By RAD

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सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवा कर के आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX
हैदराबाद-1 आयुक्तालय
HYDERABAD -I COMMISSIONERATE
एल. बी. स्टेडियम रोड. बशीरबाग. हैदराबाद **500 004**
L.B.STADIUM ROAD:: BASHEERBAGH:: HYDERABAD 500 004

आ.सं/O.R.No. 53/2012-Hyd-I Adjn. (S.T.) दिनांक / Dated: 17.01.2013

मूल आदेश संख्या 6/2013-(सेवा कर)- आयुक्त
(श्री एस. एन. साहा, आयुक्त, द्वारा पारित)
ORDER-IN-ORIGINAL No. 6/2013-(Service Tax)-Commr.
(Passed by Shri S.N.SAHA, Commissioner)

प्रस्तावना
PREAMBLE

1. निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति बिना मूल्य के दी जाती है
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2. जो भी व्यक्ति वित अधिनियम. 1994 के अंतर्गत धारा 86 (1) संशोधित के अधीन आदेश से दुषप्रभावित हो तो इस प्रकार प्राप्त आदेश निर्णय के खिलाफ सीमा शुल्क. उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण के दक्षिणी न्यायपीठ. प्रथम तल. विश्व व्यपार केंद्र भवन. एफ.के.सी.सी.आई कंप्लेक्स. के.जी. रोड. बेंगलूर 560 009 स्थित रजिस्टी के पते पर अपना अपील प्रस्तुत कर सकता है ।
Under Sec.86 (1) of the Finance Act, 1994, as amended, any person aggrieved by this order can prefer an appeal to the South Bench of the Customs, Excise and Service Tax Appellate Tribunal having its Registry at 1st floor, WTC Building, FKCCI Complex, K.G. Road, Bangalore – 560 009.

3. इस आदेश के प्राप्त होने के तीन महिने के भीतर सेवा कर नियमावली 1994 के नियम 9(1) के अधीन निर्धारित फार्म एस.टी-5 में अपील दर्ज की जानी चाहिए ।
Appeals must be filed in Form ST-5 prescribed under Rule 9(1) of the Service Tax Rules, 1994 within three months from the date of communication of this order.

4. हर एक अपील का ज्ञापन. प्रत्याक्षेप. स्थगित आवेदन या कोई अन्य आवेदन. फुल स्केप पेपर के एक ओर दुगना स्पेस छोडते हुए स्पष्ट रूप में टंकित किया जाए और इसे समयक रूप से पृष्टों को कमवार जमाते हुए सूचक सहित एवं हर एक कागज पुस्तक को अलग फोल्डर में अधिक मजबूती के साथ नत्थी करना चाहिए ।
Every memorandum of Appeal, cross-objections, stay application or any other application shall be typed neatly in double spacing on one side of the full scape paper and the same shall be duly paged, indexed and tagged firmly with each paper book in a separate folder.

5. सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण (कार्यविधि) नियमावली. 1982 के नियम 13 के अधीन यथा अपेक्षित यदि अपील पर प्राधिकृत प्रतिनिधि द्वारा अपीलकर्ता की ओर से अपील एवं हस्ताक्षर करने के दस्तावेज सहित अधिकरण के दक्षिणी न्यायपीठ के सहायक रजिस्ट्रार के नाम से राष्ट्रीयकृत बैंक से प्राप्त मूल्य की रेखित बैंक डाफ्ट के साथ अपील प्रस्तुत की जानी चाहिए एवं बैंक की शाखा बेंगलूर में स्थित बैंक के अधीन होनी चाहिए ।
The appeal must be accompanied by a crossed Bank Draft for a sum as applicable obtained from a Nationalised Bank drawn in favour of the Assistant Registrar of the Southern Bench of the Tribunal and should be on the branch of bank at Bangalore; and the documents authorizing the representative to sign and appeal on behalf of the appellant if the Appeal is signed by authorized representative, as required under Rule.

M/s.Modi Ventures, 5-4-187/3&4, II Floor, MG Road, Secunderabad - 500 003 [hereinafter referred to as the "assessee" / "noticee"] are engaged in providing Construction of Complex Service and Works Contract Service. M/s Modi Ventures is a registered partnership firm and got themselves registered with department on 17.08.2005 under Construction of Complex Service and on 29.02.2008 under Works Contract Service for payment of Service Tax vide STC No. AAJFM0646DST001.

