(4)

FORM ST-4

Form of Appeal to the Commissioner of Service tax (Appeals)

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

BEFORE COMMISSIONER OF SERVICE TAX (APPEALS), KENDRIYA SHULK BHAVAN, 7TH FLOOR, L.B STADIUM ROAD, BASHEERBAGH, HYDERABAD-500 004

(1) Appeal No. _____ of 2017	
(2) Name and address of the Appellant	M/s. Kadakia & Modi Housing, 5-4-187/3 & 4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad-500 003.
(3) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	Joint Commissioner of Service Tax, Hyderabad-I Commissionerate, 3rd Floor, Kendriya Shulk Bhavan, Basheerbagh, L.B Stadium Road, Hyderabad-500004 [Order-In-Original No. 048/2016-(S.T) dated 30.12.2016]
(4) Date of Communication to the Appellant of the decision or order appealed against	07.02.2017
(5) Address to which notices may be sent to the Appellant	M/s Hiregange & Associates, "Basheer Villa", House No: 8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad – 500 034. **(And also copy to the Appellant)**
(5A)(i) Period of dispute	October 2010 to March 2015
(ii) Amount of service tax, if any demanded for the period mentioned in the Col. (i)	• Rs.14,35,330/- [Site Formation Service] • Rs. 40,80,581/- [Works Contract Service] • Rs. 7,01,874/- [Other taxable Service] Total: 62,17,785/-
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	NA
(iv) Amount of Interest	Interest u/s 75 of Finance Act, 1994.
(v) Amount of penalty	Rs.62,17,785/- of Penalty under Section 78 of the Finance Act, 1994 and Rs.10,000/- of Penalty under Section 77 ibid.
(vi)Value of Taxable Service for the period mentioned in Col.(i)	Rs.10,83,75,186/-
(6) Whether Service Tax or penalty or interest or all the three have been deposited.	Rs.19,00,736/- towards total service tax liability was paid & appropriated in order and same was adjusted towards mandatory pre-deposit in terms of section 35F of Central Excise Act, 1944
(6A) Whether the appellant wishes to be heard in person?	Yes, at the earliest
(7) Reliefs claimed in appeal	To set aside the impugned order to the extent aggrieved and grant the relief claimed.

Signature of the Appellant

BRIEF FACTS OF THE CASE:

A. M/s. **Kadakia & Modi Housing** (hereinafter referred as 'Appellant') *inter alia* engaged in sale of residential villas on their own land under the name & style of **'Bloomdale'**. They are registered with department vide STC No. AAHFK8714ASD001 w.e.f. 25.04.2010 (copy of ST-2 enclosed as annexure V)

B. Appellant initially executes Agreement Of Sale (AOS) for sale of residential villa and thereafter executes

i. Sale Deed (sample copies sale deed is enclosed as annexure XI), XII that gets registered and appropriate 'Stamp Duty' has been discharged on the same. Initially 'sale deed' was entered only for the portion of land value and separate agreement was entered in the name of 'land development charges' however from 2012 practice of entering separate agreement for 'land development charges' was dispensed with as the land was already developed by that time and started entering 'sale deed' for the semi-constructed villa along with land attached thereto.

ii. Construction agreement is being entered for the construction work to be undertaken for the said villa's (sample copies of construction agreements are enclosed as annexure XI, XII). This agreement includes construction of common amenities like club house, CC roads, street lighting, landscaped gardens etc.,

C. Appellant collects amounts from their customers towards:

i. Sale deed for sale of semi-finished villa along with land;

ii. Construction agreement (includes for *'common amenities/facilities'*);

iii. Other taxable receipts (additions/alternations works)

iv. Other non-taxable receipts (Corpus fund, electricity deposit, water deposit & service tax);

v. Taxes/duties (VAT, stamp duty, service tax etc.,);

vi. Land development charges (only during 2010-11, 2011-12, nominally in 2012).

Service tax Compliance & correspondence with department:

D. Appellant was given understanding that service tax is not liable and same was also clarified vide CBEC circular No. 108/02/2009-ST dated 29.01.2009. On this understanding, initially Appellant has not paid service tax and however with intent not to litigate and also in light of amendments took place in the year 2010, Appellant decided to pay service tax on the construction done from 01.07.2010 onwards.

E. The above understanding on the taxability prior to 01.07.2010 and after 01.07.2010 and compliance thereof was duly intimated to the department vide letter dated 16.08.2010 with specific request to revenue department on their understanding so that appropriate decision can be taken at Appellant end and same was followed-up vide letter dated 13.09.2010 (copy of both letters are enclosed as annexure VI, VII). But there was no response from the department.

F. Again vide letter dated 30.12.2011, Appellant intimated that service tax was paid under protest for the period 01.04.2011 to 30.09.2011 on the value attributable to the construction done after 01.07.2010 under the category of 'construction of complex service' (COCS) after adjusting the service tax payments previously made, if any (prior to 01.07.2010). And filed ST-3 return also (copy of ST-3 return for the period April 2011 to September 2011 is enclosed as annexure IX). Here again there is no response from the revenue department.

