आयुक्त(अपील-II) जीएसटी, व केन्द्रीय उत्पाद शुल्क का कार्यालय

OFFICE OF THE COMMISSIONER (APPEALS-II), GST & CENTRAL EXCISE

7 वीं मंजिल, जीएसटी भवन, एल बी स्टेडियम रोड

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अपील सं : Appeal No: 118 / 2017 (STC) ST

अपील आदेश सं : ORDER-IN-APPEAL NO: HYD-SVTAX-000-AP2-0210-17-18-ST DATED 14.09.2017

पास करने वाले आधिकारी : **श्री. बी.वी.वी.टी. प्रसाद नायक, आयुक्त (अपील-II),** हैदराबाद

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

प्रस्तावना PREAMBLE

1 आदेश जिनके नाम जारी किया गया है उस व्यक्ति के निजी उपयोग के लिए यह प्रति मुफ्त में दी जाती है।

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2.(a) कोई भी निर्धारिती इस आदेश से असहमत हो तो वे वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत सीमाशुल्क, उत्पाद शुल्क व सेवाकर अपील अधिकरण, क्षेत्रीय बेंच, प्रथम तल, **हैदराबाद मेट्रो जल आपूर्ति और सीवरेज बोर्ड इमारत (पीछे के हिस्से), खैरताबाद, हैदराबाद, तेलंगाना-500004** के समक्ष अपील दायर कर सकते हैं।

Any assessee aggrieved by this order may file an appeal under Section 86 of the Finance Act, 1994 to the **Customs, Excise & Service Tax Appellate Tribunal, Regional Bench, 1st Floor, HMWSSB Building (Rear Portion), Khairatabad, Hyderabad, TS-500004.**

2.(b) केन्द्रीय उत्पाद शुल्क अधिनियम,1944 की धारा 35 एफ़ के खंड (iii) के अनुसार, धारा 85 की उप-धारा (5) में संदर्भित आदेश या निर्णय के विरुद्ध अपील के लिए, अपीलकर्ता को निर्णय या जिस आदेश के विरुद्ध अपील की गई हो उसके अनुसरण के लिए कर का, ऐसे मामले में जहां कर या कर और दंड विवादित हो, या दंड का, जहां ऐसा दंड विवादित हो, दस प्रतिशत जमा करना होगा : सेवा कर के मामलों में, एफ़ ए, 1994 की धारा 83 के प्रभाव से अधिनियम की धारा 35 एफ़ लागू है।

As per clause (iii) of Section 35F of the CEA, 1944, the appeal against the decision or order referred to in sub-section (5) of section 85, the appellant has to deposit ten per cent of the tax, in case where tax or tax and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against: Section 35F of the Act is applicable to service tax case by virtue of Section 83 of FA,1994.

3. उप धारा (1) [या उप धारा (2) या उप धारा (2ए)] के अंतर्गत प्रत्येक अपील जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती द्वारा प्राप्त करने की तारीख से तीन महीने के भीतर (मुख्य आयुक्तों या आयुक्तों की समिति] के समक्ष, जैसे भी मामला हो, दायर किया जाना चाहिए।

Every appeal under sub-section(1) [or sub-section(2) or sub-section(2A)] of Section 86 of FA,1994 shall be filed within three months of the date on which the order sought to be appealed against was received by the assessee, the [Committee of the Commissioners], as the case may be.

4. पैरा 2 में उल्लिखित अपील एस टी 5/ एस टी 7 प्रोफॉर्मा में चार प्रतियों में जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती के पास पहुँचने की तारीख से तीन महीने के भीतर किया जा सकता है। जिस आदेश के विरुद्ध अपील किया जाना चाहता हो और अपील करने के लिए लिखित मूल आदेश की उस आदेश की चार प्रतियाँ संलग्न होने चाहिए (जिसमें से एक प्रति प्रमाणित प्रति होने चाहिए)

The appeal, as referred to in Para 2 above, should be filed in S.T.5/S.T.-7 proforma in quadruplicate; within three months from the date on which the order sought to be appealed against was communicated to the party preferring the appeal and should be accompanied by four copies each (of which one should be a certified copy), of the order appealed against and the Order-in-Original which gave rise to the appeal.

