(3)

FORM ST-4

Form of Appeal to the Commissioner of Central Excise (Appeals)
[Under Section 85 of the Finance Act, 1994 (32 of 1994)]
BEFORE THE COMMISSIONER (APPEALS-II),
7th Floor, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004

(1) Name and address of the Appellant	M/s Greenwood Estates 5-4-187/ 3 & 4 2nd Floor, MG Road Secunderabad-500 003
(2) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	Additional Commissioner, Hyderabad-II Commissionerate, Basheerbagh, Hyderabad-500 004. Order in Original No.51/2012 – Adjn (S.T) ADC (C. No. IV/16/197/2011. OR No. 61/2011 & 52/2012) dated 31.08.2012
(3) Date of Communication to the Appellant of the decision or order appealed against	05.09.2012
(4) Address to which notices may be sent to the Appellant	M/s Hiregange & Associates, "Basheer Villa", H.No: 8-2 268/1/16/B, 2nd Floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad – 500 034. **(Also copy to the Appellant at the above mentioned address.)**
(5A)(i) Period of dispute	Jan 2010 to Dec 2010 - OR No. 61/2011-Adjn(ST) Jan 2011 to Dec 2011 - OR No. 52/2012-Adjn(ST)
(ii) Amount of service tax, if any demanded for the period mentioned in the Col. (i)	OR No. 61/2011-Adjn(ST)- Rs.48,00,391/- OR No. 52/2012- Adjn(ST)- Rs.46,81,850/-
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	NA
(iv) Amount of Interest	Interest U/s 75 at applicable rates.
(v) Amount of penalty	Rs.1000 U/s 77 and Rs.200 per day or 2% of Service tax whichever is higher U/s 76 provided such amount shall not exceed amount of service tax.
(vi) Value of Taxable Service for the period mentioned in Col. (i)	Rs.11,65,14,336/- for Jan-Dec 2010 & Rs.11,36,37,141/- for Jan-Dec 2011.
Whether Service Tax or penalty or interest or all the three have been deposited.	No
(6A) Whether the appellant wishes to be heard in person?	Yes
(7) Reliefs claimed in appeal	To set aside the impugned order and grant the relief claimed.
(8) Statement of Facts and Grounds of Appeal	As appended.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner

Signature of Appellant

STATEMENT OF FACTS

A. M/s Greenwood Estates (Hereinafter referred to as 'Appellant') provides Construction Services to various customers. Appellant is a partnership firm engaged in the business of construction of residential units.

A. Appellant is registered as service providers under the category of "Works Contract Service" with the Department vide **Service Tax Registration No. AAHFG0711BST001.**

B. Appellant had undertaken a venture by name M/s Paramount Residency towards sale of land and agreement of construction. In respect of the residential units constructed and sold, two agreements were entered into by the appellant, one for sale of the undivided portion of land and the other is the construction agreement.

C. Appellant has initially, upto December 2008, when amounts were being received by them they paid service tax in respect of the receipts of construction agreement even though there was a doubt and lot of confusion on the applicability of service tax on construction of complexes. Later, on when the issue was clarified vide the Circular No. 108/02/2009-ST dated 29.01.2009 by the department, the customers of the appellant, stopped paying the service tax and accordingly appellant was forced to stop 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.

D. The Department initially issued a show cause Notice No. HQPOR No. 77/2010-Adjn(ST) for the period September 2006 to December 2009 and the same was adjudicated and the Appellant has preferred appeal and the same has been adjudicated and confirmed vide OIO No: 47/2010-ST

dated 24.11.2010. Further the Appellant has gone on appeal and the same has been dismissed vide OIA No.11/2011 dated 31.01.2011 by the Commissioner Appeals, Hyderabad.

E. Subsequently, the Additional Commissioner has issued the periodical SCN OR No. 61/2011 dated 23.04.2011 for the period Jan 2010 to Dec 2010 and SCN OR No. 52/2012 dated 24.04.2012 for the period Jan 2011 to Dec 2011 as under:

i. An amount of Rs.48,00,391/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2010 to December 2010;

ii. An amount of Rs. 46,81,850/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Act for the period January 2011 to December 2011;

iii. Interest on the above should not be demanded under section 75 of the Act;

iv. Penalty under sections 76 of the Act should not be demanded from them.

v. Penalty under Section 77 of the Act should not be demanded from them.

F. Appellant had submitted a detailed reply to the impugned show cause notices and also appeared for personal hearing on 16.08.2012 and reiterated the submissions made along with additional submissions for OR.No.61/2011- Adjn (ST) ADC. (Copy of the replies is enclosed along with this appeal memo).

G. Despite of the detailed submissions made vide written reply as well as during the personal hearing, the Assistant Commissioner has passed a common order for the both the notices as under:

i. An amount of Rs. 48,00,391/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(2) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2010 to December 2010;

ii. An amount of Rs. 46,81,850/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(2) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2011 to December 2011;

iii. Interest at applicable rates on the above should not be demanded under section 75 of the Act;

iv. Penalty of Rs. 200 per day or 2% p.m provided penalty shall not exceed the service tax payable under sections 76 of the Act should not be demanded from them.

v. Penalty of Rs. 1000 under Section 77 of the Act should not be demanded from them.

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

GROUNDS OF APPEAL

1. For easy comprehension, the subsequent submissions in this appeal memo are made under different heading covering different aspects involved in the subject order:

    A. Validity of the Order

    B. Order is a non-speaking order

    C. Advance ruling not binding on other parties

    D. Construction of Residential complex for "Personal Use"

    E. Liability on Builders is w.e.f 01.07.2010

    F. Filing of ST-3 returns

    G. Quantification of Demand

    H. Payment of Service Tax prior to issue of Show Cause Notice

    I. Interest Under Section 75

    J. Penalty Under Section 76 & 77

In re: Validity of the order

2. Appellant submits that subject order is passed without understanding the ***nature of activity being undertaken, without examining the agreements/documents in its context, bringing out its own theory though the same is not set out n the statutory provisions, without considering the clarifications issued by the Board, without considering the intention of the legislature but confusing with the provisions of Service Tax***, incorrect basis of computation and many other factors discussed in the course of this reply but based on mere assumption, unwarranted inferences and presumptions. Supreme Court in case *Oudh Sugar Mills Limited v. UOI,* 1978 (2) ELT 172 (SC) has held

that such orders are not sustainable under the law. On this count alone the entire proceedings under impugned order requires to be dropped.

