(8)

सेवा कर प्रिंसिपल आयुक्त का कार्यालय
OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX

सेवा कर आयुक्तालय

SERVICE TAX COMMISSIONERATE
11-5-423/1/A:: सीताराम प्रसाद टावर:: रेड हिलस:: हैदराबाद – 4
11-5-423/1/A:: SITARAM PRASAD TOWER::RED HILLS::HYDERABAD-500004
(दूरभाष PHONE NO: +91-40-2323 1198, फैक्स FAX NO: +91-40-2321 1655)

O.R. No. 156/2014-Adjn. (ST) (Commr) दिनांक Date: 20 .02.2015

ORDER IN ORIGINAL NO. HYD-SVTAX-000-COM- 02-14-15

(Passed by Shri. B.Ravichandran, Commissioner of Service Tax, Service Tax Commissionerate, Hyderabad in respect of M/s Green wood Estates, Hyderabad)

प्रस्तावना / PREAMBLE

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

2. कोई भी व्यक्ति जो केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की संशोधित धारा 35 ख (1) के अधीन आदेश से दुषप्रभावित हो तो इस निर्णय के खिलाफ सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण के दक्षिणी न्यायपीठ, प्रथम तल, विश्व व्यपार केंद्र भवन, एफ.के.सी.सी.आई कॅंप्लेक्स, के.जी. रोड, बेंगलूर 560 009 स्थित रजिस्ट्री के पते पर अपना अपील प्रस्तुत कर सकता है
Under Sec.35 B (1) of the Central Excise Act, 1944, as amended, any person aggrieved by this order can prefer an appeal to the South Bench of the Customs, Excise and Service Tax Appellate Tribunal having its Registry at 1st floor, WTC Building, FKCCI Complex, K.G. Road, Bangalore – 560 009.

3. इस आदेश के प्राप्त होने के दिन से तीन महीनों के अन्दर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 6(1) के अधीन निर्धारित फार्म ई.ए 3 में अपील दर्ज की जानी चाहिए ।
Appeals must be filed in Form EA3 prescribed under Rule 6(1) of the Central Excise (Appeals) Rules, 2001 within 3 (three) months from the date of communication of this order.

4. हर एक अपील का ज्ञापन, प्रत्याक्षेप, स्थगित आवेदन या कोई अन्य आवेदन, फुल स्केप पेपर के एक ओर दुगना स्पेस छोडते हुए स्पष्ट रूप में टर्मकित किया जाए और इसे समयक रूप से पृष्टों को कमवार जमाते हुए सूचक सहित एवं हर एक कागज पुस्तक को अलग फोल्डर में अधिक मजबूती के साथ नत्थी करना चाहिए ।

Every memorandum of Appeal, cross-objections, stay application or any other application shall be typed neatly in double spacing on one side of the foolscap paper and the same shall be duly paged, indexed and tagged firmly with each paper book in a separate folder.

5. सीमा शुल्क उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण कार्यविधि नियमावली, 1982 के नियम 13 के अधीन यथा अपेक्षित यदि अपील पर प्राधिकृत प्रतिनिधि द्वारा अपीलकर्ता की ओर से अपील एवं हस्ताक्षर करने के दस्तावेज सहित अधिकरण के दक्षिणी न्यायपीठ के सहायक रजिस्टार के नाम से राष्ट्रीयकृत बैंक से प्राप्त मूल्य की रेखित बैंक ड्राफ्ट के साथ अपील प्रस्तुत की जानी चाहिए एवं बैंक की शाखा बेंगलूर में स्थित बैंक के अधीन होनी चाहिए। केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की संशोधित धारा 35F के अधीन 7.5% की अनिवार्य पूर्व जमा राशि के साथ किया जाना चाहिए अपील मांग की है या जुर्माना लगाया या दोनों और देय पूर्व जमा की गई राशि 10 करोड़ रुपये की सीमा के अध्यधीन होगा.

