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आयुक्त (अपील - II) जी एस टी एवं उत्पाद शुल्क का कार्यालय
OFFICE OF THE COMMISSIONER (APPEALS - II) GST & CENTRAL EXCISE
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अपील सं: Appeal No: 08/2018 (SC) ST

अपील आदेश सं: ORDER-IN-APPEAL NO: HYD - EXCUS - SC - AP2 - 0026 - 18 - 19 DATED 27.04.2018

पास करने वाले अधिकारी : श्री.बी.वी.वी.टी. प्रसाद नायक, आयुक्त (अपील-II), हैदराबाद

Passed by : Sri. B.V.V.T PRASAD NAIK, COMMISSIONER (APPEALS - II) HYDERABAD

प्रस्तावना P R E A M B L E

- आदेश जिनके नाम जारी किया गया है उस व्यक्ति के निजी उपयोग के लिए यह प्रति मुफ्त में दी जाती है।
This copy is granted free of cost for the private use of the person to whom it is issued.
- (a) कोई भी निर्धारिती इस आदेश से असहमत हो तो वे वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत सीमाशुल्क, उत्पाद शुल्क व सेवाकर अपील अधिकरण, क्षेत्रीय बेंच, प्रथम तल, हैदराबाद मेट्रो जल आपूर्ति और सीवरेज बोर्ड इमारत (पीछे के हिस्से), खैराताबाद, हैदराबाद, तेलंगाना-500004 के समक्ष अपील दायर कर सकते हैं।
Any assessee aggrieved by this order may file an appeal under Section 86 of the Finance Act, 1994 to the Customs, Excise & Service Tax Appellate Tribunal, Regional Bench, 1st Floor, HMWSSB Building (Rear Portion), Khairatabad, Hyderabad, TS-500004.
- (b) केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35 एफ के खंड (iii) के अनुसार, धारा 85 की उप-धारा (5) में संदर्भित आदेश या निर्णय के विरुद्ध अपील के लिए, अपीलकर्ता को निर्णय या जिस आदेश के विरुद्ध अपील की गई हो उसके अनुसरण के लिए कर का, ऐसे मामले में जहां कर या कर और दंड विवादित हो, या दंड का, जहां ऐसा दंड विवादित हो, दस प्रतिशत जमा करना होगा : सेवा कर के मामलों में, एफ ए, 1994 की धारा 83 के प्रभाव से अधिनियम की धारा 35 एफ लागू है।
As per clause (iii) of Section 35F of the CEA, 1944, the appeal against the decision or order referred to in sub-section (5) of section 85, the appellant has to deposit ten per cent of the tax, in case where tax or tax and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against: Section 35F of the Act is applicable to service tax case by virtue of Section 83 of FA, 1994.
- उप धारा (1) [या उप धारा (2) या उप धारा (2ए)] के अंतर्गत प्रत्येक अपील जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती द्वारा प्राप्त करने की तारीख से तीन महीने के भीतर (मुख्य आयुक्तों या आयुक्तों की समिति) के समक्ष, जैसे भी मामला हो, दायर किया जाना चाहिए।
Every appeal under sub-section(1) [or sub-section(2) or sub-section(2A)] of Section 86 of FA, 1994 shall be filed within three months of the date on which the order sought to be appealed against was received by the assessee, the [Committee of the Commissioners], as the case may be.
- पैरा 2 में उल्लिखित अपील एस टी 5/ एस टी 7 प्रोफार्मा में चार प्रतियों में जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती के पास पहुँचने की तारीख से तीन महीने के भीतर किया जा सकता है। जिस आदेश के विरुद्ध अपील किया जाना चाहता हो और अपील करने के लिए लिखित मूल आदेश की उस आदेश की चार प्रतियाँ संलग्न होने चाहिए (जिसमें से एक प्रति प्रमाणित प्रति होने चाहिए)
The appeal, as referred to in Para 2 above, should be filed in S.T.5/S.T.-7 proforma in quadruplicate; within three months from the date on which the order sought to be appealed against was communicated to the party preferring the appeal and should be accompanied by four copies each (of which one should be a certified copy), of the order appealed against and the Order-in-Original which gave rise to the appeal.
- अपील के साथ ट्रिब्यूनल के दक्षिणी बेंच के सहायक रजिस्ट्रार के पक्ष में जहाँ ट्रिब्यूनल स्थित है वहाँ के किसी भी राष्ट्रीयकृत बैंक की शाखा से प्राप्त किए गए रेखांकित मांग ड्राफ्ट संलग्न होने चाहिए और अधिनियम की धारा 86 के अंतर्गत विनिर्दिष्ट शुल्क के भुगतान का प्रमाण भी संलग्न होने चाहिए। देय शुल्क निम्नलिखित है।
The appeal should also be accompanied by a crossed bank draft drawn in favour of the Assistant Registrar of the Tribunal, drawn on a branch of any nominated public sector bank at the place where the Tribunal is situated, evidencing payment of fee prescribed in Section 86 of the Act. The fees payable are as under:-

(क) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख या उससे कम हो तो, रुपये एक हजार;

(a) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(ख) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख से अधिक, लेकिन रुपये पचास लाख से कम, हो तो, रुपये पाँच हजार;

(b) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(ग) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड, रुपये पचास लाख से अधिक हो तो, रुपये दस हजार;

(c) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees;

5.(i) उसी की धारा 86 की उप धारा (4) के अंतर्गत बताए गए कुल आपत्तियों के ज्ञापन के संबंध में कोई शुल्क देय नहीं है।

No fee is payable in respect of the Memorandum of Cross Objections referred to in Sub-Section (4) of Section 86 ibid.

6. अपीलीय ट्रिब्यूनल के समक्ष प्रस्तुत किए गए सभी आवेदनपत्र के साथ:

Every application made before the Appellate Tribunal:

(क) रोक की मंजूरी के लिए अपील या गलती को सुधारने के लिए अथवा किसी अन्य प्रयोजन के लिए आवेदन पत्र; या

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(ख) किसी अपील या आदेश को पुनः स्थापित करने के लिए उसके साथ रुपये पाँच सौ का शुल्क होने चाहिए।

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees:

6.(i) इस उप धारा के अंतर्गत आयुक्त द्वारा दायर किए गए आवेदन के मामले में कोई शुल्क देय नहीं है।

No fee is payable in case of an application filed by Commissioner under this sub-section.

7. केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 और केन्द्रीय उत्पाद शुल्क नियमावली, 2002 तथा सीमाशुल्क, केन्द्रीय उत्पाद शुल्क व सेवा कर अपीलीय ट्रिब्यूनल (प्रक्रिया) नियमावली, 1982 में शामिल इससे और अन्य संबन्धित मामलों को नियंत्रित करने वाले प्रावधानों की ओर ध्यान आकर्षित किया जाता है।

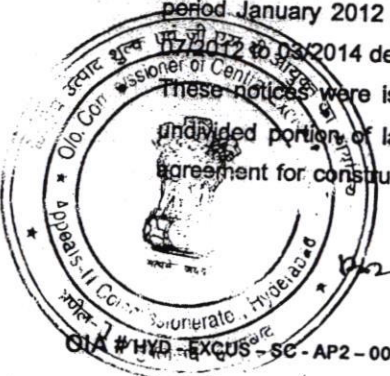
Attention is invited to the provisions governing these and other related matters, contained in the Central Excise Act, 1944 and Central Excise Rules, 2002 and the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

This appeal is filed by M/s Paramount Builders, 5 - 4 - 187/ 3&4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad - 500003 (herein after referred as 'appellant') against Order-in-Original No. 45 / 2016 - Adjn (ST)(ADC) dated 30.12.2016 {in O.R. No. 24/2016 - Adjn(ST)ADC / C. No. IV/16/195/2011- S.Tax (Gr.X)} (hereinafter referred to as the impugned order) passed by the Assistant Commissioner, Division - II, Service Tax Commissionerate (presently Assistant Commissioner, Secunderabad Division, Secunderabad GST Commissionerate, Hyderabad) (hereinafter referred to as Adjudicating Authority).

2. The facts of the case in brief are that:

- The appellant is engaged in providing Works Contract Services and are a registered partnership firm and are registered with the Department vide registration number AAHFP4040NST001.
- A notice HQPOR No. 87/2010 - Adjn (ST)(ADC) dated 24.06.2010 was issued for the period September 2006 to December 2009 involving an amount of Rs.11,80,439/-.
- Further periodic notices were issued - for the period January 2010 to December 2010 vide notice dated 23.04.2011 demanding an amount of Rs.4,46,403/-, another for the period January 2011 to December 2011 vide notice dated 24.04.2012 demanding an amount of Rs.46,81,850/-, for the period January 2012 to June 2012 demanding an amount of Rs.2,92,477/- and for the period July 2012 to Dec 2014 demanding an amount of Rs.5,20,892/-.

These notices were issued alleging that the appellant had entered into Sale deed for sale of undivided portion of land together with the semi-finished portion of the flat and thereafter, an agreement for construction with the buyer of the flat. The Department contended in the notices



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that on execution of the sale deed the right in the property got transferred to their customers and hence the construction service rendered by the appellant thereafter to their customers under agreement was taxable service as there existed service provider to service receiver relationship between them and this service rendered by them after execution of the sale deed against the agreement of construction to each of their customers to whom the land was already sold was taxable under 'Works Contract Service'.

- The present notice was issued for the period 04/2014 to 03/2015 based on the details furnished by the appellant vide letter dated 13.04.2016 and alleging the appellant to have rendered taxable services under the category of Works Contract Services for a taxable value of Rs.43,18,635/- on which the Service Tax due was Rs.1,92,667/-.
- Invoking the provisions of Section 73(1A) of the Finance Act, Section 65B, 66B & 66D and contending that the grounds of the previous notices issued were also applicable to the present case, the status of the service and the corresponding tax liability remaining same, the notice was issued demanding Rs.1,92,667/- on the Works Contract Services rendered; demand of interest was also made and penalties proposed under Section 76 & 77 of the Act.
- The Adjudicating Authority heard the matter and adjudicated the notice, holding inter alia that the appellant was liable to pay tax on Works Contract Services discarding the contentions regarding the validity of the notice, non-taxability of the sale of semi-finished flats and the non-taxability of the other amounts received. Regarding the quantification of the service tax demand, the Adjudicating Authority held that the Department had correctly quantified the duty amount and the appellant's claim was not supported by any data. Penalty was levied under Section 76 & 77 of the Act. The confirmation of the demand culminated in the instant appeal.

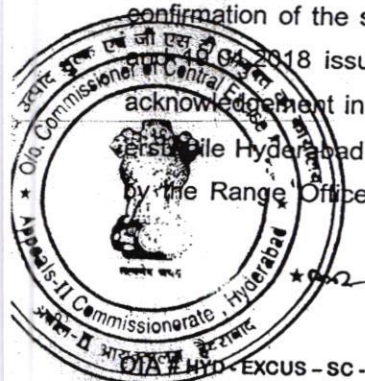
3. The appellant contested the demands confirmed in the impugned order, on the following grounds:

- That the impugned order was illegal and untenable in law;
- That the finding at para 11.6 was not correct at all as the appellant had submitted the requisite details inter alia, the detailed statement showing the flat wise details of the booking date, amount received towards the sale deed, additional works, VAT, Registration expenses etc and also submitted the copies of the occupancy certificate; however the impugned order gave a finding that the details / documents were not submitted; that the Adjudicating Authority could have collected the information and nothing prevented him from doing so;
- That they had contended that the provisions of Section 73(1A) of the Act was not applicable in the instant case and cited various explanations but the same were not considered and hence the issue of notice was not valid;
- That ST could not be levied on the sale of immovable property; that the flats were booked after the date of occupancy certificate and the sale deed was executed for the entire value; that they refer to the provision in Section 66E(b) of the Act;
- That they submit that they are liable to discharge Service Tax on construction agreements, thereby accepting Service Tax on the activity as proposed in the SCN (read with previous notices); that the sole allegation of the notice (para 2) is that the construction agreements are subjected to Service Tax under Works Contract Services and no allegation is raised to demand Service Tax on the sale deed value;
- That the statements provided by them made it amply clear that though the allegation was to demand the Service Tax on construction agreements, the quantification was based on gross amounts mentioned for all the activities including the amounts received towards sale deeds;



