केन्द्रीय उत्पाद सीमा शुल्क एवं सेवा कर के आयुक्त का कार्यालय

OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX

हैदराबाद II आयुक्तालय

HYDERABAD -II COMMISSIONERATE

एल.बी. स्टेडियम रोड. बशीरबाग. हैदराबाद 500 004

L.B.STADIUM ROAD:: BASHEERBAGH :: HYDERABAD 500 004

O.R.No.77/2010-Adjn.ST **Dt: 24 .11.2010**

मूल आदेश संख्या 47/2010 (सेवा कर)

ORDER IN ORIGINAL NO.47/2010 (Service Tax)
(Passed by Shri. G.SREE HARSHA, Additional Commissioner, Service Tax)

प्रस्तावना

PREAMBLE

1. निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति विना मूल्य के दी जाती है This copy is granted free of charge for the private use of the person to whom it is issued.

2. जो भी व्यक्ति वित अधिनियम. 1994 के अंतर्गत धारा 85 संशोधित से दुषप्रभावित हो. इस प्रकार प्राप्त आदेश निर्णय के खिलाफ आदेश की प्राप्ति के 90 दिन के भीतर आयुक्त (अपील), मुख्यालय कार्यालय. 7 वॉ तल. एल.वी. स्टेडियम रोड. वशीरवाग. हैदरावाद 500 004 को अपनी अपील प्रस्तुत कर सकता है ।

Under Sec.85 of the Finance Act, 1994, as amended, any person aggrieved by this order can prefer an appeal within three months from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs., Office, 7th floor, L.B.Stadium Road, Basheerbagh, Hyderabad – 500 004.

3. धारा 85 के के अंतर्गत आयुक्त (अपील) को की जानेवाली अपील फार्म एस.टी-4 में हो और इसकी जॉच निर्धारित पद्रति के अनुसार की जानी चाहिए ।

An appeal under Sec.85 to the Commissioner (Appeals) shall be made in form ST.4 and shall be verified in the prescribed manner.

4. एस.टी–4 फार्म में की गई अपील अनुलिपि मे प्रस्तुत की जानी चाहिए और उसके साथ जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उसकी एक प्रति भी संलग्न की जानी चाहिए;

The form of appeal in Form No: ST-4 shall be filed in duplicate and shall be accompanied by a copy of the decision or the order appealed against.

5. अपील पर और जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उस आदेश की प्रति पर भी समुचित मूल्य के अदालती टिकट लगाए जाने चाहिए ।

The appeal as well as the copy of the decision or order appealed against must be affixed with court fee stamp of the appropriate amount.

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Sub: Service Tax – Works Contract Services -- M/s. Greenwood Estates - Non payment of Service tax on taxable services rendered – Show cause Notice – Reg.

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M/s. Greenwoods Estates, 5-4-187/3 &4, II Floor, MG Road, Secunderabad 500 003 [here in after referred to as **'the service provider / the assesses'**] are engaged in providing works contract service. . The assesses is a registered partnership

firm and got themselves registered with department for payment of service tax with STC No. AAHFG0711BST001.

2. On gathering intelligence that the assesses, though registered with the service tax department were not discharging the service tax liability properly and also not filing the required returns, investigation was taken up by the department and Summons dated 13.1.2010 for submission of relevant record /documents / information were issued to them. On verification of records submitted by the assesses, it was found that they have undertaken a single venture by name **Greenwood Estates** located at Kowkur village, Malkajgiri Mandal, RR District, and received amounts from customers from September, 2007 to December 2009 towards sale of land, agreement for development charges for development of the layout into plots by laying of roads, drainage lines, electrical lines, water lines etc., and agreement of construction. In the said venture, in respect of 47 houses they have entered into sale deed, agreement for development charges and agreement of construction with their customers. Till date they have not filed the ST3 returns with the department. However, they have submitted the copies of the ST3 returns prepared for the periods October, 2007 to March 2008, October, 2008 to March 2009 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 22,24,946/- along with other payments of Rs.7,624/-. It is also found that in respect of 47 houses they have paid the said service tax for the period from December, 2007 to December, 2008 under Works Contract service availing the option under Rule 30) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

