A9

**FORM ST - 5**
[See rule 6(1)]

# Form of Appeal to the Appellate Tribunal under sub-Section (1) of Section 86 of the Finance Act, 1994

## In the Customs, Excise and Service Tax Appellate Tribunal

**APPEAL No..... of 2013**

**BETWEEN:**

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

**Vs.**

**The Commissioner of Customs,**
**Central Excise & Service Tax,**
**Hyderabad-II Commissionerate,**
**Central Revenues Building,**
**1st Floor, L.B.Stadium Road,**
**Hyderabad – 500 004** ..... **Respondent**

| | | |
|---|---|---|
| 01(a) | Assessee Code | AAHFG0711BST001 |
| (b) | Premises Code | 5213050001 |
| (c) | PAN or UID | AAHFG0711B |
| (e) | E-mail Address | info@modiproperties.com |
| (f) | Phone Number | 091-40-66335551 |
| (g) | Fax Number | 091-40-27544058 |
| 02. | The Designation and Address of the Authority passing the Order Appealed against. | The Commissioner of Customs, Central Excise & Service Tax (Appeals-II), 7th Floor, Kendriya Shulk Bhavan, Opp. L.B. Stadium, Basheerbagh, Hyderabad-500 004 |
| 03. | Number and Date of the Order appealed against | Order-In-Appeal No. 39/2013 (H-II) S. Tax (Appeal No. 202/2012 (H-II) S. Tax) dated 27.02.2013 |
| 04. | Date of Communication of a copy of the Order appealed against | 01.04.2013 |
| 05. | State of Union Territory and the Commissionerate in which the order or decision of assessment, penalty, was made | Andhra Pradesh, Commissioner of Customs, Central Excise & Service Tax, Hyderabad II Commissionerate, Hyderabad-500 004. |
| 06. | If the order appealed against relates to more than one Commissionerate, mention the names of all the Commissionerate, so far as it relates to the Appellant | Not Applicable |

For GREEN WOOD ESTATES

Hiregange & Associates Chartered Accountants Hyderabad

A10

| | | |
|---|---|---|
| 07. | Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals) | Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad II Commissionerate, L.B.Stadium Road, Basheerbagh, Hyderabad – 500 004. |
| 08. | Address to which notices may be sent to the appellant | Hiregange & Associates, Chartered Accountants # 1010, 1st Floor, Above Corporation Bank, 26th Main, 4th T Block, Jayanagar, Bangalore – 560 041.<br><br>**Also to Appellant as stated in cause title supra.** |
| 09. | Address to which notices may be sent to the respondent | The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Basheerbagh, L. B. Stadium Road, Hyderabad-500 004 |
| 10. | Whether the decision or order appealed against involves any question having a relation to the rate of Service Tax or to the value of goods for the purpose of assessment. | Yes |
| 11. | Description of service and whether in 'negative list' | Works Contract service |
| 12. | Period of Dispute | January 2010 to December 2011 |
| 13(i) | Amount of service tax, if any Demanded for the period of dispute | Rs.94,82,241 /- |
| (ii) | Amount of interest involved up to the date of the order appealed against | Rs. 26,89,497/- (Apprx.) |
| (iii) | Amount of refund if any, rejected or disallowed for the period of dispute | Not Applicable |
| (iv) | Amount of penalty imposed | Penalty imposed under Section 76 of the Finance Act, 1994 |
| 14(i) | Amount of service tax or penalty or Interest deposited. If so, mention the amount deposited under each head in the box. (A copy of the Challan under which the deposit is made shall be furnished) | An amount of service tax Rs.24,29,887/- is already paid by Cash and Rs.39,666/- paid by the CENVAT Account. An amount of Rs. 23,11,233/- towards Service Tax has been paid vide Challan 10 dated 07.01.2013 as compliance of Order In Stay Petition before Commissioner (Appeals). |

For GREEN WOOD ESTATE;

A11

| | | |
|---|---|---|
| (ii) | If not, whether any application for dispensing with such deposit has been made? | Stay application is separately filed along with this appeal for waiver of pre-deposit of remaining amount of the Service Tax, applicable interest, and Penalty under Section 76 & 77 of the Finance Act, 1994 and to stay the operation of the impugned order. |
| 15. | Does the order appealed against also involve any central excise duty demand, and related fine or penalty, so far as the appellant is concerned? | No |
| 16. | Does the order appealed against also involve any customs duty demand, and related penalty, so far as the appellant is concerned? | No |
| 17. | Subject matter of dispute in order of priority (please choose two items from the list below)<br>[i] Taxability – Sl. No. of Negative List.<br>ii) Classification of Services<br>iii) Applicability of Exemption Notification No.,<br>iv) Export of Services<br>v) Import of Services<br>vi) Point of Taxation<br>vii) CENVAT<br>viii) Refund<br>ix) Valuation<br>x) Others] | Priority 1 – Taxability<br><br>Priority 2 - Others |
| 18. | Central Excise Assessee Code, if registered with Central Excise | Not registered with Central Excise |
| 19. | Give details of Importer/Exporter Code (IEC), if registered with Director General Of Foreign Trade | Not Applicable |
| 20. | If the appeal is against an Order-in- appeal of Commissioner (Appeals), the number of Order-in-original covered by the said Order-in-Appeal. | Order in Original No.51/2012 – Adjn (S.T) ADC (C. No. IV/16/197/2012. OR No. 62/2011 & 52/2012-Adjn (ST) ADC dated 31.08.2012 |

FOR GREEN WOOD ESTATE

Hiregange & Associates Chartered Accountants Hyderabad

A12

| | | |
|---|---|---|
| 21. | Whether the respondent has also filed Appeal against the order against which this appeal is made. | No |
| 22. | If answer to serial number 21 above is 'Yes', furnish details of appeal. | Not Applicable |
| 23. | Whether the appellant wishes to be Heard in person? | Yes. At the earliest convenience of this Honorable Tribunal. |
| 24. | Reliefs claim in appeal | To set aside the impugned order to the extent aggrieved and grant the relief claimed. |

**For Hiregange & Associates**
**Chartered Accountants**

**Sudhir V S**
**Authorised Representative**

For GREEN WOOD ESTATE; Ltd.

**Appellant**

A124

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

**BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL BANGALORE**

A12

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

**Between:**

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

**Vs**

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

**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.

A124

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

A 12

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**

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL**

**Service Tax Appeal No. _____ of 2013**
**Stay Application No. _____ of 2013**

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

..... **Appellant**

**Vs.**

**The Commissioner of Customs,**
**Central Excise & Service Tax,**
**Hyderabad-IICommissionerate,**
**Central Revenues Building,**
**1st Floor, L.B.Stadium Road,**
**Hyderabad – 500 004**

..... **Respondent**

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

The Appellant in the above appeal petition is the Applicant herein and craves to submit for kind consideration of this Hon'ble tribunal as under:

1. The Applicant/Appellant is now in appeal against Order-In-Appeal No. 39/2013 (H-II) S. Tax (Appeal No. 202/2012 (H-II) S. Tax) dated 27.02.2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Hyderabad, L.B Stadium Road, Hyderabad- 500 004confirming the demand of service tax under provisions of Section 73 of the Finance Act, 1994.

2. The facts and events leading to the filing of this application and grounds of appeal have been narrated in the memorandum of appeal in Form ST-5 filed along with this application, and the Applicant/Appellant craves leave of this Honorable tribunal to adopt, reiterate and maintain the same in support of this application. The Applicant / Appellant maintain and reiterate the same grounds in support of this application.

A76

3. The Applicant 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. 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.

4. The Applicant 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.1,00,70,537/- is received towards value of sale deed and Rs.66,11,038/- 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. 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. The Ld. Commissioner (Appeals) vide Para 11 accepted the above submissions and directed the lower authority to arrive the correct taxable value and liability of the service tax.

5. The Applicant submits that an amount of service tax Rs. 24,29,887/- is already paid by Cash and Rs. 39,666/- paid by the CENVAT Account towards liability of service tax for the period January 2011 to December 2011 even before issuing show cause notice. An amount of Rs. 23,11,233/- towards Service Tax has been paid vide Challan _____, dated _____ as compliance of Order In Stay Petition before Commissioner (Appeals). Stay application is filing along with this appeal for waiver of pre-deposit of remaining amount of the Service Tax, applicable interest, and Penalty under Section 76 & 77 of the Finance Act, 1994 and to stay the operation of the impugned order.

