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IN THE CUSTOMS, CENTRAL EXCISE, AND SERVICE TAX APPELLATE TRIBUNAL,
WTC BUILDING, FKCCI COMPLEX, BANGALORE

Sub: Appeal against the Order in Appeal No: 10/2011 (H-II) S.Tax dated 29.10.2010 passed by the Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II, L.B. Stadium Road

(8)

Between:

M/s. Modi & Modi Constructions,
5-4-187/3 & 4,
II Floor, MG Road,
Secunderabad – 500 003. ..... Appellant

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-II, Kendriya Shulk Bhavan,
L.B. Stadium Road,
Hyderabad – 500 004. ..... Respondent

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ACCOMPANYING DECLARATION TO BE ATTACHED TO ST-5
IN THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL

Appeal No. **of 2011**

Between:
M/s. Modi & Modi Constructions,
5-4-187/3 & 4,
II Floor, MG Road,
Secunderabad – 500 003. ..... **Appellant**

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-II, Kendriya Shulk Bhavan,
L.B. Stadium Road,
Hyderabad – 500 004.

..... **Respondent**

ISSUE INVOLVED IN APPEAL:			**Taxability of service**
1.	Designation and address of the authority passing the order appealed against	:	The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.
2.	The number and date of order appealed against	:	O-I-A No: Order in Appeal No: 10/2011 (H-II) S.Tax (Appeal No: 06/2011 (H-II) ST) (O-I-O No: 45/2010 (S Tax) passed on 29.10.2010)
3.	Date of communication of the order appealed against	:	21.02.2011
4.	State/Union Territory and the Commissionerate in which the order/decision of assessment/ penalty/fine was made	:	Andhra Pradesh, Commissioner of Customs, Central Excise & Service Tax, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.
5.	Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals).	:	The Commissioner of Customs, Central Excise & Service Tax, (Appeals-II), L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.
6.	Address to which notices may be sent to the Appellant	:	Hiregange & Associates, Chartered Accountants # 1010, 1st Floor, Above

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			Corporation Bank, 26th Main, 4th T Block, Jayanagar, Bangalore – 560 041. **Also to Appellant as stated in cause title supra.**
7.	Address to which notices may be sent to the Respondent	:	The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.
8.	Whether the decision or order appealed against involves any question having a relation to the value of the taxable service for purposes of assessment; if not difference in tax or tax involved, or amount of interest or penalty involved, as the case may be.	:	Yes
8A (i)	Period of dispute	:	From the period Jan '09 to Dec '09
(ii)	Amount of Tax if any demanded for the period mentioned in Item (i)	:	Rs.6,04,187/- including Cess
(iii)	Amount of refund if any claimed for the period mentioned in Item (i)	:	Nil
(iv)	Amount of interest involved	:	Interest u/s 75 of the Finance Act 1994
(v)	Amount of penalty imposed	:	Rs. 6,04,187/- under section 78 and Rs. 5000/- u/s 77 of the Finance Act, 1994.
9.	Whether duty or penalty or both is deposited if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	:	No, Stay application filed along with this Appeal.
9A	Whether the appellant wishes to be heard in person?	:	Yes. At the earliest convenience of this Honorable Tribunal.
10.	Reliefs claimed in appeal	:	To set aside the impugned order and grant the relief claimed.

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FORM ST – 5

Form of appeal to Appellate Tribunal under Section 86 of the Finance Act, 1994

In the Customs, Excise and Service Tax Appellate Tribunal

Appeal No. of 2010

Between:

M/s. Modi & Modi Constructions,
5-4-187/3 & 4,
II Floor, MG Road,
Secunderabad – 500 003. ..... **Appellant**

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-II, Kendriya Shulk Bhavan,
L.B. Stadium Road,
Hyderabad – 500 004.

