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

Sub: Proceedings under OR No.24/2016 Adjn (ST) (JC) [C.No. IV/16/195/2011 ST Gr.X] dated 18.04.2016 issued to M/s Paramount Builders, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

FACTS OF THE CASE:

A. M/s. Paramount Builders, Secunderabad (hereinafter referred to as 'The Noticee') is mainly engaged in the sale of residential flats to prospective buyers during and after construction.

APPROVED BY
19 SEP 2016
SOHAM MOD
MANAGING DIRECTOR

B. Occupancy certificate (OC) for the project was obtained in the year 2010 and during the subject period all flats were sold/booked after occupancy certificate date only and not before it. Sale deed is executed for the total sale value and 'sale deed' is registered and appropriate 'Stamp Duty' has been discharged on the same. Service tax was not paid on the amounts received towards these 'sale deed' since same is sale of 'immovable property'.

C. Further in some cases construction agreement is executed for the additional works carried out and amounts received towards this construction agreements were assessed for service tax under the category of 'works contract' adopting the taxable value in terms of Rule 2A of Service tax (determination of value) Rules, 2006 i.e. on a presumed value of 40% of the contract value.

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

Description	Receipts	Non taxable	Taxable
Sum of towards sale deed	38,85,000	38,85,000	
Sum of towards agreement of construction	-		
Sum of towards other taxable receipts	11,985		11,985
Sum of towards VAT, Registration charges, etc		4,21,650	
Total	43,18,635	43,06,650	11,985

E. Accordingly, the value of taxable services constituted 40% of Rs.11,985/- i.e. Rs.4,794,/- and the service tax thereon @ 12.36% constituted Rs.593/-. It was also explained that the actual payment of service tax amounted to Rs. NILL the tax required to be paid is Rs.593/-.

F. The above facts of receiving OC and flats booked after OC was correctly taken by SCN vide Para 4 but proposed to demand service tax on the flats booked after OC date.

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

a. Vide Para 3 of SCN dated 24.06.2010 and Para 2 of the Order adjudicating the said SCN
b. Vide Para 3 of Second SCN dated 23.04.2011
c. Vide Para 2 of third SCN dated 24.04.2012
d. Vide Para 2 of fourth SCN dated 02.12.2013
e. Vide Para 2 of fifth SCN dated 19.09.2014

In all the above SCN's, there is error in as much including the value of sale deeds within the ambit taxable value while alleging service tax is liable only after execution of sale deed i.e. on construction agreements.

H. The present status of SCN's as referred above is as follows:

Period	SCN	Amount	Status
Sep 06 to Dec 09	HQPQR No. 87/2010 Adjn (ST)(ADC) dated 24.06.10	Rs.11,80,439/-	Stay granted by CESTAT vide stay order dated 18.04.2012
Jan 10 to Dec 10	OR No.60/2011-Adjn (ST) (ADC), dated 23.04.2011	Rs.4,46,403/-	Pending before CESTAT, Bangalore
Jan 11 to Dec 11	OR No. 54/2012 Adjn (ADC) dated 24.04.2012	Rs.46,81,850/-	Pending before CESTAT, Bangalore
Jan 12 to Jun 12	C.No.IV/16/16/195/2011. ST-Gr.X	Rs. 2,92,477/-	Pending Adjudication
July 2012 to March 2014	OR No.108/2014 Adjn (ST) (JC) dated 19.09.2014	Rs.5,20,892/-	

I. Now the present SCN was also issued with similar error of quantifying the proposed demand of service tax in as much treating the sale deed values & other taxes as taxable value of services (annexure to SCN) while alleging that service rendered after execution of sale deed alone liable for service tax (Para 2 of SCN).