2. On gathering intelligence that M/s Modi Ventures, being a registered assessee of the Service Tax department was not discharging the Service Tax liability properly, investigation was taken up by the department. Summons dated 13.01.2010 for submission of relevant records/ documents/ information were issued to them. On verification of records submitted by the assessee, it was found that they undertook one project namely Gulmohar Gardens located at Mallapur village, Uppal Mandal, RR District (total 506 Residential units) in the year 2006 and received amounts from customers from April, 2006 to December, 2010 towards sale of land and agreements for construction. In the said projects, they entered into sale deed and agreement for construction with their customers in respect of 290 flats. They filed the ST-3 returns for April, 2006 to September, 2008 and April, 2010 to December, 2010. They did not file the ST-3 returns for the period from October, 2008 to March, 2010. It was found that they paid the Service Tax of Rs.15,21,176/- under Construction of Complex Service and Rs.5,25,567/- under Works Contract Service on the receipts against agreements for construction for the period from June, 2007 to December, 2008. They paid the Service Tax under Construction of complex service availing abatement under Notification No. 1/2006-ST, dated 01.03.2006 (as amended) and under Works Contract Service availing the Composition Scheme under Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. It was found that they stopped payment of Service Tax on receipts from 01.01.2009 by misinterpreting the clarification of the Board vide Circular No. 108/02/2009 - ST dated 29th January 2009.

3. Sri. A.Shanker Reddy, Deputy General Manager (Administration) & authorized representative, in his statement dated 01.02.2010 recorded under Section 14 of the Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1994, interalia, stated that; the activities undertaken by the company are providing services of construction of Residential Complexes; purchased the land under sale deed and on that they

5. It was clarified in para 3 of the Circular No.108/02/2009-ST, dated 29th January 2009 that if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity is not liable to Service Tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/ developer constructing entire complex for a single person for personal use as residence by such person would not be subjected to Service Tax. Normally, a builder/ promoter/developer constructs residential complex consisting of number of residential units and sells those units to different customers. So, in such cases the construction of complex do not appear to be meant for one individual entity. Therefore, as the whole complex is not constructed for single person the exclusion provided in Section 65(91a) of the Finance Act, 1994 doesn't apply. Further, the builder/promoter/developer normally enters into construction/ completion agreements after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/developer and the stamp duty is paid on the value consideration shown in the sale deed. As regard the agreements/contracts against which they render services to the customer after execution of sale deeds, there exists service provider and service recipient relationship between the builder/promoter/developer and the customer and such services are leviable to Service Tax. Thus, it appeared that the contention and interpretation of the definition of the Construction of Complex services and Board Circular dated 29.1.2009 by the assessee was incorrect.

6. It appeared that the services provided by M/s.Modi Ventures during the period 01.06.2007 to 31.12.2010 were classifiable under Works Contract Service in terms of Section 65(105)(zzzza) read with Section 65(91a) of the Finance Act, 1994 and the Board's Circular No. 128/10/2010-ST dated 24.08.2010.

7. In terms of the Board Circular dated 24.08.2010, the amounts received towards construction services after 0.1.06.2007 were classified under Works Contract Service. The post sale deed construction services rendered by them to various customers w.e.f. 01.06.2007 appeared classifiable under the category of Works Contract Service. The subject venture of M/s. Modi Ventures was started in the year 2006 and was going on after 01.06.2007 also, appropriately classifiable as Works Contracts. As the said project is an ongoing Works Contract and the assessee paid Service Tax under Construction of

constructed the residential complexes; initially, they collect the amounts against booking form/ agreement of sale and at the time of registration of the property, the amount received till then will be allocated towards Sale Deed and Agreement of construction; therefore, Service Tax on amounts received against Agreement of construction portion up to registration was remitted immediately after the date of agreement; the Service Tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis; agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction; the sale deed constitutes a condition to go for construction with the builder and accordingly, the construction agreement will also be entered immediately on the same date of sale deed; all the process is in the way of sale of the constructed unit as per the agreement of sale but possession was given in two phases one is land / semi finished flat with undivided share of land and other one is completed unit; this is commonly adopted procedure as required for getting loans from the banks; that services to a residential unit/complex, which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex; that they stopped collection and payment of Service Tax from 01.01.2009 in the light of the clarification given by the Board vide Circular No. 108/02/2009 - ST dated 29th January 2009.

