BEFORE THE COMMISSIONER (APPEALS-II) OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, 7TH FLOOR, L.B. STADIUM ROAD, BASHEERBAGH, HYDERABAD – 500 004.

Sub: Appeal against the order of the. Commissioner of Customs, Central Excise and Service Tax (Appeal), Hyderabad in Order in Original No 48/2012 (H-IV) S. Tax dated 31.08.2012 issued to M/s Modi & Modi Constructions, Secunderabad

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

- 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 29th day of October 2012 at Hyderabad.

Signature

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

Dated: 29.10.2012

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

Sudhir V. S.
Partner. (M. No. 219109)

केन्द्रीय उत्पाद, सीमाशुल्क एव सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX
हैदराबाद-II आयुक्तालय :: एल.बी.स्टेडियम रोड
HYDERABAD II COMMISSIONERATE :: L.B.STADIUM ROAD
बशीरबाघ :: हैदराबाद & 500 004
BASHEERBAGH :: HYDERABAD-500 004
(PHONE NO: +91-40-2323 1198 & FAX NO: +91-40-2321 1655)

CNO.IV/16/35/2012-S.Tax(Gr.X) Date: 31.08.2012
OR No.59/2011-Adjn(ST)ADC &
OR No.53/2012-Adjn(ST)ADC

ORDER IN ORIGINAL NO.48/2012-Adjn(ST)ADC
(Passed by Shri R.S. Maheshwari, Additional Commissioner, Service Tax)

प्रस्तावना
PREAMBLE

1. निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति विना मूल्य के दी जाती है This copy is granted free of charge for the private use of the person to whom it is issued.

2. जो भी व्यक्ति वित अधिनियम. 1994 के अंतर्गत धारा 85 संशोधित से दुषप्रभावित हो. इस प्रकार प्राप्त आदेश निर्णय के खिलाफ आदेश की प्राप्ति के तीन महीनों के भीतर आयुक्त (अपील), मुख्यालय कार्या लय. 7 वॉ तल. एल.वी. स्टेडियम रोड. वशीरवाग. हैदरावाद 500 004 को अपनी अपील प्रस्तुत कर सकता है ।

Under Sec.85 of the Finance Act, 1994, as amended, any person aggrieved by this order can prefer an appeal within three months from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs., Office, 7th floor, L.B.Stadium Road, Basheerbagh, Hyderabad – 500 004.

3. धारा 85 के के अंतर्गत आयुक्त (अपील) को की जानेवाली अपील फार्म. एस.टी-4 में हो और इसकी जॉच निर्धारित पद्धति के अनुसार की जानी चाहिए ।

An appeal under Sec.85 to the Commissioner (Appeals) shall be made in form ST-4 and shall be verified in the prescribed manner.

4. एस . टी–4 फार्म में की गई अपील अनुलिपि में प्रस्तुत की जानी चाहिए और उसके साथ जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उसकी एक प्रति भी संलग्न की जानी चाहिए;

The form of appeal in Form No: ST-4 shall be filed in duplicate and shall be accompanied by a copy of the decision or the order appealed against.

5. अपील पर और जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उस आदेश की प्रति पर भी समुचित मूल्य के अदालती टिकट लगाए जाने चाहिए ।

The appeal as well as the copy of the decision or order appealed against must be affixed with court fee stamp of the appropriate amount.

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Sub: Service Tax – Offence – Case against M/s. Modi & Modi Constructions – Non payment of Service Tax on taxable services rendered – OIO Passed – Regarding.

* * * * *

M/s. Modi & Modi Constructions, 5-4-187/3 & 4, IInd Floor, MG Road, Secunderabad – 500 003 (hereinafter referred as Paramount / assessee, in short) are engaged in providing works contract service. M/s Paramount Builders is a registered partnership firm and got themselves registered with the department for payment of service tax with STC No.AAKFM7214NST001.

