Alpine Estates

Office: 5-4-187/3 & 4, II floor, Soham Mansion, M G Road,
Secunderabad – 500 003. Ph: +91 40 66335551

ANNEXURE IV

31

Date: 4th July 2016

To,
The Joint Commissioner
Office of the Principal Commissioner of Service Tax
Service Tax Commissionerate, Hyderabad
11-5-423/1/A, Sitaram Prasad Tower
Red Hills, Hyderabad – 500 004

सेवोत्तम
SEVOTTAM 531/16

Dear Sir,

Sub: Service Tax – Alpine Estate, Secunderabad – Show cause notice for the period from Apr'14 to Mar'15 – Objections called for – Reply against SCN – Reg.

Ref: O.R. No.22/2016 – Adjn (ST) (JC) – C.No.IV/16/62/2012 – ST (Gr-X) dated 15.04.2016.

With reference to the above we, herewith enclosed the SCN Reply of M/s. Alpine Estates #5-4-187/3&4, Soham Mansion, M.G Road, Secunderabad-500 003, Telangana against SCN in O.R. No.22/2016 – Adjn (ST) (JC) – C.No.IV/16/62/2012 – ST (Gr-X) dated 15.04.2016. Passed by the Joint Commissioner of Service Tax, Service Tax Commisionerate, 11-5-4-423 / 1/ A, Sitaram Tower, Red Hills, Hyderabad – 500 004. In SCN Reply along with Authorisation letter with Annexures.

Kindly post the matter for hearing at the earliest.

Thank you,

Yours faithfully,
For Alpine Estates

SOHAM MODI
(PARTNER)

OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX
04 JUL 2016
HYDERABAD.
हैदराबाद.

Copy To:
The Superintendent of Service Tax, Range – 2A, Hyderabad – II, Commissionerate

BEFORE THE JOINT COMMISSIONER OF SERVICE TAX, SERVICE TAX COMMISSIONERATE, 11-5-423/1/A, SITARAM PRASAD TOWERS, RED HILLS, HYDERABAD – 500004

Sub: Proceedings under OR No.22/2016 Adjn (ST) (JC) [C.No. IV/16/62/2012 ST Gr.X] dated 15.04.2016 issued to M/s AlpineEstates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

FACTS OF THE CASE:

A. Alpine Estates, Secunderabad (hereinafter referred to as 'The Noticee') is mainly engaged in the sale of residential flats to prospective buyers during and after construction. However in case of flats for which occupancy certificate (OC) was received and booked after OC, sale deed is executed for the entire sale consideration in most cases. Only in some cases **Sale deed is being executed for semi-finished construction along with an agreement of construction.** Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.

B. Various charges are recovered under the said agreements as under:
   a. Value towards the sale deed
   b. Value towards the construction agreement
   c. Other Charges like electricity charges, etc.
   d. Collection of taxes like VAT, Service Tax, Stamp Duty and Registration Charges from the buyer

C. The levy of service tax on such arrangements has seen a fair share of litigation and amendments. The Noticee is also a party to the litigation process and matters for earlier periods are pending at various adjudication/judicial forums.

D. In July 2012, the service tax law underwent a paradigm shift and importantly, the exemption for personal use available for construction of residential complexes was removed. Accordingly, it became evident that service tax was payable on the construction agreement as per valuation prescribed under Rule 2A of the Service Tax (Determination of Value) Rules, 2012 i.e. on a presumed value of 40% of the contract value. The

Noticee regularly discharged the service tax on the said value in normal course. It also discharged service tax on other charges. However, it did not discharge service tax on sale deed value, which is in the nature of immovable property and on the value of taxes collected.

E. The detailed working of the receipts and the attribution of the said receipts was already provided to the Department authorities, identified receipt wise and flat wise. The summary of the same is provided hereunder:

Description	**Receipts**	**Non taxable**	**Taxable**
Sum of towards sale deed	1,28,68,826	1,28,68,826	0
Sum of towards agreement of construction	0		0
Sum of towards other taxable receipts	2,04,900		2,04,900
Sum of towards VAT, Registration charges, etc	19,97,968	19,97,968	0
Total	1,50,71,694	1,48,66,794	2,04,900

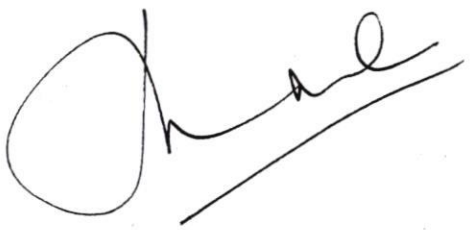
F. Accordingly, the value of taxable services constituted 40% of Rs.2,04,900/- i.e. Rs.81,960/- and the service tax thereon @ 12.36% constituted Rs.10,130/-. It was also explained that the actual payment of service tax amounted to Rs. NILL/-.