The appeal must be accompanied by a crossed Bank Draft for a sum as applicable obtained from a Nationalised Bank drawn in favour of the Assistant Registrar of the Southern Bench of the Tribunal and should be on the branch of bank at Bangalore; and the documents authorizing the representative to sign and appeal on behalf of the appellant if the Appeal is signed by authorized representative, as required under Rule 13 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. Under Section 35 F of Central Excise Act, 1944, the appeal also must be accompanied by mandatory pre-deposit amount of 7.5% of the duty demanded or penalty imposed or both and the amount of pre-deposit payable would be subject to a ceiling of Rs.10 Crore.

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Sub: Service Tax – Non-payment of Service Tax by M/s. Greenwood Estates – Orders passed - Reg.

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M/s.Greenwood Estates, 5-4-187/3&4, II Floor, Soham Mansion, MG Road, Secunderabad (hereinafter referred to as "M/s.Greenwood" or "the assessee") are engaged in providing works contract service. The assessee is a registered partnership firm and got themselves registered with the department vide Service Tax Registration No AAHFG0711BST001.

2. On scrutiny of the records of the assessee, it appeared that they have not been discharging their service tax liability properly in respect of services rendered by them in construction of flats. Accordingly, the following show cause notices were issued to them to demand service tax not paid. The current status of the notices are as indicated.

Sl No	SCN OR NO. and Date	Period	Amount of Service Tax demanded	Status
1	HQ POR No.77/ 2010-Adjn (ST) dated 21.05.2010	Jan-Dec, 2009	9,47,737	Confirmed vide OIO No.47/2010-ST dated 24.11.2010. Assessee's appeal was dismissed vide OIO No.11/2011(H.II)S.Tax, dated 31.01.2011. CESTAT granted stay on 25.04.2012 vide Stay Order No.666&667/2012 without pre-deposit condition. Vide Misc. Order No.21860-21877/2014 dated 31.07.2014 extended stay for six months from 31.07.2014
2	OR NO.61/2011	Jan-Dec,	48,00,391	Confirmed vide OIO No.51/2012-Adjn(ST)(ADC) dated 31.08.2012.

				Ordered denovo by the Commissioner (Appeals) vide OIA No.39/2013-(H.II) S.Tax for re-quantification of the service tax payable.
3	OR No.52/2012-Adjn(Addl.Commr) dt.24.04.2012	Jan-Dec, 2011	46,81,850	Confirmed vide OIO No.51/2012-Adjn(ST)(ADC) dated 31.08.2012. Ordered denovo by the Commissioner (Appeals) vide OIA No.39/2013-(H.II) S.Tax for re-quantification of the service tax payable.
4	OR No.83/2013-Adjn(ST)ADC dated 02.12.2013	Jan-June, 2012	16,53,856	Pending adjudication

3. Further, for the subsequent period, July, 2012 to March,2014, another notice OR No.156/2014-Adjn(ST) Commr., dated 25.09.2014 was issued to them to demand service tax of Rs.92,38,975/- towards service tax for the above mentioned period under the category of works contract service.

4. M/s.Greenwood filed a writ petition No..38486/2014 in the High Court of Judicature at Hyderabad praying for setting aside the show cause notice dated 25.09.2014,for recomputing the service tax liability in accordance with the law by excluding the value of stamp duties, registration charges and taxes during the relevant period. Hon'ble High Court vide their order dated 23.12.2014 disposed off the writ petition with a direction to the Commissioner of Service Tax, Hyderabad to take a decision with reasons and in accordance with law after examining the details given by the petitioner.