3. A Statement has been recorded from Sri. A. Shanker Reddy, Deputy General Manager (Admn.) authorized representative of M/s. Greenwoods Estates, on 1.2.2010 under Section 14 of the Central Excise Act,1944 made applicable to Service Tax vide Section 83 of the Finance Act,1994. Sri. Reddy vide his Statement dated 1.2.2010 had interalia stated that "the activities undertaken by the company are providing services of construction of Residential Complexes. They purchased the land under sale deed. On that they constructed the residential complexes. Initially, they collect the amounts against booking form / agreement of sale. At the time of registration of the property, the amount received till then will be allocated towards Sale Deed and Agreement of construction. Therefore, service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement. The service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis. Agreement of sale constitutes the total amount of the land / semi finished fiat with undivided share of land and the value of construction. The sale deed constitutes a condition to go for construction with the builder. Accordingly, the construction agreement will also be entered immediately on the same date of sale deed. All the process is in the way of sale of the constructed unit

as per the agreement of sale but possession was given in two phases one is land / semi finished flat with undivided share of land and other one is completed unit. This is commonly adopted procedure as required for getting loans from the banks". Further, he stated that services to a residential unit / complex which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex. Further, he stated that they have stopped collection and payment of service from 1-1-2009 in the light of the clarification of the Board vide circular No; 108/02/2009 — ST dated 29th January 2009.

4. As per the exclusion provided in Sec 65(91a) of the Service Tax Act, the residential complex does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person. *It is further clarified in Para 3 of the Circular No. 108/02/2009 – ST,* dated 29th January 2009 that if the ultimate owner enters into a contract for construction of a **residential complex** with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for a single person for personal use as residence by such person would not be subjected to service tax. Normally, a builder/promoter/developer constructs residential complex consisting number of residential units and sells those units to different customers. So, in such cases the construction of complex is not meant for one individual entity. Therefore, as the whole complex is not constructed for single person the exclusion provided in Sec 65(91a) of the Service Tax Act is not applicable. Further, the builder/promoter/developer normally enters into construction / completion agreements after execution of sale deed. Till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore there is no levy of Service Tax on the services rendered till sale deed i.e., on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements / contracts against which they render services to the customer after execution of sale deeds. There exists service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements for construction invariably attract service tax under Section 65(105(zzzza)) of the Finance Act, 1994.

5. As per the definition of "Residential Complex" provided under Section 65(91a) of the Finance Act, 1994, it constitutes any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s. Greenwood Estates qualifies to be a

residential complex as it contains more than 12 residential units with common area and common facilities like common water supply, etc., and the layouts were approved by HUDA & Alwal Municipality vide permit No. 3822/P4/P/H/07 Dt: 9.7.2007. As seen from the records submitted, the assesses have entered into 1) a sale deed for sale of land together with / without semi finished portion of the house and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the assesses thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deeds are taxable services under works contract service.

6. As, the assesses, have not furnished the month wise particulars of amounts received exclusively on agreements for Construction, the tax liability has been arrived at on the basis of soft copies of the books of accounts provided by the assesses. It is arrived at that they have collected an amount of **Rs. 2,30,03,332/-** against agreements of construction during the period from January 2009 to December 2009 and are liable to pay service tax including Education cess and Secondary & Higher education cess of Rs. 9,47,737/- and the interest at appropriate rates under works contract service respectively. The details of amounts collected, service tax liability are as detailed in the **Annexure** to this Notice.

7. M/s Greenwoods Estates are well aware of the provisions and of liability of Service tax on receipts as a result of these agreements for Construction and have not assessed and paid service tax properly by suppression of facts and convened the provisions of Section 68 of the Finance Act, 1994 with an intention to evade payment of tax. They have intentionally not filed the returns and produced the particulars. Further, they misinterpreted the definition of the works contract service with an intention to evade payment of Service Tax. All the facts have come to light only after the department has taken up the investigation. Hence, the service tax payable by the assesses appears to be recoverable under **Sub Section (1) of Section 73 of the Finance Act, 1994.**

8. From the foregoing it appears that M/s. Greenwood Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003 have contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have not paid the appropriate amount of service tax on the value of taxable services and Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they have not filed statutory Returns for the

taxable services rendered and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details / information, with an intent to evade payment of service tax and are liable for recovery under proviso to the section 73(1) of the Finance Act, 1994 and thereby have rendered themselves liable for penal action under Section 76, 77 and 78 of the Finance Act.1994

9. Thus, M/s. Greenwoods Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003 , were required to show cause in O.R.No.34/2010-ST, as to why:

(i) an amount of **Rs. 9,20,133/-** towards Service tax, **Rs. 18,403/-** towards Education Cess and **Rs. 9,201/-** towards Secondary & Higher Education Cess (a total amount of **Rs. 9,47,737/-**) should not be demanded on the works contract service under the Sub Section 1 of the Section 73 of the Finance Act, 1994 for the period from January 2009 to December 2009 as shown in the Annexure attached to the Notice.