..... **Respondent**

1. Designation and address of the authority passing the order appealed against	:	The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.
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6. Address to which notices may be sent to the Appellant	:	Hiregange & Associates, Chartered Accountants # 1010, 1st Floor, Above Corporation Bank, 26th Main, 4th T

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		Block, Jayanagar, Bangalore – 560 041. **Also to Appellant as stated in cause title supra.**
7. Address to which notices may be sent to the Respondent	:	The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.
8. Whether the decision or order appealed against involves any question having a relation to the value of the taxable service for purposes of assessment; if not difference in tax or tax involved, or amount of interest or penalty involved, as the case may be.	:	Yes
8A. (i) Period of dispute	:	From the Period Jan '09 to Dec '09
(ii) Amount of tax, if any demanded for the period mentioned in item (i)	:	Rs.6,04,187/- including Cess
(iii) Amount of refund, if any claimed for the period mentioned in item (i)	:	Nil
(iv) Amount of interest involved	:	Interest u/s 75 of the Finance Act 1994
(v) Amount of penalty imposed	:	Rs. 6,04,187/- under section 78 and Rs. 5000/- u/s 77 of the Finance Act, 1994.
9. Whether duty or penalty or both is deposited if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	:	No, Stay application filed along with this Appeal.
9A. Whether the appellant wishes to be heard in person?	:	Yes. At the earliest convenience of this Honorable Tribunal.
10. Reliefs claimed in appeal	:	To set aside the impugned order and grant the relief claimed.

For Hiregange & Associates
Chartered Accountants

Rajesh Kumar T R
Authorised Representative

For MODI & MODI CONSTRUCTIONS

Partner

Appellant

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FACTS OF THE CASE

A. M/s Modi & Modi Constructions (herein after referred to as Appellant) is a registered partnership firm engaged in the business of construction of residential units. Appellant had undertaken a venture by name Nilgiri Homes wherein 18 houses were constructed and sold. Appellant had obtained service tax registration and made payments of service tax for the receipts pertaining to the period December 2007 to December 2008.

B. In respect of the 18 residential units constructed and sold two agreements were entered into by the appellant, one for sale of the undivided portion of land and the other is the construction agreement.

C. Initially, upto December 2008, when amounts were received by the appellant and eventhough there was a doubt and lot of confusion on the applicability of service tax the appellant paid service tax in respect of the receipts of construction agreement. Later, on the issue of the clarification vide the circular No. 108/02/2009 dated 29.01.2009 by the department, the customers of the appellant, stopped paying the service tax and accordingly appellant was forced to stop collecting and discharging service tax liability on the

amounts collected in respect of the construction agreement as they were of the bonafide belief that they were excluded vide the personal use clause in the definition of residential complex.

D. A letter dated 06.07.2009 was written to the Additional Commissioner of Service Tax indicating the stand taken by the Noticee and also intimating the non-payment of Service Tax.

E. Investigation was taken up by the department and summons dated 11.01.2010 were done for the submission of relevant records/documents/information for which the appellant had extended full cooperation.

F. Subsequently, the Additional Commissioner has issued a show cause notice dated 15.04.2010 to the appellant to show cause as to why:

i. An amount of Rs.6,04,187/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section73(1) of the Finance Act,1994 (hereinafter referred to as the Act) for the period January 2009 to December 2009;

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

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

iv. Penalty under sections 77 of the Act should not be demanded from them.

v. Penalty under sections 78 of the Act should not be demanded from them.

G. Appellants made a detailed reply dated 18.05.2010 countering and answering all the points raised by the respondent in the show cause notice mentioned above. (copy of the reply is enclosed along with this appeal).

H. The Additional Commissioner had passed an impugned order stating all the views submitted by the Appellant were not in accordance with law and confirmed the demand raised vide SCN.

I. Aggrieved by the impugned order, the appellant had preferred an appeal to the Commissioner (Appeals).

J. The issues for determination in the present case before Commissioner (Appeals) were :-

i. Whether the units in the residential complex that are sold to the customers would be excluded by the personal use clause?

ii. Whether the circular 108/02/2009 dated 29.01.2009 clarifies about the entire complex to be put to use for personal purpose or would suffice if one unit in the complex is put to personal use?

iii. Whether extended period of limitation can be invoked?