The above was done only on their sole understanding of law and because of this, Appellant repeatedly requested the revenue department to confirm their understanding but Appellant at no point of time received any communication from department.

G. As the department was not responding and Appellant has their own doubts, Appellant approached consultant for advised on the compliance to be made for service tax. As per the consultant advise, Appellant started paying service tax under protest on the amounts received towards 'construction agreements' & also on the Other taxable receipts (stated supra) under the category of 'Works contract service (WCS). Said fact of paying under protest & on the amounts received towards 'construction agreement' was intimated to department along with detailed statements showing the total receipts, amounts included in taxable value and excluded from it etc., was also submitted. For instance, for the period January 2012 to March 2012, letter dated 22.07.2012 was filed and similarly for the subsequent period also (copies of letter filed are enclosed as annexure-4. Here again it was specifically requested revenue department to confirm Appellant understanding and but no response again.

All these were done voluntarily and well before the intervention of revenue department.

H. And it was only after expiry of nearly 5 years from the date of filing letter asking for clarification/confirmation, officers of anti-evasion in the month of August 2015 sought various records, thereafter recorded statements and viewed that

i. Land development charges collected are liable for service tax under the category of *'site formation and clearance, excavation and earthmoving and demolition ('site formation' for short)';*

ii. Service tax is liable to be paid at full rate on *'common amenities/facilities* without any abatement;

iii. Other charges collected are liable for service tax;

I. Subsequently, Present SCN vide O.R.No. 99/2016-Adjn. (ST) (Commr) dated 22.04.2016 was served asking to show cause as to why:

i. An amount of Rs. 14,35,330 /- (including all cesses) being the service tax payable on Site formation Service (as per Enclosure WS-5 read with WS-3 & WS-4 to this 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/- (including all cesses) being the service tax payable on Works Contract Service (as per Enclosure WS-5 read with WS-3 & WS-4 to this 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/- (including all cesses) being the service tax payable on other taxable Services (as per Enclosure WS-5 read with Ws-3 & WS-4 to this 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/- paid towards service tax (as per Enclosure WS-5) should not be appropriated towards the service tax demanded at Sl 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 Financ 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;

J. Defence reply was filed (Copy attached as annexure-III) and appeared for Personal Hearing (Copy of PH recording is enclosed as annexure-II).

K. Despite of the detailed submissions, the impugned order vide OIO No. 12/2015-ST(JC) dated 29.01.2016 was passed confirming all the demand along with interest and penalties (Copy of the same is attached as annexure-I)

Particulars	**As per Appellant**	**As per SCN/OIO**
(A) Gross Receipts	10,95,38,310	10,95,38,310
B) Towards sale of land	41,437,250	41,437,250
(C) Land development charges for laying of roads, drains etc.,	62,29,000	62,29,000
(D) Construction	5,54,36,665	5,54,36,665
(E) VAT, Registration charges, stamp duty and other non taxable receipts	64,35,395	64,35,395
(F) Taxable amount (=D)	5,96,06,204	6,81,01,060
Abatement @ 40%	2,38,42,482	-
Service Tax @ 12.36%	26,79,277	62,17,785
Actually Paid	19,29,728	19,00,736
Balance Demand	7,49,509	43,17,049

L. The impugned order was passed on following grounds:-

a. 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 sale 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.

b. I find that these case laws are delivered with different factual situations and hence are distinguishable with the facts of the present case:

c. 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 assesses contention is not tenable.

d. 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 cannot be treated as species of "works contract services."

e. 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.

f. 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.

g. In terms of 65(A) 2(a) "land development services" give 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 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.

h. It is imperative from the above section that "land development 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.

i. 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 judgment Larsen and Turbro 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 services".

j. 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 the tax is payable on these charges.

k. 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 cannot be the practice.

l. 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.

m. 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 hve 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 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 their case.

GROUNDS OF APPEAL

1. The Appellant submits that the impugned order is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.

2. For the ease of comprehension, the subsequent submissions in this reply are made under different heads covering different aspects involved in the subject SCN as listed below:

   A. Violation of natural justice;

   B. Villas constructed are not liable for service tax;

   C. Land development charges are not liable for service tax;

      a. It does not fall under the category of 'site formation';

      b. species of 'works contract' but not 'works contract' taxable under section 65(105)(zzzza), *ibid;*

      c. even assuming taxable, not liable for the cases wherein land development agreement was not entered;

   D. Construction of common amenities involves the transfer of property and hence it is 'works contract' and correctly assessed at abated rate – there is no short payment to this extent;