G. Previously several SCN's were issued covering the period upto March 2014 with sole allegation that "*services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under "works contract service".*

a. Vide Para 3 of SCN dated 16.06.2010 and Para 2 of the Order adjudicating the said SCN
b. Vide Para 3 of Second SCN dated 23.04.2011
c. Vide Para 2 of third SCN dated 24.04.2012
d. Vide Para 2 of fourth SCN dated 02.12.2013
e. Vide Para 2 of fifth SCN dated 26.09.2014

J. The liability for the impugned period and the details of the payments is summarized in the below mentioned table for ready reference:

Particulars	**Amount (Rs.)**
Gross Receipts	1,50,71,694
Less: Deductions	
Sale Deed Value	1,28,68,826
VAT, Registration charges, stamp duty and other non taxable receipts	19,97,968
Taxable amount	2,04,900
Abatement @ 40%	81,960
Service Tax @ 12.36%	10,130
Actually Paid	0
Payable	10,130



Submissions:

1. Noticee submits that the subject show cause notice in Para 5 extracted the provisions of section 73(1A) of the Finance Act, 1994 and in Para 6 mentions that the grounds as explained in the show cause notice issued for the earlier period is also applicable for the present case. Hence, this statement of demand/show cause notice is issued in terms of section 73(1A) of Finance Act, 1994, for the period April 2014 to March 2015. For this, Noticee submits that section 73(1A) of the Finance Act, 1994 reads as follows.

   "(1A) Notwithstanding anything contained in sub-section (1) (except the period of eighteen months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, ***a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period,*** *on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person,* ***subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices."***

2. Noticee submits that from the analysis of provisions of section 73(1A), it is clear that to issue show cause notice / statement under this section, the grounds relied upon for the subsequent period should be same in all aspect as mentioned in the previous notices. Further, the subject show cause notice has not mentioned which earlier show cause notice it has referred i.e. show cause notice issued under the old service tax law. However, present show cause notice is issued for the period April 2014 to March 2015 i.e. under new service tax law where there is a substantial changes in the provisions of service tax from positive list based taxation to negative list based taxation, thereby exemption and abatement has also undergone change. Accordingly, the grounds of the old period is not at all applicable for the new period due to the following substantial changes.

a. Taxable service list provided under section 65(105) of the Finance Act, 1994 ceases to effect w.e.f. 01-07-2012.
b. Section 65A pertaining to classification of service ceases to effect.
c. There is no concept of classification of service.
d. Definition of service introduced under section 65B(44) ***where it contains certain exclusions.***
e. Negative list introduced in section 66D of the Finance Act, 1994.
f. Concept of bundled service introduced in section 66F.
g. New definition of works contract has been introduced under section 65B(90) of the Finance Act, 1994.
h. Mega exemption notification provided under Notification No. 25/2012-ST dated 20.06.2012, which is available irrespective of classification of service. (earlier exemption was subject to classification of service)
i. New Valuation Rule provided vide Rule 2A of The Service Tax (Determination of Value) Rules, 2006 vide Notification 24/2012-ST dated 20.06.2012 for determination of tax liability in case of works contract service.
j. Abatement for various services issued under notification no 26/2012-ST dated 20.06.2012 is issues based on the nature of the service irrespective of its classification (earlier abatement was subject to classification of service)

3. Noticee submits that from the above it is clear that there is a substantial changes in the service tax law w.e.f. 01-07-2012. Accordingly, the allegations made in the previous show cause notice for the period upto 31.03.2012 are not applicable and not relevant for the period from 01.07.2012 onwards. As the subject show cause notice has considered various irrelevant and non-applicable grounds provisions of section 73(1A) is not applicable to the present case, which needs to be dropped.

