



Recd
15/04/10
(A Sree)

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX
HYDERABAD II COMMISSIONERATE
3RD FLOOR (Annexe) :: SHAKKAR BHAWAN :: L.B.STADIUM ROAD
BASHEERBAGH::HYDERBAD - 500 004

O.R.No. 34 /2010-ST
HQST No: 59/09 - AE IV

Date: 12.04.2010

SHOW CAUSE NOTICE

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

M/s. Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003 [here in after referred to as 'the service provider'] are engaged in providing works contract service. M/s. Modi & Modi Constructions is a registered partnership firm and got themselves registered with department for payment of service tax with STCNo. AAKFM7214NST001.

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

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

- (i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) Such contract is for the purposes of carrying out,—
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof; or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

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

- (i) a building or buildings, having more than twelve residential units
- (ii) a common area; and
- (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

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

4. On gathering intelligence that M/s. Modi & Modi Constructions though registered with the service tax department are not discharging the service tax liability properly and also not filing the required returns, investigation has been taken up by the department and Summons dated 11.1.2010 for submission

of relevant record /documents / information have been issued to them. On verification of records submitted by the assessee, it is found that M/s. Modi & Modi Constructions have undertaken a single venture by name **Nilgiri homes** located at Rampally village, Keesara Mandal, RR District, and received amounts from customers from December, 2007 to December 2009 towards sale of land, agreement for development charges for development of the layout into plots by laying of roads, drainage lines, electrical lines, water lines etc., and agreement of construction. In the said venture, in respect of 18 houses they have entered into sale deed, agreement for development charges and agreement of construction with their customers. Till date they have not filed the ST3 returns with the department. However, they have submitted the copies of the ST3 returns prepared for the periods October, 2007 to March 2008, October, 2008 to March 2009 which were not acknowledged by the department, along with the copies of the challans consisting of payments of Rs. 13,56,460/-. It is also found that in respect of 18 houses they have paid the said service tax for the period from December, 2007 to December, 2008 under Works Contract service availing the option under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

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

6. As per the exclusion provided in Sec 65(91a) of the Service Tax Act, the residential complex does not include a **complex** which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person. Here, "personal use" includes permitting the complex for use as residence by another person on rent or without consideration. *It is further clarified in para 3 of the Circular No. 108/02/2009 – ST, dated 29th January 2009* if the ultimate owner enters into a contract for construction of a **residential complex** with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for one person for personal use as residence by such person would not be subjected to service tax. For example, construction of residential quarters by the Income tax department for their employees by employing a contractor for design, planning and construction is not leviable to service tax because it is for the personal use of the Income tax department. Normally, a builder/promoter/developer constructs residential complex consisting number of residential units and sells those units to different customers. So, in such cases the construction of complex is not meant for one individual entity. Therefore, as the whole complex is not constructed for single person the exclusion provided in Sec 65(91a) of the Service Tax Act doesn't apply. Further, the builder/promoter/developer normally enters into construction / completion agreements after execution of sale deed. Till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore there is no levy of Service Tax on the services rendered till sale deed i.e., on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements / contracts against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements of construction are invariably attracts service tax under Section 65(105(zzzza)) of the Finance Act, 1994.

7. As per the definition of "Residential Complex" provided under Section 65(91a) of the Finance Act, 1994, it constitutes any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s. Modi & Modi Constructions qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like park, common water supply etc., and the layout was approved by HUDA vide permit No. 6092/MP2/Plg/HUDA/07, dated 16-11-2007. As seen from the records submitted, the assessee has entered into 1) a sale deed for sale of land together with / without semi finished portion of the house and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the assessee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the 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 deeds are taxable services under works contract service.

8. As M/s. Modi & Modi Constructions have not furnished the monthwise particulars of amounts received exclusively on agreements for Construction, the tax liability has been arrived at on the basis of soft copies of the books of accounts provided by M/s. Modi & Modi Constructions. It is arrived at that they have collected an amount of **Rs. 1,46,64,738/-** against agreements of Construction during the period from January 2009 to December 2009 and are liable to pay service tax including Education cess and Secondary & Higher education cess of Rs. 6,04,187/- and the interest at appropriate rates under works contract service respectively. The details of amounts collected, service tax liability are as detailed in the **Annexure** to this Notice.

