

**BEFORE THE ADDITIONAL COMMISSIONER OF CUSTOMS, CENTRAL
EXCISE, SERVICE TAX, HYDERABAD-II COMMISSIONERATE,
11-5-423/1/A, SITARAM PRASAD TOWERS, RED HILLS,
HYDERABAD-4**

**Sub: Proceeding under O.R No.82/2013- Adjn(ST) (ADC) dated 02.12.2013
(C.No.IV/16/62/2012-ST (Gr-X)) issued to M/s. Alpine Estates.**

BRIEF FACTS OF CASE

- A. M/s Alpine Estates, # 5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, and Secunderabad-500 003 (hereinafter referred to as 'Noticee') are engaged in Selling of Flats to the customers. For this, Noticee would enter into a a Booking from initially, which would be followed by the Agreement to sell a flat for the agreed consideration.
- B. The Noticee had registered with the Service Tax department vide Service tax registration No. **AANFA5250FST001**. It has undertaken a by name of M/S Flower Heights having residential flats. 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 Noticee. Based on negotiations, he fills up a booking form. **A copy of the booking form is enclosed and marked as Annexure VI&VII.** The key terms and conditions from the booking form are as under:-

(1) NATURE OF BOOKING:

- 1.1 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.

- 1.2 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.

(2) REGISTRATION AND OTHER CHARGES

- 2.1 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.
- 2.2 Service Tax & VAT as applicable from time to time shall be extra and is to be borne by the purchaser.

(3) CANCELLATION CHARGES

- 3.1 In case of default mentioned in clause 1.2 above, the cancellation charges shall be Rs.5,000/-, Rs.10,000/- & Rs.15,000/- for 1,2 & 3 bedroom flats respectively.
- 3.2 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.5,000/-, Rs.10,000/- & Rs.15,000/- for 1, 2 & 3 bedroom flats respectively.

3.3 In case of request for cancellation in writing within 60 days of this provisional booking, the cancellation charges shall be 10,000/-, 20,000/- & 30,000/- for 1,2 & 3 bedroom flats respectively.

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

(4) OTHER CONSEQUENCES UPON CANCELLATION

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

(5) POSSESSION

5.1 The builder shall deliver the possession of the completed Flat to the purchaser only on payment of dues to the builder.

6.1 Once the booking is confirmed, the Noticee enters into an agreement of sale with the intending buyer. **A copy of the Agreement of Sale is enclosed and marked as Annexure VI.**

The key aspects of the said Agreement of Sale are as under:-



- i. Preamble A to L of the Agreement explains and demonstrates the Title of the Noticee in the underlying land and the sanction received by the Noticee from HUDA for development of the residential units as per the approved layout plans.
- ii. Preamble M highlights that the Noticee has agreed to sell the Scheduled Apartment together with proportionate undivided share in land and parking space as a package for the total consideration and the buyer has agreed to purchase the same.
- iii. 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 Standard Apartment together with proportionate undivided share in land and a parking space, as a package, as detailed here below in the residential apartment named as Flower Heights, being constructed on the Scheduled Land (such apartment hereinafter is referred to as Scheduled Apartment) which is more fully described in Schedule 'B' annexed to this agreement. The construction of the Scheduled Apartment will be as per the specifications given in Schedule 'C'.
 2. That the total sale consideration for the above shall be Rs.
/- (Rupees only).



9. 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 apartment 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 completing the unfinished apartment and the Buyer shall not raise any objection for execution of such an agreement.
12. 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 apartment to the Buyer with all amenities and facilities as agreed to between the parties and the Buyer shall enter into possession of the schedule apartment and enjoy the same with all the rights and privileges of an owner.
16. That it is specifically understood and agreed by the Buyer that the Sale Deed executed in favour of the Buyer and the Agreement for Construction entered into, if any, between the parties hereto in pursuance of this



agreement are interdependent , mutually co-existing and are inseparable.

19. That the Vendor agrees to deliver the schedule apartment to the Buyer on or before with a further grace period of 6 months.
25. That from the intimation as to possession of the Scheduled Apartment or date of receipt of possession of the apartment, whichever is earlier that Buyer shall be responsible for payment of all taxes, levies, rates, dues, duties, charges, expenses etc that may be payable with respect to the Schedule apartment including Municipal taxes, water and electricity charges either assessed/charged individually or collectively and such other taxes, etc. payable to state or Central Government or other local bodies or any other concerned body or authority, etc.
31. 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.