3. Appellant submits that Para 14 of Page 8 of the subject order states that ***"The demand for the past period was confirmed vide OIO No. 49/2010-ST dated 24.11.2010 and the same was also upheld by Commissioner (Appeals) vide OIA No. 09/2011-(H-II) dated 31.01.2011. Respectfully following the decision of the Commissioner (A), I hold that demand of Service Tax is sustainable".*** Appellant submits that from the above it is evident that the order has been passed with a presumed attitude and not considering the facts involved. Appellant submits that the order passed in such a state has to be kept aside.

4. Appellant draws support from the case of Uflex Ltd. v. CCE 2010 (19) S.T.R. 666 (Tri. - Del.) wherein it was held as-***"Plain reading of the above para of the impugned order discloses that the Commissioner (Appeals) instead of analyzing materials on record to ascertain whether the findings arrived at by the original adjudicating authority are born out from the record or not, proceeded solely on the basis of certain findings arrived at in the earlier decision ignoring the fact that the said decision was based on the materials which were available on the record in the earlier appeal and not in the matter in hand.*** Undoubtedly, the records in the said case did justify the findings arrived at in the said case. However, the same cannot be the sole basis to decide the appeal in the present case. The Commissioner having totally ignored the facts of the case and decided the matter on the basis of the findings in the decision in relation to the earlier impugned order, the same cannot be sustained and is liable to be set aside and the

matter needs to be remanded to the Commissioner (Appeals) to decide afresh in accordance with provisions of law." Therefore, the facts of the present case being exactly similar to the said order of the Hon'ble Tribunal the order of the adjudicating authority confirming the demand based on the previous order of Commissioner (Appeals) without proper examination and reasoning should be set-aside.

In re: Order is a Non-speaking order:

5. Appellant submits that on perusal of the impugned order it reveals that the ld. Adjudicating Authority had not dealt with the submissions made by the appellants during the replies to the SCN. Hence, the order has been issued with revenue bias without appreciating the statutory provision, the relevant case laws cited by them and also the objective of the transaction/activity/agreement. Appellant submits that the order has failed to examine the submissions which were made vide the reply to the notice which were meritorious.. The case laws on which reliance was placed and the various decisions that have been rendered relying on the Circular 108 which is the crux of the entire issue are as under:

    a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL–1106-CESTAT–Bang,
    b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,
    c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)
    d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang
    e. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

f. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

6. Appellant further submits that the reliance placed on circular no. 108/02/2009 –ST dated 29.02.2009 which was also clarified in two other circulars as under:

a. F. No. B1/6/2005-TRU, dated 27-7-2005

b. F. No. 332/35/2006-TRU, dated 1-8-2006.

Appellant submits that neither the above case laws nor the circulars were considered while passing the impugned order. Appellant further submits that on one hand the order vide Para 14 states that the decision of Commissioner (Appeals) has to be followed and however on the other hand the decisions rendered by various tribunals and Commissioner (Appeals) which are beneficial to the assessee are not considered while passing the subject order. Appellant submits that from the above it is clear picture of revenue bias and hence order passed in such a state is required to be kept aside.

7. Appellant submits that in the case of *CCE, Indore v. Engineers Combine 2009 (15) S.T.R. 473 (Tri-Del)* it was aptly held as – *"It is necessity of law that the* ***quasi-judicial authorities should pass a reasoned and speaking order so that the orders shall see the light of the day and meet scrutiny. It is needless to mention that reason is heart beat of justice****. Therefore this matter has to go back to the learned adjudicating authority to clearly lay down in the order as to charges leveled against the respondent, factual aspects including the* ***nature of activity carried out by the respondent, pleadings of the respondent, manner of examination, evidence tested, reason of decision*** *and the decision of*

that Authority by a speaking order." Therefore, the findings of the ld. Adjudicating authority in the impugned order without taking into consideration the pleadings of appellant in their SCN reply, Various statutory provisions and Case Laws cited therein is a non-reasoned order which does not have the required sanctity and is liable to be quashed.

8. Appellant submits that authority has the duty to refer the facts of the cases relied by the Appellant and the facts of the appellant case, applicability of judgment of cases relied by Appellant to the present case. But it has not happened in the present case. In this regard Appellant wishes to rely on a case law *Parle International Ltd Vs CCE, Raigad 2011 (22) S.T.R 255 (Tri-Mum)* it was held that *"However, it is not discernible from his order as to in what manner he was convinced. He also states that he has gone through the case law referred to by the respondents. However,* ***there is nothing to indicate that he examined the applicability of the case law****. In his conclusion, he merely states that he does not find reason to uphold the show-cause notice. We have got to deprecate this kind of an order. We set aside the Commissioner's order and allow these appeals by way of remand directing the lower authority to pass a speaking order on all issues in de novo adjudication of the case, after giving the respondents a reasonable opportunity of being heard".* In the present case also the authority has not examined the applicability of cases relied by the Appellant, and therefore it can be rightly concluded that order passed is non speaking order therefore liable be set aside.

9. Appellant submits that the order has been passed without application of mind as is evident that the issue involved in the instant case is whether the appellants are out of service tax levy since the ultimate consumer has put the same for personal use and covered vide Circular 108 and other circular.

However in the subject order the discussion is restricted only to the classification of the service provided which was not an issue relevant to the present case. Both the notice and the Appellant are in consensus that the service provided is 'works contract services'. Hence, in such a situation the reliance on Circular No. 128/10/2010-ST dated 24.08.2010 is undesirable and out of context.

10. Appellant submits that the impugned order has relied on the decision of the authority on advance ruling in the case of Hare Krishna Developers 2008 (10) S.T.R. 357 (A.A.R). It is pertinent to note the facts of the case are entirely different from facts of the present case and does not support the contention of the adjudicating authority.

11. Appellant further submits that the ruling of advance ruling is not binding on other parties. Appellant places reliance on the case of Caliron Power Corporation Ltd. v. Comm. Of Customs 2008 (222) E.L.T. 528 (Tri. - Chennai) wherein it was held as - *we note that advance ruling given by the above authority is binding only on the party applying to that authority for such ruling and also that it is binding on the Commissioner of Customs concerned only in respect of that party.* Further in the case of Zee Tele films Limited v. CCE 2006 (4) S.T.R. 349 (Tri. - Mumbai) it was held as *Precedent - Rulings of Advance Authority - They are binding only on parties and not as a precedent on persons not party therein.* Hence from the above, it is evident that classification of service is not a matter of dispute in the present case and hence the reliance on the Circular 128/10/2010 and judgment of Hare Krishna Developers is unwarranted and out of context.