4. Once SCN raises allegation/demand based on inapplicable provisions then such allegation/demand cannot sustain. In this regard reliance is placed on Maharashtra Industrial Development Corporation Vs CCE,

Nasik 2014 (36) S.T.R. 1291 (Tri. - Mumbai) wherein it was held that *"With regard to the show cause notice in Appeal No. ST/85267/14 we find that the period involved is 1-10-2011 to 30-9-2012. In the said case, the demand is for two periods - one from 1-10-2011 to 30-6-2012 and the second is from 1-7-2012 to 30-9-2012* ***when the negative list came into effect but the show cause notice has been issued on the basis of definition of Management, Maintenance and Repair service has stood prior to 1-7-2012. Therefore, as post-1-7-2012 the provisions are not existing therefore, the demands for the period post-1-7-2012 are not maintainable"***

5. Noticee submits that as the subject SCN is issued without any allegations, the same has not proved the burden of proof of taxability, which is essential under new service tax law. In this regard to Noticee wishes to rely on the following decisions.

    a. United Telecom Ltd. Vs CST 2008 (9) S.T.R 155 (Tri-Bang)
    b. Jetlite (India) Ltd. Vs CCE 2011 (21) S.T.R 119 (Tri-Del)

    In light of the above judgments where the Department alleges that the service is taxable, the burden lies upon the Department to establish the taxability. In the present case, the department failed to discharge the burden as no evidence was placed on record to establish that the service is taxable. On the basis of the same, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

6. Noticee submits that undoubtedly they are discharging service tax on construction agreements thereby paying service tax on activity as proposed by impugned SCN read with earlier SCN's. SCN included the value of sale deeds only at the time of quantifying the demand. As seen from the operative part of SCN, it is clear that it is only sole allegation of SCN (Para 2) that construction agreements are subject to service tax under the category of "works contract", no allegation has been raised to demand service tax on the sale deed value.

7. As stated in the background facts, the Noticee started paying service tax on the value of "construction agreements" from July 2012 onwards. Thereafter, the said taxes have been regularly paid. This is also evident from the fact that the current SCN proposes appropriation of taxes already paid by them. The details of the taxes paid are also acknowledged in Para 4 of the SCN. On a perusal of the SCN, it is evident that the issue in the current SCNs is therefore limited to the aspect of quantification of demand. On a perusal of Para 4 of the SCN which quantifies the demand, it can be easily inferred that the demand is quantified based on statements submitted by the Noticee. The said statements for the periods are marked as Annexure "A".

8. On going through the statements provided by the Noticee, it can be seen that a detailed breakup of the receipts into receipts towards "sale deeds", receipts towards "construction agreements", receipts towards other taxable receipts and receipts towards other non-taxable receipts was provided.

9. However, on going through the annexure to the SCN, it can also be observed that though the allegation is to demand service tax on construction agreements, the quantification is based on gross amounts mentioned above for all the activities including amounts received towards the "sale deeds".

10. It is therefore apparent that the SCN represents an error in quantification of the demand. It may be noted that the Noticee have regularly and diligently discharged Service Tax on the value of "construction agreements" after June 2012 onwards. The above is explained through a comparative chart provided below:

Particulars	**As per Noticee**	**As per SCN**
Gross Receipts	1,50,71,694	1,50,71,694
Less Deductions		
Sale Deed Value	1,28,68,826	
VAT, Registration charges, stamp duty and other non taxable receipts	19,97,968	21,18,795

Taxable amount	2,04,900	1,29,52,899
Abatement @ 40%	81,960	51,81,160
Service Tax @ 12.36%	10,130	6,40,391
Actually Paid	0	0
Balance Demand	10,130	6,40,391

11. The Noticee submit that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

12. Since SCN read with earlier SCN's agree on the principle that service tax cannot be demanded on the value attributable to sale deeds, the Noticee is not making detailed grounds on the legal merits of the said claim and would like to submit the following broad lines of arguments:

    a. In many cases, the "sale deed" is entered into after the completion of the building and therefore the demand cannot be justified under the said entries.

    b. Till the stage of entering into a "sale deed", the transaction is essentially one of sale of immovable property and therefore excluded from the purview of Service Tax.

    c. In any case, the deeming fiction for construction services prior to completion cannot be classified under works contract services since doing the same would render Section 66E(b) of Finance Act, 1994 & Notification 26/2012 ST dated 20.06.2012 redundant.

    d. If at all a view is taken that the value of "sale deed" is liable to service tax, the benefit of the above notification should be granted after reclassification of the service.

13. The Appellants also reserve their right to make additional arguments as felt necessary on this aspect of service tax on value of "sale deeds" if it is ultimately held that this aspect could be taken up without an allegation in the SCN.

