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

Sub: Proceedings under SCN O.R No.59/2011-Adjn.(ST) Gr.X dated 23.04.2011 issued to M/s. Modi & Modi Constructions, Secunderabad.

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

BRIEF FACTS OF THE CASE:

1. Noticee is registered as service providers under the category of under the category of "Works Contract Service" with the Department vide Registration No. AAKFM7214NST001.
2. The Noticee provides Construction Services to various customers. Noticee is a partnership firm engaged in the business of construction of residential units. Noticee had undertaken a venture by name M/s Nilgiri Homes towards sale of land and agreement of construction pertaining to the period January 2010 to December 2010.
3. In respect of the residential units constructed and sold two agreements were entered into by the Noticee, one for sale of the undivided portion of land and the other is the construction agreement.
4. Noticee Initially, upto December 2008, when amounts were received by the and eventhough there was a doubt and lot of confusion on the applicability of service tax the appellant paid service tax in respect of the receipts of construction agreement. Later, on the issue of the clarification vide the circular No. 108/02/2009 dated 29.01.2009 by the department, the customers of the appellant, stopped paying the service tax and accordingly appellant was forced to stop collecting and

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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

5. The Department initially issued a Show Cause Notice No. HQPOR No. 34/2010-Adjn(ST) for the period January 2009 to December 2009 and the same was adjudicated and the Noticee has preferred appeal and the same has been adjudicated and confirmed vide OIO No: 45/2010-ST dated 29-10-2010. Subsequently, the Additional Commissioner has issued a the subject periodical show cause notice dated 23.04.2011 to the Noticee to show cause as to why:

   i. An amount of Rs.12,06,447/- 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 2010 to December 2010;

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

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

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

In as much as:

a. The Notice is issued demanding the said Service Tax on the amounts received towards agreement of Construction executed with various customers in respect of noticee's venture viz. M/s Paramount Residency Since the amounts received are for the services rendered prior to the amendment of Finance Act, 1994 in the Budget 2010, should be liable to pay tax @ of 4.12% under the category of Works Contract Service.

b. There exists service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements for construction invariably attract service tax under Section 65(105zzzza) of the Finance Act, 1994.

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SUBMISSIONS:

1. The Noticee submits that the impugned Notice was passed totally ignoring the factual position and also some of the submission made and judicial decisions relied but was based on mere assumption, unwarranted inferences and presumptions. Supreme Court in case *Oudh Sugar Mills Limited v. UOI,* 1978 (2) ELT 172 (SC) has held that such impugned order are not sustainable under the law. On this count alone the entire proceedings under impugned Notice requires to be set-aside.
2. The Noticee submits that for the service tax to be applicable the apart from the service, taxable object definition also has to be satisfied. In the instant all residential constructions are not taxable but only construction of residential complex is what is intended to tax. Therefore the definition of the residential complex has to be satisfied in order to apply service tax.
3. The definition of residential complex mentioned in section 65(*91a*) states that where such a complex is for personal use then no service tax is payable. The definition is extracted below:

"residential complex" means any complex comprising of—

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

(ii) a common area; and

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

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

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

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

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

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

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

5. Noticee submits that non-taxability of the construction provided for an individual customer intended for his personal was clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 (mentioned above) during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio.

   Relevant Extract

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

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

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

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	Will the construction of an individual house or a bungalow meant for residence of an individual fall in purview of service tax, is so, whose responsibility is there for payment?	*Clarified vide F. No. B1/6/ 2005-TRU, dated 27-7-2005, that residential complex constructed by an individual, intended for personal use as residence and constructed by directly availing services of a construction service provider, is not liable to service tax.*

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

   Relevant extract

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

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

9. Further the notice has bought a new theory that the exemption for personal use as stated in the definition would be available only if the entire complex is for personal use of ONE person. The noticee wishes to state that while interpreting the law no words should be added or deleted. The law should be read as it is in its entirety. 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

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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 noticee wishes to highlight that neither in the definition nor in the clarification, there is any mention or whisper 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. And such personal use, either by one person or multiple person is irrelevant.

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

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

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

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

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

14. The noticee 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.

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

"... The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract ***for construction of a residential complex*** *with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)*

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

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

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

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

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18. The impugned notice has very narrowly interpreted by the department 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.

19. 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.

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

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

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

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

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

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

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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

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

23. Further the noticee submits that in the Finance Bill 2010 there was an explanation added to the section 65(105)(zzzh) of the Act where the taxable service construction of residential complex is defined. This was the first time the deeming fiction of the service provided by the Builder was bought into the tax net. (prior to this only contractors were taxable) In this respect, in the clarification issued by the TRU vide D.O.F. No.334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in tax treatment among different practices, the said explanation was inserted. The circular also clarifies that by this explanation the scope has been enhanced. This gives the conclusion of the same being prospective and also clarifies that the transaction between the builder and buyer of the flat is not taxable until the assent was given to the Bill. Hence this shows that the transaction in question is not liable to service tax for the period of SCN.

24. Further Notification No. 36/2010-ST dated 28.06.2010 and Circular no. D.O.F.No.334/03/2010-TRU dated 01.07.2010 exempts the advances received prior to 01.07.2010, this itself indicates that liability of service started for the construction provided after 01.07.2010 and not prior to that, hence there is no liability of service tax during period of the subject show cause notice.

25. Without prejudice to the foregoing, Noticee submits that in a recent Trade Notice F.No. VGN(30)80/Trade Notice/10/ Pune, the 15th Feb, 2011 issued by the Pune Commissionerate, has specifically clarify that no service tax is payable by the builder prior to 01.07.2010 and amounts received prior to that is also exempted. Since the issue is prior to such date the same has to be set aside.

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

Cum tax benefit

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

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

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).

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PENALTY:

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

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

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

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

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

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

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

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

For M/s. Modi & Modi Constructions

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Authorised Signatory

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

Sub: Proceedings under SCN O. No. 59/2011-Adjn. (ST) dated 23.04.2011 issued to M/s. Modi & Modi Constructions, Secunderabad.

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 31 day of May, 2011 at Hyderabad.

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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: 31.05.2011

Address for service:

Hiregange & Associates,

"Basheer Villa", 8-2-268/1/16/B,

2nd Floor, Sriniketan Colony,

Road No. 3 Banjara Hills,

Hyderabad – 500 034.

For Hiregange & Associates

Chartered Accountants

Hiregange & Associates Chartered Accountants Bangalore

Sudhir V. S.

Partner. (M. No. 219109)

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