5. अपील के साथ ट्रिब्यूनल के दक्षिणी बेंच के सहायक रजिस्ट्रार के पक्ष में जहां ट्रिब्यूनल स्थित है वहाँ के किसी भी राष्ट्रीयकृत बैंक की शाखा से प्राप्त किए गए रेखांकित मांग ड्राफ्ट संलग्न होने चाहिए और अधिनियम की धारा 86 के अंतर्गत विनिर्दिष्ट शुल्क के भुगतान का प्रमाण भी संलग्न होने चाहिए। देय शुल्क निम्नलिखित है।

The appeal should also be accompanied by a crossed bank draft drawn in favour of the Assistant Registrar of the Tribunal, drawn on a branch of any nominated public sector bank at the place where the Tribunal is situated, evidencing payment of fee prescribed in Section 86 of the Act. The fees payable are as under:-

(क) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख या उससे कम हो तो, रुपये एक हज़ार;

(*a*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(ख) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख से अधिक, लेकिन रुपये पचास लाख से कम, हो तो, रुपये पाँच हज़ार;

(*b*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(ग) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड, रुपये पचास लाख से अधिक हो तो, रुपये दस हज़ार;

(*c*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

5.(i) उसी की धारा 86 की उप धारा (4) के अंतर्गत बताए गए कुल आपत्तियों के ज्ञापन के संबंध में कोई शुल्क देय नहीं है।

No fee is payable in respect of the Memorandum of Cross Objections referred to in Sub-Section (4) of Section 86 ibid.

6. अपीलीय ट्रिब्यूनल के समक्ष प्रस्तुत किए गए सभी आवेदनपत्र के साथ: Every application made before the Appellate Tribunal:

(क) रोक की मंजूरी के लिए अपील या गलती को सुधारने के लिए अथवा किसी अन्य प्रयोजन के लिए आवेदन पत्र; या

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(ख) किसी अपील या आदेश को पुन: स्थापित करने के लिए उसके साथ रुपए पाँच सौ का शुल्क होने चाहिए।

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees:

6.(i) इस उप धारा के अंतर्गत आयुक्त द्वारा दायर किए गए आवेदन के मामले में कोई शुल्क देय नहीं है।

No fee is payable in case of an application filed by Commissioner this sub-section.

7. केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 और केन्द्रीय उत्पाद शुल्क नियमावली, 2002 तथा सीमाशुल्क, केन्द्रीय उत्पाद शुल्क व सेवा कर अपीलीय ट्रिब्यूनल (प्रक्रिया) नियमावली, 1982 में शामिल इससे और अन्य संबन्धित मामलों को नियंत्रित करने वाले प्रावधानों की ओर ध्यान आकर्षित किया जाता है।

Attention is invited to the provisions governing these and other related matters, contained in the Central Excise Act, 1944 and Central Excise Rules, 2002 and the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

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This appeal is filed by **M/s Kadakia & Modi Housing,** No.5-4-187/3 & 4, Second Floor, Soham Mansion, MG Road, Secunderabad, TS-500003 (hereinafter referred to as the "**appellant**"), against the **Order-in-Original No.048/2016-ST** dated 30.12.2016 in OR No.44/2016-Hyd-I.Adjn(ST) (hereinafter referred to as the "**impugned order**"), passed by the Joint Commissioner of Customs, Central Excise & Service Tax, (erstwhile) Hyderabad-I Commissionerate, Kendriya Shulk Bhavan, LB Stadium Road, Basheerbagh, Hyderabad, TS-500004, presently falling under the jurisdiction of Secunderabad GST Commissionerate (hereinafter referred to as the "**respondent / adjudicating / lower authority**").

2. The brief facts of the case are that the appellant is engaged in constructing independent villas and holds registration for rendering services of Construction of Residential Complex (CRC) and Works Contract (WCS) services; with STC No.AAHFK8714ASD001. Based on intelligence that the appellant was not discharging tax on consideration received toward taxable services involving construction of villas in a project named "Bloomsdale", the authorized