2. A Show Cause Notice vide HQPOR No.34/2010-Adjn(ST) dated 12.04.2010 was issued for the period from January 2009 to December 2009 involving an amount of Rs.604187/- including cess and the same has been adjudicated and confirmed vide Order-In-Original No.45/2010-ST dated 29.10.2010. Further, the assessee has gone an appeal and the same has been dismissed vide OIA No.10/2011(H-II) dated 31.01.2011 by the Commissioner (Appeal), Hyderabad. The present notice is issued in sequel to the same for the period from January 2010 to December 2010.

3. As per Section 65 (105) (zzzza) of the Finance Act, 1994 defines that 'taxable service 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 .....,

(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. M/s Modi & Modi Constructions, Hyderabad registered with the service tax department and not discharging the service tax liability properly and also not filing the ST-3 returns, which are mandatory as per Service Tax Rules

made there under. On verification of the records, it is found that M/s Modi & Modi Constructions, Hyderabad have undertaken a single venture by name M/s NILGIRI HOMES located at Rampally Village, Keesara Mandal, RR District and received amount from customers towards sale of land and agreement of construction of 18 houses for the said period. Further, it is found that they have not filed ST-3 returns for the said period.

5. Further it is made clear on 01.02.2010 by Sri A. Shanker Reddy, Deputy General Manager(Admn) authorized representative of the assessee , that the activities undertaken by the company are providing services of construction of residential complexes and also stated that initially, they collected the amounts against booking form/agreement of sale. At the time of registration of the property, the amounts received till then will be allocated towards Sale Deed and Agreement of Construction. Therefore, service tax on amount received against Agreement of Construction portion of the amounts towards agreement of construction is aid on receipt basis. The Agreement of Sale constitutes the total amount of the land/semi finished flat with undivided share of land and 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 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 loads from the banks".

6. As per the exclusion provided in Section 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 29.01.2009 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, 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 construction entire complex for one person for personal use as residence by such person would not be subjected to service tax. Further, the builder/promoter/developer normally enters into construction/completion agreement 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/contract 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 ore more of facilities or services such as park, lift, parking space, community hall, common water

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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/2007 dated 16.11.2007. As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat 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 assesses 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 deed are taxable services under works contract service.

8. In spite of several reminders from group and anti-evasion and summons dated 18.04.2011, M/s Modi & Modi Constructions, Hyderabad vide their statement received in this office on 22.04.2011 has submitted the Flat-wise amounts received for the period from January,2010 to December,2010. The total amount received is Rs.29282693/- against agreements of construction during the period and are liable to pay service tax including cess works out to Rs.1206447/- and the interest at appropriate rates under Works Contract Service respectively.

9. M/s Modi & Modi Constructions, Hyderabad are well aware of the provisions and of liability of service tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly with an intention to evade payment of Service Tax. They have intentionally not filed the ST-3 returns for the said period. Hence, the service tax payable by M/s Modi & Modi Constructions, appears to be recovered 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-3 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 the 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 provisons to the Section 73(1) of the Finance Act 1994 and thereby they have rendered themselves liable for penal action under Section 77 & 76 of the Finance Act 1994.

11. Therefore, M/s Modi & Modi Constructions, Hyderabad were issued a show cause notice dated 23.04.2011 and are asked to show cause to the Additional Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad, as to why;

(i) an amount of Rs.1206447/- including cess should not be demanded on the works contract service under the Sub-Section (1) of Section 73

of the Finance Act 1994 for the period from January 2010 to June 2010; and

(ii) Interest is not payable by them on the amount demanded at (i) above under Section 75 of the Finance Act 1994; and

(iii) Penalty should not be imposed on them under Section 76 &77 of the Finance Act 1994 for the contravention of Rules and provisions of the Finance Act 1994 ;

12. A Personal Hearing was held on 16.08.2012. Shri Jaya Prakash, Manager (Accounts) along with Shri Sudhir V. S. and Sri Harsha, Chartered Accountants, appeared for the personal hearing. While reiterating the earlier submissions made in their reply to show cause notices, they have made following submissions. In addition, the assessee has stated that one more periodical show cause notice with O.R.No.53/2012-ST dated 24.04.2012 covering the period January, 2011 to December, 2011 under similar issue is pending adjudication and requested to adjudicate the same with this order.