K. The Commissioner (Appeals) passed the impugned order

i. Upholding the demand;

ii. Holding that appellant were not eligible for the benefit of CENVAT credit

iii. Holding that appellant were not eligible for cum tax benefit even though the service tax was not collected from the customers.

iv. Holding that there was no doubt and confusion at all regarding the levy of service tax on the construction of complex service.

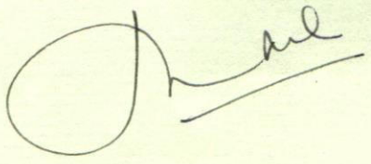
L. The impugned order was passed which has aggrieved the Appellant, in which it was held to the following effect:

i. Demand of Service Tax amount of Rs. 6,04,187/- is hereby confirmed on under Sec 73 (1) of the Finance Act, 1994 (hereinafter referred to as the Act) for the period from Jan 09 to Dec 09.

ii. Demand of interest under section 75 of the Act confirmed.

iii. Imposition of penalty of Rs. 5,000 and Rs. 6,04,187/- under section 77 and 78 of the Act respectively.

Aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.



GROUNDS OF APPEAL

1. The Appellant submits that the impugned order is *ex-facie* illegal and untenable in law since the same is contrary to facts and judicial decisions.

2. The Appellant submits that the impugned order is in violation of the principles of natural justice, as the submissions made by the appellant, which are meritorious, have not been adverted to or rebutted. The impugned order passed short-sighted, uprooting the very basic need of sustainability, which merits annulment at the hands of Honorable CESTAT.

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

4. The Appellant submits that the impugned Order as well as adjudicating order has by traveling outside the boundaries of the adjudication, made out a totally new case against them, which is impermissible in the light of the following decisions and the impugned order has resulted in a travesty of justice:

   a. Gujarat State Fertilizer Co. v. CCE, 1997 (91) ELT (SC).

   b. Hindustan Polymers Co.Ltd. v. CCE, 1999 (106) ELT 12 (SC).

   c. SACI Allied Products Ltd. v. CCE, 2005 (183) ELT 226 (SC).

   d. Reckitt and Colman of India Ltd. v. CCE, 1996 (88) ELT 641 (SC).

5. The Appellant submits that the adjudication proceedings and appellate proceedings was rendered a solemn farce and idle formality, and the attitude of the respondent shows that a made-up mind was his approach for confirming the demand and the order was a merely a formality to complete the process with wholly irrelevant findings, and the order is therefore untenable.

6. The allegation and the conclusion of the impugned order is as under

   a. The appellants are liable to pay service tax on the construction of residential complex under taken by them since the definition of

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residential complex service squarely applicable and no exemption whatsoever can be allowed for such construction activity as it is not meant for self use.

b. Three conditions have to be satisfied for not attracting service tx

i. Construction should be completed

ii. Full payment of the agreed sum should be paid

iii. Sale deed should be executed for the full value of the residential unit

c. Exclusion clause would apply to the "complex as a whole" and not to individual residential units.

d. Appellant are also not covered under Notification No. 24/2010- ST dated 22.06.2010 r/w notification 36/2010-ST dated 01.07.2010, since the said taxable service are effectively only from 01.07.2010 on account of the Finance Act,2010 whereas in the instant case issue involved was for the period Jan 2009 to December 2009, which us much earlier than 01.07.2010.

e. Cum tax basis payment of service tax is not permitted under the Works Contract Rules, as it is not prescribed under the said rules.

f. The Appellant had not obtained any clarification from the department regarding applicability of the said Board's Circular before stopping payment of service tax extended period and penalties are imposable

g. Merely having said with the bonafide belief they had not paid service tax on the basis of the clarification issued in the Board's circular No. 108/02/2009-ST dt 29.01.2009, which is contrary to the statutory obligation cast upon, hence section 80 relief is not available.

7. The appellants submits that impugned order had failed to examine the context in which the circular was issued and the conclusion there on but has read the same is bits and pieces and has arrived at the wrong conclusion and hence the same has to be set aside.