   E. Other charges (electricity, water etc.,) are not liable – hence shall not be included in 'taxable value'

   F. Taxes/duties collected (VAT, service tax, stamp duty) are not liable – hence shall not be included in 'taxable value'

   G. Extended period of limitation is not invokable;

   H. Benefit of cum-tax shall be given;

   I. Interest and penalties are not payable/imposable;

In re: Violation of principles of natural justice:

3. Appellant submits that the impugned order was passed violating the principles of natural justice as the submissions made by Appellant which are meritorious have not been adverted to or rebutted *inter alia*

the following vital decision making submissions were made before the Ld. Respondent vide SCN reply but Ld. Respondent has totally ignored the same while passing the impugned order. The same has been summarized as hereunder:

a. Land development charges do not fall under "Site formation and clearance and earthmoving and demolition. (Para 6 to 16 of SCN Reply);

b. 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 (Para 27 to 35 of SCN Reply);

c. The property in goods incorporated in the construction of common amenities has been transferred to the owners of villa's and hence it is works contract;

d. Various statutory charges are collected, which cannot be treated as collected for rendition of service;

e. There was continuous submission of various information very specifically informing the compliance made by them and mechanism arrived, which proves that there was no suppression of facts and in fact allegation levelled in SCN that department intervention only unearthed the alleged non-compliance is incorrect;

4. Appellant submits that all the above meritorious grounds have not been considered while passing the impugned order. The system of departmental adjudication is governed by the principles of natural justice. The impugned order neither analyses the submissions, nor discusses the relevant case law, but has given the order without proper reasoning making the same as non-speaking and predetermined order. In this regard Appellant wishes to rely on the following judicial pronouncements:

a. Southern Plywoods Vs CCE 2009 (243) E.L.T 693 (Tri-Bang)

b. Kesarwani Zarda Bhandar Vs CCE 2009 (236) E.L.T 735 (Tri-Mum)

c. Herren Drugs & Pharmaceuticals Ltd. Vs CCE, Hyderabad 2005 (191) E.L.T 859 (Tri-Bang)

d. Youngman Hosiery Factory Vs CCE, Chandigarh 1999 (112) E.L.T 114 (Tribunal)

In light of the above, judicial pronouncements order passed without considering the submissions and without discussing and distinguishing the case laws relied by Appellant is liable to be quashed.

In Re: Villas construction is not subjected to service tax as it cannot be construed as complex:

5. Appellant submits that it was vehemently contended before Ld. Adjudicating authority that villas are not covered under the definition of "residential complex" as defined under Section 65(91a) of the Finance Act, 1994 and hence not subject to levy of Service tax. Relied on 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.);

6. Rejecting this submission, Ld. Adjudicating authority vide Para 12 alleges that *"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."* In this regard, Appellant submits that from the above it is clear that buildings having more than 12 residential units are made liable for service tax whereas in the instant case each villa is self contained unit and not part of any building or buildings.

7. Ld. Respondent chose to sustain the demand of service tax raised in the show-cause notice, regardless of the fact that construction of **individual residential houses** was not included within the scope of

"construction of complex" defined under Section 65(30a) of the Finance Act, 1994. The law makers did not want construction of individual residential houses to be subject to levy of service tax. Unfortunately, this aspect was ignored by the Ld. Respondent.

8. The Appellant submits that in couple of the above mentioned judicial judgments, revenue had taken the same arguments that common approval, common facilities and common layout to levy the service tax on independent houses before the Hon'ble Tribunals and Tribunal held that only those buildings of more than 12 residential units in the same building will be covered by the definition of residential complex. However without giving cognizance to the same the Ld. Respondent has confirmed the demand on same arguments.

In Re: Land development charges are not liable for service tax

9. Appellant submits that it was contested in SCN Reply that Land Development charges does not fall under the category of *"Site Formation and Clearance" qua* Section 659105)(zzza), *ibid* after explaining about the non-applicability of each sub-clause of said category. The Impugned order has not at all rebutted to the said submission. The Therefore Appellant wish to summarize the same as under.

Definition of taxable Service & Site Formation and clearance and earthmoving and demolition and such other Service

Section 65(105)(zzza) of Finance Act, 1994: *"to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities;*

Section *65(97a)* of Finance Act, 1994: *"site formation and clearance, excavation and earthmoving and demolition" includes,—*

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

(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,

but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies;

Not falling under any sub-clauses of 'site formation' service:

a. The 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.

b. The 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.

c. The 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.

d. 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 Appellant 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.

e. The 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.

f. The 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.

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.

Part of composite contract of villa construction/sale – hence not covered under the category of 'site formation':

10. Appellant submits that that 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. The relevant extract is as under:

"iv) 'site formation and clearance, excavation, earthmoving and demolition services' are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road."