- That there was an error in quantification of the demand in the notice and was explained through a comparative chart in para 11 of the grounds;
- That once the apparent error was taken to its logical conclusion, the entire demand fails;
- That the finding of the Adjudicating Authority in para 11.4 regarding the appellant's contention that there was no demand on the sale of semi-finished flats was totally out of context and incorrect for the reason that the demand of Service Tax on sale of semi-finished flat runs beyond the scope of the notice; that the Tribunal Stay order dealt with taxability of construction prior to 01.07.2010 and not taxability of semi-finished flat;
- As there was no finding given regarding the taxability of the finished flat (sale deed value), they wish to reiterate the submissions made in the Show Cause Notice reply;
- That sale deed was entered into after the completion of the building, demand cannot be justified under the said entries; that till the stage of entering into a sale deed, the transaction was essentially one of sale of immovable property and therefore excluded from the purview of Service Tax; that 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 the FA and the Notification No. 26/2012 ST dated 20.06.2012 redundant; that if at all a view was taken that the value of sale deed was liable to service tax, the benefit of the above Notification should be granted after reclassification of service;
- That there was no Service Tax levy on sale of semi-finished flat as the same is excluded from the definition of service under Section 65B (44);
- That interest and penalties are not imposable / payable; that the Service Tax itself not being payable, question of interest does not arise as held by the Apex Court in the Prathiba Processors case;
- That penalty was proposed under Section 77 but the notice has not provided reasons for the applicability of the same; that as the appellant is already registered with the Department and is filing returns, the same is not applicable; that they rely on the decision in the case of Creative Hotels Pvt. Ltd. Vs CCE, Mumbai [2007 (6) STR (Tri Mumbai)] and Jewel Hotels Pvt Ltd [2007 (6) STR 240 (Tri Mum)];
- That cum tax benefit under Section 67 is required to be extended to them if the demand for sale of semi-finished contract is confirmed under Works Contract Service as the appellant had not collected Service Tax from the customers; that they rely on the case laws cited in this regard;
- That penalty could not be imposed as merely automatic consequence of failure to pay duty; that they were under bonafide belief that the amounts received towards flats sold after the receipt of Occupancy certificate was not subject to Service Tax and wish to rely on the decisions cited in this regard;
- That the benefit of Section 80 of the Act is to be extended to them in view of the reasonable causes of the given understanding of law and the impugned order has also not given any reason as to why there was no bonafide belief regarding the issue and hence the order needs to be set aside;
- They request for the setting aside of the order and grant consequential relief.

4. I have heard the appellant on 17.04.2018, represented by Shri. P. Venkata Prasad, Chartered Accountant, who reiterated the submissions made in their grounds of appeal and had nothing more to add. None appeared for the respondent despite notice. I find that the appeal has been filed on 08.02.2018 holding that the impugned order was received by them on 03.01.2018. I find that the date of the impugned order is 31.12.2016. Considering the delay in filing the appeal and the contention of the appellant that the date of service of the impugned order was 03.01.2018, letters were addressed to the concerned jurisdictional officers for confirmation of the same. The jurisdictional Divisional Officer, in the letters dated 02.04.2018 and 04.04.2018 issued from C.No.V/04/23/2017-Arrears; confirmed that there was no dated acknowledgement in token of receipt of the impugned order in the case file transmitted by the erstwhile Hyderabad Service Tax Commissionerate; and that the appellant was served a copy by the Range Officer on 03.01.2018 in response to the appellant's letter of the same date,



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protesting arrears recovery even when they had not received the OIO. I am therefore satisfied that the date declared at Item SI.No.4 of Form ST-4 is correct and admit the appeal for a decision on merit.

FINDINGS:

5. I have carefully perused the notice, impugned order and the submissions made by the appellant. The crux of the dispute is the sustainability of the impugned demands, considering the factual matrix and law in vogue during the material period. The disputed issue is periodical in nature, and the material period in the instant case is Apr 2014-Mar 2015.

6. Perusal of the records show that the appellant is registered with the Department for payment of Service Tax for the services 'Works Contract Services'. Intervention of the Department revealed that the appellant had entered into Sale deed for sale of undivided portion of land together with the semi-finished portion of the flat and thereafter, an agreement for construction with the buyer of the flat. The Department viewed that the construction service rendered by the appellant under agreement was taxable service as there existed service provider to service receiver relationship between them and this service was rendered partly before execution of sale deed (semi-constructed flat) and partly after execution of the sale deed against the agreement of construction (finishing) to each of their customers to whom the semi-constructed flat was already sold was taxable under 'Works Contract Service'. This being the case, Service Tax was arrived at in the notice and the demand raised. The primary contention raised by the appellant is that the amounts received after occupancy certificates (OC) were issued by the competent authority cannot be assessed to tax in view of the specific exclusion in Sec 66E(b). I have carefully considered this contention and find that while the notice indeed reproduced the tabulation submitted by the appellant, at Para 4 of the SCN [Page A027 of appeal book], the demand proposal is on the total amount [last column of the table] under 'WCS' category, which is Sec 66E(h), and not Sec 66E(b). The date of issue of OC is therefore immaterial for a demand under WCS, and the appellant's contention on this aspect is rejected.

7. The appellant submits that the notice issued under Section 73(1A) of the Act was not valid as the law had changed substantially post 01.07.2012 when the negative list based scheme was introduced. They further contended that the Section 65(105) ceased to exist, Section 65A pertaining to classification of service ceased to exist, there was no classification of service, definition of service was introduced under Section 65B (44) containing certain exclusions, new definition of Works Contract Services under Section 65B (90), mega notification 25/2012 - ST, new valuation Rule 2A of the Service Tax (Determination of Value) Rules 2006 for determination of tax liability of Works Contract Services and abatements under Notification 26/2012 - ST. That therefore the allegations in the earlier notices were not applicable for the relevant period and as the impugned order was passed on irrelevant and non-applicable grounds, the same needs to be dropped. I have carefully considered these contentions and find

that the activity of the appellant, Works Contract Services, is also agreed upon by the appellant and the only objection to the notices issued was regarding the valuation of the contract undertaken by him. This being the case, when the changes in the law were effected, the basic definitions of the activities were not changed and remained the same though the liability was governed by the new provisions. As submitted by the appellant themselves, Works Contract Services was defined under Section 65B (90) and abatements provided under Notification referred to. Further the grounds mentioned in the earlier periodical notices were also the same demanding tax on the Works Contract Services provided by the appellant. Therefore, I do not find any infirmity in the notice referring to the allegations in the earlier notices and making the same applicable to the present notice in terms of Section 73(1A) of the Act. On this basis the argument of the appellant in this regard is rejected.

8. The appellant in their submissions accept that they are liable to discharge Service Tax on the construction agreements thereby accepting Service Tax on activity as proposed by the impugned notice. It is not in dispute upon examination of the impugned notices that, the demand has been made for the activity after the sale deed has been executed, under the category of Works Contract Service. The Adjudicating Authority however, in the findings, proceeding to decide whether the appellant was liable to pay Service Tax on the flats sold by them under Works Contract Services held the notice to be in order disposing of the arguments placed by the appellant but has admittedly not given a clear finding regarding the validity of the inclusion of the sale value of the semi-finished flats being appropriate. It can be inferred from the penultimate row of the Table under Para 4 of the Show Cause Notice [Page A027 of appeal book] that the assessment is made in terms of clause 2(A)(ii)(A) of the Service Tax (Determination of Value) Rules, 2006. The cited Rule 2A underwent a retrospective amendment by Section 129 of the Finance Act, 1994 read with the sixth schedule thereunder. In terms of this retrospective amendment, where the composite contracts include the land value, the assessment under this Rule 2(A) [applicable for the material period in dispute in the instant case] would be in terms of Sl. No. 2 of the Table at Schedule VI of the Finance Act, 2017 since there is no dispute that clause (ii) under Rule 2A is to be applied only after exhausting clause (i) and the same has actually been applied in the instant case.