(ii) interest is not payable by them on the amount demanded at (i) above and also on the delayed payments made during the period from January, 2009 to December 2009, under the Section 75 of the Finance Act,1994

(iii) Penalty should not be imposed on them under Section 76 of the Finance Act, 1994 for their failure to pay service tax in accordance with the provisions of Section 68 or the rules made under Chapter V of the Finance Act 1994.

(iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994 for the contravention of Rules and provisions of the Finance Act, 1994 for which no penalty is specified else where.

(v) Penalty should not be imposed on them under Section 78 of the Finance Act, 1994 for suppression of value of service tax and contravention of provisions of Chapter V of the Finance Act or the rules made there under, with intent to evade payment of service tax.

10.1 The Assesses has submitted their reply dt: 16.06.2010, interalia, stated that they had obtained service tax registration and made payments of service tax for the receipts pertaining to the period from December 2007 to December 2008 and that with respect to residential units constructed and sold by them, they entered into two agreements, namely Sale deed for conveying the title of land along with the semi-constructed apartment and another 'Construction Agreement' for construction of the semi Finished house and initially, up to December 2008, they paid service tax in spite

of having doubt and lot of confusion on the applicability of service tax and on issue of the clarification vide the circular No.108/02/2009 dated 29.01.2009 by the department, they stopped collecting and discharging service tax liability' on the amounts collected in respect of the construction agreement as they were of the bonafide belief that they were excluded vide the personal use clause in the definition of residential complex and the transaction with the customer was in two folds as under:

a. M/s. Greenwood Estates sold the undivided share of land along with the semi-constructed residential unit to the customer.

b. Subsequently the customer/owner of the land along with the semi-built up unit gets the construction done by the M/s. Greenwood Estates.

10.2 The assesses further submitted that the SCN has assumed that the M/s Greenwood Estates constructs houses and that it sells the land in the first agreement entered with the client and that the SCN has been issued without considering the actual facts and for this reason itself, shall be set aside. It was held in the case of SCT v BPL Ltd. (2010) 24 STT 220 (KAR) by the Hon'ble High Court that *'without ascertaining the actual facts, the substantial questions of law could not be answered'.* And that in respect of the first fold there is no construction service provided by the M/s. Greenwood Estates to their customer as there is no distinct service provider and receiver and that in respect of the second fold of the transaction there was always a doubt regarding the applicability of service tax as the definition of residential complex mentioned in section 65(91*a)* states that where such a complex is for personal use then no service lax is payable and that same was clearly clarified in Circular No. 108/02/2009-ST Dt: 29.02.09, Bl/6/2005-TRU, dated 27-7-2005 and *332/35/2006-TRU.* dated 1-8-2006. That the notice has bought a new theory that the exemption for personal use as stated in the definition would be available only if the entire complex is for personal use of one person and that while interpreting the law no words should be added or deleted. The law should be read as it is in its entirety and that neither in the definition nor in the clarification, there is any intention that the entire complex should be used by' one person for his or her residence to he eligible for the exemption. The exemption would he available if the sole condition is satisfied i.e. personal use and that the preamble of the referred circular for understanding what issue exactly the board wanted to clarify and reproduced the circular.

10.3 The assesses further submitted that the service tax is not payable for service provided until the sale deed has been executed to the ultimate owner and for service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use and the entire amount of service tax paid is eligible for refund and that when levy does not exist, then payment of penalty does not arise.

10.4 The assesses further submitted that non-taxability of the construction provided

(ii) Akhar Badruddin jaiwani V Collector— 1990 (47) ELT 161 (SC)

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

and requested to drop the penalty proceedings under the provisions of Section 76.

10.8 Further submitted that section 80 of Finance Act provides no penalty shall be levied under section 76 77 or 78 if the assesses proves that there is reasonable cause for the failure.