32. 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. On a perusal of the clauses in the Agreement of Sale, it is evident that the agreement is for the sale of an apartment which consists of the standard construction, an undivided share in land and reserved parking space. All rights and obligations are cast on the respective parties accordingly. However, as stated in Para 9 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 Noticees may enter into a sale deed for sale of Apartment in a semi finished state, simultaneously entering into a separate construction contract for completing the unfinished apartment. It may be noted that as per para 16 of the Agreement of Sale, both the Sale deed and the Agreement for Construction are interdependent, mutually co-existing and inseparable. **(Enclosed are copies of the Sale Deed and the Agreement for Construction Annexure "VI" & "VII" for With financing/Without financing types)**

5.1 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 under a Sale Deed dated _____ has purchased a semi-finished, semi-deluxe apartment bearing no. _____, on the _____ floor in block no. _____, admeasuring _____sft. of super built up area in residential apartments styled as 'Flower Heights', together with:
- a. Proportionate undivided share of land to the extent of _____sq. yds.
 - b. A reserved two wheeler parking bearing no. _____ admeasuring 15 Sft.
- B. This Sale Deed is registered as document no. _____ in the office of the Sub-Register, Uppal. This Sale Deed was executed subject to the condition that the Buyer shall enter into an Agreement for Construction for completion of construction of semi-finished apartment as per the agreed specifications.
- C. The Buyer is desirous of getting the construction completed with respect to the scheduled apartment by the Builder.
- D. The Buyer as stated above had already purchased the semi-finished apartment bearing no. _____and the parties hereto have specifically agreed that this consideration agreement and the Sale Deed referred herein above are and shall be interdependent and co-existing agreements.
- E. The Builder shall complete the construction for the Buyer a semi-deluxe apartment bearing no. _____ on the first floor in



block no. 'A' admeasuring ____sft. of super built up area and undivided share of land to the extent of ____ sq. yds. A reserved two wheeler parking bearing no. _____ admeasuring 15 sft. As per the plans annexed hereto and the specifications given hereunder for a consideration of Rs. ____/- (Rupees ____ Only).

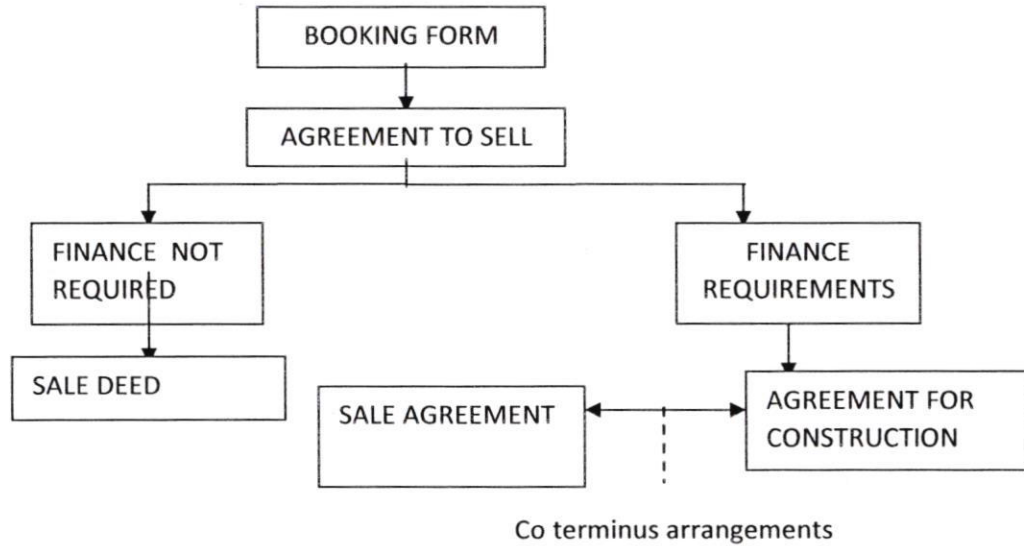
- F. The Builder upon completion of construction of the Apartment shall intimate to the Buyer the same at his last known address and the Buyer shall within 15 days of such intimation take possession of the Apartment provided however, that the Buyer shall not be entitled to take possession if he/she has 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 apartment 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 Buyer 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 Apartment 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 50% 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 Apartment 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 unless otherwise specifically waived and/or differently agreed upon in writing.