A77

6. The Applicant submits that summery of value of taxable service as per the show cause notice and correct value of taxable receipts as submitted before the Ld. Commissioner (Appeals) and details of the amount paid enumerated in the following table.

| Period (1) | Receipts as per the SCN (2) | Correct Receipts as submitted before Ld. Commissioner (Appeals) (3) | Tax liability as per the SCN (4) | Tax liability on corrected figures (5) (3)*4.12% | Amount paid before show cause notice (6) |
|---|---|---|---|---|---|
| January 2010-December 2010 | Rs. 11,65,14,336/- | Rs.5,73,06,355/- | Rs. 48,00,391/- | Rs.23,61,022 /- | - |
| January 2011 to December 2011 | Rs. 11,36,37,141/- | Rs. 5,99,40,604/- | Rs.46,81,850/- | Rs.24,69,553/- (without come tax benefit) | Rs.24,69,553/- |

| | |
|---|---|
| Total actual liability of service tax | **Rs.48,30,575/-** |
| **Service Tax paid before SCN** | Rs.24,69,553/- |
| Service tax paid in compliance of Stay order | Rs. 23,11,233/- |
| Actual short payment | Rs.49,789/- |

this Hon'ble Tribunal to entertain and dispose of this application on merits.

10. The Applicant/Appellant submits that the amount payable is huge and there is no sufficient amount for the payment of the pre-deposit if any order, which would lead to a huge financial crunch, and in turn would result in the threat for the continuity of the business.

11. The Applicant/Appellant has relied upon a number of judicial decisions in support of their grounds of appeal and craves leave of this Hon'ble Tribunal to rely on the same in support of this application.

12. The Appellant submits that in the following decisions the Courts have held that while deciding a stay application, an appellate forum is required to first look into the prima-facie merits of a case and then the financial hardship, and if there is a prima-facie case, stay could be granted, in terms of *Benara Valves Limited v. CCE*, 2006 (204) ELT 513 (SC); *Mehsana District Milk PU Cooperative Ltd., Vs. UOI*, 2003 (154) ELT 347 (SC) and *ITC Vs. CCE*, 2005 (18 4) ELT 347 (All); *Hoogly Mills Co. Ltd., Vs. UOI*, 1999 (108) ELT 637 (Cal.). Your Appellant therefore prays that the prima-facie nature of the case be kindly considered and the Honourable tribunal Appeals be pleased to grant stay along with waiver of pre-deposit of adjudication levies.

**Applicant**

## PRAYER

Wherefore, it is prayed that this Hon'ble tribunal be pleased to grant waiver of pre-deposit of service tax, interest and penalty and stay the recovery of the said amount during the pendency of the appeal, and hear the appeal on merits in the justice and equity, for which act of justice and fairness, the Applicant would as in law, be beholden and would pray for in law & c

Place: Hyderabad

Dated: 26.06.2013

For GREEN WOOD ESTATES
Applicant

## VERIFICATION

I, Soham Modi, Partner of M/s. Greenwood Estates, Hyderabad the Appellant hereinabove, do hereby declare that what is stated above is true to the best of our information and belief.

Verified at Hyderabad on this 26th day of june 2013

Place: Hyderabad

Date: 26.06.2013

For GREEN WOOD ESTATES
Applicant

Hiregange & Associates
Chartered Accountants
Hyderabad

A13

## STATEMENT OF FACTS

A. M/s. Greenwood Estates, Secunderabad (Hereinafter referred to as 'Appellant') mainly engaged in the sale of residential houses to prospective buyers while the units are under construction. The constitution of the Appellant is a partnership firm.

B. The Appellants have applied for the registration with the Service Tax department and accordingly registered under the category of "Works Contract Service" with the Department vide Service Tax Registration No. AANFA5250FST001.

C. The Appellant undertaken a venture by name M/s Greenwood Estates located in Kowkur Village, Malkajgiri Mandal. The exact modus operandi of the arrangement with the prospective buyers is explained hereunder.

   a. Whenever an intending buyer wants to purchase a residential unit, he approaches the Appellant. Based on negotiations, he fills up a booking form. **A copy of the booking form is enclosed and marked as Annexure "___".** The key terms and conditions from the booking form are as under:-

      i. This is a provisional booking for a flat mentioned overleaf in the project known as Flower Heights. The provisional bookings do not convey in favour of purchaser any right, title or interest of whatsoever nature unless and until required documents such as Sale Agreement/ Sale Deed/ Work Order etc., are executed.

      ii. The purchaser shall execute the required documents within a period of 30 days from the date of booking along with payment of the 1st installment mentioned overleaf. In case, the purchaser fails to do so then this provisional booking

shall stand cancelled and the builder shall be entitled to deduct cancellation charges as mentioned herein.

**D. Registration And Other Charges**

a. Registration Charges, Stamp Duty and incidental expenses thereto as applicable at the time of registration shall be extra and is to be borne by the purchaser.

b. Service Tax & VAT as applicable from time to time shall be extra and is to be borne by the purchaser.

**E. Cancellation Charges**

a. In case of default mentioned in (c) above, the cancellation charges shall be Rs.25, 000/-

b. In case of failure of the purchaser to obtain housing loan within 30 days of the provisional booking, the cancellation charges will be NIL provided necessary intimation to this effect is given to the builder in writing along with necessary proof of non-sanction or cancellation charges shall be Rs.25,000/-

c. In case of request for cancellation in writing within 60 days of this provisional booking, the cancellation charges shall be Rs.50, 000/-

d. In all other cases of cancellation either of booking or agreement, the cancellation charges shall be 15% of the agreed sale consideration.

**F. Other Consequences Upon Cancellation**

a. **The purchaser shall re-convey and redeliver the possession of the** plot in favour of the builder at his/her cost free from all encumbrances, charges, claims, interests etc., of whatsoever nature.

AIS

**G. Possession**

a. The builder shall deliver the possession of the completed flat to the purchaser only on payment of dues to the builder.

b. Once the booking is confirmed, the Appellant enters into an agreement of sale with the intending buyer. **A copy of the Agreement of Sale is enclosed and marked as Annexure "___".** The key aspects of the said Agreement of Sale are as under:-

   i. Agreement of sale explains and demonstrates the Title of the Appellant in the underlying. Agreement highlights that the Appellant has agreed to sell the semi finished flat together with a flat constructed thereon.

   ii. Some important clauses of the Agreement of Sale are as under:-

      1. That the Vendor agrees to sell for a consideration and the Buyer agrees to purchase a semi finished flat along with flat constructed thereon. The construction of the Scheduled Apartment will be as per the specifications given in agreement of sale.

      2. That the total sale consideration for the above shall be Rs. 23,96000/- .

      3. That for the purposes of creating a charge in favour of the bank/ financial institutions on the apartment being constructed so as to enable the Buyer to avail housing loan, the Vendor will execute a sale deed in favour of the Buyer for sale of flat in a semi-finished state. In the event of execution of sale deed before the apartment is fully completed, the Buyer shall be required to enter into a separate construction contract with the Vendor for

A16

completing the unfinished apartment and the Buyer shall not raise any objection for execution of such an agreement.

4. That on payment of the full consideration amount as mentioned above and on completion of construction of the said apartments, the Vendor shall deliver the possession of the schedule flat to the Buyer with all amenities and facilities as agreed to between the parties and the Buyer shall enter into possession of the schedule flat and enjoy the same with all the rights and privileges of an owner.
5. That the Vendor shall cause this Agreement of sale to be registered in favour of the Buyer as and when the Buyer intimates in writing to the Vendor his/her/their preparedness with the amount payable towards stamp duty, registration charges and other expenses related to the registration of this Agreement.
6. That the stamp duty, registration charges and other expenses related to the execution and registration of this agreement of sale and other deeds, or conveyances and agreements shall be borne by the Buyer only.

c. In certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Appellants may enter into a sale deed for sale of flat in a semi finished state, simultaneously entering into a separate construction contract for completing the unfinished flat. It may be noted that as per para 18 of the Agreement of Sale, both the Sale deed and the Agreement for Construction are interdependent, mutually co-existing and

A17

inseparable. **Enclosed are copies of the Sale Deed and the Agreement for Construction (Annexure "___" & "___")**

H. Some important provisions from the Agreement for Construction (which is the subject matter of the current litigation) are extracted below for ready reference:-

a. The Buyer has purchased a semi finished flat bearing No. 203 admeasuring 1230 sq. yds. Under a sale deed dated 14.06.2010 registered as document no. 709067 in the office of the sub-registrar, Vallabh Nagar.

b. This sale deed was executed subject to the condition that the buyer shall enter into a agreement for construction and agreement for development charges with the builder for construction of a flat.

c. The Buyer is desirous of getting the construction completed with respect to the scheduled flat by the Builder.