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

residential unit itself would exclude it from service tax. For this reason as well the impugned order shall be set aside.

9. The appellants submits that the relevant part of the circular is as under

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

10. The Appellant wishes to highlight that neither in the definition nor in the clarification, there is any mention that the entire complex should be used by **one** person for his or her residence to be eligible for the exemption. The exemption would be available if the sole condition is satisfied i.e. personal use.

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

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

The Appellant submits that from the above extract, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the notice.

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

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

13. The Appellant submits that the argument is in context of single residential unit bought by the individual customer and not the

transaction of residential complex. The clarification has been provided based on the examination of the above argument among others.

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

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

both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)

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

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

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

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

17. The Appellant submits that Circular has very narrowly interpreted in the impugned Order without much application of mind and has concluded that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex.

Further the impugned order also states that three condition has to be satisfied, which is for the portion of circular not related to the facts of the appellants.

18. Where an exemption is granted, the same cannot be denied on unreasonable grounds and illogical interpretation as above. In the definition "*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**.*" Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person**....." similar the reference "personal use as residence by **such** person" also cannot be interpreted as "personal use by **ONE persons**" Such interpretation would be totally against the principles of interpretation of law and also highly illogical.

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

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

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

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

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CESTAT)

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

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

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

20. The impugned order has not considered the case law cited in respect of M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL–1106-CESTAT–Bang on the ground that in the present case there is no construction of commercial complex. It would be important to note that in the cited case there was both construction of residential complex and commercial complex and only part amount was pre deposited. Based on the circular 108/02/2009-ST this part amount deposited was considered sufficient and it was considered to cover the part of demand in respect of the construction of commercial complex.

21. The appellant submits that liability on the Builders were first time imposed vide intersection of explanation in Finance Act 2010, hence the appellant would not be liable for service tax prior to 01.07.2010. This submission has been differentiated since the explanation has

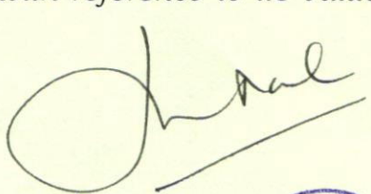
been constitutionally upheld in case of G.S. Promoters vs. Union of India 2011 (021) STR 0100 P&H. The correlation as to upholding the constitutional validity and the levy prior to such date has not been bought out hence the impugned order has to be set aside.

22. Without prejudice to the foregoing, Appellant submits the decision of Chennai tribunal in case of Macro Marvel Projects Ltd. vs Commr. of Service Tax, Chennai 2008 (012) STR 0603 Tri.-Mad which specifically held that individual houses are not taxable.

QUANTIFICATION

23. Without prejudice to the foregoing, appellant submits that the impugned order has not given the benefit of payment of service tax on the cum tax basis for the reason that the appellant has opted for the composition scheme. Appellant submits that as per section 67 of the Finance Act (reproduced below) the appellant would be entitled for the benefit of payment of service tax on cum tax basis where the same is not collected from the customers. Such benefit would be available for all services as there is no exception/exclusion given for works contract service.

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,—



(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

24. Appellant further submits that it was also held in the following cases that where no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis.

a. VGB Tyre Retreading Works *v.* Commissioner of Central Excise, Salem [2010] 26 STT 210 (CHENNAI - CESTAT)

b. Billu Tech Video Communication *v.* Commissioner of Central Excise, Jaipur[2010] 28 STT 325 (NEW DELHI - CESTAT)

c. M/s Vidyut Consultants Vs CCE, Indore (Dated: June 17, 2010) 2010-TIOL-1196-CESTAT-DEL

Eventhough the above cases do not pertain to the works contract service, appellant submits that there is nowhere in the statute stated that the works contract category would be given a different treatment in case the same is not collected from the customer. Hence the benefit (cum tax) given to the other services should also be available to the works contract service.

The impugned order has drawn conclusions without giving proper legal backup. For this reason as well the impugned order shall be set aside.

25. The Appellant submits that the work contract specifies that only the service tax can be paid at 2.06/4.12 instead of rate specified under section 66 and hence all other provisions including the cub tax benefit should extend even if not explicitly provided in the Composition scheme.

