OIO 45/2016 Dt.30.12.2016

Annexure-IV

OFFICE OF THE ASSISTANT COMMISSIONER OF SERVICE TAX
DIVISION-II :: SERVICE TAX COMMISSIONERATE
Room No -600, 5th Floor:: Kendriya Shulk Bhavan, Basheerbagh
HYDERABAD-500 004.

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

Date. 30/12 /2016.

ORDER IN ORIGINAL NO. 45/2016-Adjn (ST)(AC)

(Passed by Shri. J.Vijaya Bhaskar, Assistant Commissioner, Service Tax)

PREAMBLE

1 यह आदेश जिसके नाम जारी किया गया है, उस व्यक्ति के निजी उपयोग के लिए यह प्रति मुफ्त में दी जाती

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2 इस आदेश से किसी भी व्यक्ति को हानि पहुंचती हो तो वे यथा संशोधित वित्त अधिनियम,1994 की धारा 85 (3A)के अधीन, इस आदेश /निर्णय की प्राप्ति की तारीख से दो महीनों के भीतर आयुक्त)अपील(, मुख्यालय, सातवा तल, एल बी स्टेडियम रोड, बशीरबाग, हैदराबाद 4 के समक्ष अपील कर सकते हैं।

Under Section 85 (3A) of the Finance Act, 1994 as amended, any person aggrieved by this order can prefer appeal within two months from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs, Office, 7th floor, L. B. Stadium Road, Basheer Bagh, Hyderabad-4

3 धारा 85 के अंतर्गत आयुक्त (अपील) को की जानेवाली अपील फार्म एस टी 4 में होगी और निर्धारित तरीके से इसका सत्यापन किया जाएगा ।

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 अपील का स्वरूप फॉर्म सं. एस टी-4 में दो प्रतियों में फाइल किया जाना है और जिस आदेश या निर्णय के विरोध में अपील की जा रही है उसकी एक प्रति भी अपील के साथ संलग्न की जानी है।

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 और जिस आदेश या निर्णय के विरोध में अपील की जा रही है उसकी एक प्रति के साथ निर्धारित मूल्य का न्यायालय शुल्क टिकट लगाना होगा ।

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.

A003 A26

Sub: Service Tax-Non payment of Service tax on taxable services rendered by M/s. Paramount Builders, Hyderabad – Orders Passed - 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 beed 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

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 in the present case, the legal position in so far as **"Works Contract Service"** is concerned, the said service and its taxability 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 in 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**, vide Corrigendum to Show Cause Notice issued vide O.R. No.24/2016 (ST)(JC), that show cause notice is answerable to Assistant Commissioner Service Tax, Division-II, Service Tax Commissionerate, Hyderabad within 30 (thirty) days from the date of receipt of this notice as to why:

... 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. Written Submissions:-

The Assesses have submitted written submissions vide their letter Dt.20.09.2016, stating, interalia.

1. That all flats were booked after the date of occupancy certificate and sale deed is being executed for the entire sale value; that being the 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. that without prejudice to the foregoing, 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; 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. 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.

abatement for various services [illegible] under [illegible] 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. that from the above it is clear that there are 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. that 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. 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 they 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

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

7. 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 the sole allegation of SCN (Para 2) is 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. that, 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. That it is apparent that the SCN represents an error in quantification of the demand; that they 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	0	0
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	41,985	38,96,985
Abatement @ 40%	16,794	15,58,974
Service Tax @ 12.36%	593	1,92,667
Actually Paid	0	0
Balance Demand	593	1,92,667

10. 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. that SCN read with earlier SCN's agree on the principle that service tax cannot be demanded on the value attributable to sale deeds, they are not

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making detailed grounds on the legal merits of the said issue [illegible] 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. That they 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. that without prejudice to the foregoing, when service tax itself is not payable, the question of interest does not arise. 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. that without prejudice to the foregoing, penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as

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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. 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. that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It is 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. They 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. that there is a bona fide litigation 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.)

... 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.

9.20 that they have established the reasonable cause for the non-payment of service tax. Since reasonable cause for the non-payment of the service tax, imposition of the penalty is not sustainable. In this regard they wish to rely on Commissioner of Service Tax, Bangalore Vs Motor World 2012 (27) S.T.R 225 (Kar).