d. The Buyer as stated above had already purchased the semi finished flat of land bearing no. 203 and the parties hereto have specifically agreed that the construction agreement and the sale deed date 14.06.2010 referred herein above are and shall be interdependent and co-existing agreements.

e. The Builder shall complete the construction for the Buyer of a flat on plot of land bearing no. 203 as per the plans annexed hereto and the specifications given hereunder for a consideration of Rs. 14,96,000/-.

f. The Builder upon completion of construction of the flat shall intimate to the Buyer the same at his last known address and the Buyer shall within 15 days of such intimation take possession of flat provided however, that the Buyer shall not be entitled to take possession if he/she has not fulfilled the obligations under this

agreement. After such intimation, the Builder shall not be liable or responsible for any loss, breakages, damages, trespass and the like.

g. The buyer upon taking possession of the flat shall own and possess the same absolutely and shall have no claims against the Builder on any account, including any defect in the construction.

h. The Buyer upon receipt of the completion intimation from the Builder as provided above shall thereafter be liable and responsible to bear and pay all taxes and charges for electricity, water and other services and outgoings payable in respect of the said Apartment.

i. The Builder shall deliver the possession of the completed flat to the Buyer only upon payment of entire consideration and other dues by the Buyer to the Builder.

j. The Buyer hereby covenants and agrees with the Builder that if he fails to abide with the terms and conditions of this agreement, the Builder shall be entitled to cancel this agreement without any further action and intimation to the Buyer. The Builder upon such cancellation shall be entitled to forfeit a sum equivalent to 10% of the total agreed consideration as liquidated damages from the amounts paid by the Buyer to the Builder. The Builder shall further be entitled to allot, convey, transfer and assign the said flat to any other person of their choice and only thereafter, the Builder will refund the amounts paid by the Buyer after deducting liquidated damages provided herein.

k. It is mutually agreed upon by the parties hereto that all the terms and conditions contained in the booking form as amended from time to time shall be deemed to be the part of this agreement

A19

unless otherwise specifically waived and/or differently agreed upon in writing.

I. It has been the belief of the Appellant that irrespective of the mode in which the transactions are undertaken, the Appellant has a singular obligation to deliver a flat hence the substance of the transaction is that of a sale of an immovable property and therefore, no service tax can be attracted.

J. Appellant initially, till 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.

K. Later, on when the issue was clarified by CBEC 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.

L. 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 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 (H-II) S. Tax dated 31.01.2011 by the Commissioner Appeals, Hyderabad. Now the proceedings pertaining to above show cause notice is now pending before Hon'ble CESTAT, Bangalore.

M. The Appellant vide letter dated 22.04.2011, 07.02.2012 submitted the details of the amount received towards the construction agreement for the period January 2010 to December 2010 and January 2011 to December 2011. A 20

N. Accordingly, the Additional Commissioner has issued the two periodical SCN vide 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 section 73(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.

O. An amount of service tax Rs. 24,29,887/- is already paid by Cash and Rs. 39,666/- paid by the CENVAT Account towards liability of service tax for the period January 2011 to December 2011. However the show cause notice vide Para 5 has recognized only Rs. 5,98,671/- as piad.

P. 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. (Copy of the replies and personal hearing recording is enclosed along with this appeal memo).

Q. Despite the detailed submissions made vide written reply as well as during the personal hearing, the Additional 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 shouldnot 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.

R. The Ld. Additional Commissioner passed the order in original mainly on the basis of the following grounds.

a. Since the demand of the service tax for the past period was upheld by the Commissioner (Appeals) on being appeal filed by the

Appellant, respectfully following the decision of Commissioner (Appeals) the demand of the Service Tax is sustainable.

b. Since the residential complex project having more than 12 flats and layout of the project has been approved by Civic authorities the project has satisfied the definition of the residential complex.

c. Construction agreement involves the supply of the material and provision of the service therefore it is composite contract and the project should be classified under the "Works Contract Service".

d. It is neither their submission that VAT amount also included in the gross amount nor they have furnished any evidence that they have paid VAT hence the quantification arrived in the show cause notice is to be upheld.

e. Benefit under Section 80 of the Finance Act, 1994 is not available to the Appellant since their submission of the assessee does not cause the reasonable cause.

S. On aggrieved by the order of the Ld. Additional Commissioner the Appellant filed an Appeal along with the Application for the waiver of the pre-deposit of the taxes before Commissioner (Appeals) explaining in detail as to why the order in original passed by the lower authority was not sustainable (Copy of Appeal filed to Commissioner (Appeals) is enclosed for reference).

T. The Ld. Commissioner (Appeals) has disposed the stay application vide Order-In-Stay-Petition No. 63/2012 (H-II) S. Tax where in ordered the pre-deposit of the 50% of taxes demanded in the original adjudicating order.

U. The Appellant has complied the above Stay order by depositing the amount of 23,11,233/- vide Challan 10, dated 07.01.2013 and attended the personal hearing on 26.11.2012. The Ld. Commissioner (Appeals)

vide Order-In-Appeal No. 39/2013 (H-II) S. Tax dismissed the Appeal filed by the Appellant. The Ld. Commissioner (Appeals) passed the order mainly on the basis of the following grounds.

a. Since sale deed was executed for the part amount of the total consideration, Appellant is not covered by the exclusion given under the Board Circular No. 108/102/2009-ST dated 29.01.2009.

b. If the entire 'residential complex' is meant for use by one person then it gets excluded from the definition of 'Residential Complex'.

c. The penalty has to be reduced from Rs.200/- to Rs. 100 per day with effect from 08.04.2011.

d. Since the Appellant had not shown the fact of taxable receipts from their customers in their ST-3 Returns filed with the department with intention to evade the payment of service tax as such on their part cannot be treated as bonafide act and imposition of the penalty is rightly applicable.

e. **Lower authority is directed limited extent to re-quantify the service tax liability.**

Aggrieved by the impugned order, 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 (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, submissions in this appeal memo are made under different heading covering different aspects involved in the subject Order:

    a. The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all

    b. In substance also, the transaction is a sale of immoveable property

    c. The transaction of sale of immoveable property is not a works contract at all

    d. Construction of Residential complex for "Personal Use"

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

    f. Non consideration of the submissions vis-à-vis violation of principle of natural justice

    g. Time bar

    h. Interest Under Section 75 of Finance Act, 1994

    i. Penalty Under Section 76 & 77 of Finance Act, 1994

**In Re: The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all**

2. The Appellants crave leave to draw the attention of the Bench to the detailed fact matrix presented earlier. In particular, the Appellants wish to emphasize on the following documents:

    a. The Booking Form signed by the intending buyer, which is the first document governing the relationship between the Appellant and the intending buyer.

b. The Agreement to Sell, which formalizes the said relationship between the Appellant and the intending buyer.

c. A set of two co-terminus agreements, viz. the Sale Agreement and an Agreement for Construction, which are executed only to enable the transfer of title in semi-finished construction in cases where **there is a financing requirement for the buyer.**

d. **Sale Agreement, without a corresponding Agreement for Construction in cases where there is no financing requirement for the buyer.**

3. The Appellants have to submit that the Booking Form and the Agreement to Sell clearly define the relationship between the Appellants and the Buyer.

a. Agreement explains and demonstrates the Title of the Appellant in the underlying land and the sanction received by the Appellants from HUDA for development of the residential units as per the approved layout plans. It may not be out of place to stress that in a typical works contract/construction contract, the contractor works on client property and therefore the agreement has no necessity to emphasise on the title of the underlying land. The essence of the transaction between the Appellant and the Buyer is evident right from the Agreement and that essence is the title in the immoveable property.

b. Thereafter, agreement highlights that the Appellant has agreed to sell the semi finished flat with the flat together for the total consideration and the buyer has agreed to purchase the same. Thus, the said agreement clearly brings out the intention of the parties, which is sale of immoveable property.

c. The Appellants therefore submit that the Agreement to Sell is an agreement which evidences the transaction of commitment of sale of immoveable property at a future date and therefore there cannot be any service tax on the said transaction.

d. However, as stated in Para 11 of the Agreement, in certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Appellants may enter into a sale deed for sale of flat in a semi-finished state, simultaneously entering into a separate construction contract for completing the unfinished flat. It may be noted that as per para 18 of the Agreement of Sale, the Sale deed and the Agreement for Construction are interdependent, mutually co-existing and inseparable

e. It may be noted that the said set of co-terminus agreements do not result in any exchange of consideration between the parties but are entered into so as to effectuate the objectives of the Agreement to Sell. Therefore, in that sense, the entering into the said set of co-terminus agreements cannot be considered as an economic transaction resulting in any tax consequence.

f. Further, the substance of the transaction continues to be that of sale of immoveable property. Merely because the buyer is interested in defending the title to the property in the interim does not change the transaction to be that of a rendition of service.