9. The department viewed that the activity carried out by the appellant after the execution of sale deed is taxable under the category of Works contract. Merely because the notice differentiates the activity of the appellant in respect of the sale of the semi-finished flats sold by the appellant and the subsequent activity of Works Contract Services as per the contract agreements; this in itself is insufficient to conclude that the value of semi-finished flats is inconsequential for arriving at the gross receipts for assessment to tax. If the appellant's view is accepted, there would have been no need to issue the Show Cause Notice in the first place since the liability on the finishing contract is undisputed; it is only the inclusion of the value of the sale deed including unfinished flat built on composite contract of land+unfinished flat) that is disputed in the instant case. I find that the appellant submitted his calculations, which have not been studied or considered by the Adjudicating Authority in his findings; hence the order is non -

speaking in this regard. The submissions of the appellant regarding the quantification of the value of the contract supported by proper documentation therefore merits being re-examined by the lower authority. In the interest of justice, the matter has to be remanded back to the Adjudicating Authority for the express purpose of arriving at the value of the contract under the Works Contract Services undertaken by the appellant to correctly assess the tax liability. The appellant is also directed to submit the details to the Adjudicating Authority for perusal during the hearing granted to them in accordance with the principles of natural justice. I rely upon the rulings pronounced in the case of CCE, Panchkula vs Goel International Pvt Ltd [2015(39) STR 330 (Tri Del)] and CST vs Associated Hotels Limited [2015 (37) STR 723 (Guj)] in ordering the remand.

10. In view of the discussions recorded above, Para 11.8(i) of the ORDER portion is set aside and remanded to the Adjudicating Authority who is directed to:

- (a) Examine the sale deeds to vivisection the land value and the value involved in the semi-constructed flats;
- (b) Aggregate the value of the semi-constructed flat to the gross value of the finishing works contract in the second construction agreement;
- (c) Apply the results of (b) to clause (i) of Rule 2A of the Service Tax (Determination of Value) Rules 2006 to assess the liability
- (d) If the assessment is not possible under clause (i) it shall be done in accordance with clause (ii) after allowing abatement prescribed in the sixth schedule to Finance Act, 2017. After deciding on whether clause (i) or (ii) [under Rule 2A of the ST Valuation Rules] is applicable, at the time of quantification of liability, the lower authority shall consider the appellant's plea that the notice did not consider the Cenvat credit utilization toward payment of tax; and cum-tax benefit shall be extended under Sec 67(2) on the value attributable to the semi finished flat in the sale deed.
- (e) Interest, a quintessential liability accompanying belated payment of tax, is to be computed on such modified tax liability arrived at (c) or (d) supra. Para 11.8(ii) of the impugned order stands modified accordingly.

11. The appellant is registered with the Department under the category of works contract service and being aware of the contingencies of law. Post 01.07.2012, there has been no doubt regarding the payment of Service Tax under the category of works contract, and the appellant cannot hide behind the excuse of the disputed issue being under litigation. If the appellant has already paid tax on the activity for which the demand is raised, then the penalty would be in accordance to the short paid / not paid demand quantified based on the remand made. Furthermore, I am also restrained from allowing the benefit of Section 80 as the same has been omitted from the statute as on the date of adjudication, without saving / repeal in respect of the existing impositions, by Section 116 of the Finance Act, 2015. The waiver provision is therefore not available for invocation. The penalty under Sec 76 is specific to non

discharge of tax and does not require allegation of gross violations; and is imposable for the malfeasance where the notice is issued for normal period of limitation. Para 11.8(III) of the impugned order stands modified to the effect that it shall be computed at 10% of tax liability arising in denovo proceedings ordered supra.

12. A penalty of Rs.10,000 has also been imposed under Sec 77 of the FA 1994, which has been contested in the appeal. I find that Para 8(iv) of the Show Cause Notice is vague in making the proposal nor does the impugned order discuss the violations meriting the imposition. When a penalty under Sec 76 squarely covers the malfeasance, there is no call for an imposition under Sec 77 for the same violation. The cited provision has two sub-sections, 77(1) and residuary 77(2). None of the violations listed in Sec 77(1) is alleged in the SCN, and there is no justification for imposition of penalty for a violation which is already covered by Sec 76. There is clearly no justification recorded for taking recourse to the residuary penalty provided under Sec 77(2). The vagueness in proposing penalty has been disapproved in several rulings, particularly SANMAR FOUNDRIES LTD. Versus COMM. OF C. EX. & CUS., TIRUCHIRAPPALLI [2015 (316) E.L.T. 659 (Mad)], and RAJMAL LAKHICHAND Versus COMMISSIONER OF CUSTOMS, AURANGABAD [2010 (255) E.L.T. 357 (Bom)]. Therefore the penalty imposed under Sec 77 at Para 11.8(iv) of the impugned order is legally unsustainable and is set aside. In view of the above, the following order is passed.

The impugned order stands modified to the extent discussed supra and the appeal is partly allowed by way of remand.

// TRUE COPY //
For Hiregange & Associates
Chartered Accountants


Venkat Prasad. P
Partner
M.No: 236558



(बी.वी.टी. प्रसाद नायक)
(B.V.T PRASAD NAIK)
आयुक्त (अपील-II), हैदराबाद
Commissioner (Appeals-II), Hyderabad

By **SPEEDPOST** to

1. M/s Paramount Builders, 5 - 4 - 187/ 3&4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad - 500003.

2. M/s. Hiregange & Associates, "Basheer Vila", H.No. 8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad - 500034.

Copy Submitted to: The Chief Commissioner, Central Tax & Customs, Hyderabad Zone, Hyderabad.

Copy to

1. The Commissioner of Central Tax & GST, Presently Secunderabad Commissionerate, (Erstwhile Service Tax Commissionerate) GST Bhavan, L B Stadium Road, Basheerbagh, Hyderabad, TS-500004. [Jurisdictional Commissioner]

2. The Additional Commissioner, Secunderabad Commissionerate, (Erstwhile Service Tax Commissionerate), GST Bhavan, L B Stadium Road, Basheerbagh, Hyderabad, TS-500004. [Respondent]

3. Master copy.





अपील सं : Appeal No.08/2018 (SC) ST

केन्द्रीय सीमा शुल्क एवं केन्द्रीय कर आयुक्त का कार्यालय (अपील्स-II)
OFFICE OF THE COMMISSIONER OF CUSTOMS & CENTRAL TAX (APPEALS-II)

सातवा तल, केन्द्रीय शुल्क भवन, एल.बी.स्टेडियम रोड, बशीरबाग, हैदराबाद - ५०० ००४

7th Floor, Kendriya Shulk Bhavan: L.B.Stadium Road, Basheerbagh, Hyderabad-500 004

Ph:040-23234219

E-Mail: cgst.hyddappeals2@nic.in

Appeal No.08/2018 (SC) ST

Dated: 17.04.2018

Appeal against Order-In-Original No. 45/2016-Adjn (ST) (AC) dated 30.12.2016 passed by the
Assistant Commissioner of Service Tax, Division-II, Service Tax Commissionerate, Hyderabad.