(i) Noticee submits that the Finance Act, 1994 was amended by the Finance Act, 2010 to introduce an explanation to Section 65(105)(zzq) and Section 65(105)(zzzh). Clause (zzq) relates to a service provided or to be provided to any person by any other person in relation to commercial or industrial construction and clause (zzzh), a service in relation to the construction of a complex. Both bear the following explanation:

Explanation — For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorized by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer.

(ii) Noticee further submits that reliance is place on Mohtisham Complex (P) Ltd. v. CCE 2011 (021) S.T.R.551 (Tri-Bang) wherein it was held as under- *"The deeming provision would be applicable only from 1-7-2010.* Our attention, has also been taken to the texts of certain other Explanations figuring under Section 65(105). In some of these Explanations, there is an express mention of retrospective effect. Therefore, there appears to be substance in the learned counsel's argument that the deeming provision contained in the explanation added to Section 65(105)(zzq) and (zzzh) of the Finance Act, 1994 will have only prospective effect from 1-7-2010. *Apparently, prior to this date, a builder cannot be deemed to be service provider providing any service in relation to* industrial/commercial or residential complex to the ultimate buyers of the property."

(iii) Noticee further submits that Circular 1/2011- S.T. 15.2.2011 issued by Pune Commissionerate it has been clarified as under:

"Representations have been received from trade requesting

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clarification particularly for advance payments for services of Construction of Residential Complex rendered after 1-7-2010 and also for service tax collected by builders even where no liability exists. It is hereby clarified that where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of Para 3 of Boards Circular number 108/02/2009-S.T., dated 29-1-2009. The Service of Construction of Residential Complex would attract service tax from 1-7-2010. *Despite no service tax liability, if any amount has been collected by the builder as "Service Tax" for Services rendered prior to 1-72010, the same is required to be deposited by the builder to the Service tax department. Builder cannot retain the amount collected as Service Tax.*

(iv) Without prejudice to the foregoing, Noticee submits that taxable value under the work contract service is that part of value of the works contract which is relatable to services provided in the execution of a works contract. For this purpose, valuation mechanism has been provided under Rule 2A of the valuation rules. However, an option is given to assessee to opt for a composition scheme. that composition scheme is not mandatory and if he chooses not to opt for the said scheme, service tax can be paid under Rule 2A, ibid. Therefore, the said notice is invalid in as much as it imposes the composition scheme on the assessee.

(v) Noticee submits assuming but not admitting Service Tax, if any is payable under the head Works Contract, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006. Noticee submits that the impugned SCN has been passed with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. It is unreasonable to hold that material value is nil in any construction activity merely on the ground that material value has not been furnished by noticee in his correspondence dated 22.04.2011, the same was not furnished as it was not asked for by the department, therefore it does not lead to a conclusion that the same is nil without being given an opportunity of being heard. Noticee shall submit the material Consumption for the period January 2010 to December 2010.

(vi) Noticee further submits that where the Value of Work Contract Service shall is determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, he shall also be entitled to utilize Cenvat Credit on Input services and Capital goods.

(vii) Noticee submits that assuming but not admitting service tax if any is payable and the benefit of Rule 2A, ibid is not available for any reason, service tax payable under composition scheme at 4.12% can be paid by utilizing the Cenvat Credit in respect of Input services and Capital goods. However, impugned notice has not considered the same before arriving at the tax liability and such notices issued mechanically with revenue bias should be set-aside.

(viii) Without prejudice to the foregoing, assuming but not admitting Noticee submits for the period January 2010 to December 2010,

the SCN has claimed that amount of Rs.292.83 Lakhs are taxable. However, noticee fails to understand how the said amount has been arrived at. Out of the total receipts of Rs.391.13 Lakhs during the period January 2010 to December 2010, Rs.15.21 Lakhs is received towards value of sale deed, Rs.45.19 Lakhs is towards land development charges and Rs.132.43 Lakhs taxes and other charges which shall not be leviable to service tax. An amount of Rs.243.47 Lakhs has only been received towards Construction agreement. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.243.47 Lakhs and not on the entire amount as envisaged in the notice.