10.9 Further submitted that can't be an intent to evade payment of duty in such cases and just because they have not interpreted the law properly it cannot be said that there was an intent to evade payment of tax and cited the following case laws :

a. The Financiers Vs Commissioner of C. Ex ., Jaipur 2008 (009) STR 0136 Tri.- Del

b. Vipul Motors (P) Ltd Vs Commissioner of C'. Ex., Jaipur—I 2008 (009) STR 0220 Tri-Del

c. Commissioner of Service Tax, Daman Vs Meghna Cement Depot 2009 (015) STR 0179 Tri-Ahmd

10.10 Further submitted that penalties under Sections 76 and 78 are mutually exclusive and both the penalties can't be imposed simultaneously and placed reliance on following case laws :

a, Opus Media and entertainment Vs Commissioner of C.Ex., Jaipur 2007 (8) STR 368 (T').

b. The Financers Vs Commissioner of C.Ex, Jaipur 2007 *(8)* STR 7 (T).

11. Personal hearing was held on 12.10.2010, wherein Shri. V.S.Sudhir, Chartered Accountant filed Vakalatnama and appeared on behalf of M/s Greenwoods Estates and reiterated the submissions made in their reply and requested to drop proceedings.

DISCUSSIONS AND FINDINGS :

12. I have carefully gone through the case records and the submissions made by the retainers of the assesses vide reply dt: Nil and submissions made during the personal hearing held on 12.10.2010. I observe that M/s. Greenwood Estates, was registered with department, under STC No. AAHFG0711BST001. M/s. Greenwood Estates have under taken a venture, namely Greenwood Estates located at Kowkur Village, Malkajgiri Mandal, Ranga Reddy District, and received amounts from their customers from September, 2007 to December 2009 towards sale of land, agreement for development charges for development of the layout into plots by laying of roads, drainage lines, electrical lines, water lines etc., and agreement of construction. In the said venture, in respect of 47 houses they have entered into sale deed, agreement for

for an individual customer intended for his personal was also clarified by TRU vide its letter dt: F.No.B1/6/2005-TRU dt: 27.07.05 and therefore the service tax is not payable on such consideration from abinito and that the board had clarified in an indicative manner that the personal use of a residential complex is nor liable for service tax in the Circular F.No.332/35/2006-TRU Dt: 1.08.2006 and submitted that Hon'ble CESTAT, Bangalore has granted stay in the case of M/s Classic Promoters and Developers.

10.5 The Assesses further submitted that any activity to be a taxable service few conditions mentioned below have to be satisfied:

a. There must he a defined service provider
b. 'There must he a defined service receiver
c. The activity under question should be a defined activity
d. During the period that is under question the levy must be in existence.

all these conditions have to he fulfilled simultaneously and cumulatively; and that in the instant ease the condition c' is not fulfilled as the complex that is constructed falls under the exclusion portion of the 'residential complex definition and for other reasons already' mentioned above.

10.6 Further the assesses submitted that in the Finance Bill 2010 there was an explanation added to the section 65(105)(zzzh) of the Act where the taxable service of construction of residential complex is defined and in this respect, in the clarification issued by the TRU vide D.O.F. No,334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in tax treatment among different practices, the said explanation was inserted. The circular also clarifies that by this explanation the scope has been enhanced. This gives the conclusion of the same being prospective and also clarifies that the transaction between the builder and buyer of the flat is not taxable until the assent was given to the Bill. Hence this shows that the transaction in question is not liable to service tax for the period under question and that if the transaction is considered as taxable and there is service tax liability then they would be eligible for CENVAT credit on the input services and Capital goods used.

10.7 The assesses further submitted that when service tax itself is not payable, the question of interest and penalty does lot arise and relied on the judgment of Hon'ble Supreme Court in the case of M/s Prathiha Processors Vs. UOI, 1996 (88) ELT 12 (SC). The assesses further submitted that service tax liability on builders till date has not been settled and there is full of confusion and with this background it is a settled proposition of law that when the assesses acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by' the common public, there can't be intention of evasion and penalty cannot be levied and cited the following decisions of Hon'ble Supreme Court.

(i) Hindustan Steel Ltd. V. State of Orissa - 1978 (2) ELT (J159) (SC')

development charges and agreement of construction with their customers. I also observe that they have not filed the ST3 returns with the department and have produced copies of the ST3 returns prepared for the periods October, 2007 to March 2008, October, 2008 to March 2009 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 22,24,946/- along with other payments of Rs.7,624/-. It is observed that in respect of 47 houses they have paid the said service tax for the period from December, 2007 to December, 2008 under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. I find that the assesses have stopped payment of Service tax from 01.01.2009.

13. As M/s Greenwoods Estates have not furnished the month-wise particulars of amounts received exclusively on agreements for Construction, the same, on the basis of soft copies of the books of accounts provided by them is arrived. An amount of Rs.2,30,03,332/- against agreements of Construction was received by them during the period from January,2009 to December,2009.