12. Appellant further submits that nowhere in the findings in the order there was a discussion regarding whether the appellants are covered vide the

Circulars 108 and other relevant circulars since there service is to ultimate customer who puts the flats for personal use and thus are out of service tax levy. In this regard, Appellant resubmits the entire discussion for the kind perusal of the Learned Commissioner (Appeals) in the subsequent paragraphs.

In re: Construction of Residential complex for "Personal Use"

13. Appellant submits that they are rendering works contract service as defined in Section 65 (105) (zzzza) of the Finance Act, 1994. Appellant submits that this was also accepted by the subject order. In this regard, Appellant submits that the works contract service is provided in relation to construction of a new residential complex. The phrase 'residential complex' has been defined in Section 65 (91a) of the Finance Act, 1994 which is reproduced as under for ready reference:

65(91a) *"residential complex" means any complex comprising of—*

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

(ii) a common area; and

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

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

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause,—

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

14. Appellant submits that from the above it is evident that definition excludes construction of complex which is put to personal use by the customers. Appellant submits in the instant case, the flats constructed were put to personal use by the customers and hence outside the purview of the definition and consequently no service tax is payable. Without prejudice to the foregoing Appellant submits that the same was clearly clarified in the recent circular no. 108/02/2009 –ST dated 29.02.2009. This was also clarified in two other circulars as under :

    a. F. No. B1/6/2005-TRU, dated 27-7-2005
    b. F. No. 332/35/2006-TRU, dated 1-8-2006

15. Appellant submits that non-taxability of the construction provided for an individual customer intended for his personal was clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 (mentioned above) during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio.

Relevant Extract

"13.4 However, residential complex having only 12 or less residential units would not be taxable. ***Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service***

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

16. Appellant further submits that the board in between had clarified in an indicative manner that the personal use of a residential complex is not liable for service tax in the Circular F. No. 332/35/2006-TRU (mentioned above), dated 1-8-2006.

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

17. Appellant further submits that the Board Circular No. 108/2/2009-S.T., dated 29-1-2009 states that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction.

Relevant extract:

"...Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'..."

18. Appellant submits the preamble of the referred circular for understanding what issue exactly the board wanted to clarify. The relevant part of the said circular (para 1) is extracted hereunder for ready reference.

"....Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for ***selling a dwelling unit in a residential complex*** *at any stage of construction (or even prior to that) and who makes construction linked payment..." (Para 1)*

19. Appellant submits that from the above extract, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex. Hence, where a residential unit in a complex is for personal use of such person it shall not be leviable to service tax.

20. Appellant submits that it is important to consider what arguments are considered by board for providing this clarification. The relevant part as applicable in the context has been extracted as under for ready reference.

"...It has also been argued that even if it is taken that service is provided to the customer, ***a single residential unit bought by the individual customer*** *would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax..." (Para 2)*

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

"... The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract ***for construction of a residential complex*** *with a promoter/builder/developer, who himself provides service of design, planning and construction; and* ***after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the***

d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

e. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

f. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

In re: Liability on Builders with effective from 01.07.2010:

25. Assuming but not admitting that the personal use ground fails, the Appellant is not liable to pay service tax in as much as the demand raised for the period prior to the date of the explanation is inserted. The explanation is inserted with effective from 01.07.2010 but the demand raised in the instant case is for the period 08.05.2010 and therefore the demand raised is bad in law. The clarification issued by board 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 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 prior to 01.07.2010.

26. Further Notification No. 36/2010-ST dated 28.06.2010 and Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010 exempts advances received prior to 01.07.2010, this itself indicates that the liability of service tax has been triggered for the construction service provided after 01.07.2010 and not prior to that, hence there is no liability of service tax during the period of the subject notice.

27. Without prejudice to the foregoing, Appellant submits that Trade notice F.No VGN(30)80/Trade Notice/10/Pune dated 15.02.2011 issued by Pune Commissionerate, has specifically clarified that no service tax is payable by the builder prior to 01.07.2010 and amounts received prior to that is also exempted. Since part of the period in the issue involved is prior to such date the order to that extent has to be set aside.

28. Appellant further submits that the Honorable Tribunal of Bangalore in the case of Mohtisham Complexes (P) Ltd. vs Commissioner of C. Ex., Mangalore 2011 (021) STR 0551 Tri.-Bang stating that the explanation inserted to Section 65(105)(zzzh) from 01.07.2010 is prospective in nature and not retrospective. The relevant extract of the subject case is reproduced here under:

"In other words, the present case is covered by the situation envisaged in the main part of the Explanation, thereby meaning that the appellant as a builder cannot be deemed to be service provider vis-a-vis prospective buyers of the buildings. The deeming provision would be applicable only from 1-7-2010. *Our attention, has also been taken to the texts of certain other Explanations figuring under Section 65(105). In some of these Explanations, there is an express mention of retrospective effect.* ***Therefore, there appears to be substance in the learned counsel's argument that the deeming provision contained in the explanation added to Section 65(105)(zzq) and (zzzh) of the Finance Act, 1994 will have only prospective effect from 1-7-2010.*** *Apparently, prior to this date, a builder cannot be deemed to be service provider providing any service in relation to industrial/commercial or residential complex to the ultimate buyers of the property.* ***Admittedly, the entire dispute in the present case lies prior to 1-7-2010. The appellant has made out prima facie case***

against the impugned demand of service tax and the connected penalty." Appellant submits from the above, it is evident that there shall be no liability for the receipts received for the period prior to 01.07.10 and since the subject period involved is prior to 01.07.10, the demand to that extent shall be liable to be quashed.

29. Appellant further submits the Honorable Tribunal of Delhi in the case of Ambika Paints Ply & Hardware Store vs Commissioner of Central Excise, Bhopal 2012 (27) STR 71 (Tri-Del) has held as under: "Hon'ble Gau. High Court in the case of Magus Construction Pvt. Ltd. v. Union of India (supra) has held that construction of residential complex by a builder/developer against agreement for purchase of flat with the customers is not service, but is an agreement for sale of immovable property. Hon'ble Punjab & Haryana High Court in the case of G.S. Promoters v. Union of India (supra) cited by the learned SDR has only upheld the validity of the explanation added to Section 65(zzzh) by the Finance Act, 2010. Moreover, we find that it is only w.e.f. 1-7-2010, that explanation was added to Section 65(zzzh) of the Finance Act, 1994 providing that for the purpose of this sub-clause, construction of a complex which is intended for sale; wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authorized competent to issue such certificate under any law for the time being in force, shall be deemed to be service provided by the builder to the buyer. ***This legal fiction introduced by explanation to Section 65(zzzh) has not been given retrospective effect. Therefore, for the period prior to 1-7-2010, the appellant's activity cannot be treated as service provided by them***

to their customers. In respect of the period prior to 1-7-2010 same view has been expressed by the Board in its Circular No. 108/2/2009-S.T., dated 29-1-09. We are, therefore, of prima facie view that the impugned order is not correct."