5. The assessee filed written reply dated 11.02.2015 and a personal hearing in the was case held on 12.02.2015. Their submissions can be summarized as below:

a. The show cause notice issued invoking section 73(1A) has no validity as the same was issued without appreciating the facts and without considering the nature of amounts received. The show cause notice did not explain the ground on which the demand is sustainable. The show cause notice issued for the period July,2012 to March 2014 did not elaborate the legal provisions introduced with effect form 01.07.2012. A whole lot of changes in statutory provisions were brought about with effect from 01.07.2012 and these details were not elaborated and no specific allegation regarding applicable provisions of law have been made in the periodical notice dated 25.09.2014.

b. No service tax is payable by them on the sale of semi-finished flats and stamp duty and registration charges. As mentioned in para 2 of the show cause notice, the service provider and service recipient relationship exist after the execution of sale deed and entering into agreement for construction. Any amount received prior to that is not liable to be taxed. Definition of 'service' shall not include the transfer of title in immovable property by way of sale. As the transaction of semi-finished flats is one of sale of immovable property, no service tax is leviable.

c. The value for works contract service cannot include the sale proceeds of semi-finished flats, as sale of such semi-finished flats is not a works contract service. The allegation in the show cause notice that service rendered by them is taxable under works contract as per Section 65B of the Finance Act,1994 has not been elaborated. While their agreement of construction maybe liable for tax under works contract and they are paying appropriate service tax under rule 2A of the Service Tax (Determination of Value) Rules,2006, further demand on them is not legally sustainable.

d. No service tax is payable on amounts received for corpus fund, electricity charges and maintenance charges received on behalf of the Owners' Association or Electricity Department. They have claimed that they have acted as pure agent in terms of Rule 5(2) of Service Tax (Determination of Value) Rules,2006.

e. The assessee also questioned the quantification of tax liability and claimed the benefit of cum tax calculation to arrive at the tax liability.

f. Finally, they contested the proposal for imposing penalty under sections 76 and 77 as the whole issue is one of interpretative in nature and there is no justification of penal action. They have also claimed the benefit of Section 80 as there is a reasonable and sufficient cause for failure, if any, in discharging service tax liability.

6. During the personal hearing and also vide their letter dated 11.02.2015, the assessee submitted that there is already a pending notice OR No.83/2013 dated 02.02.2013 for adjudication by the Joint/Additional Commissioner, Service Tax, Hyderabad. As the issue involved is same for the previous six months, they requested the said pending case with the Joint/Additional Commissioner may be combined and decided by the Commissioner. They also requested for decision in these proceedings on the earlier two show cause notices (OIO No.51/2012 dated 31.08.2012) decided by the Additional Commissioner which were remanded to the original authority by the Hon'ble CESTAT vide order No. 20401 dated 02.04.2014 for denova adjudication. Since the directions of CESTAT are to the original authority (Additional Commissioner), the said two notices cannot be taken up for adjudication in the present proceedings. As such show cause notice O.R.No. 156/2014 – Adjn. (ST) (Commr) dated 25.09.2014 answerable to the Commissioner as well as Show Cause Notice OR No.83/2013 – Adjn. (ST) (ADC) dated 02.12.2013 pending adjudication at the level of Joint Commissioner are being taken up for decision together in the present original proceedings.

FINDINGS:

7. I have examined the records of the case and the submissions made by the assessee carefully. The main point of dispute is that whether or not the assessee is liable to pay service tax on the gross amount received by them as a consideration for the flats constructed by them. To begin with, the assessee contested the legality of the show cause notice itself. They have pleaded that the notices, though periodical in nature, have not invoked relevant statutory provisions and explained the ground on which their liability for service tax arises. In this connection, it is seen that the first show cause notice was issued to them on 21.05.2010 invoking the provisions for the period January, 2009 to December, 2009. The demand was made under

works contract service. The notice examined the scope of Board's Circular No.108/202/2009-ST dated 29.01.2009. The assessee claimed the benefit under the same. The show cause notice claimed the existence of relationship between builder (service provider) and the customer (service recipient) and consequent liability for service tax for construction of residential complex. When periodical notices for the subsequent periods were issued, earlier justification is applicable and legal provisions relevant to period covered under the said notices will apply. It is pertinent to note that an explanation has been inserted by the Finance Act, 2010 with effect from 01.07.2010 under sub-clause (zzzh) of clause 105 of Section 65 of the Finance Act, 1994. The said explanation (reproduced below) makes it very clear that construction of a complex which is intended for sale, wholly or partly by a builder before, during or after construction shall be deemed to be service provided by the builder to the buyer.