The issue before me is to decide whether M/s Greenwoods Estates, are liable to pay Service Tax on Rs.2,30,03,332/- being the amount received against agreements of construction during the period from Jan'2009 to Dec'2009, under Works Contract service.

14.1. As per Section 65(105(zzzza)) of the Finance Act, 1994 ***"taxable service"*** *under works contract means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*

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

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

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

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

(d) completion and finishing services, repair, alteration, renovation or restoration of, or

similar services, in relation to (b) and (c); or

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

14.2. As per Section 65(91a) of the Finance Act, 1994, *"Residential Complex means any complex comprising of –*

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

(ii) a common area; and

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

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

15. I observe in the instant case, that the venture, namely Greenwood Estates located at Kowkur Village, Malkajgiri Mandal, Ranga Reddy District, qualify to be classified under 'residential complexes' by virtue of the following facts :

i). buildings having more than twelve residential units

ii). having common area

iii). having common facilities like common water supply etc.

iv). having layouts approved by HUDA & Alwal Municipality vide permit No. 3822/P4/P/H/07, Dt:09.07.2007.

16. I observed from the reply submitted by them during that their transaction with the customer was in two folds as under:

a. Sale of undivided share of land along with the semi-constructed residential unit to the customer.

b. Subsequently the customer/owner of the land along with the semi-built up unit gets the construction done by the notice, under agreement of construction.

Hence, the issue before me revolves around the agreement of construction, since the sale of undivided share of land is not taxable.

17. I notice that M/s Greenwoods Estates have paid an amount of Rs.22,24,946/- and other payment of Rs.7,624/- on the receipts against agreements for construction for the period from December'2007 to December'2008, under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and stopped payment of Service Tax with effect from January 2009. I also notice that they have not filed the ST3 returns till

March'2010 with the department.

18. I observe that Shri. A.Shanker Reddy, Deputy General Manager (Admn.), authorized representative of the noticee in his statement recorded under Section 14 of the Central Excise Act 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act,1994, interalia, stated that the activities undertaken by their company were providing services of construction of Residential Complexes and that they purchased the land under sale deed and constructed the residential complexes. That they collect the amounts against booking form / agreement of sale and at the time of registration of the property, the amount received till then will be allocated towards Sale Deed and Agreement of construction and service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement. That the service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis. That agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction and the sale deed constitutes a condition to go for construction with the builder and accordingly, the construction agreement will also be entered immediately on the same date of sale deed. Further, he stated that services to a residential unit / complex which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex. Further, he stated that they have stopped collection and payment of service from 1-1-2009 in the light of the clarification of the Board vide circular No; 108/02/2009 — ST dated 29th January 2009.

19. I also notice that the assesses pleaded that there was always a doubt regarding the applicability of service tax as the definition of residential complex mentioned in section 65(91a) states that where such a complex is for personal use then no service tax is payable and that although there was no liability the entire amount of service tax was paid out of doubt and the same is eligible for refund and cited Board's Circular Nos.10//02/2009-ST dt: 29.02.09, B1/6/2005-TRU dt: 27.07.05 & 332/35/2006-TRU dt: 1.08.06.

20. I find that the Board's Circular No. B1/6/2005-TRU Dt: 27.7.05 states that residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is not covered under the scope of the service tax and not taxable and the Circular Nos. 332/35/2006-TRU dt: 1.8.06 and 108/2/2009-St dt: 29.01.09, reiterated the same. Hence, the contention of the notice that there was confusion is not tenable.

21. I find from the definition of 'residential complex' as reproduced at Para 14.2 above, it is clear that residential complex meant for personal use of a person has been

excluded. In the case of the assesses, the residential complex constructed by them is not meant for personal use of one person and the complexes constructed by the assesses were sold out to various customers under two agreements. What has been excluded in the definition is the residential complex as a whole if meant for one person for personal use of such person. The interpretation adopted by the assesses would render the entire provisions relating to levy of service tax on residential complex redundant. Therefore, the contention of the assesses is not acceptable. The Board vide circular dt: 29.01.2009 has also clarified as under :

"Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax".

22. Further, The assesses has cited the following case law of M/s Classic Properties vs. CCE, Mangalore 2009-TIOL-1 106-CESTAT-Bang in support of their contention. I observe that this case law is not applicable to the instant case, as building of commercial complexes is also involved therein.

