue before me. Hence the tax demanded under works contract services is correct and liability demanded in the notice is payable by them.

14. M/s KMH contested that "**Land development charges**" are not falling under "site formation and clearance, excavation and earthmoving and demolition" as none of the works specified in the definition were carried out by them in the Bloomsdale project. It was also contested that the services do not even fall under works contract service and stated that there is no liability of service tax on the services such as electrical cabling, laying roads, drainage lines water lines etc.,. It was stated that both labour and material are involved in these activities. It was contested that the notice was issued with baseless allegation that the services provided such as electrical cabling, laying roads, drainage lines water lines fall under "site formation and clearance, excavation and earthmoving and demolition". They contested that the notice is issued without any merit and needs to be quashed and relied upon the case Crystic Resins (India) Pvt. Ltd., Vs CCE, 1985 (019) ELT 0285 Tri.-Del and United Telecoms Limited vs. CCE, Hyderabad-2011 (21) S.T.R. 234 (Tri-Bang). I find that these case laws are delivered with different factual situations and hence are distinguishable with the facts of the present case.

15. Further to afore said contentions , M/s KMH further contested that taxability question arises only when site formation is done independently not as a part of composite contracts and relied on the Board's circular 123/5/2010-TRU, dated 24-5-2010. In this connection I observe that the contents of the circular are misconstrued by the assesses in their favour as the issue dealt in the circular dealt laying of cable along the road side. In the present case the services are not mere laying of cables alone and hence the assessees contention is not tenable. The assessees vehemently argued that the agreements such as " sale of land", "land development charges" and " construction charges" are mutually co-existing and inseparable and the activity of land development is not

a "site formation service" if taken as a part of composite work and relied on few judgements M. Ramakrishna Reddy v. CCE & Cus, Tirupathi 2009 (13) S.T.R. 661 (Tri.-Bang.); Commissioner v. Vijay Leasing Company - 2011 (22) S.T.R. 553 (Tribunal);

16. Assessees further contested in their reply that the impugned " land development services" shall be treated as species of "works contract" and relied upon various case laws in support of theirs view. It was stated that common amenities were constructed with the material such as murram, concrete and electrical poles, electrical wiring etc., and used labour and transferred the property in goods to their customers and hence satisfies the definition of "works contract" services. The definition of works contract is reproduced hereunder

> (zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.
>
> ***Explanation***. — For the purposes of this sub-clause, "works contract" means a contract wherein, —
>
> (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
>
> (ii) such contract is for the purposes of carrying out, —
>
> (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
>
> (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
>
> (c) construction of a new residential complex or a part thereof; or
>
> (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
>
> (e) turnkey projects including engineering, procurement and construction or commissioning *(EPC)* projects;

17. From the above definition it clearly manifested that in order to classify " Land development charges" under "Works Contract services" two conditions are required to be satisfied Ist there should be transfer of property in goods and the activities to be performed under (a) to (e) listed in

the definition. Hence the common area and amenities even though constructed with murram and concrete and usage of labour it is not transferred in goods to any individual and the common area and amenities are used by the group of individuals and hence the same can not be treated as species of " Works contract services". In fact this is the allegation leveled against them in the notice. The assessees submitted that there is a transfer of property in goods in respect of common amenities provided and the amounts collected under " land development services" as they said that they paid VAT on these charges and hence it is a species of "Works Contract services". Again in their written reply it is again contested that (vide para 23 onwards) Land development services are not at all covered under any of the works defined under " Works contract services" and hence the land development services do not fall under works contract services and referred to Apex court case law Supreme court decision in CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.). It is noted that the assessees lacks clarity on his submissions as they say that the land development services do not fall under " site formation services" and they say that it forms species of " works contract service" and again they say that its not a works contract services as none of the works specified in the works contract service was performed for land development activities (reference to para 24 to 27). Again vide para 34 of their reply they requested that if at all land development services are to be treated as taxable the same may be classified under Works contract and requested to extend the benefit of abatement or benefit of paying @ 4.8% in terms of 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 – as it is specie of works contract. Further they contested that the construction of common amenities involves the transfer of property and it is " works contract" service only and claimed that they correctly assessed at abated rates. They further argued that if 'land development charges' are taxable, adopting the principles of 'Bundled service' u/s. 66F of Finance Act, 1994, same shall be construed as 'works contract' and tax shall be levied only @40% on the amount received in terms of Rule 2A of Service tax (determination of value) Rules, 2012.

18. From the above submissions and contentions it is noticed that they lack clarity and trying to negotiate tax liability and circumvented the issue with divergent contentions and relying on irrelevant case laws. It is noticed that they wish to scheme on service tax liability as much as possible with

illogical contentions. I find that in terms of Section 65 A, services are classified with more relevant description of services. Extracts of Section 65 A are reproduced here under

> **Section 65 A : Classification of taxable services.** — (1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65;
>
> (2) When for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-
>
> (a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
>
> (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
>
> (c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.]
>
> [(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.]