A. The entire process can be summarized below:-



D. As intimated to department in their earlier correspondences (dated ____), receipts from the customer were appropriated sequentially in the following manner.

- Sale Deed.
- Then towards the agreement of construction.
- Towards addition and alteration and
- Finally towards VAT, Service Tax, Stamp Duty, Registration charges, excess consideration received etc.

E. The department has issued show cause notice on various reasons for the past period and statuses of the same are as follows.

Sl.No.	SCN O.R.No. Date	Period	Amount of Service tax demanded Rs.	Status
1.	HQPOR No. 82/2010- Adjn (ST) dated 16.06.2010	Jan 2009 to Dec2009	Rs.31,10,377/-	Confirmed vide OIO No. 44/2010-ST dt. 15.10.2010 and



				appeal was dismissed vide OIA No. 08/2011(H-II) dt. 31.01.2011 and presently pending in Hon'ble CESTAT.
2.	O.R.No.62/2011-Adjn (ST) dated 23.04.2011	Jan 2010 to Dec 2010	Rs.35,03,113/-	Confirmed vide OIO No. 49/2012-Adjn (ST) (ADC) dt. 31.08.2012 and ordered de novo by the Commissioner (Appeals) vide OIA No. 38/2013(H-II) S.Tax dt. 27.02.2013 for re-quantification of the service tax payable.
3.	O.R.No.51/2012-Adjn (Addl.Commr.) dated 24.04.2012	Jan 2011 to Dec 2011	Rs.48,33,495/-	Confirmed vide OIO No. 49/2012-Adjn (ST) (ADC) dt. 31.08.2012 and ordered de novo by the Commissioner (Appeals) vide OIA No. 38/2013(H-II) S.Tax dt. 27.02.2013 for re-quantification of the service tax payable.

F. For the period of the show cause notice i.e. January 2012 to June 2012, for the receipts received towards the Sale Deed, Noticee were/are on the understanding that the transaction is a sale of immovable property **(Which is a subject matter of Stamp Duty)** and not covered under the purview of Service Tax.

G. For the receipts received/appropriated towards the construction agreement, for the present period, Noticee are under bona fide belief that the same is not liable for Service Tax as they are selling/constructing the



Flats for the individuals which is used for residential purpose. However, due to recurring issue of show cause notice from the department, for the present period, the Noticee are paying Service Tax under protest under works contract service for the amount received towards construction agreement and also got registered with the department vide Service Tax Registration no. AANFA5250FST001

H. While computing the service tax liability on consideration received / for the construction portion, the Noticee has excluded the following from the total receipts.

- a. Receipts towards the value of sale deed.
- b. Receipts towards payment of VAT, Service Tax, Stamp Duty and Registration Charges that were remitted to the government whether in advance or on a later stage.
- c. Receipts that are in excess of the agreed sale consideration which were refunded or liable to refunded to the purchaser.
- d. Receipts towards the other charges like corpus fund, maintenance charges, electricity charges etc received on behalf of the Owners Association or the Electricity department which were paid to them in advance or on a later date.

I. After making the payment of Service Tax under protest on the portion of the consideration received for the construction portion, the Noticee has intimated the same to the Superintendent vide their letter dated 22nd July 2012 for the period January 2012 to March 2012 and vide their letter



dated 29th April 2013 for the period April 2012 to September 2012. Along with the letter, the Noticee has also submitted the annexure which clearly explains that they have excluded the amount received towards the sale of undivided portion of land and paid applicable service tax **under protest** on the amount received towards the construction portion.

J. Noticee submits that the occupancy certificates for M/s Flower Heights was received on for Block B is 13.04.2010, Block A on 04.11.2010, Block C on 23.03.2011.

K. Without appreciating the facts of the case and also without asking / calling for any further documents / information from the Noticee, the subject show cause notice has issued on the notice to show cause as to why:-

- i. An amount of Rs.30,39,597/- (Rupees Thirty Lakhs Thirty Nine Thousand Five Hundred and Ninety Seven only) including Cess should not be demanded on the "Works Contract" services rendered by them during the period from January 2012 to June 2012 and an amount paid vide challans listed in the assessee's letters dated 22-07-2012 and 08-04-2013 of Rs. 14, 43,841/- should not be adjusted against the above demand.
- ii. Interest at applicable rates on the service tax amount demanded as at (i) should not be demanded from them under Section 75 of the Finance Act, 1994.