signatory of the appellant firm was summoned by officers and statements were recorded on 16.11.2015 and 01.02.2016, wherein he deposed inter alia that the sale deed is executed for land value and construction agreement is made separately; that they discharge tax under WCS on the amount agreed to in the construction contract; that there was flux in the legality of the levy, leading to possible short-payments which they are willing to discharge. The service was classified under CRC until Sep 2011 and then amended to WCS; and tax was discharged under WCS with effect from Oct 2011. However, no tax was discharged for the period Oct 2010-Mar 2011 and no ST3 was filed, although the returns for the period post Apr 2011 were filed. Examination of the agreements showed that the appellant was collecting the consideration as an aggregate of three elements, viz. (i) sale of land; (ii) Development charges of land for laying drains, pipelines, roads etc.; and (iii) cost of construction, including amenities and utilities (water / electricity connections). It was observed that element (ii) did not form part of value covered by construction agreement either fully or partially; and that the activity per se merited classification as "site formation / clearance" service up to 30.06.2012 under Sec 65(97a) read with Sec 65(105)(zzza); and under Sections 65B(44) and 65B(51) of the Finance Act 1994 post 01.07.2012. It was also viewed that for the (material) period Oct 2010-Sep 2011, the construction activity itself was rightly classifiable under WCS and not CRS as classified by the appellant; that the entire consideration including that for common amenities is to be considered as the gross value for assessment to tax under WCS, even in cases where the sale deed covers the land parcel as well as semi-constructed building. Tax liabilities of Rs.14,45,330 under site formation service; Rs.40,80,581 under WCS; and Rs.7,01,784 (said to be collected towards corpus fund, electricity deposit, water charges etc.) under various other services were calculated in worksheets designated WS1-WS4. It was viewed that the appellant suppressed material facts and values in respect of Site formation and WCS, unearthed only with the departmental intervention; that gross violations were thus committed with intent to evade tax, meriting the invocation of the proviso to Sec 73(1) in proposing the demands for the extended period of limitation.

2.1. A show cause notice dated 22.04.2016 in OR No.99/2016-Adjn(ST)(Commnr) [HQPOR No.10/2016-ST-AE-III] was issued, raising the tax demand proposals quantified in the manner laid out in Para 4 and 4.1 of the SCN, along with interest and penalties under Sec 78 (gross violations) and 77(2) (delayed registration) for violations listed at Para 5.1-5.5 therein. The notice was adjudicated in the impugned order, culminating in the instant appeal; wherein the tax demands were confirmed to the extent proposed; an amount of Rs.19,00,736 paid by the appellant was appropriated; a penalty of Rs.62,17,785 was imposed under Sec 78 for gross violations with intent to evade tax; and a penalty of Rs.10,000 imposed under Sec 77(2) for delayed registration. He held inter alia that the Bloomsdale project met all the parameters of residential complex; that the activity is rightly classifiable under WCS and taxable; that the land development charges cannot be considered as a species of works contract since no title transfer of property in goods / material has occurred; that they raised contradictory contentions on the classification of land development charges; that in terms of Sec 65A(2)(a), the land

development activity is appropriately covered under the category, "site formation / clearance" particularly as it was charged separately; that the ratios of the rulings cited at Para 18.1 of the impugned order apply; that the demand under WCS was contested on irrelevant grounds; that they failed to submit evidences in support of the claim that the amount of Rs.7,01,784 was not consideration toward taxable service; that he relies on the rulings cited at Para 21 of the impugned order in support of this view; that cum-tax benefit cannot be extended in terms of the ruling cited at Para 22 of the impugned order; that the extended period is justified in terms of the rulings cited at Para 23 of the impugned order and the facts narrated at Para 24 ibidem; and that the plea for waiver of penalty under Sec 80 is rejected in terms of the rulings cited at Para 25 ibidem.