18.1 In terms of 65(A) 2(a) "land development services" gives more specific description under "Site formation and clearance, excavation and earth moving and demolition" service and the works involved are leveling the land and making it suitable for construction of villas and horizontal drilling for laying of drainage lines and water pipes and cables etc., apart from constructing common amenities such as park, current poles and club houses. Since majority works involved are relatable to "Site formation and clearance, excavation and earth moving and demolition" services, the land development services are rightly classified under the same. As requested by the assessees, land development services can not be classified either under " residential complex services" or under "works contract services" (after 1/7/2007) as they collected charges under "land development services" separately and hence are rightly classifiable under "Site formation and clearance, excavation and earth moving and demolition" services. In this context I rely upon the case Alokik Township Corporation *Versus* Commr. Of C. Ex. & S.T., Jaipur-I (Tri. - Del.) 2015 (37) S.T.R. 859 *Demand – Land Development for housing project - Demand raised under Construction of Complex service upto 30-5-2007 and under Works Contract service category w.e.f. 1-6-2007 - HELD : Development of land for township not covered by definition of Construction of Commercial Complex*

service in Section 65(105)(zzzh) read with Sections 65(39a) and 65(91a) of Finance Act, 1994 or by definition of Works Contract service in Section 65(105)(zzzza) ibid - Service Tax demand not sustainable - Impugned order set aside - Sections 65(39a), 65(91a) and 65(105)(zzzza) of Finance Act, 1994.

19. Hence in view of the above the land development services can not be classified either under "*Construction of Complex service" or under "Works Contract service"*. I also find that from the definition under Section 66F the entire set of services under "land development services" should be bundled under service that is "Site formation and clearance, excavation and earth moving and demolition" services. Relevant extracts of Section 65 F are reproduced hereunder

> **SECTION [66F. Principles of interpretation of specified descriptions of services or bundled services.** — (1) Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.
>
> *['Illustration*
>
> The services by the Reserve Bank of India, being the main service within the meaning of clause (b) of section 66D, does not include any agency service provided or agreed to be provided by any bank to the Reserve Bank of India. Such agency service, being input service, used by the Reserve Bank of India for providing the main service, for which the consideration by way of fee or commission or any other amount is received by the agent bank, does not get excluded from the levy of service tax by virtue of inclusion of the main service in clause (b) of the negative list in section 66D and hence, such service is leviable to service tax.].
>
> (2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.
>
> (3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely :—
>
> (a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the ***single service which gives such bundle its essential character;***
>
> (b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.
>
> ***Explanation.*** — For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.]

It is imperative from the above section that " land developments services" shall be treated as single service due to its nomenclature and essential characteristics even though it contains various elements . Hence the demand under Site

formation and clearance, excavation and earth moving and demolition is correctly set in the notice and I confirm the tax liability under the same.

20. The main demand under " works contract services" , it is noticed that the assessees undervalued the services charges by not including cost of construction of semi finished units by claiming the same as sale of land and there by claimed ineligible exemption. The contentions of the assessees that (para 30) that "*undivided portion of land along with semi finished villa/ house is not chargeable to VAT and it is mere sale of immovable property*" and cited the judgement Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.) The assesses again scheming with irrelevant arguments that no service tax is payable on these transactions as it was not falling under " works contract services". I find that there is no basis in their argument and the definition is totally misconstrued in their favour to get benefit from paying service tax. I confirm the tax liability demanded in the notice under "works contract service".

21. The contention by M/s KMH that the demand of service tax in respect of "other services" is not tenable in the notice as it was claimed that the amounts were received towards Corpus fund, Electricity deposit, water charges and towards service tax. However it was observed that the assessees failed to submit documentary evidence in support of their claim and hence cannot be considered as non-taxable. Hence, in the absence of any documentary backing the amounts collected for other services are taxable and I hold that that tax is payable on these charges. In this connection I rely on the judgment of Delhi High Court in the case Gokaldas Images Ltd Vs Union Of India reported in 2007 (7) S.T.R. 347 (Del.) where in Delhi High Court held that

> *WP (C) No. 5916/2003* : The grievance of the petitioner is that the quota could not be utilised due to power cut and the appeal was heard on 5-11-1998 by the first appellate authority while the order was passed in January, 2000 and signed on 15-11-2000. There is undoubtedly delay on the part of the first appellate committee in passing the order but the matter has also been considered by the second appellate committee and the petitioner had *failed to file necessary documentary evidence.* Thus, I see no reason to interfere in this case.
>
> (xv) *WP (C) No. 16102/2004* : The plea is frequent power failure in Okhla Industrial Area and the printing job at Jodhpur being affected due to cold weather and less sunshine. *No documentary evidence was produced* and the findings were, thus, correctly arrived at by the first appellate committee and the second appellate committee rejecting the plea of the petitioner. Thus, the matter, in my considered view, calls for no interference.