- iii. Penalty shall not be imposed on them under Section 76 of Chapter V of the Finance Act, 1994.
- iv. Penalty should not be imposed on them under Section 77 of Chapter V of the Finance Act, 1994.
- L. The show cause notice has been issued in terms of Section 73(1A) of the Finance Act, based on the allegation and grounds on the previous show cause notice
- M. The Show Cause Notice has proposed demand of the tax based on workings provided in the annexure to the show cause notice wherein it has not excluded the amount received towards the Sale of Land portion and computed the Service Tax under Works Contract on the entire amount which includes consideration received for the Sale of Land/sale deed.

In as much as -

- i. As seen from the records, the Noticee entered into
 - 1) A sale deed for sale of undivided portion of land together with semi-finished portion of flat and
 - 2) An agreement for construction, with their customer.
- ii. On execution of sale deed the right in a property got transferred to the customer, hence the construction service rendered by the Noticee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them



- iii. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the service rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the semi-finished flats was already sold are taxable under "Works Contract Service".
- iv. As per information furnished by the Noticee vide their letters dated 22-07-2012 and 18-04-2013 and also statement received on 22-11-2013, it is seen that Noticee have rendered taxable services under the category of "Works Contract Services" during the period January 2012 to June 2012. The Noticee had rendered services for a taxable value of Rs.67,103,665/- on which service tax (including cesses) works out to Rs.30,39,597/-. As seen from the challans submitted by the Noticee along with the letters mentioned above, an amount of Rs.14,43,841/- was paid leaving an amount of Rs.15,95,756/- unpaid for the services rendered during the said period detailed in the Annexure enclosed.
- v. The ground and legal position as explained in the show cause - cum demand notices issued except the Point of Taxation Rules, 2011 are equally applicable to the present case, hence this statement of demand / show cause notice is issued in terms of Section 73(1A) of the Finance Act, 1994 for the period from January 2012 to June 2012.



SUBMISSIONS

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

- I. Validity of the Show Cause Notice
- II. Validity of demand for the Construction portion which is already paid
- III. The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all.
- IV. In substance also, the transaction is a sale of immoveable property'
- V. The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer
- VI. Composite transaction
- VII. Quantification of demand
- VIII. Interest under Section 75
- IX. Penalty under Section 76
- X. Penalty under Section 77
- XI. Penalty under Section 77
- XII. 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. Also subject show cause has issued without understanding the nature of the activities undertaken by the Noticee, without understanding the provisions of the Law and show cause notice has issued merely on the assumption that the ***entire consideration was received towards the Construction Agreement.*** 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. Noticee submits that the subject show cause notice even though relied on the letters of the Noticee dated 22-07-2012 and 29-04-2013, not at all appreciated the workings provided in the said letter where they have clearly excluded the amount received towards the sale of the land. Accordingly, the proposition of the subject show cause notice is not sustainable and requires to be set aside.
4. Noticee submits that the subject show cause notice has seems to propose service tax on the amount received towards the agreement of construction.



But, the show cause notice has not deducted the value towards the sale deed out of the total receipts from the customer, thereby proposing the demand even on the sale deed portion, although in agreement that value towards the same sale deed is not taxable. Since these crucial aspects has not been considered by the show cause notice and also as the show cause notice has not proved the burden of proof as to why the service tax is liable in the instant transaction of sale of immovable property, the same is not sustainable as per the decision of the Delhi CESTAT in the case of M/s ITC Ltd Vs Commissioner of Service Tax, Delhi 2013-TIOL-1394-CESTAT-DEL and also in the case of **Crystic Resins (India) Pvt. Ltd., vs. CCE, 1985 (019) ELT 0285 Tri.-Del**

5. 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.
6. Noticee submits that the previous SCN (which has been relied in 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 also not 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.

7. 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.

8. 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: Validity of demand for the Construction portion which is already paid

9. Noticee submits that the subject show cause notice has demanded the service tax on the amount received for the construction portion of the contract. Noticee submits that they have paid the service tax on the construction portion of the contract within the due date. As the applicable service tax has been already paid by them on the construction portion, the demand of service tax of Rs.14,43,841/- (the workings for the same is enclosed as annexure__) and proposition for appropriation of the same amount is not legally sustainable. Accordingly, the amount of



Rs.14,43,841/- requires to be dropped without further examination. Further, only for the balance amount liability under service tax should be examined.