4. The Appellant submits that in the case of Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh [2000] 119 STC 0533 (SC), the Supreme Court held that a contract for construction of ship as per the specifications of

A2

the buyer with specific stipulations is a sale contract and not a works contract. The Supreme Court also observed that the clause in the contract providing for passing of property in goods as and when the said goods are used in the contract is not important in deciding the issue. The relevant extracts from the said decision are as under:

> *"22. Reverting back to the facts of the contract under consideration before us, a few prominent features of the transaction are clearly deducible from the several terms and conditions and recitals of the contract. The contract is for sale of a completely manufactured ship to be delivered after successful trials in all respects and to the satisfaction of the buyer. It is a contract for sale of made to order goods, that is, ship for an ascertained price. Although the plans and specifications for the ship are to be provided by the customer and the work has to progress under the supervision of the classification surveyor and representative of the buyer, the components used in building ship, all belong to the appellant. The price fixed is of the vessel completely built up although the payment is in a phased manner or, in other words, at certain percentages commensurate with the progress of the work. The payment of 15 per cent of the price is to be made on satisfactory completion of the dock trials, that is when the vessel is ready to be delivered and strictly speaking excepting the ,delivery nothing substantial remains to be done. Twenty per cent of the price is to be paid upon delivery of the vessel. Thus 65 per cent of the price paid before the trials is intended to finance the builder and to share a part of the burden involved in the investments made by the builder towards building the ship. It is a sort of an advance payment of price. The "title and risk clause" quoted as sub-para (14) above is to be found in 6 out of 8 contracts in question. So far as these 6 contracts are concerned they leave no manner of doubt that property in goods passes from seller to the buyer only on the ship having been builtfully and delivered to the buyer. In all the contracts the ultimate conclusion would remain the same.* ***The ship at the time of delivery has to be completely built up ship and also seaworthy whereupon only the owner may accept the delivery.*** *A full reading of the contract shows that the chattel comes into existence as a chattel in a deliverable state by*

A28

*investment of components and labour by the seller and property in chattel passes to the buyer on delivery of chattel being accepted by the buyer. Article 15 apparently speaks of property in vessel passing to the buyer with the payment of first instalment of price but we are not to be guided by the face value of the language employed; we have to ascertain intention of the parties. The property in machines, equipments, engine, etc., purchased by the seller is not agreed upon to pass to the buyer. The delivery of the ship must bepreceded by trial run or runs to the satisfaction of the owner.* ***All the machinery, materials, equipment, appurtenances, spare parts and outfit required for the construction of the vessel are to be purchased by the builderout of its own funds. Neither any of the said things nor the hull is provided by the owner and in none of these the property vests in the owner.*** *It is nota case where the builder is utilising in building the ship, the machinery, equipment, spares and material, etc., belonging to the owner, whosoever might have paid for the same. The builder has thereafter to exert and investits own skill and labour to build the ship. Not only the owner does not supply or make available any of the said things or the hull of the ship the owner does not also pay for any of the said things or the hull separately. All the things so made available by the builder are fastened to the hull belonging to the builder and become part of it so as to make a vessel. Whatthe owner pays to the builder in instalments and in a phased manner a reall payments at the specified percentage which go towards the payment of the contract price, i.e., the price appointed for the vessel as a whole. 65 percent payment of the price is up to the stage of the main engine having been lowered in position on board the vessel, i.e., the stage by which the building of the vessel is complete. 15 per cent payment is to be done on satisfactory completion of the trial and 20 per cent upon delivery of the vessel.* ***Giving maximum benefit in the matter of construction and interpretation of this clause in favour of the appellant it can be said that it is the property in vessel which starts passing gradually to the buyer proportionately with the percentage of payments made and passes fully with the payment of last instalment on delivery of vessel having been accepted.***

5. The Appellant submits that based on the above observations, the Supreme Court concluded that the contracts in question ***involve sale of the respective vessels within the meaning of clause (n) of the Andhra Pradesh General Sales Tax Act, 1957 and are not merely works contract as defined in clause (t) thereof.***

6. The Appellant submits that similar view has been taken by the Supreme Court in the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd. [2005] 140 STC 0022 (SC), wherein it has been held that a contract for construction and supply of a lift is a sale contract and not a works contract. The relevant tests laid down in the said decision are reproduced below:

> *5. It can be treated as well-settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movableproperty of the customer? If it is the former, it is a "sale"; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the*

*reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a"sale" or a "works contract"*

7. The Appellant therefore have to submit that the transaction is essentially a transaction for sale of immoveable property and the relationship between the Appellants and the prospective owner is that of seller & buyer of an immoveable property. We submit that the said proposition is not altered even in cases where the set of co-terminus agreements are entered into.

8. The Appellant submits levy of service tax requires that there should be some rendition of service. In the instant case, there is a sale of immoveable property and therefore the provisions of the service tax law do not apply at all.

9. The Appellant submits that view that the builders are not liable for service tax is confirmed by the Ministry of Finance *vide* its letter number F. No. 332/35/2006-TRU, dated 1st August 2006; wherein it is acknowledged that the relationship between a builder and the purchaser is not that of a "service provider" and "service recipient"

**In Re: In substance also, the transaction is a sale of immoveable property**

10. The Appellant submits that it is an accepted principle that before characterizing a transaction, one has to carefully examine the exact legal nature of the transaction and other material facts. Not only the form but also the substance of transaction must be duly taken into account[1]. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of charging does not in itself determine whether the service provided is a single service or multiple services.

11. Further, continuous to the above in the following cases it has been held that substance of the transaction prevails over the form:

- Venus Jewel Vs. Commr of S.T. -I, Mumbai 2012 (285) E.L.T. 167 (Guj.)
- BhootpurvaSainik Society Vs. Commr of C. EX. & S.T., Allahabad 2012 (25) S.T.R. 39 (Tri. - Del.)
- Commr. OF S.T., Bangalore Vs. Karnataka State Beverages Corp.Ltd. 2011 (24) S.T.R. 405 (Kar.)

Even in commercial& legal parlance, the transactions are not in the nature of the Works Contract Services

12. The Appellant submits that when one looks at the substance of the transaction in the fact matrix as explained earlier, the issue is crystal clear, the essential feature of the transaction is that the Appellants sell immoveable properties. That being the case, the only place where the tax can be examined is under the Explanation to Section 65(105)(zzzh) as a deemed service and not under Section 65(105)(zzzza).

---

[1]CBEC Letter (F. No. B14/2006-TRU) dated 19/04/2006.

13. The Appellants submit that the activity of construction is for self and as a part of the obligation to deliver a developed immoveable property. Notwithstanding the same, even if it is presumed that the transaction contains elements of works contract services as alleged, the same are subsidiary and do not lend the essential characteristic to the transaction. For example, the Buyer has little wherewithal of the quality, quantity, brand or the price of most of the building materials used. Similarly, the Buyer is not concerned with the extent to which the labour or the services are required for the purpose of the completion of the unit. For both the Appellant as well as the Buyer, the linkage with works contracts is very remote and laborious.

14. The Appellant submits that from the above clarifications and distinctions, it is more than evident that commercially and legally, the transaction does not represent the characteristics required of the alleged categories of taxable services.

15. The Appellant submit that in a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance i.e. "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". Such words must be understood in their 'popular sense'. The particular terms used by the legislature in the denomination of articles are to be understood according to the common, commercial understanding of those terms used and not in their scientific and technical sense "for the legislature does not

suppose our merchants to be naturalists or geologists or botanists". This is referred to as the common parlance test[2].

16. The Appellant submits that based on the above common parlance test, we have to submit that in common parlance, no one would treat us as a works contractor but would consider us as sellers of immoveable properties and therefore, the transaction cannot be classified as Works Contract Services. For the said purpose, we rely on the following decisions:

    i. The expression "fish" is not wide enough to include prawns since If a man were to ask for fish in the market and if prawn is provided or in the vice versa, he would not accept the same[3]

    ii. Steam generated from water cannot be considered as chemical in common parlance[4]

17. The Appellants therefore submit that the essence of the transaction is not the same as alleged and therefore cannot be made liable for payment of service tax under the said categories of taxable services. The Appellants therefore submit that since the transaction in substance is that of sale of immoveable property and not one of construction, the same is not liable for payment of service tax.