(xvii) *WP (C) No. 13154/2004* : The petitioner has pleaded frequent court/ customs strike and load shedding by the electricity authority. *Documentary evidence was not produced* and additional pleas were sought to be added before the second appellate committee, which has considered all the matters and rejected the same which, in my considered view, do not call for any interference.

22. M/s KMH contended that in case the demand is confirmed , they may be given the benefit of cum-tax under section 67(2) of Finance Act,1994 and relied on various case laws in their favour. It is observed that the assessees have not collected values including service tax element in many cases. They collected service tax separately and are filing returns. They are aware of the statutory provisions and are billing service tax separately where ever they collected towards taxable services. Hence in some cases separate collection of taxes and in some cases cum tax benefit can not be the practice. In fact the demand notice was issued against them as they suppressed the facts of receipt of taxable amounts with intent evade payment of taxes and claiming ineligible exemptions. In this context I rely upon the following case law

The Settlement Commission in the case of M/s TIRUCHENGODE LORRY URIMAIYALARGAL SANGAM , reported in 2016 (41) S.T.R (343) (Settle Comn)(Chennai) held that *"The Commissioner conceded that the claim of exemption from Service Tax on the rent collected for the vacant land prior to 30-6-2010, was correct in law subject to production of documentary evidences. He further stated that threshold exemption of Rs. 8/10 lakhs in terms of Notification No. 6/2005-S.T., dated 1-3-2005 and Notification No. 33/2012-S.T., dated 20-6-2012 is applicable only for the aggregate value of all such taxable services. Since the aggregate turnover was more than 8/10 lakhs in the preceding Financial Years for all the services provided by the applicant, they are not eligible for exemption. In respect of claim for cum-tax benefit the Commissioner stated that the applicant did not initiate any effort to recover Service Tax element from their service receivers and in such scenario extending the benefit of cum-tax benefit does not arise and mere failure on the part of the applicant to collect Service Tax separately from their service receivers and later claiming cum-tax benefit would result in the deprival of legitimate revenue due to the Government"*

In view of the above case law I find that their request for cum-tax benefit can not be considered and extended.

23. M/s KMH contested that Interest and penalties are not imposable as extended period is not invokable in theirs case and stated that they paid an amount of Rs 19,00,736/- and the same amount was only payable and paid the same with in the statutory time and burden to prove imposition of penalty was not discharged by the department and relied on a case law Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) and further stated that it involved interpretation of law and hence penalties are not imposable and relied on CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.L.T 661 (S.C) in support of their contention. In this regard it was stated by them that they are new to service tax provisions and requested benefit under Section 80 of the Finance Act,1994. I find that their contentions are not acceptable as they were registered with the department and were discharging tax liability and filing, but for allegations made in the notice, ST-3 returns regularly.

> ERECON Versus COMMISSIONER OF SERVICE TAX, AHMEDABAD reported in 2016 (41) S.T.R. 538 (Tri. - Ahmd.) "*Heard both sides and perused the case records. Appellant was discharging tax liability up to September, 2004 and thereafter stopped making the payment of Service Tax No ST-3 returns was filed by the appellant after September, 2004. Once appellant was aware of the fact that service tax on the services provided was paid earlier, it can not be considered that there was no intention to evade payment of tax by suppression when appellant was not even filing the statutory returns of the tax which he was paying earlier. Accordingly, it is held that penalties under Section 78 of the Finance Act, 1994 is imposable. The case laws relied upon by the appellant are distinguishable on facts and are not applicable to the facts and circumstances of this case*".
>
> *FREE LOOK OUTDOOR ADVERTISING Versus COMMR. OF CUS. & C. EX., GUNTUR2007 (6) S.T.R. 153 (Tri. - Bang.)*
>
> *Demand (Service tax) - Limitation - Failure to file return - It was sufficient for invocation of extended period when there was no time limit for recovery of dues as per Section 73 of Finance Act, 1994. [para 5.1]*
>
> BOX & CARTON INDIA PVT. LTD. Versus COMMISSIONER OF C. EX., DELHI-IV 2008 (228) E.L.T. 85 (Tri. - Del.) "*Demand - Limitation - Extended period - Plea that Departmental officers visited the units on 27-3-2003 and SCN issued on 1-9-2004 for duty demand for short paid duty for period from 1-8-1999 to 31-3-2004 and duty demand for period from 27-3-2003 to 31-7-2003 time barred - Tribunal decision in 1999 (114) E.L.T. 429 (Tribunal) holding that knowledge of Department in respect of suppression of facts not relevant for computing limitation period of five years - Demand sustainable - Section 11A of Central Excise Act, 1944.*"