Explanation:

"For the purposes 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."

As seen from the above, the legal provision relating to nature of transaction in construction service has been made explicitly clear by the insertion of the said explanation and the earlier Board's clarifications are relevant only prior to said explanation. As such for the period 01.07.2010 to 30.06.2012, the nature of transaction liable for taxation under construction service will be governed by the service category definition read along with the explanation as stated above. For the period after 01.07.2012, it is seen that construction of a complex, building, civil construction etc., is a declared service under Section 66 E(b) . Section 66 B(54) defines 'works contract' and Section 66E(h) states service portion in the execution of works contract as a declared service. The above legal provisions read together will explain the scope of taxable activity and the assessee's contention that the show cause notice is not clear on this aspect is not tenable. Further, Section 66E(h) talks about the service portion in the execution of works contracts to be liable for tax. The execution of works contract is a method of rendering service of various categories. Construction of immovable property involving transfer of property in goods in the execution of such contract is leviable to service tax under works contract service. The assessee themselves admitted that there are certain changes in the scope of service tax liability of construction service. This is more relevant with respect to insertion of explanation as discussed above, and the definition indicated under declared services with effect from 01.07.2012. These being the legal provisions which are also indicated in the show cause notices, the assessee's contention that the tax liability is not on sale of semi-finished flats, is not tenable. The explanation inserted with effect form 01.07.12010 and the scope of declared service make it clear that construction of complex or building intended for sale to a buyer except where the entire consideration is received after issuance of completion certificate by the competent authority is a taxable service. The assessee's contention that consideration received towards sale

deed of semi-finished flat is a sale transaction of immovable property and cannot be taxed for service is untenable. The scope of service rendered by them cannot be included under section 65B(44)(a) as claimed by the assessee. "Service" shall not include the activity which constitutes merely a transfer of title in immovable property by way of sale. In the present context, the transaction now under consideration is not mere transfer of title by way of sale. It involves the service of construction before and after such sale. The service tax liability is on such service and not on sale of immovable property as mis-construed by the assessee. The assessee built residential complex intended for sale to buyer and they have not received entire consideration after issuance of completion certificate by the competent authority. Such activity of building complex intended for sale before the completion certificate is squarely covered for service tax purposes. The nature of work executed being such which fulfills the criteria of works contract, the same are liable to be taxed under works contract which is a declared service and also specifically defined as elaborated above.

8. The nature of service tax levy in construction service was examined and clarified by Hon'ble High Court of Punjab and Haryana in the case of GS Promoters Vs. UOI [2011 (21)STR 100(P&H)]. The Hon'ble High Court held that whether or not service is involved has to be seen not only from the point of view of the builder but also from the point of view of the service recipient. What is sought to be taxed is service in relation to construction which is certainly involved even when construction is carried out or got carried out before construction and before flat is sold. The Hon'ble High Court further held that the levy of tax is on service and not on service provider and construction services are certainly provided even when a constructed flat is sold. Taxing of such transaction is not outside the purview of the Union Legislature as the same does not fall in any of the taxing entries of the state list.

9. Hon'ble High Court of Bombay in the case of Maharashtra Chamber of Housing Industry Vs. UOI [2012 (25) STR 305 (Bom)] held that the explanation which was inserted by the Finance Act of 2010 clearly brings within the fold of taxable service a construction service provided by the builder to a buyer where there is an intended sale between the parties whether before, during or after construction.