---

[2]Mukesh Kumar Aggarwal & Co vs. State of Madhya Pradesh 2004 (178) ELT 3 (SC)
[3] Commissioner of Customs vs. Edhayam Frozen Foods 2008 (230) ELT 225 (Mad HC)
[4]Gopalan and Rasayan vs. State of Maharashtra 2011 (263) ELT 381 (Bom HC)

A34

**In Re: The transaction of sale of immoveable property is not a works contract at all**

18. The Appellants have to submit that service tax is levied on a selective approach. The service tax is demanded under the category of "Works Contract Services". However, the Order in Original has no detailed analysis of why the alleged transaction constitutes a works contract.

19. The Appellant submits that it is a settled proposition in law that a works contract is a contract wherein the contractor works upon a property owned by the client and while performing the work transfers the ownership of materials to the client.

20. The Appellant submits that Whether the contracts for sale of immoveable properties can be considered as works contracts or not is right now an issue pending before the Supreme Court since the decision in the case of K Raheja Development Corporation v State of Karnataka 2005-TIOL-77-SC-CT has been doubted by the Supreme Court and the matter has been referred to a Larger Bench[5].

21. The Appellant further submits, the transaction cannot be covered under the category of "Works Contract Services" since the activity is not specifically listed in the definition set.

22. The Appellant submits that the relevant definition sets are reproduced below for ease of reference:

[5] Larsen & Toubro Ltd. Vs. State of Karnataka 2008 (12) STR 257 (SC)

| | |
|---|---|
| *Taxable Service defined u/s 65(105)(zzzza)* | ***Taxable service** means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*<br><br>*Explanation.—For the purposes of this sub-clause, "works contract" means a contract wherein,—*<br><br>*(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*<br><br>*(ii) such contract is for the purposes of carrying out,—*<br><br>*(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*<br><br>*(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*<br><br>*(c) construction of a new residential complex or a part thereof; or*<br><br>*(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or*<br><br>*(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;* |

On a perusal of the above definition sets, it is evident that there are twin conditions to consider a transaction as a works contract under the provisions of the service tax law. The first condition is that transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and the second condition is that the contract is for specific purposes, which inter alia includes construction of a new residential complex or a part thereof

23. The Appellants have to submit that the impugned Order does not demonstrate in reasonable detail the satisfaction of either of the two conditions.

24. The Appellant submits that first condition for treating a transaction as works contract is that the transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods. Neither the SCN nor the OIO at any point of time, refer to this vital condition nor is there any demonstration of how this condition is satisfied.

25. The Appellants have to submit that though they are paying sales tax on the agreement for construction, the mere act of paying the sales tax does not demonstrate that the sales tax was actually leviable and the condition of works contract requires that the sales tax was actually leviable. As stated earlier, the issue regarding the applicability of sales tax on such transactions is pending before the Supreme Court.

26. The Appellants have to further submit that the role played by them is much wider than that of mere construction. We typically undertakes numerous activities like

- Evaluation/Acquisition of a Site
- Removal of Encumbrances
- Demolition
- Layout Planning & Approval
- Purchase of Additional TDR
- Construction
- Sale
- Possession & Maintenance
- Society Formation & Handing over

27. The Appellant submits that all the above steps are performed by the Appellants for self and are not performed specific for any buyer or prospective buyer. In fact, the approval of the standard layout is obtained by the Appellants without any consultation with the buyers and much before the buyer even knows the Appellants.

28. The Appellants therefore have to submit that merely entering to co-terminus agreements in case of financing requirements do not change the substance of the transaction to that of provision of works contract services.

29. Further, the Supreme Court judgment of K Raheja Development Corporation v State of Karnataka 2005-TIOL-77-SC-CT, which is the sole basis for treating the transaction as works contract was rendered in the

context of works contract tax. Under the Karnataka GST, the definition of works contract was specifically including development contracts, which is not the case with the service tax law, which includes only construction contracts. Further, the scope of development contracts is much wider than that of construction contracts and construction is just one of the responsibilities of the said contract.

**In Re: Construction of Residential complex for "Personal Use"**

30. Without prejudice to the foregoing, assuming but not admitting the same is covered under the tax net. The term "Construction of Complex" is defined under section 65 (30a) as under

*(30a) "construction of complex" means —*

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

*(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or*

*(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex*

31. Without prejudice to the foregoing, Appellant submits that the construction service of the semi-finished flat is provided for the owner of the semi-finished flat/customer, who in turn used such flat for his personal use.

A3

32. The Appellant submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 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 Ac, 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'...***"

33. The Appellant wishes to highlight that neither in the definition nor in the clarification, there is any mention that the entire complex should be used by **one** person for his or her residence to be eligible for the exemption. The exemption would be available if the sole condition is satisfied i.e. personal use. Hence the allegation of the Ld. Commissioner (Appeals) vide Para 7.2 of the impugned order has to set aside.

34. The 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.

AHO

*"....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)*

35. The 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 as alleged in the notice.

36. The 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)*

37. The Appellant submits that the argument is in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been provided based on the examination of the above argument among others. Hence the allegation of the Ld. Commissioner (Appeals) vide Para 7.2 of the impugned order is against to clarification given has to set aside. It is

settled law that officers of the department should not argue against their own Circulars. In this regard wishes to rely on Chandras Chemical Industries Pvt. LtdVsCollr. Of C. Ex., Calcutta 2000 (122) E.L.T 268 (Tribunal) it was held that ***"We also take note of the fact that the Hon'ble Supreme Court has laid down in a number of decisions that the Excise Authorities cannot be heard to argue against the Circular issued by the Board and it is not open to them to take a different view than the one taken by the Board in the Circular"***

38. The 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 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)*

39. The 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.

40. The 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.

41. The Appellant submitted that department has very narrowly interpreted the provision without much application of mind and has concluded that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex.

42. Where an exemption is granted through Circular No. 108/2/2009-S.T., dated 29-1-2009, the same cannot be denied on unreasonable grounds and illogical interpretation as above. In the definition *"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**."* Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person**....." similar the reference "personal use as residence by **such** person" also cannot be interpreted as "personal use by **ONE persons**" Such interpretation would be totally against the principles of interpretation of law and also highly illogical.

43. Appellant 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.

44. Without prejudice to the foregoing, Appellant further submits that non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio. Relevant Extract is reproduced below:

*"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"***

AUR

45. Without prejudice to the foregoing, 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, 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.* |

46. Without prejudice to the foregoing, assuming but not admitting that when the entire residential complex is meant for a person for his personal use, then such complex falls under excluded category is to be considered as interpreted by the impugned order, then the entire section 65(91a) gets defeated as in case complex belonging to single person there would be nothing called as a common area, common water supply etc,

the word "common" would be used only in case on multiple owner and not in case of single owner, therefore the interpretation of the department is meaningless.

47. 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-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

**In re: Liability on Builders with effective from 01.07.2010:**

48. Further the Appellant submits that in the Finance Bill, 2010 there was an explanation added to the Section 65(105)(zzzh) of the Act where the taxable service construction of residential complex is defined. This was the first time the deeming fiction of the service provided by the Builder was bought into service tax net (prior to this only the contractors were taxable). 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 the 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.

AU6

49. The Appellant submits that the Ld. Commissioner (Appeals) vide para 7.1 alleged that since the sale deed was not executed for total consideration, Appellant is not covered by the exclusion given under the Board Circular No. 108/102/2009-ST dated 29.01.2009. It is one of the modus operandi in construction industry to split full consideration as agreed in agreement of sale towards sale deed and construction agreement. So that customer will get the finance for the house from the Banks by furnishing semi constructed flat as security. Ultimate intention is to sell the residential unit to the final customer. Because Bankers are insisting the registered sale deeds for semi constructed flats to disburse the loans in order to ensure guaranteed completion ofproject by builders. Otherwise there is no need for us to enter in to the separate construction agreement with customers.

50. The Appellant submits that in continuation to above, TRU vide D.O.F No. 334/1/2010-TRU dated 26.02.2010 listed out the different patterns adapted by the builder. One among the other is 'Sale of Undivided Portion of The Land' and parallel execution of 'Construction Agreement' under which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated. The above Circular states that to bring parity in the tax treatment among different practices explanation has been inserted. From the above it is clear that even if the builder executes the construction through the construction agreement no service tax will apply for the builder till

insertion of the explanation. Therefore confirmation of the service tax liability on the basis of sale deed was executed for the part of the consideration is not sustainable.

AU8

51. 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 the 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.

52. Without prejudice to the foregoing, Appellant submits that Trade notice F.NoVGN(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 the issue is prior to such date the same has to be set aside.

