SCN reply - 51/2012

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

Sub: Proceedings under SCN O. No. 51/2012-Adjn. (ST) dated 24.04.2012 issued to M/s Alpine Estates, Secunderabad.

I/We, M/s Alpine Estates, hereby authorise and appoint Hiregange & Associates, Chartered Accountants, Bangalore or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

- To act, appear and plead in the above noted proceedings before the above authorities or any other authorities before whom the same may be posted or heard and to file and take back documents.
- To sign, file verify and present pleadings, applications, appeals, cross-objections, revision, restoration, withdrawal and compromise applications, replies, objections and affidavits etc., as may be deemed necessary or proper in the above proceedings from time to time.
- To Sub-delegate all or any of the aforesaid powers to any other representative and I/We do hereby agree to ratify and confirm acts done by our above authorised representative or his substitute in the matter as my/our own acts, as if done by me/us for all intents and purposes.

This authorization will remain in force till it is duly revoked by me/us.

Executed this 15th day of June, 2012 at Hyderabad.

For ALPINE ESTATES

Partner

Signature

I the undersigned partner of M/s Hiregange & Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 35Q of the Central Excises Act, 1944. I accept the above said appointment on behalf of M/s Hiregange & Associates. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated: 15.06.2012

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

For Hiregange & Associates
Chartered Accountants

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

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

Sub: Proceedings under SCN O.R No. 51/2012-Adjn.(ST) Gr.X dated 24.04.2012 issued to M/s. Alpine Estates, Secunderabad.

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

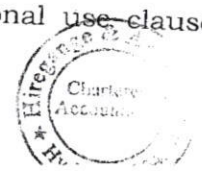
BRIEF FACTS OF THE CASE:

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

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

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

D. Noticee Initially, upto December 2008, when amounts were received by the and eventhough there was a doubt and lot of confusion on the applicability of service tax the appellant paid service tax in respect of the receipts of construction agreement. Later, on the issue of the clarification vide the circular No. 108/02/2009 dated 29.01.2009 by the department, the customers of the appellant, stopped paying the service tax and accordingly appellant was forced to stop collecting and discharging service tax liability on the amounts collected in respect of the construction agreement as they were of the bonafide belief that they were excluded vide the personal use clause in the definition of residential complex



E. The Department initially issued a Show Cause Notice No. HQPOR No. 82/2010-Adjn(ST) for the period January 2009 to December 2009 and the same was adjudicated and the Noticee has preferred appeal and the same has been adjudicated and confirmed vide OIO No: 44/2010-ST dated 15-10-2010.

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

G. Now the present show cause notice has been issued for the period January 2011 to December 2011 asking to show cause as to why:

i. An amount of Rs.48,33,495/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2011 to December 2011

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

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

iv. Penalty Under Section 77 of the Act should not be demanded from them

In as much as:

a. The Notice is issued demanding the said Service Tax on the amounts received towards agreement of Construction executed with various customers in respect of noticee's venture viz. M/s Flower Heights Since the amounts received are for the services rendered during January 2011 to December 2011.

b. There exists service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such

services against agreements for construction invariably attract service tax under Section 65(105zzzza) of the Finance Act, 1994.

SUBMISSIONS:

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

   A. Validity of Show Cause Notice

   B. Applicability of Service Tax

   C. Quantification of Demand

   D. Interest under Section 75

   E. Penalty Under Section 76 & Section 77

   F. Benefit Under Section 80

In re: Validity of Show Cause Notice

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

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

4. Noticee further submits that the definition of the "Work Contract Service" has been extract on one side and the scope of the activities on the other side and has just concluded that the service tax is liable on such activity

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

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

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

6. Noticee further submits that the SCN should also contain the correct classification of the Service and if in the definition there are more sub-clauses then the correct sub-clause should be indicated. It was held in the case of United Telecoms Limited vs Commissioner of Service Tax, Hyderabad-2011 (22) S.T.R. 571 (Tri-Bang) no demand can be confirmed against any person towards Service Tax liability unless he is put on the notice to its exact liability under the Statute.

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

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

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

In re: Applicability of Service Tax

8. Noticee submits that the impugned SCN alleges that the services rendered by them are 'Work Contract Services'. However, it does not clearly bring out under which clause of the said taxable service they are classifiable. Noticee submits entire SCN seems to have been issued with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. Therefore the allegation made in the subject SCN is not sustainable.

9. According to Section 65 (105) (zzzza) of Finance Act, 1994 *to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*

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

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and(ii) such contract is for the purposes of carrying out,—

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

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

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

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

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

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

"residential complex" means any complex comprising of—

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

(ii) a common area; and

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

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

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

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

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

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

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

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

13. Noticee submits that non-taxability of the construction provided for an individual customer intended for his personal was clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 (mentioned

above) during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio.

Relevant Extract

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

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

2.	*Again will service tax be applicable on the same, in case he constructs commercial complex for himself for putting it on rent or sale?*	*Commercial complex does not fall within the scope of "residential complex intended for personal use". Hence, service provided for construction of commercial complex is leviable to service tax.*
	Will the construction of an individual house or a bungalow 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.*

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

Relevant extract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In re: Quantification of Demand

26. Noticee submits for the period January 2011 to December 2011, the SCN has claimed that entire receipts of Rs.11,73,17,845/- are taxable. Out of the said amount Rs.5,66,66,170/- 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. An amount of Rs.5,40,40,637/- has only been received towards Construction agreement. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.5,40,40,637/- and not on the entire amount as envisaged in the notice.

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27. Noticee hence submits that service tax is to be levied on Rs.5,40,40,637/-. Thus the service tax liability shall amount to Rs.22,26,474/-. Out of the said amount, Rs.7,45,524/- was paid earlier to the issuance of notice and acknowledged the same in the subject notice and Rs.36,958/- was paid by utilisation of Cenvat Credit and the balance of Rs.14,50,000/- was paid vide Challan dated 09.02.2012. Therefore, the entire liability has been discharged by the Noticee and hence the notice is required to be set aside. (Copies of the challans are enclosed along with this reply).

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

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

In re: Interest under Section 75

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

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

In re: Penalty under Section 76 & Section77

32. Without prejudice to the foregoing, Noticee submits that service tax liability on the builders till date has not been settled and there is full of confusion as the correct position till date. With this background it is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be intention of evasion and penalty cannot be levied. In this regard we wish to rely upon the following decisions of Supreme Court.

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

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

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

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

In re: Benefit under Section 80

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

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

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

For Hiregange & Associates

Sudhir V S

For M/s. Alpine Estates

Authorised Signatory

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