4. Subject project of M/s Modi Ventures., qualified to be a residential complex as it contains more than 12 residential units with common area and common facilities like common water supply etc., and the layouts were approved by the concerned authorities in terms of Section 65(91a) of the Finance Act, 1994. M/s Modi Ventures received the amounts from the customers as mentioned in the sale deeds and agreements of construction. As seen from the records submitted, the assessee entered into (i) a sale deed and (ii) an agreement for construction with their customers. On execution of the sale deed, the right on a property got transferred to the customer, hence the construction service rendered by the assessee thereafter to their customers under agreement of construction appeared taxable under Service Tax as there existed service provider and service recipient relationship between them. As transfer of property in goods is involved in the execution of these contracts, it appeared that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide the sale deeds were taxable services under Construction of Complex Services / Works Contract Service.

Complex Service before 01.06.2007, hence, it appeared that the benefit of Composition scheme cannot be extended in terms of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

8. As the assessee did not furnish month wise particulars of amounts received exclusively on agreements for Construction. Hence, the Service Tax liability was arrived at on the basis of soft copies of the books of accounts provided by them vide their letter dated 20.01.2010. The Board vide Circular No. 108/02/2009-ST, dated 29th January 2009 clarified that Service Tax is not chargeable for services provided upto the stage of Sale deed. Therefore, the receipt of amounts from each customer, to the extent of the sale deed value, were excluded from the total receipts of individual customer to arrive at the total taxable value of construction services rendered, post execution of sale deed.

9. From June, 2007 to December, 2010, the assessee collected an amount of Rs. 13,81,56,949/- against Agreements of Construction in respect of ongoing Works contracts. In respect of these contracts, the benefit of Composition Scheme appeared not extendable. Further, they have also failed to furnish the details of material consumed. In the absence of which the deduction of material cost under Rule 2A of Service Tax (Determination of Value) Rules, 2006 appeared not extendable. Hence, Service Tax calculated @12.36%/10.30% on Rs.13,81,56,949/-worked out to Rs. 1,58,60,319/- (Service Tax of Rs. 1,53,98,368/-, Education Cess of Rs.3,07,967/-, Secondary & Higher Education Cess of Rs.1,53,984/-). However, M/s. Modi Ventures paid an amount of Rs.20,46,743/- (Rs.9,21,176/- under Construction of Complex Services and Rs.11,25,567/- under Works Contract Services) after 01.06.2007. Thus, it appeared that they short paid/not paid an amount of Rs.1,38,13,576/- (including Cesses) and the same appeared liable for recovery under Section 73(1) of the Finance Act, read with proviso there to. They also appeared liable to pay interest on the said amount under the provisions of Section 75 of the Finance Act, 1994.

10. Therefore, it appeared that M/s.Modi Ventures misinterpreted the Board Circular only with an intention to evade payment of Service Tax and stopped paying Service Tax with effect from 01.01.2009. Further, M/s Modi Ventures were well aware of the provisions and of the liability of Service Tax on receipts against the agreements for Construction and did not assess and did not pay Service Tax properly by suppression of facts and contravened the provisions of Section 68 of the Finance Act, 1994 with intent to evade payment

of Service Tax. It appeared that they intentionally did not show any receipts towards construction in their ST-3 returns and misinterpreted the definition of the Works Contract Service with intent to evade payment of Service Tax. The fact of receipt of the amounts towards construction came to light only after the department took up the investigation. Hence, the Service Tax payable by M/s. Modi Ventures appeared recoverable under proviso to Sub Section (1) of Section 73 of the Finance Act, 1994.

11. From the foregoings, it appeared that M/s. Modi Ventures, Secunderabad contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 inasmuch as they did not pay the appropriate amount of Service Tax on the value of taxable services and Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 inasmuch as they did not show the amounts received for the taxable services rendered in the statutory Returns and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details / information, with intent to evade payment of Service Tax and hence the amounts appeared liable for recovery under proviso to the Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Further, it appeared that M/s. Modi Ventures rendered themselves liable for penal action under Section 77 and 78 of the Finance Act, 1994.