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) entered with customers. The relevant extract reads as

"The vendor in the scheme of the development of Bloomdale has planned that the prospective buyers shall eventually become the absolute owners of the identifiable land (i.e. plot of land) ***together with independent bungalow*** *constructed thereon. For this*

purpose the vendor and the vendee are required to enter into three separate agreements, one with respect to the sale of land, second with respect to development charges on land and the third with respect to the construction of the bungalow. ***These agreements will be interdependent, mutually co-existing and inseparable though in the scheme of the project*** *the vendor may execute a sale deed in favour of the vendee before commencing the construction of the bungalow."* (Sample copies of 'AOS' are enclosed as annexure XI, XII).

Therefore 'land development is not taxable under the category of 'site formation'.

11. Appellant submits that impugned order alleged vide Para 15 that *"the contents of the circular dealt laying of cables along the road side whereas in the present case service are not mere laying of cables along the road side"*. In this regard Appellant submits that aforesaid Circular has only given one such example to describe that laying of cables is the type of work does not fall under the category of '*site formation and clearance, excavation, earthmoving and demolition services*'. Mere giving an example to give more clarity does not mean it covers only transaction of that example. Therefore the understanding of the Ld. Adjudicating authority is fallacious and deserves to be set aside.

12. Appellant submits that in case of CCE, Panaji, Goa v. Vrindavan Engineers & Contractors (I) (P) Ltd. 2015 (40) S.T.R. 765 (Tri. - Mumbai) it was held that land development is not liable under the category of 'site formation. The relevant portion of the judgement reads as under

"From the above definition we find that the site formation basically refers to earth work or activities related to earthwork or, at the most,

drilling for the passage of cables or drain pipes. Whereas the activities undertaken by the respondent indicate a comprehensive works contract which includes appreciable RCC work for foundations, columns and walls apart from construction of walls, laying of pipes. The definition includes creation of passages for pipes. It does not include laying of pipes itself. There is merit in the finding of the Commissioner (Appeals) that if such works are held to be taxable under the site formation service, then every such project would involve the activity of site formation. Revenue could at most tax only that part of the contract which involves site formation and related earthwork and not the entire works. But that has not been done by Revenue. Be that as it may, the total activities undertaken cannot be categorized under the Site Formation service. The nature of work is more akin to a comprehensive works contract. It is not the argument of Revenue that the same may be split up into components including the component of site formation. Therefore, we hold that the work undertaken by the respondent cannot be termed as an activity of "Site formation and clearance, excavation & earthmoving & demolition".

In Re: Species of 'works contract' as it involves supply of materials also and not liable for service tax as it was not specified under the category of 'works contract service' *qua* Section 65(105)(zzzza) of Finance Act, 1994:

13. Appellant submits that the following submissions were made in SCN Reply vide Para __ to __ in support of contention that activities involved in the land development are not subjected to service tax:

a. 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

b. It is well recognized 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.

c. The above principles are flown from unvarying series of Apex court rulings *inter alia* the following:

a. State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd — (1958) 9 STC 353 (SC);

b. Gannon Dunkerley & Co. and others vs. State of Rajasthan and others (1993) 088 STC 0204;

c. Builders Association of India v. Union of India — (1989) 2 SCC 645;

d. Bharat Sanchar Nigam Ltd. v. Union of India — 2006 (2) S.T.R. 161 (S.C.);

e. Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.);

f. Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu — 2014 (34) S.T.R. 641 (S.C.)

g. CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.);

d. Appellant is 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.

e. 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 Appellant incorporated the goods namely murrum, concrete, electrical poles, electrical wiring etc., therefore it is clear case that Appellant 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.

f. It is also submitted that value assessed for VAT also includes the *'land development charges'* collected which further fortifies that 'land development' is species of works contract.

g. From the definition of 'works contract' given under the provisions of Finance Act, 1994 *qua* section 65(105)(zzzza), it is very 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.

h. And the instant case of 'land development' is not falling under any of such specific works since

a. It does not involve any work of 'erection, commissioning or installation' etc., accordingly sub-clause (a) fails;

b. 'Land development' does not involve any construction of building/civil structure accordingly sub-clauses (b), (c) & (d) fails on this count;

c. Similarly sub-clause (e) also fails in the instant case as there is no execution of any turnkey projects/EPC contracts;

Therefore impugned activity is not liable under the category of 'WCS'.

i. It is submitted that 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 is placed on Hon'ble **Supreme court decision in CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.) wherein it was clearly held that** *"24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are*

service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract."

That means service element in the works contracts other than those covered under the specified category of 'Works Contract Services (WCS)' is not taxable.

j. 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 Relied on 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"*.