23. The assesses further submitted that the assesses would be eligible for CENVAT credit on the input services and capital goods used and hence the liability shall be reduced to that extent and that the SCN has not considered this and has demanded the entire service tax. Since the Assesses has discharged their service tax liability under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, up to Dec'2008, and the notice proposes to demand service tax on 'works contract service', the question of eligibility of CENVAT credit on the input services and capital goods does not arise.

24. They further submitted that service tax liability on builders till date has not been settled and there is full of confusion and with this background it is a settled proposition of law that when the assesses acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there can't be intention of evasion and penalty cannot be levied and cited the following decisions of Hon'ble Supreme Court.

(i) Hindustan Steel Ltd. V. State of Orissa - 1978 (2) ELT (J159) (SC')

(ii) Akhar Badruddin jaiwani V Collector— 1990 (47) ELT 161 (SC)

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

and requested to drop the penalty proceedings under the provisions of Section 76. This plea of the assesses that there was confusion with regard to tax liability on builders is not acceptable in view of fore going discussion. The assesses failed to prove that there existed reasonable cause for their failure to stop payment of service tax with effect from Jan'2009 and hence their plea of recourse to section 80 of Finance Act'1994 is not acceptable.

25. The assessee's plea that there can't be an intention to evade payment of duty in such cases and just because they have not interpreted the law properly it cannot be said that there was an intent to evade payment of tax is not acceptable in view of the fact that they have deliberately discontinued payment of service tax with effect from Jan'2009 citing Board's Circular Dt: 29.01.2009, which in fact elaborated the existing statutory position and hence the case laws cited by them are not relevant to the instant situation.

26. In view of the above, it is clear that there was no confusion during the impugned period and it was a clear case of suppression of taxable value with an intention to non-payment of service tax without any valid reasons. The fact of suppression would have not come to the knowledge of the department but for the investigation taken up. Hence, I hold that the assesses have made themselves liable for penal action under Section 78 of the act. Since the assesses has failed to file the ST3 returns correctly reflecting the taxable value received by them during the period from October,2008 to September, 2009, I proceed to levy penalty under Section 77 of the Finance Act also.

27. I accept the plea of the assesses that penalties under Sections 76 and 78 are mutually exclusive and both the penalties can't be imposed simultaneously and following case laws of :

a, Opus Media and entertainment Vs Commissioner of C.Ex., Jaipur 2007 (8) STR 368 (T').

b. The Financers Vs Commissioner of C.Ex, Jaipur 2007 *(8)* STR 7 (T).

and also in view of the proviso to Section 78, which reads as "*provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply.*" , I propose not to levy penalty under Section 76 of Finance Act,1994.

28. Accordingly, I pass the following order.

ORDER

(i) I demand an amount of **Rs.9,47,737/- (Rupees Nine Lakhs Fourty seven Thousands Seven Hundred and Thirty seven only)** towards Service tax of Rs.9,20,133/-, towards Education Cess of Rs.18,403/- and towards Secondary & Higher Education Cess of Rs.9,201/-, on the works

contract service under the Sub Section 1 of the Section 73 of the Finance Act, 1994 for the period from January 2009 to December 2009.

(ii) I demand interest on the amount demanded at (i) above, under the Section 75 of the Finance Act,1994

(iii) I impose a Penalty of **Rs.5000/- (Rupees Five Thousands only)** on them under Section 77 of the Finance Act, 1994 for the contravention of Rules and provisions of the Finance Act, 1994.

(iv) I impose a Penalty of **Rs. 9,47,737/- (Rupees Nine Lakhs Fourty seven Thousands Seven Hundred and Thirty seven only)** on them under Section 78 of the Finance Act, 1994 for suppression of value of service tax and contravention of provisions of Chapter V of the Finance Act or the rules made there under, with intent to evade payment of service tax.

Show Cause Notice in O.R.No. 77/2010 – Adjn. ST dated 21.05.2010 is accordingly disposed off.

24/11/2010

(G.SREE HARSHA)
ADDITIONAL COMMISSIONER

To
M/s. Greenwoods Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003. (Registered post with Ackn. Due)

Copy submitted to the Commissioner of Customs, Central Excise & Service Tax, Hyderabad II Commissionerate, Hyderabad (By name to the Superintendent (Trib.))

Copy to the Superintendent of Service Tax, Group- X, Hyderabad-II Comm'te.

Master Copy

Spare Copy.