Appellant : M/s Paramount Builders, Secunderabad

Represented by:

Name(s)Signature (with date)

1. Sri P.Venkata Prasad, Chartered Accountant

RECORD OF PERSONAL HEARING

Sri P.Venkata Prasad, Chartered Accountant appeared for personal hearing today on behalf
of the appellant.

He reiterated the submissions made in the grounds of appeal and stated that he had nothing
further more to add in this regard.

(बी.वी.वी.टी. प्रसाद नायक)

(B.V.V.T PRASAD NAIK)

आयुक्त (अपील-II), हैदराबाद

Commissioner (Appeals-II)

Hyderabad

FORM ST-4**Form of Appeal to the Commissioner (Appeals II)**

[Under Section 85 of the Finance Act, 1994 (32 of 1994)]

BEFORE COMMISSIONER (APPEALS-II),**07th Floor, GST Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad - 500 004**

(1) Appeal No. _____	_____ of 2018
(2) Name and address of the Appellant	M/s. Paramount Builders, 5-4-187/38&4, 3 rd Floor, Soham Mansion, M.G Road, Secundrabad-500003
(3) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	Assistant Commissioner of Service Tax, Division-II, Service Tax Commissionerate Room No. 600, 5 th Floor, Kendriya Shulk Bhavan, Basheerbagh Hyderabad-500 004 [OIO No.45/2016-Adjn(ST)(AC) dated 30.12.2016]
(4) Date of Communication to the Appellant of the decision or order appealed against	03.01.2018
(5) Address to which notices may be sent to the Appellant	M/s Hiregange & Associates, "Basheer Villa", House No: 8-2-268/1/16/B, 2 nd Floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad - 500 034. (And also copy to the Appellant)
(5A)(i) Period of dispute	April 2014 to March 2015
(ii) Amount of service tax if any demanded for the period mentioned in the Col. (i)	Rs.1,92,667 /-
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	NA
(iv) Amount of Interest	Interest u/s 75 of Finance Act, 1994.
(v) Amount of penalty	Penalty of Rs. 10,000/- u/s 77 and penalty u/s. 76 of the Finance Act, 1994
(vi) Value of Taxable Service for the period mentioned in Col.(i)	Rs. 38,96,,985/-
(6) Whether Service Tax or penalty or interest or all the three have been deposited.	Rs.14,450/- vide Challan No. <u>00362</u> dated <u>07.2.17</u> towards mandatory pre-deposit in terms of Section 355F of Central Excise Act, 1944 (Copy of Challan enclosed as Annexure I)
(6A) Whether the appellant wishes to be heard in person?	Yes, at the earliest
(7) Reliefs claimed in appeal	To set aside the impugned order to the extent aggrieved and grant the relief claimed.


Signature of the Appellant

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STATEMENT OF FACTS

- A. M/s. Paramount Builders, Secunderabad (hereinafter referred to as 'Appellant') is mainly engaged in the sale of residential flats to prospective buyers during and after construction.
- 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	0
Sum of towards agreement of construction	0	0	0
Sum of towards other taxable receipts	11,985	0	11,985
Sum of towards VAT, Registration charges, etc	4,21,650	4,21,650	0
Total	43,18,635	43,06,650	11,985

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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 explained that the actual payment of service tax amounted to Rs. NIL the tax required to 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 24.06.2010	Rs.11,80,439/-	Stay granted by CESTAT vide order dated



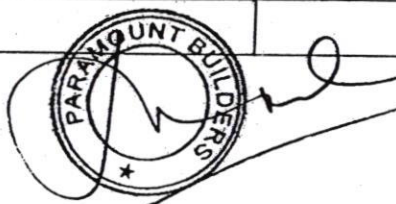
			18.04.2012
Jan 10 to Dec 10	OR No.60/2011-Adjn (ST) (ADC), dated 23.04.2011	Rs.4,46,403/-	Pending before CESTAT, Bangalore
Jan 11 to Dec 11	OR No. 54/2012 Adjn (ADC) dated 24.04.2012	Rs.46,81,850/-	Pending before CESTAT, Bangalore
Jan 12 to Jun 12	C.No.IV/16/16/195/20 11.ST-Gr.X	Rs. 2,92,477/-	Pending before Commissioner (Appeals)
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 O.R.No.24/2016-Adjn.(ST)(JC) dated 18.04.2016

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). (Copy of SCN is enclosed as **Annexure V**)

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



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K. The Appellant had filed a detailed reply to show cause notice explaining that amounts received by the Appellant is towards sale of flats after receipt of Occupancy Certificate which is not at all leviable to service tax. (Copy of SCN Reply is enclosed as **Annexure^{IV}**) & also attended the personal hearing on 28.12.2016 (Copy of Personal Hearing Record is enclosed as **Annexure^{III}**).

L. Without considering the submissions, the adjudicating authority passed the Order-In-Original No.45/2016-Adjn(ST)(AC) dated 30.12.2016 by confirming the demands proposed in SCN to

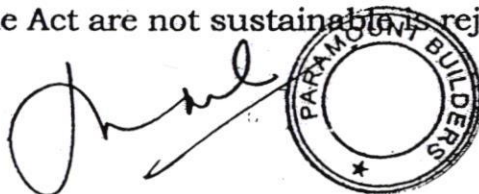
- i. Confirmed the demand of Service Tax (including cess) of Rs. 1,92,667/- on the "Works Contract" service rendered during the period of April 2014 to March, 2015 under sub section (1) of Section 73 of Financial Act, 1994
- ii. Confirmed interest on the Service Tax demanded at (i) above under Section 75 of the Financial Act 1994, at the appropriate rate
- iii. Imposed a Penalty @ of Rs. 100/- per day during which such failure continues or at the rate of one percent of such tax, per month, whichever is higher for the period April 2014 to March, 2015 starting with the first day after the due date till date of actual payment of the outstanding amount of service tax under Section 76 of the Financial Act, 1994
- iv. Imposed penalty of Rs. 10,000/- (Rupees Ten Thousand only) sub section (2) of Section 77 **of the Financial Act, 1994**



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M. The Ld. Adjudicating authority confirmed the demand on the following grounds:

