केन्द्रीय उत्पाद सीमा शुल्क एवं सेवा कर के आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX
हैदराबाद II आयुक्तालय
HYDERABAD -II COMMISSIONERATE
एल.बी. स्टेडियम रोड, बशीरबाग, हैदराबाद 500 004
L.B.STADIUM ROAD:: BASHEERBAGH :: HYDERABAD 500 004

O.R.No.82/2010-Adjn.ST **Dt:15.10.2010**

मूल आदेश संख्या 44/2010 (सेवा कर)

ORDER IN ORIGINAL NO.44/2010 (Service Tax)
(Passed by Shri. G.SREE HARSHA, Additional Commissioner, Service Tax)

प्रस्तावना
PREAMBLE

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

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

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

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

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

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

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

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

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

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

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M/s. Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003 [here-in-after referred to as 'the service provider'/ 'the assessee'] were engaged in providing works contract service. M/s. Alpine Estates is a registered partnership firm and got themselves registered with department on 29-2-2008 for payment of service tax with STC No. AANFA5250FST001.

2. On gathering intelligence that M/s. Alpine Estates, though registered with the

service tax department were not discharging the service tax liability properly and also not filing the required returns, investigation was taken up by the department and Summons dated 13.1.2010 for submission of relevant record /documents / information were issued to them. On verification of records submitted by the assessee, it was found that M/s. Alpine Estates have undertaken a single venture by name **May Flower Heights** located at PNo. 3-3-27/1, Mallapur Old village, Uppal Mandal, RR District, and received amounts from customers from May, 2007 to December 2009 towards sale of apartment along with undivided portion of land and agreement for construction. In the said venture, in respect of 102 apartments they have entered into sale deed and agreement for construction with their customers. Till March 2010 they have not filed the ST3 returns with the department. However, they have submitted the copies of the ST3 returns prepared for the periods October, 2007 to March 2008, April, 2008 to September, 2008 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 51,05,147/- including Rs. 22,910/- other receipts. It is found that in respect of 102 houses they have entered into sale deed and agreements for construction from May, 2007 to December, 2009. They paid service tax of Rs.50,82,237/- on receipts against said agreements of construction for the period from May, 2007 to December, 2008 under Works Contract service, availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. It is found that they have stopped payment of Service Tax on receipts from 1-1-2009 by misinterpreting the clarification of the Board vide circular No. 108/02/2009 – ST dated 29th January 2009.

3. Statement of Sri. A. Shanker Reddy, Deputy General Manager (Admn.) authorized representative of M/s. Alpine Estates on 1.2.2010 under Section 14 of the Central Excise Act,1944 made applicable to Service Tax vide Section 83 of the Finance Act,1994, was recorded, wherein Sri. Reddy, interalia, stated that the activities undertaken by the company were providing services of construction of Residential Complexes and they purchased the land under sale deed and constructed the residential complexes and initially, they collect the amounts against booking form/agreement of sale. Further, stated that at the time of registration of the property, the amount received till then will be allocated towards Sale Deed and Agreement of construction and service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement and the service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis. Further, stated that the agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction and the sale deed constitutes a condition to go for construction with the builder and accordingly, the construction agreement would also be entered immediately on the same date of sale deed and that the process was in the way of sale of the constructed unit as per the agreement of sale but possession was given in two phases one is land / semi finished flat with undivided share of land and other one was completed unit and this was commonly adopted procedure as required for getting loans from the banks. Further, stated that services to a residential unit / complex which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex and that they have stopped collection and payment of service from 1-1-2009 in the light of the clarification of the Board vide circular No. 108/02/2009 – ST dated 29th January 2009.

4. As per the exclusion provided in Sec 65(91a) of the Service Tax Act, the

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

5. As per the definition of "Residential Complex" provided under Section 65(91a) of the Finance Act, 1994, it constitutes any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject ventures of M/s. Grandeur Homes (P) Ltd qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like common water supply, etc., and the layouts were approved by HUDA vide permit No. 14013/p4/plg/H/2006 dated 23-3-2007 . As seen from the records submitted, the assesses have entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale deed, the right in a property got transferred to the customer, hence the construction service rendered by the assesses thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and service recipient relationship between them. As there involved transfer of property in goods, it appears that the services rendered by them after execution of sale deed against agreements of construction are taxable services under works contract service.