CENVAT

26. Without prejudice to the foregoing, assuming but not admitting that service tax liability exists, the appellant had submitted that they

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would be eligible for CENVAT credit in respect of the input services and the capital goods. But the impugned order has held that no such credit would be available as per the Works Contract (Composition scheme for the payment of service tax) Rules, 2007. Appellant submits that Rule 3(2) of such rules states that the assessee would not be eligible for CENVAT credit on inputs. There is no mention about credit in relation to input services and capital goods.

*"(2) The provider of taxable service shall not take CENVAT credit of duties or cess paid on **any inputs**, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004."*

27. The impinge Notice denies the CENVAT credit for the reason that for construction the input service and capital goods would not be requires, it is totally illogical that without the service of the contractor the constitution could not be bought further the input service is wide to cover the service related to business and hence the impugned order has to be set aside.

Extended Period of Limitation

28. The Appellant submits that the Show Cause Notice was issued on 12.04.2010 for the period January 2009 to December 2009. The returns for the half year ended 31st March 2009 was filed in 24th April

2009 hence for the period January 2009 to March 2009 the demand is after the period one year where as the SCN has been issued without invoking extended period of limitation and hence the said notice and proceeding thereof is void.

INTEREST

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

30. 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).

PENALTY

31. The Appellant Submits that the impugned order has confirmed the penalty on the ground that the appellant did not seek clarification while interpreting the circular. In this regard it was submitted that the appellant has specifically written to Additional Commissioner indicating stopping of service tax payment and also asked clarification in case the same was not proper. This has been totally ignored by the

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Commissioner (Appeals) and the order has passed, therefore the penalty should not be invoked.

32. Without prejudice to the foregoing appellant submits that they had given detailed reasoning and list of the various circulars that were issued by the department to clear doubts regarding the applicability of service tax on construction of residential complex. But the impugned order has stated that by the issue of the circular B1/6/2005-TRU, dated 27-7-2005 itself, the applicability of service tax on construction of residential complex was made clear and that the contention of the appellant that there was lot of confusion is not tenable.

33. Appellant submits that if by issue of the above circular all doubts were cleared then why were the subsequent circulars F. No. 332/35/2006-TRU, dated 1-8-2006 and 108/02/2009 –ST dated 29.02.2009 were issued on the same issue. This indicates that the impugned order has not considered all the submissions made by the appellant and have without any proper reasoning rejected their submissions. For this reason as well the impugned order shall be set aside.

34. The impugned order has stated that there is no confusion in the applicability of service tax in the present case and that this cannot be

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a reasonable cause for not having paid the service tax. Appellant states that the issue of so many circulars on the same subject at different points of time itself makes it evident that there was confusion. The impugned order has not considered this submission of the appellant and has passed the impugned order. The same shall be set aside.

35. Without prejudice to the foregoing, Appellant submits that D.O.F. No. 334/1/2010-TRU, dated 26-2-2010 has indicated that in para 8.5 of Annexure B that there was confusion, the relevant portion of the circular is extracted as under, therefore the stand that there was no confusion in the impugned order needs to be set aside.

8.5 These different patterns of execution, terms of payment and legal formalities ***have given rise to confusion,*** *disputes and discrimination in terms of service tax payment.*

36. Without prejudice to the foregoing, Appellant submits that service tax liability on the builders till date has not been settled and there is full of confusion as the correct position till date. With this background it is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there

cannot be intention of evasion and penalty cannot be levied. In this regard we wish to rely upon the following decisions of Supreme Court.