3. The appellant, aggrieved by the impugned order, agitated the demands on the following grounds:

- The impugned order was passed in violation of the principles of natural justice inasmuch as their contentions were neither addressed nor considered; that specific pleas regarding classification of land development charges, service to self until time of booking, property in goods consumed in common amenities were also transferred with the villa hence merited treatment under works contract, statutory dues cannot be treated as consideration for service, and limitation aspect; were unaddressed by the lower authority; that thereby the impugned order is non-speaking; that the ratios of the rulings cited at Para 4 of the grounds of appeal [Pages 12-13 of appeal book] apply;
- Independent villas are not covered under the definition of "residential complex" at Sec 65(91a) of the Finance Act 1994; that it was not subject to the levy as held in the Macro Marvel case cited at Para 5 of the grounds of appeal; that the lower authority chose to confirm the demand despite the legislative intent to keep individual houses out of ambit of the levy;
- The activity of land development is not covered by any clause under Sec 65(97a); that taxability under site formation arises only when the specified activities are undertaken independently; that in the instant case, it was undertaken as part of a composite contract of villa construction as is clarified in the agreement for sale; that the impugned activity is not liable under the category of Site formation;
- The activities involved in land development is a species of works contract inasmuch as property in goods namely murram, concrete, electrical poles, wiring etc., in the execution of land development is used with labor and title transferred to the property owners jointly as common amenity; that VAT is discharged on the land development charges collected, fortifying the view that it is a species of WCS; that even then, it does not fit into any clause under Sec 65(105)(zzzza) and hence does not attract service tax;
- Composite contracts can only be taxed under WCS post 01.06.2007, in terms of the Apex Court ruling cited at Para 13(i) [Page 20 of appeal book]; that since the activity of land development has not been specifically covered under the definition, it is out of ambit of the levy;
- Their contention that the activity of land development being part of composite contract, can only be classified under WCS; but the tax cannot be levied since it does not get covered under any clause of Sec 65(105)(zzzza) has been misconstrued as contradictory by the lower authority; that even under Sec 65A, the more specific description is WCS and not site formation service;
- Assuming without admitting that land development attracted the levy, no liability can be fastened where no land development agreement was entered into; that the allegation at Para 3.2 of the SCN (cost of construction of semi finished house by deducting land cost) has been

rebutted in terms of Para 115 of the Apex Court ruling in the L&T case extracted at Para 21(a) of the grounds of appeal; that goods used in constructing semi-finished house lost the identity and got converted to immovable property which cannot be considered as goods;

- There is transfer of ownership for a price in the instant case, by way of sale deed validly registered; that there is no element of service involved; that the amounts received under agreement to sale cannot be subject to tax;
- Where there is clear vivisection identifying transaction value for service of construction, further subjecting the associated transactions to separate assessment is unwarranted;
- Without prejudice to the above, even if land development attracts the levy, it merits being fastened only under WCS, at the rate under composition scheme; that for the period beyond 01.07.2012, the tax shall be levied only on 40% of the value under Rule 2A of the Service Tax Valuation Rules, 2012;
- Construction of common amenities involves the transfer property, hence is classifiable under WCS, eligible for abatement; that the cost of construction of common amenities is factored into the cost of each individual dwelling unit; that the common areas are transferred to the body of individuals, i.e., RWA; that appellant does not own the common areas;
- The definition of works contract both prior to and after 01.07.2012 does not prescribe that transfer of common areas should be to individuals or association; that the common areas was transferred to the association and VAT was discharged;
- Assuming without admitting that common areas is a service, it has been provided to the association and not to individual house-owners; that the definition of residential complex included common amenities; that the corresponding demand is untenable;
- Corpus fund for the association, electricity deposit, water charges etc., do not form consideration towards rendering taxable service; that these elements are not includible for assessment to tax; that they rely on the ratio of the ruling cited at Para 38 of the grounds of appeal, in support of this contention;
- The demand in respect of other services has been baldly confirmed on the ground that no evidences were submitted; however, no documents were explicitly sought for verification; that the lower authority was empowered to verify facts; that it was not exercised; that hence the demand is untenable in terms of the ruling cited at Para 39 of the grounds of appeal;
- Full facts were voluntarily disclosed by the appellant and no material facts were suppressed at any point of time; that the issue was in the department's knowledge well before issuance of SCN; that no positive act of malafide was established; that they rely on the ratio of the ruling cited at Para 43, 53, 55 of the grounds of appeal, in support of this contention; that mere short payment / non-payment when all transactions are recorded in financials, cannot lead to conclusion of gross violations, in terms of the rulings cited at Para 56 & 57 of the grounds of appeal;
- There was legal flux in understanding / interpretation of legal provisions during the material period; that the taxability is not free from doubt even in the recent ruling pronounced in the Suresh Kumar Bansal case [2016-TIOL-1077-HC-DEL-ST]; that contrary rulings were pronounced even by the Apex Court; that in spite of all difficulties including a slump in demand, the appellant discharged the dues voluntarily; that since malafide cannot be attributed, larger period of limitation cannot be invoked; that they rely on the ratios of the rulings cited at Para 48 and 49 of the grounds of appeal, in support of this contention;
- Extended period cannot be invoked when the dispute pertains to diverse interpretation of law, as held in the ruling cited at Para 45 of the grounds of appeal; that merely because the appellant chose a beneficial interpretation, malafides cannot be attributed, as held in the ruling cited at Para 46 of the grounds of appeal; that the periodical ST3 was admittedly filed and hence extended period cannot be invoked, as held in the ruling cited at Para 47 & 50 of the grounds of

appeal; that demands based on audit observation alone is unsustainable, as held in the ruling cited at Para 51 of the grounds of appeal;