14. The impugned order has alleged that *"the same lacks clarity and trying to negotiate tax liability"*. In this regard, it is submitted that

15. it was contended before Ld. Adjudicating authority that activities involved in the *'land development'* is composite works involving both supply of materials and labour which does not fit into the service category of *'site formation' qua* section 65(105)(zzza), *ibid* and it is only the category of *'works contract' qua* section 65(105)(zzzza), *ibid* that taxes the composite contracts. and at the same there is no other category taxing the cases of composite contracts involving the sale and labour (during the period upto 30.06.2012), the same position was very categorically supported from decision of the Hon'ble Apex court in case of **CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.)**. However category of *'works contract' qua* section 65(105)(zzzza), *ibid* has levied service tax only on composite contracts specified in Section 65(105)(zzzza), *ibid* and not the all cases of composite contracts unlike VAT provisions. Whereas the instant case of *land development* does not fall under that specific/prescribed category of works contract as explained supra consequently, the same is not liable for service tax at all. Alternatively, it was contended that if at all impugned case of 'land development' stands decided taxable, same shall be assessed under the category of *'works contract'* requested for benefit of paying rate @ composite rate in terms of "Works Contract (Composition of payment of Service Tax) Rules, 2007.

16. Appellant submits that Ld. Adjudicating authority has totally misconceived the above contentions and without application of mind, impugned order misconstrued the same with intention to confirm the demands proposed in SCN. Therefore, findings of impugned order incorrect and requires to be set aside.

17. Further Appellant submits that impugned order has alleged vide Para 18.1 alleges that "*land development charges gives more specific*

description under "Site Formation and clearance, excavation and earth moving and demolition" in terms of section 65(A)2(a)". In this regard Appellant submits that as stated supra, it is only the category of 'works contract' *qua* Section 65(105)(zzzza), *ibid* levies service tax on the composite contracts and not any other category. The same was very categorically held by the Hon'ble Apex Court in case of CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.). Once it is established that composite contracts cannot be classified under any category (other than works contract), the provisions of Section 65A, *ibid* has no relevance since the section 65A comes into picture only when the service is classifiable under two or more categories.

18. Appellant submits that impugned order relied on the decision of tribunal in case of Alokik Township Corporation v. Commissioner 2015 (37) S.T.R. 859 (Tri.-Del.) to reject the classification under the category of 'works contract' service. in this regard it is submitted that said decision in fact supports the case of Appellant that albeit impugned works is composite contract, same does not fit into the specified composite contracts in section 65(105)(zzzza), *ibid.* Therefore, impugned order misplaced the reliance on the above decision, which does in fact support of the averment of Ld. adjudicating authority.

In Re: Even assuming taxable, not liable in the cases wherein land development agreement was not entered

19. As stated in background facts, from 2012, Appellant 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.

20. Both impugned SCN & OIO does not dispute the above fact that sale deed was entered conveying the title of semi-finished villa/house along with land but demands service tax on component of semi-constructed villa after alleging that (vide Para 3.2 of SCN) *"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."*

21. Rebutting the above allegation, it was vehemently contended before ld. adjudicating authority that 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:

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

b. CHD Developers Ltd vs State of Haryana and others, 2015 –TIOL-1521-HC – P&H-VAT wherein it was held that *"45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property."*

22. Further it was contended that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi finished 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.

23. Further it was contended before Ld. adjudicating authority that there is no service tax levy on sale of semi-finished villa/house as the same was excluded from the definition of 'service' itself. The relevant portion of definition *qua* section 65B(44) reads as follows:

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*

a. Appellant submits that 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 Appellant 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.

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.

24. It is further submits that 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

a. Sale of "land along with semi-finished villa" ('sale deed' separately)

b. Construction activity (by executing construction agreement)

25. Appellant submits that 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.

26. Without prejudice to the foregoing, it is submitted that 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.

27. 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.

28. Appellant submits that the impugned order has not at all rebutted the above submissions and rejected the same with blatant finding that (Para 20) "*there is no basis in their argument and the definition is*

totally misconstrued in their favour to get benefit from paying service tax". The Ld. Adjudicating authority has not at all give the reasons for the above finding thereby passing non-speaking order, which legally does not sustain.

29. The Appellant submits that reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of authority.

In Re: Construction of common amenities involves the transfer of property and hence it is 'works contract' and correctly assessed at abated rate – there is no short payment to this extent;

30. Appellant submits that as stated in background facts, 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 Appellant 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.

31. 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.

32. Appellant submits that impugned order vide Para 17 alleged that *"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 used by group of individuals and hence the same cannot be treated as species of "Works Contract Services"*. As seen from the above, impugned order propose to deny the abatement citing that transfer of property is not to individual and hence not a 'works contract'.

33. In this regard, it is submitted that common amenities/facilities constructed are being transferred to society/association which is in turn owned by customers/individuals only and Appellant 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 impugned order averment that property in goods is not transferred to individual customers is not correct.

34. Appellant further submits that 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 averment of impugned OIO & SCN is not correct.

35. Appellant submits that though the common amenities are for all but the amount is collected from each of them. If the case of being the

receiver should be individual is mandatory to decide the taxability than the service of common amenities does not even fall under service definition w.e.f 01.07.2012 since service definition itself says that "any activity carried out by a person to **another person** for consideration".