In re: Filing of ST-3 Returns

30. Appellant submits that the impugned order has alleged that they have not filed the ST-3 returns. However, appellant submits that the same is not true and appellant have filed the Nil returns for all the periods. They have filed Nil returns since they believed that the activity carried out by them was not a taxable service and therefore not leviable to service tax. However, the appellants have constantly corresponded with the department and submitted all the information asked for by the department.

31. Therefore, appellant submits that the order is not presenting the true facts of the present case and Penalty under Section 77 is not leviable in as much as they have filed the ST-3 returns for all the periods in the present order. (Copy of ST-3 returns enclosed for reference).

In re: Quantification of Demand

32. Appellant submits for the period January 2010 to December 2010, the SCN had claimed that entire receipts of Rs.11,65,14,336/- are taxable. However, appellant is unable to understand how the said figures have been arrived at by the Adjudicating Authority. As per the statement submitted, the total receipts during the period are Rs. 10,69,12,235/-. Out of the said amount Rs.3,66,12,000/- is received towards value of sale deed and Rs.1,29,93,880/- is towards taxes and other charges which shall not be leviable to service tax. The appellant has given breakup of such amounts

along with the documentary proof for all such amounts which are Rs.2, 00,000/- or above. (Copy of Sale Deed customer-wise, VAT Challans and returns for the period, Registration charges). With regards to electricity charges, it is our submission that these amounts have been collected for the electricity bills on those flats for which builder has discharged amounts to electricity department due to delay in transfer of electricity meters in customers name. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.5,73,06,355/- and not on the entire amount as envisaged in the order.

33. Appellant submits for the period January 2011 to December 2011, the SCN had claimed that entire receipts of Rs.11, 36, 37,141/- are taxable without providing the permissible deductions. Out of the said amount Rs.4, 36, 26,000/- is received towards value of sale deed and Rs.1,00,70,537/- is towards taxes and other charges which shall not be leviable to service tax. The appellant has given breakup of such amounts along with the documentary proof for all such amounts which are Rs.2, 00,000/- or above. (Copy of Sale Deed customer-wise, VAT Challans and returns for the period, Registration charges). With regards to electricity charges, it is our submission that these amounts have been collected for the electricity bills on those flats for which builder has discharged amounts to electricity department due to delay in transfer of electricity meters in customers name. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.5, 99, 40,604/- and not on the entire amount as envisaged in the order.

***definition of 'residential complex'**. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)*

22. Appellant submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.

    a. For service provided until the sale deed has been executed to the ultimate owner.

    b. For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

23. Appellant submits that it is exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore this clarification is applicable to them ibid and with the above exclusion from the definition, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

24. Without prejudice to the foregoing, appellant further submits the various decision that has been rendered relying on the Circular 108 are as under

    a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009 (015) STR 0077 (Tri-Bang)

    b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,

    c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)

In re: Amounts paid prior to issue of SCN

34. Appellant submits that service tax is to be levied on Rs.5, 99, 40,694/- for the period January 2011-December 2011. Thus the service tax liability shall amount to Rs.24, 69,553/- and not Rs. 46,81,850/- . Out of the said amount of Rs.24,69,553 Rs.5, 98,671/- was paid on 21.12.2011 and disclosed in the ST-3 returns filed for the period and Rs.18, 31,216/- was paid vide Challan dated 18.02.2012 and Rs.39,666/- has been paid by utilization of Cenvat Credit. Copies of the challan and Cenvat statement was enclosed with the reply to show cause notice.

35. Appellant submits that the impugned order has not made even a whisper of such submission being made in the reply to the SCN. Therefore, Appellant is aggrieved by an order passed in such skewed state of mind.

In re: Interest under Section 75

36. Without prejudice to the foregoing Appellant submits that when service tax itself is not payable, the question of interest and penalty does not arise. Appellant further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

37. Appellant further submits that in the case of CCE v. Bill Forge Pvt. Ltd. 2012 (279) E.L.T. 209 (Kar.) it was held that the-"*Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest.*"

Therefore, the appellant submits that where there is no liability of tax on them due to reasons mentioned aforesaid, there cannot be a levy of interest.

In re: Penalty under Section 76 & 77

38. Without prejudice to the foregoing, Appellant submits that service tax liability on the builders till date has not been settled and there is full of confusion as the correct position till date. With this background it is a settled proposition of law that when the assessee 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 cannot be intention of evasion and penalty cannot be levied.

39. Appellant further submits that it was held in the case of Collector of Customs v. Unitech Exports Ltd. 1999 (108) E.L.T. 462 (Tribunal) that-" ***It is settled position that penalty should not be imposed for the sake of levy. Penalty is not a source of Revenue.*** Penalty can be imposed depending upon the facts and circumstances of the case that there is a clear finding by the authorities below that this case does not warrant imposition of penalty. ***The respondent's Counsel has also relied upon the decision of the Supreme Court in the case of M/s. Pratibha Processors v. Union of India reported in 1996 (88) E.L.T. 12 (S.C.) that penalty ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the particular statute.***" Hence, Penalty cannot be imposed in the absence of deliberate defiance of law even if the statute provides for penalty.

40. Appellant submits that penalty is not imposable on them as there was confusion regarding the interpretation of law. In this regards appellant

wishes to rely on HUL Ltd. v. CCE 2010 (250) E.L.T. 251 (Tri. - Del.) wherein it was held as-"As regards the issue relating to penalty, as rightly pointed out by the learned advocate for the appellants, ***the dispute related to the interpretation of statutory provisions and it did not disclose intension to evade the payment of duty and, therefore, there was no justification for imposition of penalty in the matter.*** Hence, the penalty imposed under the impugned order is liable to be set aside." Therefore, the penalty is liable to be set aside.