- They entertained bonafide belief on the non-levy of tax on the disputed elements; that in such cases, extended period cannot be invoked, as held in the rulings cited at Para 52 of the grounds of appeal;
- Without prejudice to the above contentions, the liability ought to be computed on cum-tax values inasmuch as the incidence is not passed on downstream, as held in the rulings cited at Para 60 of the grounds of appeal; that since the primary tax liability is itself questionable, the demand for interest and penalty do not sustain; that the penalty imposed under Sec 78 is unwarranted in terms of the rulings cited at Para 64-68 of the grounds of appeal; that since the impugned activity was held not taxable for the period prior to 01.07.2010, the allegation of belated registration does not have merit;
- Without prejudice to the above submissions, reasonable cause (listed at Para 70 of the grounds of appeal) existed for non discharge of tax, meriting waiver of penalty under Sec 80, as held in the ruling cited ibidem.

4. I heard the appellant, represented by Sri P. Venkata Prasad, Chartered Accountant, on 17.07.2017. He reiterated the submissions made in the grounds of appeal; and prayed for relief. None appeared for the respondent despite notice.

FINDINGS

5. I have carefully considered the documents and the submissions. The short point to be addressed is the sustainability of demands confirmed in the impugned order, under the facts and law in vogue.

6. The demands have been contested on limitation, with the appellant devoting a significant portion [Para 40-57 of the grounds of appeal] to it. I have carefully considered the contentions on limitation. The dispute arises from a departmental investigation and recording of statements on 16.11.2015 and 01.02.2016. The notice actually relied upon the ST3 filed for the material period, as admitted at Para 10(iii) therein. It is only on reconciliation of the receipts declared in the ST3 against the actual receipts booked in their financial record an the various agreements examined, that the department concluded that there existed a variance between the receipts declared in ST3 and assessed to tax, and the actual receipts detected from other sources; that the investigation uncovered facts leading to allegation of short discharge of tax by suppressing values in the ST3. The natural presumption in demands arising from a departmental intervention is that of gross violations with intent to evade tax. However, in all fairness, I do find that the appellant issued communications to the jurisdictional Commissioner, seeking confirmation of the correctness of their understanding of the levy, post the period 01.07.2010 [Pages 147-152 of appeal book]; and there was admittedly no response shown to have been issued. Be that as it may, the appellant had registered for both CRC and WCS service categories as recorded in the ST2 (Registration Certificate) dated 08.12.2010 [Page 146 of appeal book], and it was only the former which was clarified exempt up to 01.07.2010. The Department cannot presume that the

identical activity is undertaken by the appellant both as CRC simplicitor and WCS composite as the ST3 provides no clue in this direction; and requires an intervention to ascertain the factual matrix. Hence the plea that ST3 was filed, in contest of limitation, is rejected. It was only after the investigation was initiated and transactions examined, that the department could conclude that the appellant was actually undertaking a singular activity, classified both under CRC and WCS. The appellant's communication dated 16.08.2010 to the department adverts at Para 11, to the initial classification under WCS, and their intent to discharge tax under CRCS, subject to the reimbursement by the customer. Such conditional discharge of tax liability is not provided for in the fiscal statute, and the appellant made no assertion on the service classification at their end, nor the basis of the assessment made. Be that as it may, there is no dispute at any stage that the primary activity of villa construction under composite works contract has been classified by the appellant under WCS and accepted by the department; since even the demands in the impugned order toward the construction element is under WCS category. Moreover, the reconciliation between the ST3 figures and actual receipts unearthed undeclared receipts towards services, irrespective of classification. The material period in the instant case is Oct 2010-Mar 2015, well after the retrospective legislation set to rest any doubts lingering in respect of the levy on the specific activity. The reliance on case laws pertaining to legal flux is therefore of no help to the appellant. Considering the facts and circumstances in totality, I have no hesitation in concluding that there existed reasonable cause and justification for the invocation of the proviso under Sec 73(1) for the extended period; and the appellant's contentions on limitation are rejected.