12.1 Acordingly, show cause notice O.R.No. 125/2011-ST(Adjn) (Commr.) bearing C.No. IV/16/169/2011-Adjn.(ST)(Commr.) dated 24.10.2011 was issued by the Commissioner of Customs, Central Excise and Service Tax, Hyderabad- II Commissionerate to M/s Modi Ventures, Secunderabad requiring them to show cause to the Commissioner of Customs, Central Excise and Service Tax, Hyderabad- II Commissionerate, as to why:

(i) an amount of Rs. 1,38,13,576/- should not be demanded from them towards Service Tax (including Cesses) on the "Works Contract Services", provided by them during the period from 01.06.2007 to 31.12.2010 under the Section 73(1) of the Finance Act, 1994 read with proviso thereto;

(ii) interest at applicable rate(s) should not be demanded from them on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994; and

(iv) Penalty should not be imposed on them under Section 78 of the Finance Act, 1994.

12.2 The above show cause notice was transferred to the Commissioner of Customs, Central Excise & Service Tax, Hyderabad–I Commissionerate vide corrigendum dated 29.06.2012 issued by the Commissioner of Customs, Central Excise & Service Tax, Hyderabad–II Commissionerate.

13.1 M/s. Modi Ventures, Secunderabad, vide their letter dated 21.02.2012 filed reply to show cause notice, wherein they, interalia, submitted as follows:

(i) There is clear violation of principle of Natural Justice as no relied upon documents were supplied to them. Therefore, notice issued violating the Principle of Natural Justice is Void ab initio. In this regard, reference was drawn to the Board's Circular 224/37/2005-CX dated 24.12.2008 and relied on the following case laws:

- Commissioner of Customs, Calcutta Vs Indian Oil Corporation Ltd. 2004 (165) ELT 0257 S.C. - (Maintained in 2005 (186) ELT A119 (S.C.))
- Kothari Filaments Vs Commissioner of Cus. (Port), Kolkata 2009 (233) ELT 0289 S.C
- Rajam Industries (P) Ltd. Vs Addl. D.G, D.C.E.I., Chennai 2010 (255) ELT 0161 Mad
- Robust Protection Forces Vs Commr. of Cus., C. Ex. 85 S.T., Hyderabad 2010 (019) STR 0117 Tri.-Bang

(ii) The SCN was issued without understanding the exact nature of activity undertaken, without examining the agreements in its context, bringing out its own theory though the same is not set out in the statutory provisions, without considering the clarifications issued by the Board, without considering the intention of the legislature but confusing with the provisions of Service Tax, incorrect basis of computation and based on mere assumption, unwarranted inferences and presumptions. Reference in this regard is drawn to the decision of Hon'ble Supreme Court in case Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC) in support of the argument that the entire proceedings under SCN requires to be dropped on this count alone.

(iii) Without prejudice to the foregoing, entire SCN seems to have been issued with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. Therefore the allegation made in the SCN and the entire demand made there under is not sustainable.

(iv) An identified plot is being sold by execution of a "sale Deed" and such sale of immovable property is a subject matter of stamp duty and accordingly Service Tax is not applicable on such transaction and this has been accepted by SCN.

(v) The development and construction of the residential unit is done for the owner of the semi-finished flat/customer, who in turn used such flat for his personal use. It has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29.1.2009 that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no Service Tax is payable on such transactions. This was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27.7.2005 during the introduction of the levy.

(vi) The SCN brought a new theory that the exemption for personal use as stated in the definition would be available only if the entire complex is for personal use of ONE person. While interpreting the law no words should be added or deleted. The law should be read as it is in its entirety. From the preamble of the referred circular, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore, the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the notice.

(vii) It is important to consider what arguments are considered by board for providing this clarification. The relevant part as applicable in the context has been extracted for ready reference. *"...It has also been argued that even if it is taken that service is provided to the customer,* ***a single residential unit bought by the individual customer*** *would not fall in the definition of 'residential complex' as defined for the purposes of levy of Service Tax and hence construction of it would not attract Service Tax..." (Para 2).*

(viii) The argument is in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been provided based on the examination of the above argument among others. The final clarification was provided by the board based on the preamble and the arguments. The clarification provided is that in the under mentioned two scenario Service Tax is not payable:

- For service provided until the sale deed has been executed to the ultimate owner.
- For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

(ix) The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore, this clarification is applicable to them.

(x) The department has very narrowly interpreted the Board's clarification and concluded that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex.

(xi) Where an exemption is granted through Circular No. 108/2/2009-S.T. dated 29.1.2009, the same cannot be denied on unreasonable grounds and illogical interpretation as above. In the definition *"complex which is constructed by* ***a person*** *directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for* ***personal use*** *as residence by* ***such person"***. Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person** "similar the reference "personal use as residence by **such** person" also cannot be interpreted as "personal use by **ONE person"**. Such interpretation would be totally against the principles of interpretation of law and also highly illogical.