41. In this regard we wish to rely upon the following decisions of Supreme Court.

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

    (ii) Akbar Badruddin Jaiwani V. Collector – 1990 (47) ELT 161(SC)

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

    under the provisions of Section 76.

In re: Benefit under Section 80

42. Appellant submits that Para 23 of the impugned order has made a finding that the appellant's have made out a reasonable cause so as to exonerate them from the penalties by invoking Section 80. Further, the order has relied on certain case laws in support of their contention.

Case law relied upon	**Relevancy to the facts of the present case**
Guardian Leisure Planners Pvt. Ltd. 2007 (6) S.T.R. (Tri-Kolkata)	In the said case, the appellant did not accept the notice. Further, they obtain adjournment for PH and did not appear on such adjourned date. Thereafter, they made a plea of financial crisis for non-payment of service tax. It is evident that

	the facts of the present case are entirely different and assessee has always been co-operative and submitted the data. Reliance on such case is not warranted to the facts of present case.
Trans (India) Shipping Pvt. Ltd. 2005 (188) E.L.T. 445 (Tri-Chennai)	In the said case, appellant made a plea of cash crisis to exonerate appellants from penal liability. It was held that this was not sufficient ground to absolve them from liability under Section 76. Reliance on such case is not warranted to the facts of present case. The appellant has not a financial crisis plea. They have not paid service tax due to meritorious grounds which form reasonable cause in the present case.
SPIC & SPAN Security and Allied Services 2006 (1) S.T.R.	Appellant submits that the facts of the said case to an extent support them in their contention. The said case was decided against the revenue. Therefore, placing reliance on such case is of not any help to the present case.

43. Appellant submits that it is a undisputed fact that the levy of service tax on Construction of complex service had created lot of confusion and many questions have been raised about the constitutional validity, The following are the significant outcomes/events surrounding the levy of service tax right from date of introduction of this Service:

DATE	PARTICULARS
16.6.2005	Any service provided or to be provided to any person, by any other person, in relation to construction of complex is taxable under sub-clause (zzzh) of section 65(105) of the Finance Act, 1994. Provisions relating to levy of service tax by amending sections 65 and 66 of the Finance Act, 1994 have been made effective from 16th June, 2005.

1.8.2006	Circular F. No. 332/35/2006-TRU, dated 1-8-2006If no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise
1.6.2007	The Finance Act, 1994 has sought to levy service tax for the first time on certain specified works contracts.
15.5.2008	Held in the case of Magus Constructions 2008 (11) S.T.R. 225 (Gau. That in the light of what has been laid down in the catena of decisions referred to above, it becomes clear that the circular, dated August 1, 2006, aforementioned, is binding on the department and this circular makes it more than abundantly clear that when a builder, promoter or developer undertakes construction activity for its own self, then, in such cases, in the absence of relationship of "service provider" and "service recipient", the question of providing "taxable service" to any person by any other person does not arise at all.
29.1.2009	Circular No. 108/2/2009-S.T., dated 29-1-2009 clarified that firstly that Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. Secondly, 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'.

1.7.2010	In the Finance Act, changes have been made in the construction services, both commercial construction and construction of residential complex, using 'completion certificate' issued by 'competent authority'. Before the issuance of completion certificate if agreement is entered into or any payment is made for sale of complex or apartment in residential complex, service tax will be leviable on such transaction since the builder provides the construction service.
15.2.2011	Trade Facility No. 1/2011, dated 15-2-2011 issued by Pune Commissionerate stated that Where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of para 3 of Boards Circular number 108/02/2009-S.T., dated 29-1-2009.

44. Appellant further submits that under Section 80 of the Finance Act, 1994 which reads as under :

*"**Notwithstanding** anything contained in the provisions of section 76, section 77 or first proviso to sub-section (1) of section 78 **no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause** for the said failure."* On this ground the proceedings in the subject order in so far as imposition of penalties is concerned should be dropped taking recourse to the Section 80 ibid.

45. Appellant submits that it was under bonafide belief that there activity was a works contract. There was confusion as to interpretation of the words in different taxing statues differently, Appellant had a reasonable cause for the failure to pay the service tax. Therefore, penalties under various sections

should be set-aside. This chaos in the interpretation is well-depicted by the table above.

46. In such cases where the interpretation of law is required, penal provisions cannot be invoked. Also in the case of CCE vs. Ess Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (NewDelhi – CESTAT) it was held that: "*It is settled position that when there is a dispute of interpretation of provision of law, the penal provisions cannot be invoked. Therefore, the Commissioner (Appeals) rightly set aside the penalty.*" Hence penalty is not applicable in the instant case.

47. Appellant places reliance on cases where the penalty has been waived in case there being a confusion

    a. ABS Inc. vs Commr. of C. Ex., Ahmedabad 2009 (016) STR 0573 Tri.-Ahmd wherein it was held confusion led to non-payment of Service tax - Mala fide absent - Service tax liability accepted and tax paid with interest - Fit case for invocation of Section 80 of Finance Act, 1994

    b. Jay Ganesh Auto Centre vs Commr. of C. Ex. & Cus., Rajkot 2009 (015) STR 0710 Tri.-Ahmd, where in it was held confusion on liability of authorized service station on amounts received as incentive from financial institutions - Bona fide belief on non-liability for commission confirmed by issue of clarification by C.B.E. & C. - Service tax contended as paid voluntarily with interest before issue of show cause Order - Penalty under Section 78 of Finance Act, 1994 waived.

    c. Raj Auto Centre vs Commissioner of C. Ex., Ahmedabad-II 2009 (014) STR 0327 Tri.-Ahmd - Confusion prevalent on impugned issue - Fit case for waiver of penalty - Penalties set aside

d. Kamdhenu Air Services vs Commissioner of Cus. & C. Ex., Jaipur 2009 (015) STR 0317 Tri.-Del - Confusion regarding levy - Penalties set aside - Section 76 of Finance Act, 1994

e. Commissioner of Service Tax, Daman vs Meghna Cement Depot 2009 (015) STR 0179 Tri.-Ahmd - Impugned order setting aside penalty containing finding that ingredients of Section 78 of Finance Act, 1994 absent - No evidence produced to show willful suppression by assessee to avoid payment of Service tax - Confusion prevalent during relevant period - Mala fide not indicated by Revenue - Impugned order sustainable.