53. 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.***

54. The 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.

55. The Appellant submits construction activity carried on by the builders to the prospective buyers by way of entering into agreement for sale is not a taxable service in view of the Honorable Gauhati High Court judgment in the case of *Magus Construction Pvt. Ltd vs Union of India, 2008 (011) STR 0225 (Gau)* wherein it was held as follows:

*"A combined reading of the various clauses of the agreement for sale makes it abundantly clear that the transaction between the petitioners, on the one hand, and the flat purchaser, on the other, is that of purchase and sale of premises and not for carrying out any constructional activities on behalf of the prospective buyers. What the petitioner-company sells is,*

*thus, the flat/premises and the entire transaction is nothing, but sale and purchase of immovable property. The flat purchasers are entitled to seek specific performance of the contract and there is an obligation, on the part of the petitioner-company, to refund any part of money received together with interest if possession is not handed over to the prospective buyers in time. There is also an obligation, on the part of the petitioner-company, to register sale deeds and agreements. Even the registering authorities concerned treat these documents as agreements for sale/purchase of flats/premises inasmuch as the consideration is for sale and not for carrying out constructional activities. Stamp duty is, therefore, levied on the sale consideration."*

A49

56. Without prejudice to the foregoing, the Appellant submits that the subject activity is not a taxable service on the following principles laid down in the aforesaid case.

(i) Para 29 states that one can safely define "service" as an act of helpful activity, an act of doing something useful, rendering assistance or help. Service does not involve supply of goods; "service" rather connotes transformation of use/user of goods as a result of voluntary intervention of "service provider" and is an intangible commodity in the form of human effort. To have "service", there must be a "service provider" rendering services to some other person(s), who shall be recipient of such "service".

(ii) Para 30 states that under the Finance Act, 1994, "service tax" is levied on "taxable service" only and not on "service provider". A "service provider" is only a means for deposit of the "service tax" to the credit of the Central Government. Although the term "service receiver" has not

been defined in the Finance Act, 1994, the "service receiver" is a person, who receives or avails the services provided by a "service provider".

(iii) Para 31 states that any part of constructional activity for construction of building, which is carried out by the petitioner-company, is not a "service" rendered to anyone, but an activity, which is carried out by the petitioner-company, for its own self. Since the very concept of rendering of "service" implies two entities, one, who renders the "service", and the other, who is recipient thereof, it becomes transparent that an activity carried on by a person for himself or for his own benefit, cannot be termed as "service" rendered.

57. The Appellant further submits that in the case of *G.ChandrababuvsCCEx, Cus. & ST., Thiruvananthapuram, 2011 (024) STR 0492 (Tri-Bang)*, it was held as follows;

*"It is very clear from the records that the appellants were the owners of the land and developed the properties and sold the flats to the prospective buyers by entering into different agreements. It is unconceivable that just because the appellant received advances from the prospective buyers, the sale could not be considered as sale and would fall under services."*

58. The Appellant further submits that in the case of Jetlite (India) Ltd v CCEx, New Delhi, 2011 (21) STR 119 (Tri-Del), it was held that the entries relating to construction service apply to builders engaged in construction activities for others and not for themselves who merely sell immovable properties to the customers by engaging themselves in the development and/or construction activity.

59. The Appellant submits that the activity undertaken by them will fall within the scope of the taxable service only from 01/07/2010 and not prior to that date. Further to support this view, the Appellants submits that similar view is expressed by PUNE Commissionerate vide para 4(a) of Circular No: 1/2011, dated 15/2/2011 as follows

*"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. The Service of Construction of Residential Complex would attract service tax from 1-7-2010. Despite no service tax liability, if any amount has been collected by the builder as "Service Tax" for Services rendered prior to 1-7-2010, the same is required to be deposited by the builder to the Service tax department. Builder cannot retain the amount collected as Service Tax."*

60. The Appellant further submits that CBEC recently vide Circular No:151/2/2012 dated 10/02/2012, while clarifying the applicability of service tax in light of various business models has opined that the activity of builder/developer prior to 01/07/2010 is not taxable. The same is extracted here for ready reference.

**(A) *Taxability of the construction service:***

**(i) For the period prior to 1-7-2010 : construction service provided by the builder/developer will not be taxable, in terms of Board's Circular No. 108/2/2009-S.T., dated 29-1-2009 [2009 (13) S.T.R. C33].**The allegation of the Ld. Respondent vide para No. 30.7 that there is no separate construction agreement has entered there is no self-service involved is not tenable since the above Circular considered various

business models adapted by the builder hence the allegations has to be set aside.

A52

61. The Appellant further submits that 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 extracts are reproduced hereunder:

*"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."*

62. The Appellant further submits that in the case of *M/s Bairathi Developers Pvt Ltd. vs CCE, Jaipur, 2011-TIOL-1638-CESTAT-Del*, it was

held that the activity of builder/developer/promoter will not be a taxable service prior to 01/07/2010. The relevant extracts are reproduced below.

*"We find that the Hon'bleGauhati High Court in the case of Magus Construction Pvt. Ltd. (supra) has clearly held that this activity is not a service and the amount received by a developer/builder from the buyers against flat purchase agreement is a consideration for sale of flats and not for the purpose of obtaining any service. It is only by Finance Act, 2010 that an Explanation was added to Section 65(105)(zzzh) which provided 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 authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority 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. The validity of this explanation has been upheld by the Hon'ble Punjab & Haryana High Court in its judgement in the case of G.S. Promoters (supra). In view of this, we are of prima facie view that prior to this amendment, 16.06.2005, when this Explanation to Section 65(105) (zzzh) was not there, the activity of construction of flats by the builder/developer for various prospective buyer against the flat agreement entered into by them could not be called the service of construction of residential complexes."* **(Para 5)**

63. The Appellant submits that recently Hon'ble Tribunals in various cases held that explanation introduced vide Finance Act, 2010 is prospective

and prior to 01.07.2010 Builder is not liable for the service tax. Cases laws are

A5

a. Commr. Of C. Ex., Chandigarh Vs Green View Land & Buildcon Ltd 2013 (29) S.T.R 527 (Tri-Del).

b. C.C.E., Chandigarh Vs Amar Nath Aggarwal Builders P. Ltd 2012 (28) S.T.R 364

c. C.C.E., Chandigarh Vs Skynet Builders, Developers, Colonizer 2012 (27) S.T.R 388 (Tri-Del).

**In Re: Non consideration of the submissions vis-à-vis violation of principle of natural justice**

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

65. The Appellant submits that the impugned order is in violation of the principles of natural justice, as the submissions made by the appellant, which are meritorious, have not been adverted to or rebutted.

66. The Appellant submits that the following submissions were made before the Ld. Commissioner (Appeals) vide ST-4 reply but has totally ignored the same while passing the impugned order:

a. The fact that the builder is not liable for the service tax prior to 01.07.2010.

b. Circular vide D.O.F No. 334/1/2010-TRU dated 26.02.2010

c. Notification No. 36/2010-ST dated 28.06.2010

d. Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010

e. Trade notice F.No VGN(30)80/Trade Notice/10/Pune

67. The Appellant submits that all the above are meritorious points have not considered while passing the impugned order. The system of adjudication is governed by the principles of natural justice. After recounting the various submissions made before him he should thereafter analyses the submissions, discussing relevant case law and give his findings in a well-reasoned speaking order.In this regard appellant wishes to rely on the following judicial pronouncements.

a. In the case of Southern PlywoodsVsCommissioner Of C. Ex. (Appeals), Cochin 2009 (243) E.L.T 693 (Tri-Bang) it was held that *"Order - Sustainability of - Non-consideration of submission of parties makes order unsustainable. [paras 6.4, 9]"*

b. In the case of KesarwaniZardaBhandarVs Commissioner Of C. Ex., Thane-I 2009 (236) E.L.T 735 (Tri-Mum) it was held that *"I have considered the submissions made by both sides and perused the records. I find that the Commissioner (Appeals) has not dealt with any of submission made by the appellants and simply stated that the same has been fully discussed by the original authority and clearly brought out in the Panchnama and show cause notice etc. This cannot be considered as speaking order and Commissioner (Appeals) should have dealt with the submissions made by the appellants. The matter is, therefore, remanded back to the Commissioner (Appeals) with the direction that he should take into account the submissions made by the appellant and after providing sufficient opportunity of hearing to the appellants to pass a speaking order. All issues are kept open. The Revenue's appeal is also likewise remanded."*

c. In the case of Herren Drugs & Pharmaceuticals Ltd. Vs CCE, Hyderabad 2005 (191) E.L.T 859 (Tri-Bang) it was held *"In any case the adjudicating authority has violated the principles of Natural Justice, in not considering all the submissions of the appellants"*

A56

d. In the case of Youngman Hosiery Factory Vs CCE, Chandigarh 1999 (112) E.L.T 114 (Tribunal) it was held that *"We have also heard the ld. SDR, Shri A.K. Agarwal for the Revenue. We are of the view that the adjudicating authority in having ignored the main submission of the appellants that they are not undertaking any dutiable process on the grey fabric and are therefore not liable to duty, principles of natural justice have been grossly violated. Consequently, the matter is fit for remand. Hence, we set aside the impugned order and allow the appeal by remand and direct the Addl. Collector to re-adjudicate the case taking into account the aforesaid plea of the appellants."*

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

**In Re: Time Bar**

68. The Appellant submits that the period covered in the First show cause notice is Jan 2010 to December 2010. The due date for filing the ST-3 Returns for the period October 2009 to March 2010 is 25th of April 2010. Since the subject show cause notices are periodical notices, notice should be issued within one year from the relevant date as prescribed under Section 73(1) of the Finance Act, 1994. The due date for issuing

show cause notice for the quarter Jan 2010 to March 2010 is 25th of April 2011.