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

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

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

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

37. Without prejudice to the foregoing, Appellant submits that there is no allegation as to any intention to evade the payment of service tax setting out any positive act of the Appellant. Therefore any action proposed in the SCN that is invokable for the reason of fraud, wilful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made thereunder with intention to evade payment of duty, is not sustainable and penalty under section 78 is not sustainable. In this regard reliance is placed on the following decisions:

a. Cosmic Dye Chemical v. CCE, 1995 (75) ELT 721 (SC) wherein at para-6 of the decision it was held that – "Now so far as fraud and collusion are concerned, it is

evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful".

b. T.N. Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC) wherein it was held that - To invoke the proviso three requirements have to be satisfied, namely, (1) that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded; (2) that such a short-levy or short-payment or erroneous refund is by reason of fraud, collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the

Central Excise Act or the rules made thereunder; and (3) that the same has been done with intent to evade payment of duty by such person or agent. These requirements are cumulative and not alternative. To make out a case under the proviso, all the three essentials must exist. Further it was held that burden is on the Department to prove presence of all three cumulative criterions and the Revenue must have perused the matter diligently. It is submitted none of the ingredients enumerated in proviso to section 11A(1) of the Act is established to present in our clients case.

c. Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC) wherein it was held that proviso to section 11A(1) is in the nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualized by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from

six months to five years it has to be construed strictly. Further, when the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.

d. Padmini Products v. CCE, 1989 (43) ELT 195 (SC) wherein it was held that mere failure or negligence on the part of the manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation. Unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a licence. For invoking extended period of five years limitation duty should not had been paid, short-levied or short paid or erroneously refunded because of either any fraud, collusion or wilful mis-statement or suppression of

facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act, therefore, failure to pay duty or take out a licence is not necessary due to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the Act. Likewise suppression of facts is not failure to disclose the legal consequences of a certain provision.

e. Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC) wherein it was held that mere failure to declare does not amount to mis-declaration or wilful suppression. There must be some positive act on the part of party to establish that either wilful mis-declaration or wilful suppression and it is a must. When the party had acted in bonafide and there was no positive act, invocation of extended period is not justified.

f. Gopal Zarda Udyog v. CCE, 2005 (188) ELT 251 (SC) where there is a scope for believing that the goods were not excisable and consequently no license was required to be taken, then the extended period is not applicable. Further, mere failure or negligence on the part of the manufacturer either not to take out the

licence or not to pay duty in cases where there is a scope for doubt, does not attract the extended period of limitation. Unless there is evidence that the manufacturer knew that the goods were liable to duty or he was required to take out a licence, there is no scope to invoke the proviso to Section 11A(1).

g. Kolety Gum Industries v. CCE, 2005 (183) ELT 440 (T) wherein it was held that when the assessee was under bonafide belief that the goods in question was not dutiable, there was no suppression of fact.

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

39. Appellant further submits that they have not intentionally mis-interpreted the circular to evade tax payment as is mentioned in the impugned order. Hence the extended period of limitation shall not be applicable to them.

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

41. Appellant crave leave to alter, add to and/or amend the aforesaid grounds.

42. Appellant wish to be heard in person before passing any order in this regard.

PRAYER

Wherefore it is prayed:

a. The impugned order of the Commissioner is to be set-aside;

b. To hold that no Service tax vide Circular No: 108/102/2009-ST dated 29.01.2009 dated is payable.

c. To hold that there was no suppression or intention to evade the payment of service tax.

d. To hold that even if tax was payable extended period was not invokable.

e. To hold that no interest and penalties are imposable.

f. Any other consequential relief be granted.

For Hiregange & Associates
Chartered Accountants

Rajesh Kumar T R
Partner
Authorised Representative.

For MODI & MODI CONSTRUCTIONS

Partner

Appellant

VERIFICATION

We, M/s Modi & Modi Constructions, do hereby declare that what is stated above is true to the best of our information and belief.

Verified today the 10th day of March, 2011 at Hyderabad.

For MODI & MODI CONSTRUCTIONS

Partner

Appellant

IN THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL

Service Tax Appeal No. _____ of 2011
Stay Application No. _____ of 2011

Between:

Between:
M/s. Modi & Modi Constructions.,
5-4-187/3 & 4, III Floor,
MG Road,
Secunderabad – 500 003. ..... **Appellant**

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-II, Kendriya Shulk Bhavan,
L.B. Stadium Road,
Hyderabad – 500 004.