- a. Assessee contended that there is no service tax on sale of semi-finished flat. The Honorable CESTAT in this stay Order No's 697 to 699 Dated 18.04.2012 has held that the facts of the case requires to be gone into detail at the time of final disposal. Therefore it is not possible for me to accept the issue of non-taxability on semi-finished flats. Therefore assessee's contention is rejected
- b. I find the assessee had not submitted any documentary evidence to establish that completion/occupancy certificate were issued by the competent authority and the consideration received by them was after issue of completion/occupancy certificate. In the absence of the required and relevant details and documents like completion/occupancy certificate, sale deeds, date wise details of payment received it will not be possible to come to any meaningful conclusion. Therefore I hold that the department has correctly quantified the duty amount. therefore, assessee's contention is rejected on Quantification of tax liability and I hold that the demand is sustainable
- c. I find the demand made in notice is sustainable and therefore the contention of the assessee that penalty proposed under section 76 & 77 of the Act and demand of the interest under section 75 of the Act are not sustainable is rejected

A handwritten signature in black ink is written over a circular stamp. The stamp has the text "PARAMOUNT BUILDERS" around the perimeter and a small star at the bottom.

d. Further, the submissions made by the assessee do not constitute reasonable cause so as to exonerate them from the penalties by invoking Section 80 of the Act. Accordingly, I had penalty under 76 and 77 of the Act. is imposed as they have contravened the provision of law

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 to the extent aggrieved by them which are alternate pleas and without prejudice to one another amongst those to be urged at the time of hearing of the appeal.



GROUND OF APPEAL

1. Appellant submits that the order was passed not appropriately considering the nature of activity, the perspective of the same, documents on record, the scope of agreement but creating its own assumptions and presumptions without appreciating the fact that Appellant does not have any liability of service tax. Supreme Court in the case of ***Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC)*** has held that such show cause notices are not sustainable under the law.
2. Appellant submits entire order seems to have been issued with revenue bias without considering the submissions made by the Appellant and documents submitted by the Appellant along with Show Cause Notice Reply.
3. Appellant submits that the allegation of the impugned order vide Para 11.6 that *"the assessee had not submitted any documentary evidence to establish that completion/occupancy certificate were issued by the competent authority and the consideration received by them was after issue of completion/occupancy certificate. In the absence of the required and relevant details and documents like completion/occupancy certificate, sale deeds, date wise details of payment received it will not be possible to come to any meaningful conclusion. Therefore I hold that the department has correctly quantified the duty amount. therefore, assessee contention is rejected on Quantification of tax liability and I hold that the demand is sustainable"*



4. The above finding is not at all correct as the Appellant has submitted all the requisite details *inter alia* detailed statement showing the flat wise details of the booking date, amount received towards the sale deed, additional works, VAT, registration expenses etc., and also the submitted the copies of the occupancy certificate. Surprisingly, impugned order comes with the fallacious finding that details/documents were not submitted.
5. Without prejudice to the foregoing, Appellant submits assuming that if the Appellant have not submitted information, nothing will stop the adjudicate authority to collect such information. The Adjudicating authority while adjudicating the case has to collect all the information which necessary for confirmation of the demand. That is why the process is called is adjudication. In this regard reliance is placed on *The Dukes Retreat Ltd v. CCE 2015 (40) S.T.R. 871 (Bom.)* wherein it was held that *"The Appeal has been dismissed only on a technical ground and for non production of the requisite certificate or proof of room rent being charged and bills raised in that behalf. In the circumstances, the impugned order is quashed and set aside."*
6. Appellant vehemently contended before Ld. Adjudicating authority that the provisions of Section 73(1A) of the Finance Act, 1994 are not applicable in the instant case and cited various explanations differentiating the provisions applicable to previous period and current period but the impugned order was passed without any finding on the same. As the impugned order has not considered the submissions, Appellant is



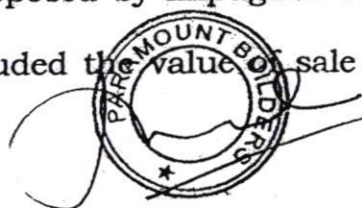
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reiterating the submissions made vide Para 02 to 06 contending that issuance of SCN u/s. 73(1A) of Finance Act, 1994 is invalid.

7. Appellant submits that the non-consideration of the various documents/submissions made by them without giving proper reasons shows the clear mind of the Adjudicating authority that giving an opportunity is merely an eye-wash and not actually an opportunity extended. Hence, there is clear violation of principles of natural justice and therefore the Order is issued violating the principles of natural justice and is void ab initio and shall be set aside.

In Re: Service Tax cannot be levied on 'sale of immovable property'

8. Appellant 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 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 OIO to demand service tax on the flats booked after OC date is not sustainable and required to be set aside.
9. Without prejudice to the above, Appellant 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 erroneously included the value of sale deeds at the



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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.

10. However, ongoing 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".

11. It is therefore apparent that the SCN represents an error in quantification of the demand. It may be noted that the Appellant 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 Appellant	As per SCN
Gross Receipts	43,18,635	43,18,635
Less: Deductions		
Sale Deed Value	38,85,000	0
VAT, Registration charges, stamp duty and other non taxable receipts	4,21,650	4,21,650
Taxable amount	11985	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

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

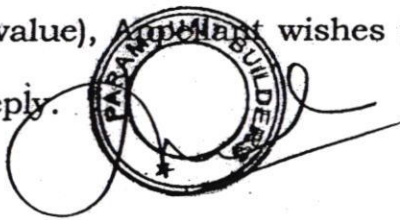


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13. Appellant submits that the impugned order vide Para 11.6 of the impugned order alleges that *"I find the assessee had not submitted any documentary evidence to establish that completion/occupancy certificate were issued by the competent authority and the consideration received by them was after issue of completion/occupancy certificate. In the absence of the required and relevant details and documents like completion/occupancy certificate, sale deeds, date wise details of payment received it will not be possible to come to any meaningful conclusion. Therefore I hold that the department has correctly quantified the duty amount. therefore, assessee contention is rejected on Quantification of tax liability and I hold that the demand is sustainable"*
14. In this regard, Appellant submits that Appellant has submitted all the details of sale deeds and occupancy certificates along with their reply dated 20.09.2016. For easy reference, the same were enclosed to this appeal as **Annexure VII**. Therefore, the allegation of the impugned order is not correct and the same needs to be set aside.
15. Without prejudice to the above, it is submitted that impugned order vide Para 11.4 alleges that *"Assessee contends that there is no service tax on sale of semi-finished flat. The Honorable CESTAT in its stay Order No's 697 to 699 dated 18.04.2012 has held that the facts of the case require to be gone in detail at the time of final disposal. Therefore it is not possible for me to accept the issue of non taxability on semi finished flats. Therefore assessee's contention is rejected"*



16. In this regard, Appellant submits that averment of impugned order is totally out of the context and incorrect for more than one reason

- a. Firstly, the action of demanding the service tax on construction completed (reflects sale deed value) runs beyond the scope of the SCN in as much as SCN categorically admits that amount received in excess of sale deed only liable for service tax under the category of 'works contract service';
- b. Secondly, the above referred tribunal stay order has dealt with the context of the taxability of the construction prior to 01.07.2010 in light of the CBEC circular dated 29.01.2009 and not the taxability of 'semi-finished flat' as misconstrued by impugned order. Further it never dealt with the taxability of the semi-finished flat under the category of 'works contract';
- c. Tribunal order merely held that taxability requires to be gone in details at the time of final disposal which does not mean that Hon'ble tribunal confirmed the liability which impugned order seems to have inferred;
- d. Further when the finding that detailed examination is required, impugned order should have done the same and confirmed the liability if found liable based on such detailed examination. Whereas impugned order without even giving single reason confirmed the liability and out rightly rejected the contentions of the appellant;
- e. As the impugned order has not given any finding on the taxability of the finished flat (sale deed value), Appellant wishes to reiterate the submissions made in SCN reply.