36. Further 'residential complex' construction falls within the realm of 'WCS' and the expression "residential complex' was defined u/s. 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 & OIO goes contrary to this and hence not valid.

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

37. Appellant submits that these receipts consists of

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

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

    c. Water deposit collected & totally remitted to 'Hyderabad Metropolitan Water Supply & Sewerage Board (HMWSS)' before taking the water connection. This Deposit amount also includes

water consumption charges for first two months along with sewerage cess. All these deposits are collected & paid in terms of HMWSS Act, 1989 r/w rules/regulations made thereunder;

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

As seen from the above, all these charges collected 'other non-taxable receipts' are statutory charges/deposit and received as mere reimbursements of expenses/charges incurred/paid on behalf of customers and does not involve any provision of service. Hence same shall be excluded from the taxable value *inter alia* in terms of Rule 5(2) of Service tax (determination of value) Rules, 2006.

38. Judicially also it was held that above charges are not to be included in taxable value. Relied 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.

39. Impugned order merely confirmed the demand alleging that documentary evidence was not produced. In this regard, it is submitted that ld. Respondent could have asked for before taking the decision, if still Appellant did not submit, then demand could have confirmed but without following such simple procedure and giving opportunity to produce requisite evidence, confirming demand is not valid in law. Further nothing will stop the adjudicate authority to collect such information. The Adjudicating authority while adjudicating the case has to collect all the information which necessary for confirmation of the demand. That is why the process is called is adjudication. In this regard reliance is placed on The Dukes Retreat Ltd v. CCE 2015 (40) S.T.R. 871 (Bom.) wherein it was held that *"The Appeal has been dismissed only on a technical ground and*

for non production of the requisite certificate or proof of room rent being charged and bills raised in that behalf. In the circumstances, the impugned order is quashed and set aside."

Supporting documents are enclosed as annexure __.

In Re: Extended period of limitation is not invokable:

40. Appellant submits that impugned order has alleged that they were registered with the department and were discharging tax liability and filing but for allegations made in the notice, ST-3 Returns regularly. In this regard Appellant submits that they has never intention to evade the service tax or suppress the fact that is the reason for taking registration and filing the returns. If the intention were to be evade they would neither have taken service tax registration and nor they would have paid the taxes where the liability was attracted.

41. Appellant submits 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 the understanding of Appellant. 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.

42. Appellant submits that 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 the Appellant 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.

43. 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 the Appellant for the failure of departmental authorities is not valid in the eyes of law. In this regard reliance is placed on Pushpam Pharmaceuticals Company Vs Collector Of C. Ex., Bombay 1995 (78) E.L.T 401 (S.C) it was held that *"suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties,the omission by one to do what he might have done not that he must have done would not render it suppression.It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression.*

44. Appellant submits that the extended period of limitation is not invokable in the instant case:

a. 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;

b. Judicially also it was held that construction of villas are not subjected to service tax as submitted supra;

c. 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 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.

d. Further taxability of contracts involving immovable property was also subject matter of dispute during the subject period. There were contrary judgments of 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.).

e. 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.).

f. 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.

Despite of above challenges/doubts/confusion, Appellant 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 (like Appellant) 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.

Interpretation is involved

45. The Appellant submits that present SCN and order arises due to difference of interpretation of provisions between Appellant & revenue. Further various letters were filed before department authorities, who never objected/responded on the compliance made by Appellant. In this regard it is submitted that 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 is placed on CCE v. Poonam Plastics Industries 2011 (271) E.L.T 12 (Guj);

46. Appellant submits that merely because Appellant chooses an interpretation beneficial to him, malafide intension to evade payment of service tax cannot be attributed on part of the assessee accordingly larger period of limitation is not invokable. In this regard reliance is placed on Rangsons Electronic Solutions (P) Ltd v. CCE 2014 (301) E.L.T. 696 (Tri. - Bang.) wherein it was held that *"It is a settled principle that merely because an assessee chooses an interpretation beneficial to him, there can be an allegation of suppression or misdeclaration. In view of the available facts and circumstances of the case and several decisions relied upon and cited by the learned counsel (we have not taken note of all of them since we do not feel the need), appellant cannot be found fault with for coming up with an interpretation and availing the benefit which was not available to them. Under these circumstances, we have to take a view that the order of the Commissioner limiting the demand to the normal period*

and not imposing the penalty was an order which rendered justice to the appellant/assessee without being unfair to the Revenue. Therefore we do not find any merit in the appeal filed by the Revenue and reject the same."