(ix) Noticee submits that penalty under Section 77 for failure to submit the returns is not right in law as they have filed their half-yearly returns in form ST-3 for the said period. (Copy of the ST-3 returns enclosed). Hence, penalty on this count should be set-aside.

(x) Noticee further submits that *mens rea* is an essential ingredient to attract penalty. The Supreme Court in the case of *Hindustan Steel v. State of Orissa [1978 (2) E.L.T. J159 (S.C.)* held that an order imposing penalty for failure to carry out the statutory obligation is the result of quasi - criminal proceedings and *penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contentious or dishonest or acted in conscious disregard of its obligation.* Penalty will not also be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, when there is a technical or judicial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

(xi) Noticee further no evidence has been brought on record by the lower authority to prove contravention of various provisions of Finance Act, 1994 by the noticee only with intent to evade the payment of service tax. In this scenario, imposition of penalties upon them is not justified. In this regard Appellant places reliance on the decisions in the case of In *Eta Engineering Ltd.* v. *Commissioner of Central Excise, Chennai* - 2006 (3) S.T.R. 429 (Tri.-LB) = 2004 (174) E.L.T. 19 (Tri.-LB). CESTAT, Northern Bench, New Delhi (Larger Bench) held - Appellants *being under bona fide doubt regarding their activity whether covered by Service tax or not, there exists reasonable cause on their part in not depositing Service tax in time* - penalty not imposable in terms of Section 80 of Finance Act, 1994.

(xii) In the case of *Ramakrishna Travels Pvt Ltd- 2007(6) STR 37(Tri-Mum)* wherein it was held that in the absence of any records as to suppression of facts, then bona fide belief is a reasonable cause under section 80 of the Finance Act, 1994.

(xiii) Noticee further submits that where the interpretation of law is required, penal provisions cannot be invoked. Also in the case of

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CCE vs. Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (New Delhi - CESTAT) it was held that: *"It is settled position that when there is a dispute of interpretation of provision of law, the penal provisions cannot be invoked. Therefore, the Commissioner (Appeals) rightly set aside the penalty."* Hence penalty is not applicable in the instant case where there have been confusions as to applicability of service tax, classification of service etc. and law has very much been unsettled.

(xiv) Without prejudice to the foregoing, assuming but not admitting that service tax on said service is payable, Noticee further submits that Penalty under Section 77 and Section 76 of the Finance Act, 1994 should not be imposed as there was a reasonable cause for the said failure.

13. Similarly, with regard to show cause notice O.R.No.53/2012-Adjn.(ST), dated 24.04.2012, covering the period from January 2011 to December 2011, they have stated as follows: -

(i) Noticee submits that for the period January 2011 to December, 2011, the show cause notice has claimed that entire receipts of Rs.6,70,15,724/- are taxable. Out of the said amount, Rs.45,73,000/- is received towards value of sale deed and Rs.37,64,435/- is towards taxes and other charges which shall not be leviable to service tax. An amount of Rs.5,81,28,289/- has only been received towards Construction agreement. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.5,81,28,289/- and not on the entire amount as envisaged in the notice.

(ii) Noticee further submits that service tax is to be levied on Rs.5,81,28,289/- Thus, the service tax liability shall amount to Rs.23,94,886/-. Out of the said amount, Rs.1,73,124/- was paid earlier to the issuance of notice and acknowledged the same in the subject notice and Rs.7,896/- was paid by utilization of Cenvat Credit and the balance of Rs.22,13,866/-, Rs.8,00,000/- was paid vide Challan dated 02.04.2012, 07.04.2012, 14.04.2012, 30.04.2012, 03.05.2012, 21.05.2012, 02.06.2012 and 09.06.2012. Therefore, the entire liability has been discharged by the Noticee and hence, the notice is required to be set aside.