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

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

11. Therefore, M/s. Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003, are hereby required to show cause to the Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, 3rd floor, Shakkar Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad-500 004, within 30 days of receipt of this Notice as to why:

- (i) a differential amount of **Rs. 5,86,589/-** towards Service tax, **Rs.11,732/-** towards Education Cess and **Rs.5,866/-** towards Secondary & Higher Education Cess (a total amount of **Rs.6,04,187/-**) should not be demanded on the works contract service under the Sub Section 1 of the Section 73 of the Finance Act, 1994 for the period from January 2009 to December 2009.
- (ii) interest is not payable by them on the amount demanded at (i) above and also on the delayed payments made during the period from January, 2009 to December 2009, under the Section 75 of the Finance Act, 1994
- (iii) penalty should not be imposed on them under Section 76, 77 and 78 of the Finance Act, 1994

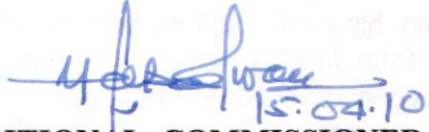
12. They are also required to produce at the time of showing cause, all the evidence upon which they intend to rely in support of their defense. They are also required to state whether would like to

avail of opportunity to be heard in person before the case is adjudicated. If they do not reply to the Show Cause Notice within 30 days or do not appear in person when the case is posted for personal hearing, it would be presumed that the Notice does not have anything to state in their defense or they do not prefer any personal hearing and case will be decided on merit based on the evidence available on record.

13. This show cause Notice is issued without any prejudice to any other action that may be taken against the recipients of this Notice or any other persons concerned with the Finance Act or any other law time being in force.

14. The above Notice is issued placing Reliance on the following Records:

- (1) Soft copy of the bank statements, books of accounts, Customer documents 2008-09 and 2009-10 (upto Dec 2009).
- (2) Service tax statement submitted by M/s. Modi & Modi Constructions vide letter dated 25-11-2009.
- (3) The Statement dated 2.1.2010 of Sri. A. Shankar Reddy, Authorised person of M/s. Modi & Modi Constructions.
- (4) Balance Sheets of M/s. Modi & Modi Constructions for the year 2008-09.


15.04.10
ADDITIONAL COMMISSIONER

To

M/s. Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad – 500 003
(By Speed Post Ack. Due)

Copy to:

The Superintendent, Service Tax, Group-X, Hyderabad-II Commissionerate, Shakkar Bhavan, Hyderabad.

The Superintendent, Adjudication, Hqrs, Hyderabad-II Commissionerate, Hyderabad.

Office Copy / Spare Copy.

Statement of Shri A. Shankar Reddy, S/o Late A. Sathi Reddy, Age: 49 years, Deputy General Manager (Administration) of M/s Modi Properties and Investments (P) Ltd given under section 14 of Central Excise Act, 1944 as made applicable to Service Tax Under Section 83 of Finance Act, 1994 before the Superintendent of Service Tax, Anti-Evasion, Hyderabad-II Commissionerate, Basheerbagh, Hyderabad on 1st February 2010.

My personal details are as above. I am appearing before you on behalf of M/s Modi and Modi Constructions to give my truthful statement in respect of the affairs of the said company, in response to your summons dated 13.1.2010 issued on the company. In this connection I submit that I am authorised to represent before the Service Tax authorities in connection with assessment proceedings for the Financial Years 2004-05 to 2009-10 (till December 2009) and to produce any documents and information connected herewith. I have been explained with the provisions of Section 14 of Central Excise Act, 1944 as made applicable to Service Tax under section 83 of Finance Act, 1994 according to which these are deemed judicial proceedings within the meaning of section 193 and 228 of Indian Penal Code, 1860. I have been explained that giving false statement or fabricating evidence is an offence punishable under section 193 of Indian Penal Code and obstructing the officers sitting in these proceedings is an offence punishable under section 228 of Indian Penal Code. Having understood the above provisions of law and knowing my responsibilities and implication of law, I depose this statement to the best of my knowledge and as per the information provided by company to me.

Q 1) Please tell briefly about yourself?

A) I am Deputy General Manager (Administration) of M/s Modi Properties and Investments (P) Ltd and am authorized to represent our group company M/s Modi and Modi Constructions, before Service Tax authorities in connection with Service Tax matters and to give Statement.

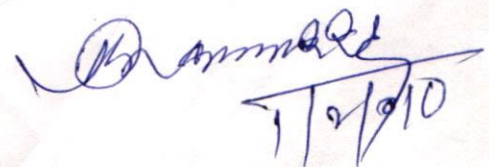
Q 2) You are aware that without submission of documents and information like month wise details of receipts, liability of tax and interest cannot be arrived at as the rate of tax and classification during the subject period changed. Then, why you have not submitted all the documents and information as called for therein the summons dated 13.1.2010?

A) We have already submitted the balance sheets, some ST3 return copies and plot-wise receipts details towards sale deed and agreement of construction since inception to October 2009. Book of accounts, Bank statements, Customer documents and unaudited book of accounts upto December, 2009 were provided in CD. The sample copies of agreement of construction and sale deed, monthwise receipts statement are also provided. Trial balance sheet for this financial year upto December, 2009, remaining copies of the ST3 returns, plot-wise receipts details towards sale deed and agreement of construction for the months Nov & Dec 2009 will be submitted at the earliest.

Q 3) When was the business operations started by M/s Modi and Modi Constructions.? What are the activities undertaken by the said company?