Returns filed regularly

47. Appellant submits that 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 the Appellant 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 Appellant has not disclosed the relevant details/information to the department is not factually correct and requires to be set aside. In this regard, Appellant wishes to rely on the following judgments wherein it has been held that if disclosure of amounts received/charged towards impugned activity are made in ST 3 Returns, extended period of limitation cannot be invoked:

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

Matters referred to larger bench and view supported by court decisions:

48. Appellant submits that as state 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. Relied on the following:

a. Continental Foundation Jt. Venture v. CCE, Chandigarh-I [2007 (216) E.L.T. 177 (S.C.)

b. J.R. Construction CO. v. CCE & ST 2016 (41) S.T.R. 642 (Tri. - Del.)

c. Megafine Pharma Pvt Ltd Vs CCE & ST 2014-TIOL-1312-CESTAT-AHM

d. CCE v. Mapro India Ltd 2015-TIOL-2554-CESTAT-MUM

49. 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. Relied on CCE v. Saurashtra Cement Ltd 2016-TIOL-365-HC-AHM-CX

50. Appellant submits that 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. Relied on Punj Lloyd Ltd. V. CCE & ST 2015 (40) S.T.R. 1028 (Tri. - Del.)

51. Appellant submits that averment of SCN as well as order is 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 relied on LANDIS + GYR LTD Vs CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata).

52. Appellant submits that 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:

a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)

b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

Other cases:

53. The Appellant submits that expression "suppression" has been used in the Section 73 of the Finance Act, 1994 accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. **Suppression means failure to disclose full information with the intent to evade payment of duty.** Relied on Continental Foundation Jt. Venture CCE, **2007 (216) E.L.T 177 (S.C)**

54. Appellant submits that the show cause notice proposed demand by invocation of the extended period of limitation only on the ground that Appellant has suppressed the details to Central Excise department. In this regard it is submitted that **extended period of five years applicable only when something positive other than mere inaction or failure on the part of manufacturer/service provider is proved** - Conscious or deliberate withholding of information by manufacturer/service provider necessary to invoke larger limitation of five years. In this regard wishes to rely on **CCE, Chemphar Drugs & Liniments 1989 (40) E.L.T 276 (S.C).** Therefore the allegation of SCN is not legal and proper.

55. Intention to evade payment of tax is not mere failure to pay tax. It must be something more i.e. that assessee must be aware that tax was leviable/credit was inadmissible and he must act deliberately

avoid such payment of tax. Evade means defeating the provision of law of paying tax and it is made more stringent by the use of word 'intent'. Where there was scope for doubt whether tax is payable or not, it is not 'intention to evade payment of tax'. reliance is placed on Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)

56. Mere non-payment/short payment of tax per se does not mean that Appellant has willfully contravened the provisions with the intent to evade payment of tax. in this regard reliance is placed on **Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.)** wherein it was held that *"The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the Appellant as fit for the applicability of the proviso.".*

57. The Appellant submits that all the entries are recorded in books of accounts and financial statements nothing is suppressed hence the extended period of limitation is not applicable. Wishes to place reliance on LEDER FX Vs DCTO 2015-TIOL-2727-HC-MAD-CT; Jindal Vijayanagar Steel Ltd. v. Commissioner — 2005 (192) E.L.T. 415 (Tri-bang);

In Re: Benefit of cum-tax shall be given

58. Appellant submits that in case demand stands confirmed, same shall be re-quantified after allowing the benefit of cum-tax u/s. 67(2)

of Act, ibid since Appellant has not collected service tax from the buyer to the extent of alleged short/non-payment of service tax.

59. Appellant submits that impugned order has alleged vide Para 22 that *"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 cannot be in the practice."* In this regard Appellant submits that section 67(2), *ibid* allows to arrive once the tax is not collected which is undisputed in the instant case. Not considering the said vital requirement, impugned order simply rejected the request stating that same is not practicable as Appellant is being collected in other cases. It is submitted that undisputedly whatever collected has been duly remitted to the government and entire impugned demands raised wherein Appellant did not collect the same from customers. In such circumstances, averment of impugned order is arbitrary and deserved to be set aside.

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

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

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

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

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

In Re: Interest and penalties are not payable/imposable:

61. Without prejudice to the foregoing, Appellant submits that when service tax is paid on time, the question of interest & also penalties does not arise.

62. Without prejudice to the foregoing, Appellant submits that all the grounds taken for ***"In Re: Extended period of limitation is not invokable"*** above is equally applicable for penalty as well.

63. As submitted supra, 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.

64. The Appellant submits that 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. In this regard wishes to rely on the judgment in the case of Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) it was held that "***It is unjustified in absence of discussion on fundamental conditions for imposition of penalty under Section 78 of Finance Act, 1994".***

65. Appellant submits that 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. Relied on Hindustan Steel Ltd. v. State of Orissa —1978 (2) E.L.T. (J159) (S.C.)

66. The Appellant submits that as submitted supra there were favourable judgments holding that **service tax is not at all payable and there was confusion existed at such point of time and the issue involved interpretation of provisions and law is at nascent stages and courts expressed different views**. Therefore the penalties cannot be imposed. Relied on CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.L.T 661 (S.C).