7. On merit, there appear to be three elements of primary demand in dispute: (i) classification of land development charges under 'Site Formation' service and corresponding tax demand of Rs.14,35,330; (ii) demand of Rs.40,80,581 under WCS in respect of unfinished house and common amenities; and (iii) Rs.7,01,784 in respect of elements like corpus fund, electricity deposit and water charges collected from the customers.

8. Insofar as element (i) is concerned, it is clear from Para 2.3.2 of the SCN that (in some cases), the vendee is required to enter into separate land development contract with the appellant, independent of the construction agreement for the house per se; which is relied upon by the department to conclude that it is a separate, identifiable service activity, meriting independent classification and assessment; and the activity was viewed as 'site formation / clearance'. I have carefully considered the facts. The activities like leveling, completion of roads / street lights, storm-water drains etc., toward setting up of common amenities is usually covered under land development and normally certain charges are also collected by the local body toward land development under the extant building regulations, when according building permissions. The development is specific to the housing project and would form an intrinsic component of that project. For example, no individual who does not own a property would be entitled to shared ownership of the internal roads, utilities, garages etc. It is the villa construction

that is the prime service, and the land development for access to that villa is clearly subsidiary to it. There is force in the appellant's contention [at Para 10 of the grounds /Page 16 of appeal book] that the activities of sale of land parcel, fastening development charges, and entering into construction agreement are mutually co-existing and inseparable; and that the land development charges are collected toward bouquet of charges for land parcel, development and construction of the villa.

9. The ratio of the Tribunal ruling in the Vrindavan Engineers & Contractors case [2015(40)STR 765(Tri-Mum)] squarely applies to the instant case, and the classification of the land development activity separately under Site Formation is legally unsustainable. In terms of Sec 65A of the Finance Act 1994 (up to 30.06.2012) and Sec 66F ibidem (beyond 01.07.2012), the land development activity, part of major activity of villa construction with common amenities merits classification under WCS in the bundled service, and not under Site formation as an independent service. It automatically restricts the demand for short levy only where the charges are actually collected. Although the SCN admittedly sought to fasten the liability under Site Formation, the appellant fairly conceded at Para 26 of the grounds of appeal, that the demand would exist under WCS category, assessed under the composition scheme inasmuch as the necessary conditions (non availment of credit etc.) are met. **Para 26(1) of the impugned order is therefore set aside and remanded** to the lower authority for re-quantification of liability under WCS, by extending composition scheme for the period up to 30.06.2012 and under Rule 2A of the Service Tax Valuations Rules with effect from 01.07.2012 by extending abatement. Since the tax incidence has been demanded on the transaction value which is deemed to consist of the tax element under Sec 67(2) inasmuch as the incidence has neither been discharged nor shown to be passed on downstream; the liability shall be assessed on cum-tax values. I rely on the rulings pronounced in COMMISSIONER OF C. EX., PANCHKULA Versus GOEL INTERNATIONAL PVT. LTD. [2015 (39) S.T.R. 330 (Tri. - Del.)]; and COMMISSIONER OF SERVICE TAX Versus ASSOCIATED HOTELS LTD. [2015 (37) S.T.R. 723 (Guj.)], in ordering the remand.

10. Insofar as the demand pertaining to element (ii) is concerned, I find that the notice, at Para 3.2 and 3.4, clearly arrived at the liability toward construction value of unfinished house, attempting to fasten liability on full value, without even extending any abatement toward goods/material components. I have carefully considered the facts. When the appellant possessed title to the land [outright purchase, as recorded at the third bullet under Para 2.1 of the SCN], any construction undertaken prior to sale of any land parcel is admittedly service to self; there is no service involved since the fiscal statute prescribes the existence of independent service provider and receiver to fasten the levy; and the factual matrix shows on record that the sale deed consisting of land parcel along with unfinished house is registered for the composite consideration. Therefore, the transaction covered by the sale deed, even when containing an unfinished villa, is sale simplicitor, and cannot be considered to represent a divisible land-

building transaction involving sale (of land) and construction (of building), for separately assessing the latter. The sale deed records the immovable property in totality (land parcel + unfinished house) which is assessed to Stamp duty and thereby recognized as a sale transaction alone, which is placed out of ambit of service tax levy, both prior to and after 01.07.2012. As far as common amenities are concerned, the unit rate of the constructions is deemed to be adjusted to amortize the cost over the entire project villas and thereby included in the unit cost of the villas since the value of apportioned common amenities (villa-wise) have not been shown to be charged separately in any case. The tax demand in respect of element (ii) is therefore legally unsustainable. Accordingly, **Para 26(2) of the impugned order is set aside**.