10. Hon'ble CESTAT in the case of Alstom Projects India Ltd. Vs. CST, Delhi [2011-TIOL-459-CESTAT-DEL] held that introduction of works contract service provided a new machinery provisions for assessment of service tax on various specified services on construction contracts, erection contracts etc.

11. Considering the above discussion and legal position, I find that the assessee is liable for service tax under works contract service on the gross consideration received by them and the tax has to be arrived at by applying the provisions of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 for the period upto 30.06.2012 and thereafter under Rule 2A(ii)(A) of Service Tax (Determination of Value) Rules, 2006. The assessee contended that

taxable value has not been correctly arrived at. They have submitted that VAT and other taxable expenses have not been excluded while arriving at the taxable value. It is seen from the work sheet enclosed as Annexure to the show cause notice dated 02.12.2013, deduction towards VAT and other non-taxable receipts like excess received refunded to customers have been considered while arriving at the taxable value. Similarly, in the Annexure to the show cause notice dated 25.09.2014, taxable value has been arrived after allowing deduction towards VAT amount. However, the assessee's plea for deduction of amounts under various head like maintenance charges, security deposit for common facilities, electricity charges etc., merits consideration. These charges are not attributable to construction work contract and as such eligible for deduction from gross amount. As such the service tax liability has been re-worked and arrived at Rs. 15,64,777/- and Rs. 89,57,783/- in respect of O.R.No. 83/2013 – Adjn.(ST) ADC and O.R. No. 156/2014 – Adjn. (ST) Comm'r respectively.

12. The assessee also requested for recalculation of service tax liability considering the gross value as inclusive service tax as they have not collected the tax from their customers. It is seen that no supporting evidence or terms of contract were shown by the assessee to extend the benefit of Section 67(2). Further, it is a fact that the assessee collected and discharged service tax partly as mentioned in demand notices. Hence, the question of extending cum tax value benefit to part value for short payment of tax does not arise. The assessee claimed that the amount received towards sale deed is not to be included in the gross value. This plea is not legally tenable as construction under works contract service is taxable on gross receipts basis and considering the scope of construction service, receipts of all amounts are liable for service tax, except where entire consideration is received after issue of completion certificate. Since construction of semi-finished flats, for which completion certificates have not been issued by the competent authority, are arising due to taxable activity, the amounts received as consideration are taxable.

13. While examining the service tax liability under these show cause notices, I find that the periodical show cause notice dated 25.09.2014 indicates the period covered as July, 2012 to March, 2014. However, on scrutiny of the Annexure to the said show cause notice which gives detailed calculation of the service tax liability for the relevant period, it is seen that there are 5 quarters period for which the calculations are indicated separately. However, the service tax liability has been reckoned only for the period upto December, 2013 and the service tax liability for the period January, 2014 to March, 2014 has not been added in the total while arriving at the tax liability which was demanded in that show cause notice. It is apparent that in the show cause notice cum demand the period January, 2014 to March, 2014 involving an amount of Rs.14,96,770/- is not part of total demand of Rs.92,38,975/-. Considering the fact that final total demand amount deals only the service tax liability upto December, 2013 (as seen from the Annexure to the show cause notice), the present order is restricted to the service tax demand upto December, 2013. The assessee vide their letter dated 19-02-2015 also admitted to have noticed the totaling error as stated above.

14. It is seen that the assessee was registered with the department as provider of taxable service and have been paying only part of the tax liability. They are aware of the implication of service tax liability and still have not discharged the full service tax due on the services. Their claim for benefit under Section 80 for waiver of penalty under Section 76 and 77 has not been supported by facts and circumstances to indicate reasonable and sufficient cause for failure to pay tax in time. In the absence of any substantial and specific grounds to invoke the provisions of Section 80, the assessee's liability for penalty under Section 76 for failure to pay tax in time and under Section 77 for various contraventions of miscellaneous nature, is to be upheld. Penalty under Section 76 is attracted if a person liable to pay service tax fails to pay such tax as per the provisions of Finance Act, 1994. Here it is clear that the assessee has not paid the full liability of service tax in time. The assesse is also liable for miscellaneous penalty under Section 77 due to non-compliance as discussed above. Their liability to pay interest for delayed payment of service tax is confirmed in terms of section 75 of the Act.