(xii) With the above exclusion, no Service Tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

(xiii) Non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27.7.2005 during the introduction of the levy, therefore the Service Tax is not payable on such consideration.

(xiv) The Board in between had clarified in an indicative manner that the personal use of a residential complex is not liable for Service Tax in the Circular F.No. 332/35/2006-TRU, dated 1.8.2006.

(xv) Assuming but not admitting that when the entire residential complex is meant for a person for his personal use, then such complex falls under excluded category is to be considered as interpreted by the SCN, then the entire Section 65(91a) gets defeated as in case complex belonging to single person there would be nothing called as a common area, common water supply etc, the word "common" would be used only in case on multiple owner and not in case of single owner, therefore the interpretation of the department is meaningless.

(xvi) Without prejudice to the foregoing, the following decisions that have been rendered relying on the Circular 108 are as under:

- M/s Classic Promoters and Developers, M/s Classic Properties Vs. CCE Mangalore 2009-TIOL-I 106-CESTAT-Bang
- M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD
- Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG.-CESTAT)
- Ocean Builders Vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang
- Mohtisham Complexes Pvt. Ltd. Vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang
- Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

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

(xviii) Further, Notification No. 36/2010-ST dated 28.06.2010 and Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010 exempts the advances received prior to 01.07.2010, this itself indicates that the liability of Service Tax has been triggered for the construction service provided after 01.07.2010 and not prior to that, hence there is no liability of Service Tax during the period of the subject notice.

(xix) Trade notice F.No VGN(30)80/Trade Notice/ 10/Pune dated 15.02.2011 issued by Pune Commissionerate specifically clarified that no Service Tax is payable by the builder prior to 01.07.2010 and amounts received prior to that is also exempted. Since the issue is prior to such date the same has to be set aside.

(xx) Further, the clarification has been issued by the board Circular No. 151/2/2012-ST, dated 10.2.2012, wherein it has clearly clarified that there is no Service Tax liability prior to 01.07.2010.

(xxi) The Hon'ble Tribunal of Bangalore in the case of Mohtisham Complexes (P) Ltd. Vs Commissioner of C. Ex., Mangalore 2011 (021) STR 0551 Tri.-Bang stating that the explanation inserted to Section 65(105)(zzzh) from 01.07.2010 is prospective in nature and not retrospective.

(xxii) The definition of works contract service also uses the phrase "Residential Complex" therefore on the same ground of personal use as mentioned supra would mutasis mutandi apply to works contract service as well.

(xxiii) On introduction of works contract service the charging section 66 of the Finance Act, 1994 was amended to include clause (zzzza) to be taxed at the rate of 12%. In addition to this there is an option of payment of Service Tax under

composition scheme under the Works Contract (Composition Scheme of Payment of Service Tax) Rules, 2007.

(xxiv) Department contended the benefit of Composition scheme in respect of long term contracts entered prior to 1.6.2007 is not applicable by misinterpreting the clarification issued by CBEC vide Circular No. 128/10/2010-ST dated 24.10.2010. When Service Tax was not applicable prior to 01.06.2007 then amount erroneously paid cannot be considered as Service Tax at all, therefore that implies that no Service Tax has been paid on such contract and can opt making payment of Service Tax under the composition scheme.

(xxv) Assuming but not admitting that amount erroneously paid if considered Service Tax, on close reading of Rule 3(1) and Rule 3(3) it clearly specified that instead of paying Service Tax at the rate specified under Section 66 composition rate may be opted and such option can be opted before paying Service Tax in respect of the said works contract, therefore the Service Tax so referred in Rule 3(3) is only the Service Tax paid at normal rates under works contract service only and not under any other service.

(xxvi) When a new levy has been introduced and Service Tax is applicable only after such date, then the question of assuming that the reference of Service Tax paid made in Rule 3(3) can in no point of imagination can be considered that the reference is with respect to payment under any other service.

(xxvii) Assuming but not admitting that there being a Service Tax liability on such transaction, the liability has been rightly discharged and amount paid prior to 01.06.2007 is erroneous. Therefore the SCN has to set aside.