6. As, M/s. Alpine Estates, have not furnished the month wise particulars of amounts received exclusively on agreements for Construction, the tax liability has been arrived at on the basis of soft copies of the books of accounts provided by M/s. Alpine Estates. It is arrived at that they have collected an amount of **Rs. 7,54,94,586/-** against agreements of

construction during the period from January 2009 to December 2009 and are liable to pay service tax including Education cess and Secondary & Higher education cess of Rs. 31,10,377/- and the interest at appropriate rates under works contract service respectively. The details of amounts collected, service tax liability are as detailed in the **Annexure** to this Notice.

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

8. From the foregoing it appears that M/s. Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003 have contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have not paid the appropriate amount of service tax on the value of taxable services and Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they have not filed statutory Returns for the taxable services rendered and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details / information, with an intent to evade payment of service tax and are liable for recovery under proviso to the section 73(1) of the Finance Act, 1994 and thereby have rendered themselves liable for penal action under Section 76, 77 and 78 of the Finance Act,1994

9. Thus, M/s. Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003 , were required to show cause in O.R.No. 82/2010-ST, as to why:

(i) an amount of **Rs. 30,19,783/-** towards Service tax, **Rs. 60,396/-** towards Education Cess and **Rs. 30,198/-** towards Secondary & Higher Education Cess (a total amount of **Rs. 31,10,377/-**) should not be demanded on the works contract service under the Sub Section 1 of the Section 73 of the Finance Act, 1994 for the period from January 2009 to December 2009 as shown in the Annexure attached to the Notice.

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

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

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

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

10. M/s Hiregange & Associates, Chartered Accountants, submitted vakalat Dt: .07.2010 and filed reply on behalf of the Assesses, interalia, stating that the notice has constructed flats and that the transaction with the customer was in two folds as under:

a. Assesses sold the undivided share of land along with the semi-constructed residential unit to the customer.
b. Subsequently the customer/owner of the land along with the semi-built up unit gets the construction done by the assesses.

and in respect of the first fold there is no construction service provided by the assesses to their customer as there is no distinct service provider and receiver and therefore there is no service tax on the same and the same was not disputed by the department as well and that in respect of the second fold of the transaction there was always a doubt regarding the applicability of service tax as the definition of residential complex mentioned in section 65((91a) states that where such a complex is for personal use then no service tax is payable and that although there was no liability the entire amount of service tax was paid out of doubt and the same was later clarified in the recent circular nos. 108/02/2009 -ST dated 29.02.2009, F. No. B1/6/2005-TRU, dated 27-7-2005, F. No. 332/35/2006-TRU, dated 1-8-2006 and the entire amount of service tax is eligible for refund.

10.1 They further submitted that non-taxability of the construction provided for an individual customer intended for his personal use was 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 abinito. 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 and that Board Circular No. 108/2/2009-S.T., dated 29-1-2009 states that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction and 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.

10.2 They further submitted that the department 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 and that when the levy does not exist, then payment of penalty does not arise and hence the SCN has to be set aside.

10.3 They cited the following case laws in support of their contention :

i).M/s Classic Properties v/s CCE, Mangalore 2009-TIOL-I 106-CESTAT-Bang
ii).Mohtisham Complexes Pvt. Ltd. Vs Commr.of C.Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

10.4 They further submitted that the assesses would be eligible for CENVAT credit on the input services and capital goods used and hence the liability shall be reduced to that extent and that the SCN has not considered this and has demanded the entire service tax.

10.5 They further submitted that assuming that the service tax is payable as per the SCN, that they have not collected the service tax amount being demanded in the subject SCN and therefore the amount received should be considered as cum-tax in terms of Explanation to Section 67 of the Finance Act, 1994 and the service tax has to be re-computed giving the assesses the benefit of cum-tax.