In view of the above discussion and findings, I pass the following order:

ORDER

i. I confirm the service tax liability of Rs.1,05,22,560/-(Rupees One Crore Five Lakhs Twenty Two Thousand Five Hundred and Sixty only) (Rs.15,64,777/- covered by show cause notice in OR No.83/2013 dated 02-12-2013 for the period 1-1-2012 to 30-06-2012) and(Rs.89,57,783/- covered by show cause notice in OR No.156/2014 dated 25.09.2014 for the period 1-07-2012 to 31-12-2013) under the category of works contract service for the period up to 30.06.2012 and thereafter as a taxable service/declared service of works contract on M/s. Greenwood Estates, 5-4-187/3&4, II Floor, Soham Mansion, MG Road, Secunderabad in terms of sub-section (2) of section 73 of Finance Act,1994.

ii. M/s.Greenwood Estates, 5-4-187/3&4, II Floor, Soham Mansion, MG Road, Secunderabad are liable to pay interest at the appropriate rate in terms of section 75 of the Finance Act,1994 in respect of the service tax liability as confirmed above.

iii. I impose a penalty of Rs.100/- for every day of failure to pay service tax or 1% of confirmed service tax per months whichever is higher, starting with the first day after due date till the date of actual payment of all dues in terms of Section 76 of the Finance Act, 1994 on M/s.Greenwood Estates, 5-4-187/3&4, II Floor, Soham Mansion, MG Road, Secunderabad.

iv. I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) on M/s.Greenwood Estates, 5-4-187/3&4, II Floor, Soham Mansion, MG Road, Secunderabad in terms of Section 77 of the Finance Act, 1994.

(B.RAVICHANDRAN) 10.2.15
COMMISSIONER

To ORNO 156/14 Addn ST comm
M/s.Greenwood Estates, 5-4-187/3&4,
II Floor, Soham Mansion,
MG Road, Secunderabad, Hyderabad. **[By Speed Post]**

Copy submitted to the Chief Commissioner of Customs, Central excise and Service Tax, Hyderabad zone, Hyderabad.

Copy to:

1.The Joint Commissioner of service tax, Service Tax commissionerate, 11-5-423,/1/A, Sitaram Prasad Tower, Red Hills, Hyderabad.

2.The Assistant Commissioner of Service Tax, Legal & Prosecution, Service Tax Commissionerate, Kendriya Shulk Bhavan, Basheerbagh, Hyderabad.

3. The Assistant Commissioner of Service Tax, Arrears Recovery Cell, Service Tax Commissionerate, Kendriya Shulk Bhavan, Basheerbagh, Hyderabad.

4. The Superintendent of service tax, Group II A, Service Tax commissionerate, 11-5-423,/1/A, Sitaram Prasad Tower, Red Hills, Hyderabad. (two copies)

(with instructions to get this Order –in-original served on the assessee and forward a dated acknowledgement to this office.)

5. Office copy / Master Copy / Spare copy.

M/s. GREEN WOOD ESTATES	
O.R. No. 83/2013 - Adjn. (ST) ADC	**January 2012 to June 2012**
	Duty
Duty demanded in SCN	1653856
Duty towards other Non-taxable receipts (as given by the assessee)	89079
Difference after deductions	**1564777**
O.R. No. 156/2014 - Adjn. (ST) Comm'r	**July 2012 to December 2013**
Duty demanded in SCN	9238975
Duty towards other Non-taxable receipts (as given by the assessee)	281192
Difference after deductions	**8957783**
grand Total	**10522560**

(B.RAVICHANDRAN)
COMMISSIONER