..... **Respondent**

Application seeking waiver of pre-deposit and stay of recovery of Adjudication levies under section 35F of the Central Excise Act, 1944

The Appellant in the above appeal petition is the Applicant herein and craves to submit for kind consideration of this Hon'ble tribunal as under:

1. The Applicant/Appellant is now in appeal against Order-In-Appeal No. 10/2011 (H-II) S.Tax dated 31.01.2011, passed by the Commissioner of Customs, Central Excise & Service Tax, (Appeals-II), 7th Floor, Kendriya Shulk Bhavan, Basheerbagh, Hyderabad, confirming the demand of service tax in respect of "Construction of Residential Complex Services" for the period January 2009 to

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December 2009 under provisions of Section 73 of the Finance Act, 1994.

2. The facts and events leading to the filing of this application and grounds of appeal have been narrated in the memorandum of appeal in Form S T-5 filed along with this application, and the Applicant/Appellant craves leave of this Honorable tribunal to adopt, reiterate and maintain the same in support of this application. The Applicant / Appellant maintain and reiterate the same grounds in support of this application.

3. The Applicant/Appellant submits that they have a strong *prima facie* case on merits, and the balance of convenience is also in their favour, and the demand of adjudication levies is not only illegal, but untenable and they would be put to "undue hardship" if called upon to pre-deposit the entire adjudication dues, or if the impugned order is not stayed during the pendency of this appeal and have filed this application.

4. The Applicant/Appellant has not made any similar petition or application before any other forum, Tribunal or Court and would therefore entreat this Honourable Tribunal to entertain and dispose of this application on merits.

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5. The Applicant/Appellant has relied upon a number of judicial decisions in support of their grounds of appeal and craves leave of this Hon'ble Tribunal to rely on the same in support of this application.

6. The Appellant submits that in the following decisions the Courts have held that while deciding a stay application, an appellate forum is required to first look into the prima-facie merits of a case and then the financial hardship, and if there is a prima-facie case, stay could be granted, in terms of *Benara Valves Limited v. CCE,* 2006 (204) ELT 513 (SC); *Mehsana District Milk PU Cooperative Ltd., Vs. UOI,* 2003 (154) ELT 347 (SC) and *ITC Vs. CCE,* 2005 (184) ELT 347 (All); *Hoogly Mills Co. Ltd., Vs. UOI,* 1999 (108) ELT 637 (Cal.). Your Appellant therefore prays that the prima-facie nature of the case be kindly considered and the Honourable tribunal Appeals be pleased to grant stay along with waiver of pre-deposit of adjudication levies.

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PRAYER

Wherefore, it is prayed that this Hon'ble tribunal be pleased to grant waiver of pre-deposit of service tax, interest and penalty and stay the recovery of the said amount during the pendency of the appeal, and hear the appeal on merits in the justice and equity, for which act of justice and fairness, the Applicant would as in law, be beholden and would pray for in law & c

Place: Hyderabad

Dated:10.03.2011

For MODI & MODI CONSTRUCTIONS

Applicant Partner

VERIFICATION

I/We, M/s Modi & Modi Constructions, Secunderabad, the Appellant hereinabove, do hereby declare that what is stated above is true to the best of our information and belief.

Verified at Hyderabad on this 10th day of March, 2011.

Place: Hyderabad

Date: 10.03.2011

For MODI & MODI CONSTRUCTIONS

Partner

Applicant

9

IN THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL BANGALORE

Sub: Appeal against the order of the Commissioner of Customs, Central Excise and Service Tax, Hyderabad in Order in Appeal No 10/2011 dated 31.01.2011.

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

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

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

Executed this 10th day of March, 2011 at Hyderabad.

For MODI & MODI CONSTRUCTIONS

Partner

Signature

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

Dated: 10.03.2011

Address for service :

Hiregange & Associates,
No. 1010, 26th Main,
Above Corporation Bank,
4th T Block, Jayanagar,
Bangalore- 560 041.

For Hiregange & Associates
Chartered Accountants

Rajesh Kumar T R
Partner

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