A57

69. The Appellant submits that sub section (1) of Section 73 of the Finance Act, 1994 reads as under

*"Where any service tax has not been levied or paid or has been short – levied or short paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short levied or short paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."*

70. The Appellant submits that "relevant date" means which has been defined in subsection (6) of section 73 of Finance Act, 1994 as follows.

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made thereunder, the date of adjustment of the service tax after the final assessment thereof;

A5

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.

71. The Appellant submits that ST-3 Returns for the period October 2009 to March 2010 has not been filed hence relevant date should be reckoned from the due date to file the returns. Hence the show cause notice for the period Jan 2010 to March 2010 could have been issued by 25th April 2010. The show cause notice has been issued in May 2011 hence for the quarter Jan 2010 to March 2010 the notice has been time barred.

72. The Appellant submits that admittedly the show casue notice is periodical show casue notice. And it is settled position of the law that for the periodical show casue notices the allegation of suppression of facts are not sustainable. In this regard Appellant wishes to rely on Nizam Sugar Factory Vs Collector 2006 (197) E.L.T 465 SC *"Allegation of suppression of facts against the Appellant cannot be sustained.* ***When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same or similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee or Appellant".*** Therefore the allegation of the

suppression of the facts vide Para 9.1 of the impugned order in appeal has to be set aside.

A5

**In Re: Interest under Section 75**

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

74. 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).

**In Re: Benefit under Section 73(3) of Finance Act, 1994**

75. Without prejudice to the foregoing, Appellant submits that assuming but not admitting that there was a liability and it was not paid, the provisions of Section 73(3) reads as follows:

*"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or* ***on the basis of tax ascertained by a Central Excise Officer before service of notice*** *on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information* ***shall not serve any notice*** *under sub-section (1) in respect of the amount so paid"*

Hiregange & Associates Chartered Accountants Hyderabad

76. The Appellant had paid the amount of Rs. Rs. 24,69,553/- towards service tax. Further it is submitted that there was no intention to evade the payment of service tax since the show cause notice is periodical one. Therefore the issue of Show Cause notice itself is not sustainable and requires to be set aside to the extent amounts already paid.

A61

77. Further Appellant submits that C.B.E.& C. Letter F. No. 137/167/2006-CX 4, dated 03.10.2007 & Commissioner of Central Excise, Madurai, Trade Notice No. 48/2008, dated 3-10-2008 clarifies that the no notice to be issued for recovery if the service tax and the interest has been paid voluntarily as provided in section 73(3) of the Finance Act. On this ground also the proceedings in the subject SCN requires to be dropped.

78. The Appellant submits that in the case of C.C.E & S.T., L.T.U, Banglr Vs Adecco Flexione Workforce Solution LTD it was held that *"Unfortunately the assessing authority as well as the appellate authority seems to think. If an assessee does not pay the tax within the stipulated time and regularly pays the tax after the due date with the interest. It is something which is not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly.* ***They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against the persons who are paying tax with interest for delayed payment. It is high time, the***

***authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of sec. 73. The parliament expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in governance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the tribunal and this court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this court hereafter, certainly it will be a case for taking proper action against those law breakers.***

*In that view of the matter, we do not see any merit in these appeals. The appeals are dismissed.*

***Mark a copy of this order to the commissioner of large tax payers unit who is in charge of collection of service tax to issue proper circular to all the concerned authorities, not to contravene this provision, namely sub-section (3) of section 73 of the act."*** From this the impugned order is in contravention of Section 73(3) of the Finance Act, 1994 in as much as authority has issued SCN for the amount already paid before the issuing the SCN even though the Section 73(3) says not issue the SCN.

79. The Appellant submits that Proviso to Sub section (3) of Section 73 of the finance Act, 1994 deals with the issuance of SCN when the Appellant

made the payment of service tax before the issuance of SCN. The proviso is extracted here for your ready reference

*Provided that the Central Excise officer may determine the amount of short payment of service tax or erroneously refunded service tax if any which in his opinion has* ***not been paid*** *by such person and then the Central Excise officer shall proceed to recover such amount in the manner specified in this Section and the period of one year referred to in Sub section (1) shall be counted from the date of receipt of such information of payment.*

80. The Appellant submits that explanation 2 to Sub section (3) to Section 73 of the Finance deals with the issuance of SCN and levy of the penalty when the Appellant makes the payment of service tax along with the interest the same is reproducing here for your ready reference.

*For the removal of the doubts it is here by declared that* ***no penalty*** *under any of the provisions of this Act or the Rules made there under* ***shall*** *be imposed in respect of payment of service tax under this Sub section and interest thereon.*

81. The Appellant further submits that the above explanation clearly says that no penalty shall be imposed on service tax when the Appellant makes the payment before the issuance of SCN. In this case there is no allegation regarding the fact of payment of service tax by the noticee. Therefore benefit under Section 73(3) shall be granted.

82. The Appellant submits that if any shortage found in the amount so paid, SCN may be issued for the short amount of tax so paid if any. But if the payment of tax is found correct then no penalty can imposed as per the true legislative spirit of section 73(3).

**In re: Penalty under Section 76 & 77 of the Finance Act, 1994**

83. The Appellant submits that an amount of service tax Rs.24,29,887/- is already paid by Cash and Rs. Rs.39,666/- paid by the CENVAT Account towards liability of service tax for the period January 2011 to December 2011. The Appellant vide para 34 of the Appeal memo submitted before Ld. Commissioner (Appeals) that there is error in the valuation of service. Taxable service portion is Rs. 5,99,40,604/- for the period Jan 2011 to Dec 2011.

84. The Appellant submits that Ld. Commissioner (Appeals) remanded the matter limited extent of quantification of liability to original adjudicating authority. Since the value of taxable service for the period Jan 2011 to Dec 2011 is Rs. 5,99,40,604/- service tax liability comes around Rs.24,69,553/-. The most of the service tax has been paid even before the issuance of show cause notice. Same payments have been disclosed in the ST-3 Returns for the above period. Therefore there shall not be any question of the penalty under Section 76 of the Finance Act, 1994.

85. The Appellant submits that, when the tax itself is not payable, the question of penalty under section 76 does not arise. Further assuming but not admitting, that there was a tax liability as envisaged in SCN as explained in the previous paragraphs, when Appellant were not at all having the intention to evade the service tax and further also there was a basic doubt about the liability of the service tax itself on the construction activity, Appellant is acting in a bona fide belief, that he is not liable to collect and pay service tax, there is no question of penalty under section

76 resorting to the provisions of Section 80 considering it to be a reasonable cause for not collecting and paying service tax.

A64

86. The Appellant submits suppression or concealing of information with intent to evade the payment of tax is a requirement for imposing penalty. 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. Commissioner of C.Ex., Aurangabad Vs. Pendhakar Constructions 2011(23) S.T.R. 75(Tri.-Mum)

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

iii. Akbar BadruddinJaiwani V. Collector – 1990 (47) ELT 161(SC)

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

Therefore on this ground it is requested to drop the penalty proceedingsunder the provisions of Section 76 of the Finance Act, 1994.