14. Similar to the claim for exclusion of sale deed value, the value attributable to statutory taxes/charges like VAT, service tax, registration charges, stamp duty, electricity etc., need to be reduced. It is submitted

that once the above deductions are allowed, the demand would be reduced to **Rs.10,130/-**

Interest and penalties

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

16. Without prejudice to the foregoing, Noticee submits that penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as to why how penalty is applicable under section 77 of the Finance Act, 1994. Further, the Noticee is already registered under service tax under works contract service and filing returns regularly to the department. Accordingly, penal provisions mentioned under section 77 is not applicable for the present case. As the subject show cause notice has not considered these essential aspects, the proposition of levying penalty under section 77 is not sustainable and requires to be dropped. reliance is placed on M/s Creative Hotels Pvt. Ltd. Vs CCE, Mumbai (2007) (6) S.T.R (Tri-Mumbai) and M/s Jewel Hotels Pvt Limited Vs CCE, Mumbai-1 (2007) (6) S.T.R 240 (Tri- Mumbai)

17. The Noticee submits that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the proposal of the show cause notice imposing the penalty requires to be set aside.

18. The Noticee submits that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It settled position of the law that if the Noticee is under bonafide belief as regards to non taxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.

- CCE-II Vs Nita Textiles & Industries 2013 (295) E.L.T 199 (Guj)

- CCE, Bangalore-II Vs ITC Limited 2010 (257) E.L.T 514 (Kar)
- Larsen & Toubro Ltd Vs CCE., Pune-II 2007 (211) E.L.T 513 (S.C)
- Centre For Development Of Advanced Computing Vs CCE, Pune 2002 (141) E.L.T 6 (S.C).

Benefit under section 80

19. Noticee submits that there is bona fide litigation is going on and issue was also debatable which itself can be considered as reasonable cause for failure to pay service tax. Accordingly waiver of penalty under section can be made. In this regard reliance is placed on **C.C.E., & Cus., Daman v. PSL Corrosion Control Services Ltd 2011 (23) S.T.R. 116 (Guj.)**

20. Noticee submits that as explained in above Para's they are not paying service tax on bonafide belief that same was not liable to be paid in view of

    a. Exclusion part of service definition given under section 65B(44) of Finance Act, 1994 in as much specifically excluding the sale of immovable property from levy of service tax.
    b. Activity performed till the execution of sale deed is in the nature of self service and not liable for service tax.
    c. Activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser and not prior to that.
    d. Earlier SCN's demanding service tax on the value of construction agreement.

21. The Noticee submits that they have established the reasonable cause for the non-payment of service tax. Since the Noticee explained the reasonable cause for the nonpayment of the service tax penalty imposition of the penalty is not sustainable. In this regard we wish to rely on Commissioner of Service Tax, Bangalore Vs Motor World 2012 (27) S.T.R 225 (Kar).

22. Noticee craves leave to alter, add to and/or amend the aforesaid grounds.

23. Noticee wishes to be heard in person before passing any order in this regard.

For M/s Alpine Estates,

Authorized Signatory

BEFORE THE JOINT COMMISSIONER OF SERVICE TAX, SERVICE TAX COMMISSIONERATE, 11-5-423/1/A, SITARAM PRASAD TOWERS, RED HILLS, HYDERABAD – 500004

Sub: Proceedings under OR No.22/2016 Adjn (ST) (JC) [C.No. IV/16/62/2012 ST Gr.X] dated 15.04.2016 issued to M/s Alpine Estates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

I, Soham Modi, partner of M/s Alpine Estates, 5-4-187/3 & 4, II Floor, Sohan Mansion, MG Road, Secunderabad–500003 hereby authorizes and appoint Hiregange & Associates, Chartered Accountants, Hyderabad 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: -

a. 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.
b. 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.
c. 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 on 16th day of May 2016 at Hyderabad **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: 16.05.2016

Address for service:
Hiregange & Associates,
Chartered Accountants,
"Basheer Villa" H.No.8-2-268/1/16/B,
2nd Floor, Sriniketan Colony,
Road No.3, Banjara Hills,
Hyderabad-5000034

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner (M.No.219109)

I employee/associate of M/s Hiregange & Associates duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

Sl. No	Name	Qualification	Membership No.	Signature
1	**Shilpi Jain**	**CA**	**221821**	
2	**Venkata Prasad P**	**CA**	**236558**	