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

49. Appellant wishes to be heard in person before passing any order in this regard.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner

For M/s Greenwood Estates

Authorised Signatory

PRAYER

Wherefore it is prayed that this honorable Commissioner (Appeals) be Pleased to hold:

a. Set aside the impugned order of the Respondent.

b. The activity of construction of taxable service is not taxable.

c. Extended period is not invocable.

d. Service tax and Interest is not imposable.

e. No Penalty is imposable under Section 77 & Section 78

f. Any other consequential relief is granted.

For Hiregange & Associates

Chartered Accountants

Partner

Sudhir V S

(Authorised Representative) **Appellant**

VERIFICATION

I, M/s Greenwood Estates, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today the 29th of October, 2012

Place: Hyderabad

Appellant

STAY APPLICATION UNDER SECTION 35F OF THE CENTRAL EXCISE ACT, 1944.

BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL BANGALORE

Service Tax Appeal No. _____ Of 2012
Stay Application No. _____ Of 2012

Between:

M/s Greenwood Estates .....**Appellant**
5-4-187/3 & 4, 2nd Floor,
MG Road,
Secunderabad- 500 003

Vs

The Additional Commissioner (Service Tax) .....**Respondent**
Basheerbagh
Hyderabad- 500 004

Application seeking waiver of pre-deposit and stay of recovery of Adjudication levies under section 35F of the Central Excise Act, 1944

1. The Appellants submit that for the reasons mentioned in the appeal it would be grossly unjustified and inequitable and cause undue hardship to the Appellants if the amount the amount of demand raised is required to be paid.

2. The Appellant submits that they are entitled to be granted an order staying the implementation of the said order of the Respondent pending the hearing and final disposal of this appeal viewed in the light of the fact that the order is one which has been passed without considering the various submissions made during the adjudication. It has been held by the Calcutta High Court in *Hooghly Mills Co. Ltd., Vs. UOI 1999 (108) ELT 637* that it would amount to undue hardship if the Appellant were required to pre-deposit when they had a strong prima facie case which in the instant case for reasons stated above is present directly in favour of the Appellant.

3. Without prejudice to the foregoing, appellant further submits the various decision that has been rendered relying on the Circular 108 are as under

   g. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009 (015) STR 0077 (Tri-Bang)

   h. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,

   i. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)

   j. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

   k. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

   l. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

4. Appellant further submits the Honorable Tribunal of Delhi in the case of Ambika Paints Ply & Hardware Store vs Commissioner of Central Excise, Bhopal 2012 (27) STR 71 (Tri-Del) has held as under: "*This legal fiction introduced by explanation to Section 65(zzzh) has not been given retrospective effect. Therefore, for the period prior to 1-7-2010, the appellant's activity cannot be treated as service provided by them to their customers. In respect of the period prior to 1-7-2010 same view has been expressed by the Board in its Circular No. 108/2/2009-S.T., dated 29-1-09.* We are, therefore, of prima facie view that the impugned order is not correct."

5. Appellant submits that where the Service Tax itself is not payable, the question of paying of Interest/Penalty on the same does not arise as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

6. Appellant submits that demands raised will not stand the test of appeal as correct legal and factual position were not kept in mind while passing the adjudicating Order. It is judicially following across the country when the demand has no leg to stand it is right case for 100% waiver of the pre deposit of the service tax.

7. In the case of *Silliguri Municipality and Ors.* v. *Amalendu Das and Ors.* (AIR 1984 SC 653) it was held that *"It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that* ***the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand.*** *There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief* ***may lead to public mischief,*** *grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given".*

8. The appellants also plead financial hardship due to the reason that the service tax has not been reimbursed by the recipient and also that the Appellant is not a business entity as is required to pay out a portion of their earnings.

9. The Appellants crave leave to alter, ad to and/or amend the aforesaid grounds.

10. The Appellants wish to be personally heard before any decision is taken in this matter.

PRAYER

WHEREFORE, the Appellants pray that pending the hearing and final disposal of this appeal, an order be granted in their favor staying the order of the Respondent and granting waiver of pre-deposit of the entire amount.

Signature of the Applicant

VERIFICATION

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

Verified today the 29th day of October, 2012.

Place: Hyderabad

Signature of the Applicant

BEFORE THE COMMISSIONER (APPEALS-II) OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, 7TH FLOOR, L.B. STADIUM ROAD, BASHEERBAGH, HYDERABAD – 500 004.

Sub: Appeal against the order of the. Commissioner of Customs, Central Excise and Service Tax (Appeal), Hyderabad in Order in Original No 51/2012 (H-IV) S. Tax dated 31.08.2012 issued to M/s Greenwood Estates, Secunderabad

I/We, M/s Greenwood Estates hereby authorise and appoint Hiregange & Associates, Chartered Accountants, Hyderabad or their partners and qualified staff who are authorised to act as authorised 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 authorised 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 this 29th day of October 2012 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 under Section 35Q of the Central Excises Act, 1944. 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: 29.10.2012

Address for service:
Hiregange & Associates,
"Basheer Villa", 8-2-268/1/16/B,
2nd Floor, Sriniketan Colony,
Road No. 3 Banjara Hills,
Hyderabad – 500 034.

For Hiregange & Associates
Chartered Accountants

Sudhir V. S.
Partner. (M. No. 219109)

BEFORE THE OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD-II COMMISSIONERATE, 3rd FLOOR, SHAKKAR BHAVAN, L.B.STADIUM ROAD, BASHEERBAGH, HYDERABAD-500004

Sub: Proceedings under SCN O.R No. 52/2012-Adjn.(ST) Gr.X dated 24.04.2012 issued to M/s. Greenwood Estates, Secunderabad.

We are authorised to represent M/s Greenwood Estates (hereinafter referred to as Noticee), Secunderabad vide their authorization letter enclosed along with this reply.

BRIEF FACTS OF THE CASE:

A. Noticee is registered as service providers under the category of under the category of "Works Contract Service" with the Department vide **Service Tax Registration No. AANFA5250FST001.**

B. The Noticee provides Construction Services to various customers. Noticee is engaged in the business of construction of residential units. Noticee had undertaken a venture by name M/s Greenwood Estates towards sale of land and agreement of construction.

C. In respect of the residential units constructed and sold two agreements were entered into by the Noticee, one for sale of the undivided portion of land and the other is the construction agreement.

D. Noticee Initially, upto December 2008, when amounts were received by the and even though there was a doubt and lot of confusion on the applicability of service tax the appellant paid service tax in respect of the receipts of construction agreement. Later, on the issue of the clarification vide the circular No. 108/02/2009 dated 29.01.2009 by the department, the customers of the appellant, stopped paying the service tax and accordingly appellant was forced to stop 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

Chartered Accountants

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excluded vide the personal use clause in the definition of residential complex.