17. Since the impugned order is passed agreeing on the principle that service tax cannot be demanded on the value attributable to sale deeds, the Appellant 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.

18. Appellant further submits that there is no service tax levy on sale immovable property as the same was excluded from the definition of 'service' u/s. section 65B(44) of Finance Act, 1994 ("Transfer of title in goods or immovable property, by way of sale").

In Re: Interest and penalties are not payable/imposable

19. Without prejudice to the foregoing, Appellant submits that when service tax itself is not payable, the question of interest does not arise.



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Appellant 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).

20. Without prejudice to the foregoing, Appellant 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 Appellant 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)
21. The Appellant 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.
22. The Appellant submits that they are under bonafide belief that the amounts received towards flats sold after receipt of Occupancy Certificate is not subjected to service tax. It settled position of the law that if the Appellant 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.

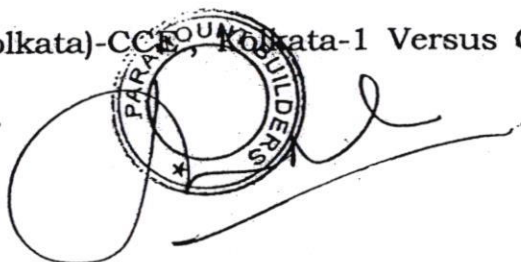
- CCE-II Vs Nita Textiles & Industries 2013 (295) E.L.T 199 (Guj)
- CCE, Bangalore-II Vs ITC Limited 2010 (257) E.L.T 514 (Kar)
- Larsen & Toubro Ltd Vs CCE., Pune-II 2007 (211) E.L.T 513 (S.C)
- Centre For Development Of Advanced Computing Vs CCE, Pune 2002 (141) E.L.T 6 (S.C).

23. Appellant submits that the impugned order vide Para 11.7 has alleged that *"I find the demand made in notice is sustainable and therefore the contention of the assessee that penalty proposed under section 76 & 77 of the Act and demand of the interest under section 75 of the Act are not sustainable is rejected"*

24. In this regard, Appellant submits that the impugned order has imposed the penalty without considering the submission made by Appellant in their reply to SCN. Appellant has made elaborated explanation as to why the interest and penalty should not be imposed on the impugned activity whereas the order has confirmed the interest and penalty without considering the submissions therefore the same is not valid and needs to be set aside.

25. The impugned order has relied on the following case laws for imposition of penalty under Section 76 of the Act.

- i. 2007(6) S.T.R.32 (Tri.-Kolkata)-CCE, Kolkata-1 Versus Guardian Leisure Planners Pvt. Ltd.



- A22
- ii. 2005 (1008) E.L.T.445 (Tri,-Chennai)-Trans (India) Shipping Pvt. Ltd. Versus CCE., Chennai-1

26. In this regard, Appellant submits that in the above referred case laws no reasonable cause has been shown with respect to non- compliance with the law by the assessee. Whereas in the instant case the following aspects reflects the compliance of Appellant with the law

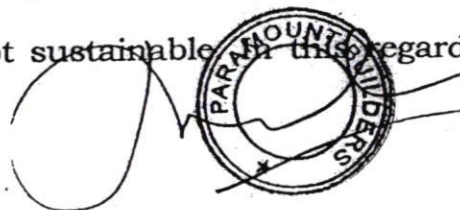
- i. There is no suppression of facts from the department i.e, all the amounts are disclosed in statutory returns and Books of Accounts
- ii. Appellant has cooperated with the department as and when called for

Therefore, the reliance of impugned order on the said case laws is of no use and needs to be set aside

Benefit under section 80 should be extended

27. Appellant 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 80 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.)**

28. The Appellant submits that they have established the reasonable cause for the non-payment of service tax. Since the Appellant 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).

29. Appellant submits that the impugned order vide Para 11.7 alleged that
"Further, the submissions made by the assessee do not constitute reasonable cause so as to exonerate them from the penalties by invoking Section 80 of the Act. Accordingly, I had penalty under 76 and 77 of the Act. is imposed as they have contravened the provision of law"
30. In this regard, Appellant submits that as explained in Para's, it is clear that order has not given any reason as to why there was no bonafide belief regarding the issue. Since the order does not give any explanation regarding the bonafide belief the same is not tenable and needs to be set aside.
31. Appellant craves leave to alter, add to and/or amend the aforesaid submissions.
32. Appellant submits that wish to be heard in personal before passing any order in this regard.

For M/s. Paramount Builders

Authorized Signatory



Annexure - VIII

ASO

सेवाकर आयुक्त का कार्यालय
OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX
हैदराबाद- सेवाकर आयुक्तालय SERVICE TAX COMMISSIONERATE
11-5-423/1/A :: SITARAM PRASAD TOWER :: RED HILLS :: HYDERABAD-500 004.

O.R. No.24 /2016- Adjn.(ST)(JC)
C. No. IV/16/195/2011- ST.Gr-X

Dt. 18.04.2016.

SHOW CAUSE NOTICE

(Notice under Section 73(1A) of the Finance Act, 1994)

Sub: Service Tax – M/s.Paramount Builders, Hyderabad – Non-payment
of Service Tax - Issue of Show Cause Notice – Regarding.

M/s. Paramount Builders., 5-4-187/3 & 4, 2nd Floor, Soham Mansion,
M.G.Road, Secunderabad- 500 003 (hereinafter referred to as
'M/s.Paramount' or "the Assessee" for short) have registered themselves with
the Service Tax Department vide Registration No.AAHFP4040NST001, for
payment of Service Tax under the categories of "Works Contract service" and
"Construction of Residential Complex service".

2. As seen from the records, the Assessee entered into 1).Sale deed for
sale of undivided portion of land together with semi-finished portion of the flat
and 2).Agreement for construction, with their customers. On execution of the
sale deed the right in a property got transferred to the customer, hence the
construction service rendered by the Assessee thereafter to their customers
under agreement of construction are taxable under Service Tax as there exists
service provider and receiver relationship between them. As transfer of property
in goods in execution of the said construction agreements is involved, 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 are taxable services under "Works Contract Service".