11. Insofar as element (iii) is concerned, it is contended that the impugned amounts have been collected toward corpus fund, electricity deposit and water charges, all of which are statutorily prescribed. The tax demand has been confirmed merely on the ground that the appellant failed to produce documentary evidences in support of their claim that these amounts were not received toward service consideration, but represented statutory dues collected from the customer and paid to the corresponding utility. The rebuttal on this count was that no specific evidences were sought by the lower authority, which could have been furnished had they been sought. Although this is a puerile ground, I find that this matter can also be examined by the lower authority afresh, along with the issue pertaining to element (i), remanded supra. It is expressly clarified that if the impugned amounts are collected from the villa vendees and deposited to the utilities / transferred to the association corpus fund without any retention in appellant's account, the question of treating the same as consideration for construction of villa and assessment under WCS does not arise. **Para 26(3) of the impugned order is therefore set aside and remanded** to the lower authority to specify the evidences required from the appellant in this connection; ascertain the facts; arrive at a conclusion on the existence of liability; and then proceed to quantify it, if applicable. The appellant is directed to co-operate in the denovo proceedings and submit the evidences sought. On re-quantification of elements (i) and (iii) in the manner directed herein, the amount paid shall automatically stand appropriated; and **Para 26(4) of the impugned order is upheld**, for adjustment against the quantification in denovo proceedings.

12. Interest under Sec 75 is a quintessential liability, accompanying belated discharge of tax; and cannot be waived under any provision of law. The liabilities quantified in denovo proceedings shall attract interest at applicable rates, which shall be paid by the appellant in addition to the primary tax liability. **Para 26(5) of the impugned order is upheld**, in respect of the tax quantification arising in denovo proceedings. The demand proposals have been upheld on limitation supra and the allegation of gross violations has been upheld; thereby a penalty under Sec 78(1) is warranted. The demands have factually been proposed on the basis of documents consistent with the definition of 'specified record' under the Explanation to Sec 78(1). The quantum of penalty, therefore, shall be computed as the aggregate of (a) 100% tax

liability arising for the period prior to 08.04.2011; and (b) 50% of the tax liability for the period 08.04.2011-31.03.2015, quantified in denovo proceedings; in terms of the first proviso under Sec 78(1). **Para 26(6) of the impugned order stands modified** accordingly. The plea for waiver under Sec 80 cannot be considered at his juncture since the provision has been omitted from the statute with effect from 14.05.2015 by Sec 116 of the Finance Act 2015, without any saving / repeal in respect of existing impositions.

13. A penalty has been proposed and imposed under Sec 77(2) for belated registration. The factual matrix shows that the demand is proposed from Oct 2010 whereas the original registration has been issued on 25.04.2010 and the amendment registration has actually been issued on 08.12.2010. Considering that no demands are proposed for the previous period under any classification, the date of original registration contradicts the allegation of belated registration; and the penalty imposed under Sec 77(2) is legally unsustainable. **Para 26(7) of the impugned order is therefore set aside;** and the appeal is partly allowed in the terms laid out supra.

ORDER

The impugned order stands modified to the extent discussed supra.

(बी.वी.वी.टी. प्रसाद नायक)
(B.V.V.T PRASAD NAIK)
आयुक्त (अपील-II), हैदराबाद
Commissioner (Appeals-II)
Hyderabad

By SPEEDPOST To

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2. Sri P. Venkata Prasad, Chartered Accountant, M/s Hiregange & Associates, "Basheer Villa", H.No.8-2-268/1/16/B, Second Floor, Sriniketan Colony, Road No.3, Banjara Hills, Hyderabad, TS-500034. [Advocate / Consultant]

Copy Submitted to The Chief Commissioner, Central Tax & Customs, Hyderabad Zone, Hyderabad.

Copy to

1. The Commissioner of Central Tax, Secunderabad GST Commissionerate [erstwhile Hyderabad Service Tax Commissionerate], GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad, TS-500004. [jurisdictional Commissioner]

2. The Additional / Joint Commissioner of Central Tax, Secunderabad GST Commissionerate [erstwhile Hyderabad Service Tax Commissionerate], GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad, TS-500004. [Respondent]

3. Master copy.