10. Record of Personal Hearing :-

Personal Hearing has been granted to the assesse. Sri P. Venkata Prasad, Chartered Accountant has appeared for personal Hearing before me on 28.12.2016 and reiterated the submissions already made in the reply to the show cause notice Dt 20.09.2016.

11. Discussions And Findings:-

11.1. I have gone through the Show cause Notice, the relied upon document, reply submitted by the assessee and submissions made by them during personal hearing. The issue to be decided by me is whether the assessee is liable to pay service tax on the flats sold by them.

11.2. It is seen from the submissions of the assessee that one of the Show Cause Notice which was confirmed by the Original Adjudicating Authority vide 49/2010ST dt. 29.11.2010 was upheld by the Commissioner (Appeals) vide OIA no 09/2011 dt 31.01.2011 and the same was appealed against before the Hon'ble CESTAT, Bangalore which has stayed recovery proceedings vide stay order no 9697-699/2012 dt. 18.04.2012. However there is no stay for adjudication of the current Show cause Notice. Therefore, I proceed to adjudicate the case in hand and now I examine the issues involved in the SCN.

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The assesses contests the issue on the following;

A. *Validity of the show cause notice*
B. *No Service tax on sale of semi-finished flat.*
C. *Inclusion of sale deed value*
D. *Interest and penalties.*
E. *Benefit under section 80*

11.3. I find the impugned show cause notice was issued on the basis of the details furnished by the Assessee to the jurisdictional range officer vide letter dt.13.04. 2016

11.4. Assessee contend 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 18.4.2012 has held that the facts of the case requires to be gone into 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 assesses contention is rejected.

11.5 Assesses contested the quantification of the demand amount. The assessee has contested the inclusion of sale deed value and requested to exclude the same in respect of flats sold after obtaining occupancy certificate. I find, service portion in the execution of a works contract is a declared service in terms of section 66E(h) of the Finance Act 1994.

As per section 66E—

The following shall constitute declared services, namely:—

(a) renting of immovable property

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

Explanation.— For the purposes of this clause,— 11 (I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely :— (A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or (B) chartered engineer registered with the Institution of Engineers (India); or (C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

11.6 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 certificates, sale deeds, date wise details of payment received it will not be possible to come to any meaningful conclusion. Therefore I hold that the

11.7. I find the demand made in notice is sustainable and therefore the contention of the assessee that penalty proposed under section 76 and 77 of the Act and demand of interest under section 75 of the Act are not sustainable is rejected.

(i) Levy of penalty under Section 76 of the Act .

Reliance for imposition of penalty is supported basing on the following case laws :

(ii). 2007(6) S.T.R. 32 (Tri.-Kolkata)-CCE., Kolkata-1 Versus GUARDIAN LEISURE PLANNERS PVT LTD.

" 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 willful breach. Of course , just because penalty is prescribed that should not mechanically be levied following Apex Court's decision in the case of Hindustan Steels Ltd. Vs. 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. No reasonable cause being patent from the record towards failure to deposit the tax due, duly, except the casual approach of aforesaid, the ld. Commissioner (Appeals) was not justified to set aside the penalty levied under Section 76 of the Act ".

(ii). 2005 (1008) E.L.T.445 (Tri,- Chennai) –TRANS (INDIA) SHIPPING PVT. LTD. VERSUS CCE., CHENNAI-I:

" The remaining question to be looked into is whether the appellants were eligible for the benefit of Section 80 of the Finance Act,1994, which laid down that a service tax assessee could be exonerated from penalties imposable under Section 76 & 77 where he proves that there was reasonable cause for the default in payment of Service Tax or in filing returns, as the case may be. As regards the appellants default in the matter of filing of service tax returns, there could be no plea of financial crisis as a reason for delayed filing of return. The question now is whether a plea of financial difficulties ("cash crisis" in this case) is a valid reason to be admitted under section 80 of the Finance Act,1994. In this commercial world , it is too late for anybody to say that a "cash crisis " is insurmountable. It also appears from the record that the appellants were solvent enough to write off "bad debts" while continuing to do their business . Apparently, their financial was only in the matter of paying their dues to the exchequer. In the circumstances, their plea of "cash crisis" cannot be accepted as a reasonable cause for exonerating them from the penal liability under Section 76 / 77 of the Finance Act,1994.