E. The Department initially issued a Show Cause Notice No. HQPOR No. 77/2010-Adjn (ST) for the period January 2009 to December 2009 and the same was adjudicated and the Noticee has preferred appeal and the the same has been adjudicated and confirmed vide OIO No: 47/2010-ST dated 24-11-2010.

F. Subsequently, the Additional Commissioner has issued the subject periodical show cause notice dated 23.04.2011 for the period January 2010 to December 2010.

G. Now the present show cause notice has been issued to show cause as to why:

i. An amount of Rs.46,81,850/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2010 to December 2010;

ii. Interest on the above should not be demanded under section 75 of the Act;

iii. Penalty under sections 76 of the Act should not be demanded from them.

iv. Penalty under sections 77 of the Act should not be demanded from them.

In as much as:

a. The Notice is issued demanding the said Service Tax on the amounts received towards agreement of Construction executed with various customers in respect of Noticee's venture viz. M/s Greenwood Estates.

Since the amounts received are for the services rendered for January 2011 to December 2011.

b. 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(105zzzza) of the Finance Act, 1994.

SUBMISSIONS

1. For easy comprehension, the subsequent submissions in this reply are made under different heading covering different aspects involved in the subject SCN.

   A. Validity of Show Cause Notice

   B. Applicability of Service Tax

   C. Quantification of Demand

   D. Interest under Section 75

   E. Penalty Under Section 76 & Section 77

   F. Benefit Under Section 80

In re: Validity of Show Cause Notice

2. The Noticee submits that the impugned Notice was passed totally ignoring the factual position and also some of the submission made and judicial decisions relied but were based on mere assumption, unwarranted inferences and presumptions. Supreme Court in case *Oudh Sugar Mills Limited v. UOI,* 1978 (2) ELT 172 (SC) has held that such impugned order are not sustainable under the law. On this count alone the entire proceedings under impugned Notice requires to be set-aside.

3. Without prejudice to the foregoing, Noticee submits entire SCN seems to have been issued with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. Therefore the allegation made in the subject SCN is not sustainable.

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4. Noticee further submits that the definition of the "Work Contract Service" has been extract on one side and the scope of the activities on the other side and has just concluded that the service tax is liable on such activity, but has failed to clearly bring out which portion of the definition is being covered by the what scope of activity and hence has not discharged its onus on proving the liability without any doubt. And hence the notice has been just issued in air and without proper examination and hence the same has to be set aside. The Special Bench of Tribunal consisting of three members in case of Crystic Resins (India) Pvt. Ltd., vs CCE, 1985 (019) ELT 0285 Tri.-Del has made the following observations on uncertainty in the SCN and said the SCN is not valid.

"If show cause notice is not properly worded inasmuch as it does not disclose essential particulars of the charge any action based upon it should be held to be null and void."

5. Noticee submits that the impugned SCN had not bought out the under which limb, he is liable for the service tax under Works Contract Service. The impugned SCN mentioned the definition of the Work Contract Service and extracted the description of the work undertaken by the Noticee and concluded the work undertaken by the Noticee is covered under the Works Contract Service. The subject SCN had never proved beyond the doubt how the particular activity undertaken by the Noticee is covered under the particular portion of the definition of the Works Contract Service. Hence the proceedings under the SCN shall be set aside.

6. Noticee further submits that the SCN should also contain the correct classification of the Service and if in the definition there are more sub-clauses then the correct sub-clause should be indicated. It was held in the case of United Telecoms Limited vs Commissioner of Service Tax, Hyderabad-2011 (22) S.T.R. 571 (Tri-Bang) no demand can be confirmed

against any person towards Service Tax liability unless he is put on the notice to its exact liability under the Statute.

"Notice is issued proposing demand under BAS the noticee will not be aware as to the precise ground on which tax is proposed to be demanded from him unless the sub-clause is specified. Under BAS several activities are listed as exigible under that head. Under BSS also several activities are listed as exigible under that head. In the absence of proposal in the show cause notice as to the liability of the assessee under the precise provision in the Act, the Tribunal found that the demand is not sustainable. The above judgment is squarely applicable and the proceedings under the Order shall be set aside".

Applying the same rationale, in the instance case the SCN does not clearly bring out under the precise provision in the Act is the tax proposed to be demanded. Based on the above judgment the entire proceedings under said SCN should be set-aside.

7. Noticee submits that in the case of CCE v. Brindavan Beverages (2007) 213 ELT 487(SC), it was observed, show cause notice is foundation on which department has to build up its case. If allegations in show cause notice are not specific and on the contrary vague, lack details and/or unintelligible, it is sufficient to hold that the Noticee is not given proper opportunity to meet the allegations indicated in the show cause notice. On this ground alone the impugned SCN is baseless and is liable to be set aside.

In re: Applicability of Service Tax

8. Noticee submits that the impugned SCN alleges that the services rendered by them are 'Work Contract Services'. However, it does not clearly bring out under which clause of the said taxable service they are classifiable. Noticee submits entire SCN seems to have been issued with revenue bias without appreciating the statutory provision, intention of

the same and also the objective of the transaction/activity/agreement. Therefore the allegation made in the subject SCN is not sustainable.

9. According to Section 65 (105) (zzzza) of Finance Act, 1994 *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;

10. Noticee further submits that assuming but not admitting noticee is rendering Construction of Complex Services one should understand the definition of residential complex mentioned in section 65(*91a*) which is extracted below:

"residential complex" means any complex comprising of—

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

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and ***the construction of such complex is intended for personal use as residence by such person.***

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause,—

(a) ***"personal use" includes permitting the complex for use as residence by another person on rent or without consideration;***

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

11. Notice submits that from the above it is evident that definition excludes construction of complex which is put to personal use by the customers. Noticee submits in the instant case, the flats constructed were put to personal use by the customers and hence outside the purview of the definition and consequently no service tax is payable.

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12. Without prejudice to the foregoing Noticee submits that the same was clearly clarified in the recent circular no. 108/02/2009 -ST dated 29.02.2009. This was also clarified in two other circulars as under :

a. F. No. B1/6/2005-TRU, dated 27-7-2005

b. F. No. 332/35/2006-TRU, dated 1-8-2006

13. Noticee submits that non-taxability of the construction provided for an individual customer intended for his personal was clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 (mentioned above) during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio.