67. It is further submitted that when schemes of 'Extraordinary tax payer friendly' and VCES was introduced to waive the penalty when assessees who did not at all comply with service tax law can be given immunity provided they pay service tax along with appropriate rate of interest, no reason why law abiding assessee who had got himself registered more or less in time and started paying service tax, shall be denied benefit of waiver of penal provisions. In this regard relied on Commissioner v. R.K. Electronic Cable Network — 2006 (2) S.T.R. 153 (Tribunal).

68. Further Appellant is new to the service tax law and not much conversant with the provision of service tax and whatever believed to be taxable, same was assessed without any department intervention. In this background, no penalty shall be imposed. Relied on Sundeep Goyal and Company v. Commissioner — 2001 (133) E.L.T. 785 (Tribunal).

69. Appellant submits that impugned SCN and order proposed/confirmed to impose penalty u/s. 77 of Finance Act, 1994 citing delayed registration. In this regard it is submitted that they had registered with department vide STC No. AAHFK8714ASD001 w.e.f. 25.04.2010 (copy of ST-2 enclosed as annexure __) 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, Appellant 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 u/s. 77, ibid.

Benefit of Section 80:

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

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

    b. Whatever believed as taxable was duly paid voluntarily;

    c. 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;

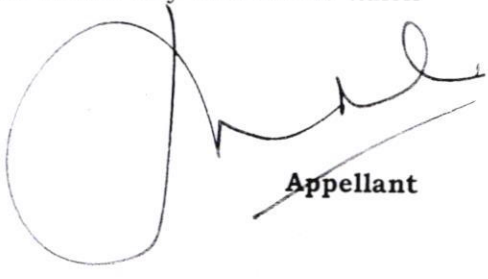
    f. Matters were referred to larger bench at various instances;

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

71. Appellant submits that several grounds are urged in the subject appeal, in this regard, Appellant wishes to communicate that **all grounds are without prejudice to one another.** Reliance is placed on the decision in case of Bombay Chemicals Pvt Ltd Vs Union of India 1982 (10) E.L.T 171 (Bom)

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

73. Appellant wish to be personally heard before any decision is taken in this matter.



Appellant

PRAYER

Wherefore it is prayed that

a. To set aside the impugned order

b. To hold that land development charges are not liable for service tax;

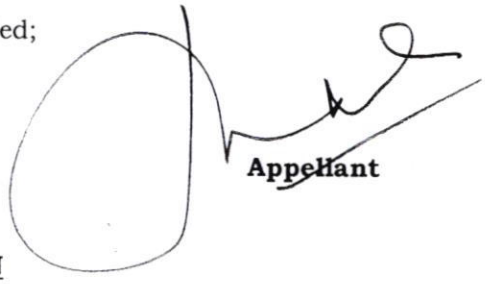
c. To hold that 'common Amenities' are to be assessed as part of 'works contract' and taxing at full rate is not required;

d. To hold that other charges such as corpus fund, electricity deposit are not liable for service tax;

e. To hold that extended period of limitation is not invokable;

f. To hold no interest and penalties are imposable;

g. Any other consequential relief to be granted;



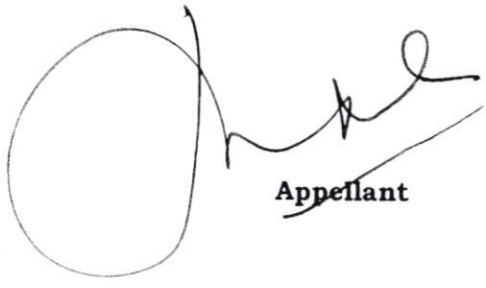
Appellant

VERIFICATION

I/We, Sobam Modi Partner of M/s. Kadakia & Modi Housing., the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today, the 12th day of April 2017

Place: Hyderabad



Appellant

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

Sub: Appeal against the O-I-O No 048/2016-ST dated 30.12.2016 passed by Joint Commissioner of Service Tax, Hyderabad-I Commissionerate pertaining to M/s. Kadakia & Modi Housing

I, Soham Modi Partner of M/s. Kadakia & Modi Housing, hereby authorize and appoint Hiregange & Associates, Chartered Accountants, Hyderabad or their partners and qualified staff who are authorized to act as authorized representative under the relevant provisions of the law, to do all or any of the following acts: -

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

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

Executed on 12th day April 2017 at Hyderabad

Signature

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

Dated: 12.04.2017

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

For Hiregange& Associates
Chartered Accountants

Sudhir V S
Partner (M. No. 219109)

Hiregange & Associates ★ Chartered Accountants ★ Hyderabad

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

Sl No.	Name	Qualification	Membership No.	Signature
1	**Shilpi Jain**	**CA**	**221821**	
2	**Venkata Prasad P**	**CA**	**236558**	

Hiregange & Associates ★ Chartered Accountants ★ Hyderabad