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 hold the Penalty under Section 76 and 77 of the Act is imposable as they have contravened the provisions of law.

11.8. In view of the above, I pass the following order.

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ORDER

(i) I Confirm the demand of Service Tax (including cess) of Rs. 1,92,667/- (Rupees One Lakhs Ninty Two Thousand Six Hundred Sixty seven only) on the "**Works Contract**" service rendered during the period **April 2014** to **March,** 2015 under sub section (1) of Section 73 of Finance Act,1994 against M/s. Paramount Builders, Secunderabad ;

(ii). I confirm Interest on the Service Tax demanded at (i) above, under **Section 75 of the Finance Act** 1994 , at the appropriate rate, from M/s. Paramount Builders, Secunderabad

(iii). I impose a Penalty @ of Rs.100/- per day during which such failure continues or at the rate of one percent of such tax, per month, which ever is higher for the period **April 2014 to March, 2015** starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax under Section 76 of the Finance Act, 1994 against M/s. Paramount Builders, Secunderabad (provided that the total amount of the penalty payable in terms of this section shall not exceed fifty per cent of the Service Tax payable

(iv). I impose Penalty of Rs. 10,000/- (Rupees Ten thousand only)under sub section (2) of Section 77 of the **Finance Act, 1994** against M/s. Paramount Builders, Secunderabad

30/12/2016

(J. VIJAYA BHASKAR)
ASSISTANT COMMISSIONER,
SERVICE TAX DIVISION II

OCSO 104/2017

TO
M/s. Paramount Builders,
5-4-187/3 & 4, 2nd Floor,
Soham Mansion, M.G.Road,
Secunderabad- 500 003
(Through Range Officer, Range IIB, Service Tax)

Copy submitted to:
The Commissioner of Central Excise Hqrs. Office, Service Tax Commissionerate
(By name to Superintendent (Review)

Copy to:
1. The Superintendent of Range IIB, Division II Service Tax Commissionerate, Hyderabad
2. Master Copy/Spare copy

Annexure - V
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OFFICE OF THE ASSISTANT COMMISSIONER OF SERVICE TAX,
DIVISION-II, HYDERABAD.
5th Floor, Room No 600, Central Revenue Building, Basheerbagh,
Hyderabad-500004
Phone No.040-29802794

RECORD OF PERSONAL HEARING

O.R..No.

In the case against : **M/s** Paramount Builders, Hyderabad

Date and time : 28/12/2016, 15.30 Hrs

Represented by Shri :1. P. Venkata Prasad, C.A.
2.

Signature of the Representative :1. [signature] 28/12/16
2.

Shri P. Venkataprasad, CA & authorised representative of the assessee appeared before me today for personal Hearing and reiterated the submissions already made in their reply to the Show cause Notice dt. 21. 4. 2016. They have nothing to add.

[signature]
28/12/2016

(J. VIJAYABHASKAR)
ASSISTANT COMMISSIONER
SERVICE TAX, DIVISION-II

ANNEXURE VI

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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.

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:

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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:

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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

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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

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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)

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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

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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

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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 <u>NIL</u>

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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)

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- 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

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11. This Notice is issued without prejudice to any other action that has been or may be taken against the noticee / others under this Act or under any other law for the time being in force in India.

12. M/s. Paramount, has obtained Service Tax registration on 29.02.2008 and filed the ST-3 return for the period April' 2014 to September' 2014 on 22.10.2014 (Due date being on 14.11.2014) and hence, **the last date for issuance of this Notice is 21.04.2016** under section 73(1) of the Finance Act, 1994.

13. Reliance for issue of this Notice is placed on the following:

(i) Assessee's letter dated 13.04.2016 received by the Jurisdictional Range Superintendent on 13.04.2016.

Place: Hyderabad

Date: 18.04.2016.

(PRABHU DAS PULI)
JOINT COMMISSIONER

To
M/s.Paramount Builders,
Address: 5-4-187/3 & 4, 2nd Floor,
Soham Mansion,
M.G.Road,
Secunderabad- 500 003.