87. The Appellant submits that penalty is imposable when the appellant breaches the provision of statute with an intent to defeat the scheme of the Act, when there is a confusion prevalent as to the leviability and the mala fide not established by the department, it would be a fit case for waiver of penalty as held by various tribunals as under

a. Vipul Motors (P) Ltd. vs Commissioner of C. Ex., Jaipur-I 2008 (009) STR 0220 Tri.-Del

Hiregange & Associates Chartered Accountants Hyderabad

b. Commissioner of Service Tax, Daman vsMeghna Cement Depot 2009 (015) STR 0179 Tri.-Ahmd

A6

88. The Appellant submits that in the following two cases, M/s Creative Hotels Pvt. Ltd. Vs CCE, Mumbai (2007) (6) S.T.R (Tri-Mumbai) and M/s Jewel Hotels Pvt Limited Vs CCE, Mumbai-1 (2007) (6) S.T.R 240 (Tri-Mumbai) it was held that *"The authorities below have not given any finding as to why penalty is required to be imposed upon them. Only because penalty can be imposed, it is not necessary that in all cases penalty is required to be imposed. In this case I accept the explanation of the appellant and therefore set aside the penalty and allow the appeal."*

89. The Appellant submits that liability of the service tax on the construction activity is depends on the interpretation of definition of Residential Complex as defined 65(91a) of Finance Act, 1994, Circular No. 108/02/2009-ST dated 29.01.2009, Circular No. D.O.F 334/03/2010-TRU dated10.02.2010 and various judicial pronouncements. It is settled position of the Law that whenever there is any scope for interpretation of the provisions of Finance Act, 1994 there cannot be imposition of Penalties. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. In the case of Commissioner Of Central Excise, Raipur Vs Ajanta Color Labs 2009 (14) S.T.R 468 (Tri-Del) it was held that *"Respectfully following the above decisions, we allow the appeals for the assessee on merits and hold that the portion of the value relating to photography materials would not be included in the levy of service tax.* ***It is a case of interpretation of the***

***statutes and, therefore,*** *extended period of limitation and* ***imposition of penalties would not warrant"***

b. In the case of Ispat Industries Ltd Vs CCE, Raigad 2006 (199) E.L.T 509 (Tri-Mumbai) it was held that *"Apart from holding that the credit was admissible to the appellants on merits, we also find that the demand raised and confirmed against them is hopelessly barred by limitation. Admittedly, the appellant had reflected the fact of availing the balance 50% credit in the subsequent financial year, in their statutory monthly returns filed with the revenue. This fact is sufficient to reflect knowledge on the part of the revenue about the fact of taking balance 50% credit and is also indicative of the bona fides of the appellant. The appellants having made known to the department, no suppression or mis-statement on their part can be held against them.* ***The issue, no doubt involves bona fide interpretation of provisions of law and failure on the part of the appellants to interpret the said provisions in the way in which the department seeks to interpret them cannot be held against them so as to invoke extended period of limitation.*** *When there is a scope for doubt for interpretation of legal provisions and the entire facts have been placed before the jurisdictional, Central Excise Officer, the appellants cannot be attributed with any suppression or misstatement of facts with intent to evade duty and hence cannot be saddled with demand by invoking the extended period of limitation.As much as the demand has been set aside on merits as also on limitation,* ***there is no justification for imposition of any penalty upon them.***

c. In the case of Haldia Petrochemicals Ltd Vs CCE, Haldia 2006 (197) E.L.T 97 (Tri-Del) it was that the *"extended period of limitation cannot be invoked under the proviso to Section 11A(1) of the Central Excise Act, 1944.* ***There is also no case for imposition of penalty,*** *firstly for the reason that the demand of duty is unsustainable and secondly for the reason that the case involves* ***a question of interpretation of law."***

d. In the case of Itel Industries Pvt. Ltd Vs CCE, Calicut 2004 (163) E.L.T 219 (Tri-Bang) it was held that *"In view of the facts of this case, we do not find any case or cause to invoke the penal liabilities, as we find that the Commissioner has held "It is essentially,* ***a question of interpretation of law*** *as to whether Section 4 or Section 4A would be applicable...." and not sustained the penalty under Section 11AC. We concur with the same.* ***Therefore we cannot uphold the Revenue's appeal on the need to restore the penalty under Section 11AC as arrived at by the Original Authority. As regards the penalty under Rules 173Q & 210,*** *we find the Commissioner (Appeals) has not given any finding why he considered the same as correct and legal in Para 8 of the impugned order. Imposition of* ***penalty*** *under Rules 173Q & 210* ***on matters of interpretation,*** *without specific and valid reasons, is not called for".*

On the basis of the above judgments it is clear that whenever due to bonafide interpretation of law service tax not paid penalty is not leviable.

90. The Appellant submits that Ld. Commissioner (Appeals) vide para 9.1 of the impugned order alleged that for the period jan 2011 to December 2011 they have not show the receipts in the ST-3 Returns. This

allegation is factually not correct. Impugned order is alleging that Appellant is intentionally evaded the tax payments. The allegation of intention to evade is beyond the scope of the show cause notice or beyond scope of adjudication order and hence needs to be set aside.

**In re: Benefit under Section 80 of the Finance, Act, 1994**

91. Appellant further submits that under Section 80 of the Finance Act, 1994which 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."*

92. 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. |
| **4.1.2008** | Circular clarifying that contracts entered into prior to 01.06.07 for providing erection, commissioning or installation and commercial or residential construction service, and service tax has already been paid for part of the payment received under the respective taxable service the classification is not required to be changed. |
| **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. |
| **24.8.2010** | As regards the classification, with effect from 01.06.2007 when the new service 'Works Contract' service was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable |

| | |
|---|---|
| | service prior to 01.06.2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date, this circular was contradictory to Circular 98/1/2008 (supra). |
| **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. |

93. The Appellant submits that they have not paid the service tax on bonafide belief that as per the Circular 108/02/2009-ST dated 29.01.2009 they are not liable to when the construction undertaken for personal use and the also the value of the material is not liable for the service tax on which they have paid. In the case of CCE, Delhi Vs Softalk Lakhotia Infocom (P) Ltd. 2006 (1) S.T.R 24 it was held that *"The Revenue is relying upon the provisions of Section 75 of the Act whereas Section 80 of the Act provides that no penalty is imposable in case the assessee explains the reasonable cause for failure to comply with the provisions. In view of the above, I find no infirmity in the impugned order. The appeals are dismissed."*

94. The Appellant further submits that the above reported case laws or the text of the Section 80 of the Finance Act, 1994 does not speak of proving

to the satisfaction of Central Excise Officer regarding the reasonable cause. Therefore from the above it is clear that Appellant is rightly eligible for the benefit under the Section 80 of the Finance Act, 1994.

A71

95. The Appellant submits that in so far as Section 80 of the Act is concerned, it overrides provisions of Sections 76 and 77of the Act and provides that no penalty shall be imposable (assuming but not admitting) even if any one of the said provisions are attracted if the assessee proves that there was reasonable cause for failure stipulated by any of the said provisions.

96. The Appellant submits that they have established the reasonable cause for the nonpayment of service tax. Once reasonable cause is established the authority has the discretion to hold that no penalty is imposable. The provision does not say that even upon establishment of reasonable cause, penalty is imposable. The provision only says no penalty is imposable.

97. The Appellant submits discretion to exercise the power under Section 80 of the Finance Act, 1994 to waive the penalty is an obligation on the authority. It is the duty of the authority to ascertain whether there is any reasonable cause for nonpayment of duty. In the case of KNR Contractors Vs CCE, Thirupathi 2011 (021) 436 (Tri-Bang) it was held that *"Perusal of Section 80 of the said Act, undoubtedly discloses that it will have overriding effect on the provisions of Sections 76, 77 & 78, in the sensethat imposition of penalty under any of those provisions is not mechanical exercise by the concerned authority. On the contrary, before proceeding to impose the penalty under any of those provisions of law, the*

*authority is expected to ascertain from the records as to whether the assessee has established that there was reasonable cause for the failure or default committed by the assessee."*

98. The appellant craves leave to alter, add to and/or amend the aforesaid grounds.

99. The appellant wish to be personally heard before any decision is taken in this matter.

**For Hiregange & Associates**
**Chartered Accountants**

**Sudhir V S**
**Partner**

**M/S Greenwood Estates**

FOR GREEN WOOD ESTATE

**Authorized Signatory**

## PRAYER

Wherefore it is prayed

a. To hold that the impugned order of Ld. Commissioner (Appeals) has to set aside.

b. To hold that the activity of construction is not taxable.

c. To hold that no Penalty is imposable under Section 76 & Section 77 of the Finance Act, 1994.

d. To hold that Appellant is eligible for the benefit of waiver of the penalty under Section 80 of the Finance Act, 1994

e. Any other consequential relief is granted.

For GREEN WOOD ESTATES

**Appellant**

## VERIFICATION

I, Soham Modi Partner of 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 26th of June, 2013

Place: Hyderabad

For GREEN WOOD ESTATES

**Appellant**