DISCUSSION & FINDINGS

14. I have carefully gone through the records of the case, the documents relied upon for issue of show cause notice and written & oral submissions made by the assessee. There are two show cause notices on the same issue covering different period. As the issue involved is same, both the show cause notices are proposed to be adjudicated by a common order, the details of which are as under :-

S.No.	SCN No. & date	Period covered	Service Tax Demanded
1.	O.R.No.59/2011-Adj (ST) Gr.X dtd 23.04.2011	January, 2010 to December, 2010	Rs.12,06,447/-
2.	O.R.No.53/2012-Adj (ST) dtd 24.04.2012	January, 2011 to December, 2011	Rs.27,61,048/-

15. I find that these are periodical show cause notices. The demand for the past period was confirmed vide OIO No.45/2010-ST dated 29.10.2010. and the same was also upheld by Commissioner (Appeals) vide OIA No.10/2011 (H-II) dated 31.01.2011. Respectfully following the decision of the Commissioner (A), I hold that demand of Service Tax is sustainable.

16. Admittedly, the assessee has executed a residential complex project having more than 12 flats and layout of the project was approved by the civic authorities. Therefore, the project satisfies the definition of 'residential complex' as defined in the statute.

17. Various flats have been sold by them to various customers in two states. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customer. Appropriate stamp duty was paid on sale deed value. No service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement.

18. The second agreement, (written or oral) and by whatever name is called, involve supply of material and labour to bring the semi-finished flat to a stage of completion. As it is a composite contract involving labour and material, it clearly satisfies the definition of 'Works Contract Service '. Therefore, the classification under work contract service and the same shall be preferred in view of the Section 65 A of the Act. The Board vide Circular No.128/10/2010-ST dated 24.08.2010, at para 2 has also clarified as under,

> *"2. The matter has been examined. As regards the classification, with effect from 01.06.2007 when the new service 'Works Contract' service was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 01.06.2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date."*

19. Reliance is also placed on the decision of the Authority on Advance Ruling in the case of HAREKRISHNA DEVELOPERS-2008 (10) S.T.R. 357 (A.A.R.) wherein it has been held as under:-

> *Advance Ruling (Service tax) - Works Contract service - Sale of plots to prospective buyers and construction of residential units under works contract - Applicant contesting liability on the ground that impugned works contract is for construction of individual residential unit and not for residential complex - Condition on transfer of property in goods leviable to sales tax satisfied - Records indicating construction of at least 12 residential units with common facilities and same covered under 'residential complex' as per provisions - Works contract not for construction of isolated house but for common facilities also - Impugned activity covered under Works Contract service - Sections 65(91a), 65(105)(zzzza) and 96D of Finance Act, 1994. - Individual houses built through works contract have to be viewed as parts of a residential complex rather than as stand alone house. [paras 1, 6, 7, 8*

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In view of the above, I hold that the impugned activity is classifiable under 'Work Contract Service'.

20. The have further submitted that composite scheme is not mandatory and service tax can be paid under Rule 2A. It is accepted that composite scheme is optional. They have not furnished the details of material cost supported by documentary evidence. In the absence of which, the demand of Service Tax on the full amount without any permissible deduction of material cost would have been very harsh on them. In this backdrop, the calculation of service tax liability in the show cause notice at composite rate is a beneficial act which does not make the show cause notice invalid. They have not submitted the details of material consumption supported by documentary evidences.

21. They have further submitted that they are entitled to utilize cenvat credit on export services and capital goods and the same has not been considered before arriving at the tax liability. Eligibility to cenvat credit is governed Cenvat Credit Rules, 2004. Credit can be taken on the strength of valid documents on eligible capital goods and input services. The assessee has to take this credit in accordance with the rules. The department is not obliged to determine their cenvat credit eligibility while demanding service tax on the taxable services. Accordingly, their contention does not have substance.

22. They have also contested the qualification of demand. They have submitted that taxes and other charges need to be deducted. I find that the demand of service tax has been made after excluding the sale deed value. The total amount collected from a customer minus sale deed value has been taken as gross amount charged for the works contract. No other deduction of any amount collected under any head, "Whether land development charges or any other charge" is permissible except VAT. It is neither their submission that VAT amount has also been included in the gross amount, nor they have furnished before me any evidence that they have paid VAT. Accordingly, their contention is rejected.