//By SPEED POST//

Copy to:

1. The Assistant Commissioner of Central Excise (Service Tax), Division-II, Service Tax Commissionerate, Hyderabad for information and necessary action.

2. The Superintendent, Service Tax, Range-IIB, Service Tax Commissionerate, with direction to serve the Notice on the assessee and submit dated Acknowledgement to this office.

3. The Superintendent of Service Tax (Adjudication), Service Tax Commissionerate, along with copies of all relied documents.

Annexure A - Sale Deed Detail

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Annexure - 6

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S No.	Block	Flat No.	Value of Sale Deed	Receipts Towards Sale Deed
1	A	104	1,900,000	225,000
2	A	507	3,010,000	2,785,000
3	B	209	846,000	-
4	D	206	1,050,000	-
5	D	304	1,450,000	-
6	D	406	1,050,000	850,000
7	3C	508	975,000	25,000
Total			**10,281,000**	**3,885,000**

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Block No	Flat No.	Occupancy Certificate Date	Booking Date	Receipt No	Receipt Date	Receipt Amount	Towards Sale Deed	Towards Agreement of Construction	Towards Other Taxable Receipts	Towards VAT, Registration Charges, etc.	Towards Other Non-Taxable Receipts	Booking after OC (Yes=0. No=1)	Total receipts towards agreement of construction based on OC	Tax rate under works contract services with composition	Estimate of tax liability under works contract services with composition - agr. of const. receipts
D	206	16-04-2009	18-12-2013	2704	02-04-2014	1,525	-	-	-	725	800	0	-	4.944	-
D	406	16-04-2009	26-03-2014	.	09-04-2014	77,000	77,000	-	-	-	-	0	-	4.944	-
D	406	16-04-2009	26-03-2014	2706	17-04-2014	850,000	773,000	-	-	77,000	-	0	-	4.944	-
D	406	16-04-2009	26-03-2014	2707	24-04-2014	4,535	-	-	-	3,735	800	0	-	4.944	-
B	209	16-04-2009	11-11-2006	3E+07	20-05-2014	77,575	-	-	-	66,535	11,040	1	-	4.944	-
A	507	16-04-2009	03-09-2013	2713	15-09-2014	785,000	785,000	-	-	-	-	0	-	4.944	-
A	507	16-04-2009	03-09-2013	2714	16-09-2014	225,000	225,000	-	-	-	-	0	-	4.944	-
A	507	16-04-2009	03-09-2013	2715	23-09-2014	1,250,000	1,250,000	-	-	-	-	0	-	4.944	-
A	507	16-04-2009	03-09-2013	2716	23-09-2014	750,000	525,000	-	11,985	213,015	-	0	-	4.944	-
D	304	16-04-2009	13-07-2012	2717	31-12-2014	48,000	-	-	-	-	48,000	0	-	4.944	593
A	104	16-04-2009	28-02-2015	.	28-02-2015	25,000	25,000	-	-	-	-	0	-	4.944	-
A	104	16-04-2009	28-02-2015	2720	17-03-2015	200,000	200,000	-	-	-	-	0	-	4.944	-
3C	508	16-04-2009	29-07-2015	2722	23-03-2015	25,000	25,000	-	-	-	-	0	-	4.944	-
	Receipts from Apr'14 to Mar'15					4,318,635	3,885,000	-	11,985	361,010	60,640		-		593

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Annexure B - Details of Receips

S No	Block No	Flat No	Receipt Amount	Receipt towards Sale Deed	Receipt towards Agreement of Construction	Other Taxable Receipts	Receipts towards non-taxable receipts like VAT, Reg charges, Stamp duty, etc.	Total taxable receipts	Abatement @ 40%	Service tax @ 12.36% for receipts
1	A	104	225,000	225,000	-		-	-	-	-
2	A	507	3,010,000	2,785,000	-	11,985	213,015	11,985	4,794	593
3	B	209	77,575	-	-	-	77,575	-	-	-
4	D	206	1,525	-	-	-	1,525	-	-	-
5	D	304	48,000	-	-	-	48,000	-	-	-
6	D	406	931,535	850,000	-	-	81,535	-	-	-
7	3C	508	25,000	25,000	-	-	-	-	-	-
			4,318,635	**3,885,000**	-	**11,985**	**421,650**	**11,985**	**4,794**	**593**