10.6 Further submitted 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 Hon'ble Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

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

i). Hindustan Steel Ltd V State of Orissa – 1978(2) ELT(J159) (SC)
ii). Akbar Badruddin Jaiwani V Collector – 1990(47) ELT(161)(SC)
iii). Tamil Nadu Housing Board V Collector – 1990(74)ELT(9)(SC)

10.8 Further submitted that there is no allegation as to any intention to evade the payment of service tax setting out any positive act of the Appellant and therefore any action proposed in the SCN that is invokable for the reason of fraud, willful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made there under with intention to evade payment of duty, is not sustainable and penalty under section 78 is not sustainable and placed reliance on the following decisions:

a.Cosmic Dye Chemical v. CCE, 1995 (75) ELT 721 (SC)
b.T.N.Dadha Pharmaceuticals v.CCE,2003(152)ELT251(SC)
c.Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)
d. Padmini Products v. CCE, 1989(43)ELT 195 (SC)

e. Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC)

f.Gopal Zarda Udyog v. CCE, 2005 (188) ELT 251 (SC)

g.Kolety Gum Industries v. CCE, 2005 (183) ELT 440 (T)

10.9 Further submitted that until there was no clarity on the applicability of service tax the amounts were collected and paid properly by the assesses. It was only on issue of a clarification by the department vide the circular 108/02/2009 ibid that the assesses stopped making service tax payments as it was of the bonafide belief that there was no service tax liability. There was never an intention to evade payment of service tax by the assesses. Hence the penalty under section 78 is not leviable in the instant case. On the other hand it was not practicable for collection of service tax from the customer as the same was denied by the customer.

10.10 Further submitted that when there was 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.

i). The Financiers Vs CCE, Jaipur – 2008 (009) STR 0136 Tri-Del.

ii). Vipul Motors (P) Ltd Vs CCE, Jaipur-I -2008 (009) STR 0220 Tri-Del.

iii). Commissioner of Service Tax, Daman Vs Megha Cement Depot – 2009 (015) STR 0179- Tri-Ahmd.

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

i). Opus Media and Entertainment Vs CCE, Jaipur – 2007 (8) STR 368 (T)

ii). The Financers Vs CCE, Jaipur – 2007 (8) STR 7 (T).

11. Personal hearing was held on 10.08.2010, wherein Shri. V.S.Sudhir, Chartered Accountant and Shri. Shanker Reddy, DGM (Admn.), M/s Alpine Estates have appeared and reiterated the submissions made in their reply and requested to drop proceedings initiated in the notice and further stressed that the agreement of construction is meant for completion of a residential unit but not the complex per se.

DISCUSSIONS AND FINDINGS :

12. I have carefully gone through the case records and the submissions made by the retainers of the assesses vide reply dt: Nil and submissions made during the personal hearing held on 10.08.2010. I observe that M/s. Alpine Estates, was registered with department on 29.02.2008 under STC No. AANFA5250FST001. M/s. Alpine Estates have under taken a venture, namely May Flower Heights located at P.No.3-3-27/1, Mallapur Old Village, Uppal Mandal, RR District, and have entered into sale deed, and agreement for construction with their customers in respect of 102 apartments. Till March 2010 they have not filed the ST3 returns with the department. However, they have submitted the copies of the ST3 returns prepared for the periods October, 2007 to March 2008, April, 2008 to September, 2008 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 51,05,147/- including Rs. 22,910/- other receipts. It is found that in respect of 102 houses

they have entered into sale deed and agreements for construction from May, 2007 to December, 2009. They paid service tax of Rs.50,82,237/- on receipts against said agreements of construction for the period from May, 2007 to December, 2008 under Works Contract service, availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

13. As M/s Alpine Estates have not furnished the month wise particulars of amounts received exclusively on agreements for Construction, the same, on the basis of soft copies of the books of accounts provided by M/s. Alpine Estates, is arrived at an amount of Rs. 7,54,94,586/- against agreements of Construction during the period from January 2009 to December 2009. Thus, the issue before me is to decide whether M/s Alpine Estates, are liable to pay Service Tax on Rs.7,54,94,586/- being the amount received against agreements of construction during the period from Jan'2009 to Dec'2009, under Works Contract service.

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

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

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

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

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

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

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

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

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

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

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

(ii) a common area; and

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

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

15. I observe in the instant case, that the venture, namely **May Flower Heights** located at PNo. 3-3-27/1, Mallapur Old village, Uppal Mandal, RR District, qualify to be classified under 'residential complexes' by virtue of the following facts :

i). buildings having more than twelve residential units

ii). having common area

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

iv). having layouts approved by HUDA vide permit No. 14013/p4/plg/H/2006, 23.03.2007.

16. I find as per the reply, which the transaction with the customer in such ventures were in two folds as under:

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

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

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

17. I notice that M/s Alpine Estates have discharged their service tax liability of Rs.50.82,237/- on the receipts against agreements for construction pertaining to the period from May, 2007 to December, 2008, under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and and stopped payment of Service Tax with effect from January 2009. I also notice that they have not filed the ST3 returns till March'2010 with the department.