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

Particulars	Amount (Rs.)
Gross Receipts	43,18,635
Less: Deductions	
Sale Deed Value	38,85,000
VAT, Registration charges, stamp duty and other non taxable receipts	4,21,650
Taxable amount	11,985
Abatement @ 40%	4,794
Service Tax @ 12.36%	593
Actually Paid	0
Net Demand	593

Submissions:

1. Noticee submits that as stated in background facts, during the subject period, **all flats were booked after the date of occupancy certificate and sale deed is being executed for the entire sale value that is being a case no service tax is liable on the amounts received towards said flats since same is 'sale of immovable property' and it was specifically provided in Section 66E(b) of Finance Act, 1994 that service tax is not liable for the flats booked after OC date. Hence proposal of present SCN to demand service tax on the flats booked after OC date is not sustainable and required to be dropped.**

2. Without prejudice to the foregoing, Noticee submits that the subject show cause notice in Para 5 extracted the provisions of section 73(1A) of the Finance Act, 1994 and in Para 6 mentions that the grounds as explained in the show cause notice issued for the earlier period is also applicable for the present case. Hence, this statement of demand/show cause notice is issued in terms of section 73(1A) of Finance Act, 1994, for the period April 2014 to March 2015. For this, Noticee submits that section 73(1A) of the Finance Act, 1994 reads as follows.

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

3. Noticee submits that from the analysis of provisions of section 73(1A), it is clear that to issue show cause notice / statement under this

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

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

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

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

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

a. United Telecom Ltd. Vs CST 2008 (9) S.T.R 155 (Tri-Bang)

b. Jetlite (India) Ltd. Vs CCE 2011 (21) S.T.R 119 (Tri-Del)

In light of the above judgments where the Department alleges that the service is taxable, the burden lies upon the Department to establish the taxability. In the present case, the department failed to discharge the burden as no evidence was placed on record to establish that the service is taxable. On the basis of the same, Noticee submits that

subject show cause notice is not sustainable and requires to be dropped.

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

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

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

Particulars	As per Noticee	As per SCN
Gross Receipts	43,18,635	43,18,635
Less Deductions		
Sale Deed Value	38,85,000	
VAT, Registration charges, stamp duty and other non taxable receipts	4,21,650	4,21,650
Taxable amount	11,985	38,96,985
Abatement @ 40%	4,794	15,58,794
Service Tax @ 12.36%	593	1,92,667
Actually Paid	0	0
Balance Demand	593	1,92,667

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

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

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

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

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

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

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

13. Similar to the claim for exclusion of sale deed value, the value attributable to stamp duty, electricity etc., need to be reduced. It is submitted that once the above deductions are allowed, the demand would be reduced to NIL

Interest and penalties

14. Without prejudice to the foregoing, noticee submits that when service tax itself is not payable, the question of interest does not arise. Noticee further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

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

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

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

- CCE-II Vs Nita Textiles & Industries 2013 (295) E.L.T 199 (Guj)
- CCE, Bangalore-II Vs ITC Limited 2010 (257) E.L.T 514 (Kar)

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

Benefit under section 80

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

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

a. Exclusion part of service definition given under section 65B(44) of Finance Act, 1994 in as much specifically excluding the sale of immovable property from levy of service tax.

b. Activity performed till the execution of sale deed is in the nature of self service and not liable for service tax.

c. Activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser and not prior to that.

d. Earlier SCN's demanding service tax on the value of construction agreement.

20. The Noticee submits that they have established the reasonable cause for the non-payment of service tax. Since the Noticee explained the reasonable cause for the nonpayment of the service tax penalty imposition of the penalty is not sustainable. In this regard we wish to

rely on Commissioner of Service Tax, Bangalore Vs Motor World 2012 (27) S.T.R 225 (Kar).

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

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

For M/s Paramount builders,

Authorized Signatory

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

Sub: Proceedings under OR No.24/2016 Adjn (ST) (JC) [C.No. IV/16/195/2011 ST Gr.X] dated 18.04.2016 issued to M/s Paramount Builders, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

I, Soham Modi, partner of M/s Paramount builders, 5-4-187/3 & 4, II Floor, Sohan Mansion, MG Road, Secunderabad–500 003 hereby authorizes and appoint Hiregange & Associates, Chartered Accountants, Hyderabad or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

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

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

Executed this on 16th day of May 2016 at Hyderabad **Signature**

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

Dated: 16.05.2016

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

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner (M.No.219109)

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

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