3. Accordingly, the following Show Causes Notice had been issued to the Assessee:

Sl. No.	SCN OR No. & date	Period	Amount of Service Tax demanded (Rs.)	OIO No. & Date
1.	HQPOR No.87/2010-Adjn(ST)(ADC) dated 26.06.2010	09/2006 to 12/2009	11,80,439	Confirmed vide OIO No.49/2010-ST dt.29.11.2010. Party's appeal was dismissed vide OIA No.09/2011(H-II) dt.31.01.2011
2.	OR No.60/2011-Adjn(ST)(ADC) dt.23.04.2011	01/2010 to 12/2010	4,46,403	Confirmed vide OIO No.50/2011-Adjn(ST)(ADC) dt.31.08.2012. Party's appeal was dismissed vide OIA No.187/2012 (H-II)-S.Tax dt.21.12.2012
3.	OR No.54/2012-Adjn.(ADC) dt.24.04.2012	01/2011 to 12/2011	46,81,850	Confirmed vide OIO No.50/2012-Adjn.(ST)(ADC) dt.31.08.2012. Party's appeal was dismissed vide OIA No.187/2012 (H-II)-S.Tax dt.21.12.2012
4.	C.No.IV/16/195/2011-ST-Gr.X (issued by AC,(ST), Division-II dt.02.12.2013	01/2012 to 06/2012	2,92,477	Pending Adjudication
5.	OR No.108/2014-Adjn.(ST)(JC) Dt.19.09.2014	07/2012 to 03/2014	5,20,892	Pending Adjudication

4. As per the information furnished by the Assessee vide their letter dated 13.04.2016 received by the Jurisdictional Range Superintendent on 13.04.2016, it is seen that "the Assessee" have rendered taxable services under the category of "Works Contract Services" during the period April, 2014 to March, 2015. The Assessee had rendered services for a taxable value of Rs.43,18,635/- (Rupees Forty three Lakhs Eighteen thousand Six Hundred and Thirty Five only). After deduction of VAT of Rs.4,21,650/- the taxable value works out to Rs.38,96,985/- on which service tax works out to Rs.1,92,667/- (including cesses) for the services rendered during the said period, as detailed below:

	Before Occupancy Certificate is obtained	After Occupancy Certificate is obtained	Total
Gross Receipts	77,575	42,41,060	43,18,635
Less: Construction Agreement Value	—	11,985	
Gross Sale Deed Value	—	42,29,075	
Less: VAT & Registration	77,575	3,44,075	4,21,650
Net Taxable Value (Net of VAT)	nil	38,85,000	38,96,985
Tax Rate	4.944%	-	4.944%
Service Tax Payable		1,92,074	1,92,667

- A51
A-60
5. Vide Finance Act, 2012 sub section (1A) was inserted in Section 73 which reads as under:

SECTION 73(1A) - Notwithstanding anything contained in sub-section (1), 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.

6. The section 65B, 66B, 66D as inserted in the Finance Act, 1994 by the Finance Act, 2012 w.e.f. 01.07.2012 are reproduced below:

6.1. SECTION 65B(44): "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include— (a) an activity which constitutes merely,— (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (ii) a transaction in money or actionable claim; (b) a provision of service by an employee to the employer in the course of or in relation to his employment; (c) fees taken in any Court or tribunal established under any law for the time being in force.

6.2. SECTION 66B.- There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

6.3. SECTION 66D: Contains the negative list of services. It appears that services provided by the Assessee are not covered under any of the services listed therein.

6.4. SECTION 66E: Contains declared service and work contract is covered under 66E(h) of the Finance Act, 1994.

6.5. Further, Notification No.25/2012-ST, dated 20.06.2012, as amended specified services which were exempt from payment of Service Tax. It appears that services provided by the Assessee are not covered under any of the services listed therein.

7. The grounds as explained in the Show Cause cum demand notices issued above are also applicable to the present case; the legal position in so far as "Works Contract Service" is concerned, the said service and its taxability

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as defined under Sub-clause (zzzza) of Clause 105 of Section 65 of the Finance Act, 1994 as existed before 01.07.2012 stands now covered by 65B(54) whereby the said service being declared service under Section 66E(h) of Finance Act, 1994 and for not being in the Negative List prescribed under 66D, continues to be a taxable service. But for the said changes in legal provision, the status of Service and the corresponding tax liability remained same. Hence, this statement of demand/show cause notice is issued in terms of Section 73(1A) of the Finance Act, 1994 for the period April, 2014 and March, 2015.

8. In view of the above, M/s.Paramount Builders, Hyderabad are hereby required to show cause to the **Joint Commissioner of Service Tax, Office of the Principal Commissioner of Service Tax, Hyderabad Service Tax Commissionerate, 11-5-423/1/A, Sitaram Prasad Towers, Red Hills, Hyderabad-4**, within 30(thirty) days of receipt of this notice as to why:-

- i). an amount of Rs.1,92,667/- (Rupees One Lakhs Ninety Two thousand Six Hundred and Sixty Seven only) (including Cesses) should not be demanded as per Para-4 above towards "Works Contract Service" rendered by them during April, 2014 to March, 2015, in terms of Section 73 (1) of the Finance Act, 1994; on the grounds discussed supra; and
- ii). Interest should not be demanded at (i) above, under Section 75 of the Finance Act, 1994; and
- iii). Penalty should not be imposed on them under Section 76 of the Finance Act, 1994, for the contravention of Rules and provisions of the Finance Act, 1994; and
- iv). Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.

9. M/s.Paramount Builders, are required to produce all the evidence upon which they intend to rely in their defense while showing cause. They are also required to indicate in their written reply whether they wish to be heard in person before the case is adjudicated.

10. If no cause is shown against the action proposed to be taken within the stipulated time and if the noticee does not appear for the personal hearing on the appointed day, then it will be presumed that they do not have anything to state in their defence and the case will be decided on merits on the basis of evidence available on records.

PRAYER

Therefore, it is prayed that

- a. To set aside the impugned order to the extent aggrieved;
- b. To hold that service tax is not leviable on 'sale of immovable property'
- c. If required, to hold that on merits the amounts received towards sale deed is not taxable
- d. To hold that amounts received towards flats sold after receipt of occupancy certificate is not leviable to service tax;
- e. To hold that no interest and penalties are leviable;
- f. To hold that Appellant is eligible for the benefit of waiver of the penalty under Section 80 of the Finance Act, 1994;
- g. Any other consequential relief shall be granted;


Signature of the Appellant

VERIFICATION

I, Soham Modi, Partner of M/s. Paramount Builders, the Appellant herein do declare that what is stated above is true to the best of our information and belief.

Verified today ^{2nd} day of ~~January~~ ^{February}, 2018

Place: Hyderabad


Signature of the Appellant