23. Penalty is a preventive as well as deterrent measure to defeat recurrence of breach of law and also to discourage non-compliance to the law of any wilful breach. Of course, just because penalty is prescribed that should not mechanically be levied following Apex Court's decision in the case of *Hindusthan Steel Ltd.* v. *State of Orissa* reported in 1978 (2)ELT (J159) (S.C.) = AIR 1970 S.C. 253. Section 80 of the Act having made provision for excuse from levy of penalty under section 76 if the assessee proves that there was a reasonable cause for failure under that section no other criteria is mandate of Law to exonerate from penalty. The submission of the assessee does not constitute reasonable cause so as to exonerate them from the penalties by invoking section 80 of the Act. Reliance is placed on the following case laws:-

(i) 2007 (6) S.T.R. 32 (Tri. - Kolkata) -CCE., KOLKATA-I Versus GURDIAN LEISURE PLANNERS PVT. LTD.

(ii) 2005 (188) E.L.T. 445 (Tri. - Chennai) -TRANS (INDIA) SHIPPING PVT. LTD. Versus CCE., CHENNAI-I.

(iii) 2006 (1) S.T.R. 320 (Tri. - Del.)- SPIC & SPAN SECURITY & ALLIED SERVICE (I) P. LTD. Versus C.C.E., NEW DELHI

24. Accordingly, I hold that penalty under section 76 & 77 is imposable as they have contravened the provisions of law despite adverse order passed by Commissioner (Appeals).

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25. Accordingly, I pass the following order:-

ORDER

(a) In respect of show cause notice O.R.No.59/2011-Adjn.(ST) Gr.X dated 23.04.2011.

(i) Demand of service tax (including Cess) of Rs.12,06,447/- for the period January 2010 to December 2010 is hereby confirmed under sub section (2) of Section 73 of Finance Act, 1994 against M/s.Modi and Modi Constructions, Secunderabad.

(ii) I demand interest on the service tax demanded at (i) above, under section 75 of Finance Act, 1994, at the appropriate rate, from M/s.Modi and Modi Constructions, Secunderabad.

(iii) I impose a penalty @ Rs.200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of Service Tax under Section 76 of Finance Act, 1994, on M/s.Modi and Modi Constructions, Secunderabad.

(iv) I impose a penalty of Rs.1,000/- under Section 77 of the Finance Act, 1994.

(v) The show cause notice issued vide O.R.No.59/2011 dated 23.04.2011 is accordingly disposed off.

(b) In respect of show cause notice O.R.No.53/2012-Adjn.(ST) dated 24.04.2012.

(vi) Demand of service tax (including Cess) of Rs.27,61,048/- for the period January 2011 to December 2011 is hereby confirmed under sub section (2) of Section 73 of Finance Act, 1994 against M/s.Modi and Modi Constructions, Secunderabad.

(vii) I demand interest on the service tax demanded at (i) above, under section 75 of Finance Act, 1994, at the appropriate rate, from M/s.Modi and Modi Constructions, Secunderabad

(viii) I impose a penalty @ Rs.200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of Service Tax under Section 76 of Finance Act, 1994, on M/s.Modi and Modi Constructions, Secunderabad. However, the total amount of penalty payable in terms of section 76 shall not exceed the service tax payable.

(ix) I impose a penalty of Rs.1,000/- under Section 77 of the Finance Act, 1994.

(x) The show cause notices issued vide OR NO 53/2012-Adjn.ST(ADC) dated 24.04.2012 is accordingly disposed off.

31.08.12

(R S MAHESHWARI)
ADDITIONAL COMMISSIONER

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

(By REGD POST ACK DUE)

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A8

Copy submitted to

(i) the Commissioner, Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad.
-(Through the Superintendent, Review & Tribunal, Service Tax)

Copy to

(ii) the Additional Commissioner of Service Tax, Hyderabad-II Commissionerate, Hyderabad.

(iii) the Assistant Commissioner of Service Tax, Hyderabad-II Commissionerate, Hyderabad.

(iv) the Superintendent of Customs, Central Excise & Service Tax, Arrears Recovery Cell, Hqrs Office, Hyderabad-II Commissionerate, Hyderabad.

(v) the Superintendent of Service Tax, Service Tax Group-X, Hyderabad-II Commissionerate, Hyderabad.

(vi) Office copy/ Master copy/ Spare copy.