A) Our business was started in 2005 as a Partnership firm. The activities undertaken by the company are providing services of construction of Residential Complexes. We purchased the land under sale deed. On that we constructed the residential complexes. Initially, we collect the amounts against booking form/agreement of sale. At the time of registration of the property, the amount received till then will be allocated towards Sale Deed and Agreement of construction. Therefore, service tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement. The service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis.

Contd-2


7/2/10

Agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction. The sale deed constitutes a condition to go for construction with the builder. Accordingly, the construction agreement will also be entered immediately on the same date of sale deed. All the process is in the way of sale of the constructed unit as per the agreement of sale but possession was given in two phases one is land / semi finished flat with undivided share of land and other one is completed unit. This is commonly adopted procedure as required for getting loans from the banks.

Q4.) Is the entire land on which construction has been took place registered in the name of M/s Modi and Modi Constructions? If not, state the details of agreement between the land owners and M/s Modi and Modi Constructions.

A) We are having single project under this concern since inception, namely 1) Neelgiri Homes. We are the owners of the land by virtue of sale deeds.

Q5) When did you receive the first payments for service and when did you start providing the services of construction?

First booking amount was received in Dec 2007, and the construction was also started in the same month.

Q 6) Have you taken registration under Service Tax and paying Service Tax?

A) We have been registered with Service Tax Department under Construction of residential complex service in 2007 and works contract services in 2008 and paying Service Tax on the total taxable services rendered by us w.e.f Apr 2008.

Q 7) Did you pay the tax along with interest on the receipts towards construction services from 16-6-2005 till the date of payment of tax?

A) All the tax has been remitted in advance, considering the first receipt as tax as per actual completion of work though the partial amounts are receivable by the date of payment of tax. We have already submitted consolidated receipts towards the services from our customers.

Q8.)How did you reclassified and converted the services of construction into works contract services?

A) Prior to 31.5.2007, we have not provided the services of construction and there are no receipts towards construction during that period. We paid service tax under Works Contract Service for all the agreements of construction till 31.12.2009.

Q.9)Why there is a difference in the receipts shown in the balance sheet, actual receipts shown in your worksheet and the receipts shown in the ST3 returns?

A) Net receipt from customers shown in the balance sheet doesn't directly reflect the actual receipts from customers towards construction service. However, the same can be arrived at by making certain calculations and the working sheet shall be provided. Our worksheet of receipts covers the period up to Dec., 2009 whereas the ST3 returns show the receipts up to Dec. 2008 only. We have not shown the receipts in ST3 returns from Jan 2009 onwards as we found our services are not taxable and as our customers stopped payment of service tax.

Cont-3


1/2/09

Q. 10) Do you say that the difference of total receipts up to Dec., 2009 shown in your worksheet and the total of values shown in ST3 returns filed, pertains to the months starting from 1/2009 to 12/2009 on which tax has not been paid?

A) Yes.

Q.11) Why did you stop payment of service tax from 1-1-2009 and also not submitted the returns?

A) Our customers have stopped payment of service tax from January, 2009 onwards in the light of the CBEC Circular No.108/2009/ST dt.29.01.2009. We already submitted our letter for cancellation of service tax registration as we believe our services are not taxable. In this regard we didn't receive any communication from the department. As we applied for cancellation we stopped submission of returns. Copy of our letter for cancellation is submitted.

Q 12) As per the statute and as clarified in the circular mentioned above, tax is not leviable on the sale value only i.e., the value mentioned in the sale deed, and only the complex built by a person for his personal use as residence engaging any person to design, plan and construct was excluded from the definition of residential complex. Therefore, why the service tax should not be demanded in your case where you provided the services of the construction of residential complex to residential units i.e., the part of the residential complex of your customers?

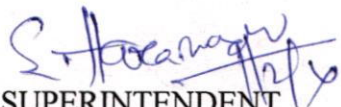
A) In this regard, we have already provided our submissions in detail vide our letters dated 13-3-2009 and 2-7-2009 respectively. Copies of the same will be provided.

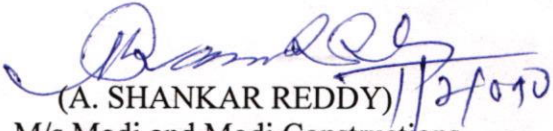
Q 13) Do you want to say anything more?

A) The word used in the exclusion is 'complex' not the 'residential complex'. A complex may also have single residential unit. Therefore, it is understood by us and our customers, services to a residential unit / complex which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex.

The above statement is given by me voluntarily without being under any pressure, threat or coercion. All the above information was given by me as per the records produced before me by the company and to the best of my knowledge. On my request, one of the officers typed the statement on the computer available in your office. I have gone through the hard copy of the statement which is true, correct and is as dictated by me.

BEFORE ME


SUPERINTENDENT
SERVICE TAX
ANTI EVASION (GR. VI)


(A. SHANKAR REDDY) 12/09
For M/s Modi and Modi Constructions
Hyderabad.