Relevant Extract

"13.4 However, residential complex having only 12 or less residential units would not be taxable. ***Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is also not covered under the scope of the service tax and not taxable"***

14. Noticee further submits that the board in between had clarified in an indicative manner that the personal use of a residential complex is not liable for service tax in the Circular F. No. 332/35/2006-TRU (mentioned above), dated 1-8-2006.

2.	*Again will service tax be applicable on the same, in case he constructs commercial complex for himself for putting it on rent or sale?*	*Commercial complex does not fall within the scope of "residential complex intended for personal use". Hence, service provided for construction of commercial complex is leviable to service tax.*
	Will the construction of an individual house or a bungalow	*Clarified vide F. No. B1/6/ 2005-TRU, dated 27-7-2005, that residential*

	meant for residence of an individual fall in purview of service tax, is so, whose responsibility is there for payment?	*complex constructed by an individual, intended for personal use as residence and constructed by directly availing services of a construction service provider, is not liable to service tax.*

15. Noticee further submits that Board Circular No. 108/2/2009-S.T., dated 29-1-2009 states that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction.

Relevant extract

*"...**Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'..."***

16. The noticee submits the preamble of the referred circular for understanding what issue exactly the board wanted to clarify. The relevant part of the said circular (para 1) is extracted hereunder for ready reference.

*"....Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for **selling a dwelling unit in a residential complex** at any stage of construction (or even prior to that) and who makes construction linked payment..." (Para 1)*

17. The noticee submits that from the above extract, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the notice. Hence, where a residential unit in a complex is for personal use of such person it shall not be leviable to service tax.

18. The noticee submits that it is important to consider what arguments are considered by board for providing this clarification. The relevant part as applicable in the context has been extracted as under for ready reference.

"...It has also been argued that even if it is taken that service is provided to the customer, ***a single residential unit bought by the individual customer*** *would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax..." (Para 2)*

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

"... The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently

would not attract service tax. Further, if the ultimate owner enters into a contract ***for construction of a residential complex*** *with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)*

20. The noticee submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.

    a. For service provided until the sale deed has been executed to the ultimate owner.

    b. For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

21. The noticee submits that it is exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore this clarification is applicable to them ibid.

22. Noticee submits that with the above exclusion, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

23. Without prejudice to the foregoing, noticee further submits the various decision that has been rendered relying on the Circular 108 are as under

    a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL-1106-CESTAT-Bang,

b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,

c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)

d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

e. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

f. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

24. Based on the above the noticee was of the bonafide belief that service tax was not payable and stopped collecting and making payment. Hence where service tax is itself not payable then the question of non-payment raised by the SCN is not correct and the entire SCN has to be set aside based on these grounds only.

25. Without prejudice to the foregoing noticee submits that if the transaction is considered as taxable and there is service tax liability then the noticee would be eligible for CENVAT credit on the input services and capital goods used and hence the liability shall be reduced to that extent. The SCN has not considered this and has demanded the entire service tax.

In re: Quantification of Demand

26. Noticee submits for the period January 2011 to December 2011, the SCN has claimed that entire receipts of Rs.11,36,37,141/- are taxable. Out of the said amount Rs.4,36,26000/- is received towards value of sale deed and Rs.1,00,70,537/- is towards taxes and other charges which shall not be leviable to service tax. An amount of Rs.5,99,40,694/- has only been received towards Construction agreement. Therefore, assuming but not

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admitting, service tax if any is payable should be levied only on amount of Rs.5,99,40,694/- and not on the entire amount as envisaged in the notice.

27. Noticee hence submits that service tax is to be levied on Rs.5,99,40,694/-. Thus the service tax liability shall amount to Rs.24,69,553/-. Out of the said amount, Rs.5,98,671/- was paid earlier to the issuance of notice and acknowledged the same in the subject notice and Rs.39,666/- was paid by utilisation of Cenvat Credit and the balance of Rs.18,31,216/- was paid vide Challan dated 21.02.2012. Therefore, the entire liability has been discharged by the Noticee and hence the notice is required to be set aside. (copies of the challans are enclosed along with this reply)

28. Without prejudice to the foregoing, assuming but not admitting that the service tax is payable as per the SCN, Noticee submits that they have not collected the service tax amount being demanded in the subject SCN. Therefore the amount received should be considered as cum-tax in terms of Explanation to Section 67 of the Finance Act, 1994 and the service tax has to be re-computed giving the noticee the benefit of cum-tax.

29. Without prejudice to the foregoing Noticee had submitted in their reply the basis on which it is evident that the circular 108/02/2009-ST dated 29.01.2009 states that where a **residential unit** is put to personal use, and not necessarily the entire complex, it would be excluded under the taxable service 'Construction of Complex'. Though the impugned order, without giving any proper justification and by just reproducing a part of the above circular, concluded that the exclusion from taxable service would be available only when the entire complex is put to personal use. The impugned Notice has not considered any of the points stated by them in their reply regarding the fact that the above circular explains that personal use of a single residential unit itself would exclude it from

service tax. For this reason as well the impugned Notice shall be set aside.

In re: Interest under Section 75

30. Without prejudice to the foregoing noticee submits that when service tax itself is not payable, the question of interest and penalty does not arise.

31. Noticee further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

In re: Penalty under Section 76 & Section 77

32. Without prejudice to the foregoing, Noticee submits that service tax liability on the builders till date has not been settled and there is full of confusion as the correct position till date. With this background it is a settled proposition of law that when the assessee 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 cannot be intention of evasion and penalty cannot be levied. In this regard we wish to rely upon the following decisions of Supreme Court.

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

(ii) Akbar Badruddin Jaiwani V. Collector – 1990 (47) ELT 161(SC)

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

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 76.

In re: Benefit Under Section 80

33. Further section 80 of Finance Act provides no penalty shall be levied under section 76. 77 or 78 if the assessee proves that there is a reasonable cause for the failure. The notice in the instant case was under confusion as to the service tax liability on their transaction, therefore

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there was reasonable case for the failure to pay service tax, hence the benefit under section 80 has to be given to them.

34. Noticee crave leave to alter, add to and/or amend the aforesaid grounds.

35. Noticee wish to be heard in person before passing any order in this regard.

For Hiregange & Associates

Sudhir V S

Hiregange & Associates Chartered Accountants Hyderabad-34

For M/s. Greenwood Estates,

Authorised Signatory

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