10. Noticee submits that they have paid the service tax to the department **under protest** and intimated the fact of payment of service tax to the department. Demanding the same by virtue of show cause notice and proposal for appropriation is not proper. On the basis of same, Noticee submits that the proposition of the subject show cause notice is not sustainable and requires to be set aside.

11. Noticee submits that they have paid the service tax for the construction portion **under protest** and still they have not accepted the liability for the same. As there is no proposition in the subject to show cause notice for vacation of protest, they are not submitting any grounds for the non-applicability of service tax on the construction portion. Once, they got favorable order for the issue pertaining to their earlier period, they would claim refund of the service tax paid under protest.



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

12. The Noticee submits that on execution of the sale deed for the sale of undivided portion of the land together with semi-finished portion of the flat, they have paid the applicable stamp duty which is governed by the law. When there are no allegations in the show cause notice on non / short payment of stamp duty, the proposition of demand of service tax on this transaction is not sustainable and requires to be dropped.

13. The Noticee submits that the activity of sale of undivided portion of land together with the semi-finished flat is leviable to Stamps Duty and ***Central is not having power to tax the same.*** When the Central Government is not having the Constitution power to taxing this transaction, the demand of service tax from the Noticee on the activity of Sale of Land together with semi-finished flat is not legally sustainable and requires to be dropped.

14. The Noticee submits that they need to emphasize on the following documents:

- i. The Booking Form signed by the intending buyer, which is the first document governing the relationship between the Noticee and the intending buyer.



- ii. The Agreement to Sell, which formalizes the said relationship between the Noticee and the intending buyer.
- iii. 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.
- iv. Sale Agreement, without a corresponding Agreement for Construction in cases where there is no financing requirement for the buyer.

15. 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.

16. 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 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 Noticee. 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 built fully 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 a 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 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, equipment's, engine, etc., purchased by the seller is not agreed upon to pass to the buyer. The delivery of the ship must be preceded 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 builder out of its own funds. Neither any of the said things nor the hull is provided by the owner nor in none of these the property vests in the owner.** It is not a case where the builder is utilizing 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 invest its 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. What the owner pays to the builder in instalments and in a phased manner are all 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 per cent 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 favor of the Noticee 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.**

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.**

17. A 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 movable property 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"

Applying the ratio of the above decisions, Noticee submits that in the present case, the demand of service tax on the Sale of undivided portion of land together with semi-finished flat and also on the amount received towards the construction portion. Accordingly, the proposition of the show cause notice demanding service tax on the Noticee is not sustainable and requires to be set aside.

18. We therefore have to submit that the transaction is essentially a transaction for sale of immoveable property and the relationship between the Noticee and the prospective flat 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.



19. The 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.
20. The 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"¹.
21. The Noticee submits that the subject show cause notice in para 2 mentions that *"on execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the Noticee **thereafter** to their customers under agreement of construction are taxable under Service Tax as there exists service provider and receiver relationship between them"*. Noticee submits that from the analysis of the allegations made in the subject show cause notice, it clears that the Noticee has alleged only on the aspect of taxability aspect of the Construction Agreement. Further, the show cause notice has nowhere made allegations on taxability of the amount received for the sale of flats. When there is no allegation and the transaction is sale of flats, proposition of the show cause notice to tax the portion of it or the full portion as actually proposed, has no grounds for taxation.



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

22. 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. 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.

23. Further, 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.)

24. Noticee submits that by applying the ratio of the decisions to the present case, the activity of Sale of undivided portion of land together with semi-finished flat and also the activity of construction of flat after the execution



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

25. 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 Noticee 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).

26. The Noticee 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 Noticee as well as the Buyer, the linkage with works contracts is very remote and laborious.



27. 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.

28. We 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 test².

29. 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:

²Mukesh Kumar Aggarwal & Co vs. State of Madhya Pradesh 2004 (178) ELT 3 (SC)



- 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 same³
- ii. Steam generated from water cannot be considered as chemical in common parlance⁴

30. The Noticee 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 Noticee 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.

In re: The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer

31. 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.

³ Commissioner of Customs vs. Edhayam Frozen Foods 2008 (230) ELT 225 (Mad HC)

⁴ Gopalanand Rasayan vs. State of Maharashtra 2011 (263) ELT 381 (Bom HC)



32. 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

33. 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**"*

34. 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.