24. In the light of the above judgments I reject the plea of the assessees that extended period is not invokable as the full facts were voluntarily disclosed by them without any inquiry from the departmental authorities and claim that they

had not hidden any fact from the officers of the department is not acceptable and tenable. They have provided the information only after initiation of investigation by the department and it was discovered that the assessees were misclassifying their services with intent to evade payment of service tax. Since the assessees are aware of statutory provisions and have been collecting service tax and not paying the same to the exchequer and they have hidden these facts to the department and they are liable to pay penalty equal to amount of service tax short paid/not paid by them. The information was provided only after initiation of investigation against them and hence I do not find that they have recorded the information in the specified records as the issue is intent to evade payment of tax by misclassifying the services and as well suppressing the facts. Hence extended period is rightly invoked in theirs case.

25. Assessees requested to consider the benefit under Section 80 of the Finance Act,1994. It is observed that they have not shown any reasonable cause to consider their request for benefit under Section 80 of the Finance Act,1994. Hence the request of the assessees for benefit under Section 80 is rejected for the afore said reasons. In this connection I rely on the following case law in support of my view.

Gitanjali Gems Ltd. Vs Commissioner Of Service Tax, Mumbai-I reported in 2016 (43) S.T.R. 230 (Tri. - Mumbai) where in it was held that *"As regards the plea of the learned counsel for the appellant for setting aside the penalty imposed, on a specific query from the bench, it was stated that the appellant has not paid the entire amount of the service tax liability and the interest thereof. The appellant has only paid 50% of the amount of service tax liability. We find that the provisions of Section 80 cannot be invoked in this case as there being no discharge of service tax liability and interest thereof the penalty imposed on the appellant needs to be upheld as there is no justifiable reason or cause shown for setting aside the penalties"*

COMMISSIONER OF SERVICE TAX, MUMBAI Versus LARK CHEMICALS P. LTD. 2016 (42) S.T.R. 417 (S.C.) *"Penalty - Quantum of - Reduction under Section 80 of Finance Act, 1994 - Scope of - In view of judgment of Apex Court in Dharamendra Textile Processors at 2008 (231) E.L.T. 3 (S.C.), penalties imposed under Sections 76 and 78 ibid not reducible under Section 80 of Finance Act, 1994".*

26. In view of the above discussions and findings I pass the following order

ORDER

1. I confirm the demand of Rs. 14,35,330 /- (Rupees Fourteen lakhs thirty five thousand three hundred thirty Only) (including all cesses) being the service tax payable on Site formation Service during the

period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;

2. I confirm the demand of Rs. 40,80,581 /-(Rupees Forty lakhs eighty thousand five hundred and eighty one Only) (including all cesses) being the service tax payable on Works Contract Service during the period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
3. I confirm the demand of Rs. 7,01,874/-(Rupees seven lakhs one thousand eight hundred and seventy four Only) (including all cesses) being the service tax payable on other taxable Services during the period October, 2010 to March, 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
4. I appropriate amount of Rs 19,00,736/- (Nineteen lakhs seven hundred and thirty six only) paid towards service tax towards the service tax demanded at SI No (1) to (3) above;
5. I confirm the demand of Interest as applicable, on the amounts at Sl.No. (1) to (3) above under Section 75 of the Finance Act, 1994;
6. I impose equivalent Penalty of Rs 62,17,785/- (Rs Sixty two lakhs seventeen thousand seven hundred and eighty five only) on the amounts at SL No. (1) to (3) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;
7. I impose Penalty of Rs 10,000/- (Rs Ten thousand only) under Section 77(2) of the Finance Act, 1994 for delayed Registration

I extend the benefit of reduced penalty of Rs15,54,446/- in terms of Section 78 of the Finance Act,1994 to the assessees equal to 25% of the Service tax confirmed at (1) to (3) above if the service tax and interest confirmed are paid within 30 days of receipt of this order along with the amount of reduced penalty of Rs 15,54,446/-

30/12/16

(श्री वी. वसुधा प्रसादा राव,)
(V. VASUDHA PRASADA RAO)
संयुक्त आयुक्त
JOINT COMMISSIONER

To

M/s. Kadakia & Modi Housing,
5-4- 187/3 & 4, II Floor,
Soham Mansion, M.G.Road,
Secunderabad-500003

Copy submitted to the Principal Commissioner of Hyderabad Service Tax Commissionerate.

Copy to:

1. The Assistant Commissioner of Service Tax, Division-III, Service Tax Commissionerate, Hyderabad
2. The Superintendent of Service tax, Range-III A , Hyderabad Service Commissionerate, Hyderabad (He is directed to serve the order and obtain dated acknowledgement for record)
3. The Superintendent of Service tax, Anti-Evasion Gr-VIII, Hyderabad Service Commissionerate, Hyderabad
4. Master Copy / Office Copy.