18. Shri. A.Shanker Reddy, Deputy General Manager (Admn.), authorized representative of the noticee in his statement recorded under Section 14 of the Central Excise Act 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act,1994, interalia, stated that the activities undertaken by the company were providing services of construction of Residential Complexes and that at the time of registration of the property, the amount received till then would be allocated towards Sale Deed and Agreement of construction and service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement and the service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis. Further, stated that the agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction and the sale deed constitutes a condition to go for construction with the builder and accordingly, the construction agreement would also be entered immediately on the same date of sale deed and that the process was in the way of sale of the constructed unit as per the agreement of sale but possession was given in two phases one is land / semi finished flat with undivided share of land and other one was completed unit and this

was commonly adopted procedure as required for getting loans from the banks. Further, stated that services to a residential unit / complex which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex and that they have stopped collection and payment of service from 1-1-2009 in the light of the clarification of the Board vide circular No. 108/02/2009 – ST dated 29th January 2009.

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

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

21. I find from the definition of 'residential complex' as reproduced at Para 14.2 above, it is clear that residential complex meant for personal use of a person has been excluded. In the case of the assesses, the residential complex constructed by them is not meant for personal use of one person and the complexes constructed by the assesses were sold out to various customers under two agreements. What has been excluded in the definition is the residential complex as a whole if meant for one person for personal use of such person. The interpretation adopted by the assesses would render the entire provisions relating to levy of service tax on residential complex redundant. Therefore, the contention of the assesses is not acceptable. The Board vide circular dt: 29.01.2009 has also clarified as under :

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

22. Further, The Consultant has cited the following case laws in support of their contention : i). the case law of M/s Classic Properties v/s CCE Mangalore 2009-TIOL-I 106-CESTAT-Bang ii). Mohtisham Complexes Pvt. Ltd. vs. Commr. of C.
Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang. I observe that these case laws are not applicable to the instant case, as building of commercial complexes is also involved therein and

Hon'ble CESTAT has not into the merits of the case in Mohtisham Complexes Pvt. Ltd case and remanded the case.

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

24. They further submitted that assuming that the service tax is payable as per the SCN, that they have not collected the service tax amount being demanded in the subject SCN and therefore the amount received should be considered as cum-tax in terms of Explanation to Section 67 of the Finance Act, 1994 and the service tax has to be re-computed giving the assesses the benefit of cum-tax. The question of cum-tax value does not arise, since the assesses have opted and paid service tax upto December'2008, under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. As per the provisions of Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the assesses has to discharge service tax liability on the gross amount charged for the works contract. Hence, the issue of cum-tax / cum-duty value does not arise. As per Rule 3(3) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, *" the provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract".* Since, the assesses has discharged their service tax liability under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, upto Dec'2008, I propose to demand service tax under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

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

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

27. Accordingly, I pass the following order.

ORDER

(i) I demand an amount of **Rs. 31,10,377/- (Rupees Thirty One Lakhs Ten Thousands Three Hundred and Seventy seven only)** towards Service tax of Rs.30,19,783/-, towards Education Cess of Rs.60,396/- and towards Secondary & Higher Education Cess of Rs.30,198/-, on the works contract service under the Sub Section 1 of the Section 73 of the Finance Act, 1994 for the period from January 2009 to December 2009.

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

(iii) I impose a Penalty of **Rs.5,000/- (Rupees Five Thousands only)** on them under Section 77 of the Finance Act, 1994 for the contravention of Rules and provisions of the Finance Act, 1994.

(iv) I impose a Penalty of **Rs. 31,10,377/- (Rupees Thirty One Lakhs Ten Thousands Three Hundred and Seventy seven only)** on them under Section 78 of the Finance Act, 1994 for suppression of value of service tax and contravention of provisions of Chapter V of the Finance Act or the rules made there under, with intent to evade payment of service tax.

Show Cause Notice in O.R.No. 82/2010 – Adjn.ST dated 16.06.2010 is accordingly disposed off.

15/10/2010

(G.SREE HARSHA)
ADDITIONAL COMMISSIONER

OCNO. 395/2010

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

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

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

Master Copy

Spare Copy.