(xxviii) Rule 3(1) of Works Contract (Composition scheme for payment of Service Tax) Rules, 2007 overrides the Section 67 of Finance Act and Rule 2A of the Service Tax (Determination of Value) Rules, 2006. When they are opting for composition scheme the valuation has to be done as per Works contract (Composition scheme for payment for payment of Service Tax) Rules, 2007 and not under Rule 2A of Service Tax (Determination of Value) Rules, 2006 for (exclusion of value of materials).

(xxix) It is difficult for them to assess the value of transfer of property in goods in the execution of the said works contract. So, because of the above reason they opted for composition scheme.

(xxx) When there is no change of their activity for the same transaction and for the same agreement/contract, however only based on the period how the same can be classified under two different category of service is not been bought but the SCN and also the legal basis for classification is also not provided. Further such classification is against the principles of classification as if the transaction is covered under one category, the need of new service introduction was not warranted.

(xxxi) The above interpretation would have been possible in case if on introduction of the "works contract service" the "construction of complex service" was deleted. However, in the absence of such deletion, it is clear that what is covered under "residential complex service" is not covered under "works contract service" and therefore classification of the same contract under tow different service is not improper.

(xxxii) Such act is against the Circular No. 98/1/2008-S.T., dated 4.1.2008, where it is clearly clarified that *"vivisecting a single composite service and classifying the same under two different taxable services depending upon the time of receipt of the consideration is not legally sustainable".*

(xxxiii) Without prejudice to the foregoing, the receipts upto 31.05.2007 is not liable for Service Tax, since the same is covered under the "works contract service" which is applicable to tax only with effect from 01.06.2007 and hence the liability on all the receipts after 01.06.2007 under composition scheme (2.06% & 4.12% as

applicable for the relevant period) the liability of Service Tax would be Rs.10,34,269/-. Even assuming Service Tax has to be paid, there has been an error in computation of service by the SCN the actual amount payable would be Rs. 13,46,478/-.

(xxxiv) If at all payment under composition scheme is not permitted, that restriction is only for the "ongoing contract" and not the "ongoing project". Each project would be covered by a multiple contract/agreements with the various customer and the restriction if at all can be made on such contract/agreements which has been entered prior to 01.06.2007 and Service Tax was paid on the same under "construction of complex service" only, which for continuing the payment under the "construction of complex" under the abatement scheme, there is no restrictions since the entry "construction of complex" is still in existence has not been deleted. Further the contract entered after 01.06.2007, that no Service Tax paid at all on such contract earlier would also qualify for the abatement scheme at the applicable rates and hence such benefit has to be extended and accordingly Service Tax payable on the same would amount to Rs. 29,03,039/-.

(xxxv) Without prejudice to the foregoing, the change of classification any payment under composition is not permitted for the entire project then the Service Tax can be paid under the "construction of complex service" under the abatement scheme, throughout the period.

(xxxvi) When Service Tax itself is not payable, the question of interest and penalty does not arise. 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).

(xxxvii) Without prejudice to the foregoing, the demands are barred by limitation inasmuch as it has invoked the extended period of limitation under proviso to Section 73(1) of the Finance Act, 1994 mechanically without any justification. There was a complete disclosure to the department as to their understanding to the department by way of the repeated correspondence and also they had sought clarification from the Board, which is still awaited, in such scenario invoking extended period of limitation based on this ground. When they volunteered and has intimate to the department as to non-payment of Service Tax and the same was not reacted by the Department at that juncture and invoking extended period of limitation on a later date does not arise.

(xxxviii) SCN has not clearly brought out that what misinterpretation or what incorrect conclusion was made by them in the entire notice, but is only a mere allegation without any substance. SCN has not brought out any documentary evidence to prove that the misinterpretation of definition of works contract has resulted in evasion of Service Tax.

(xxxix) The interpretation of the definition of works contract as made by them and by the department vide para 7 is one and the same, that is the amount received post 01.06.2007 is leviable to Service Tax under "works contract service". Further, the advice for change of classification from "construction of complex service" to "works contract service" was recommended by the Additional Commissioner of Service Tax, Hyderabad-II Commissionerate vide letter No. HQ ST No. 8 dated 21.02.2008 and hence the same is not their brain child, but the same was that of the Department.

(xl) Non-payment of Service Tax due to interpretation of statutory provisions cannot be a ground for invoking extended period of limitation. In this regard, they relied on the following case laws:

- Sujana Metal Products Ltd. Vs Commissioner of C.Ex., Hyderabad 2011 (273) ELT 0112 Tri.-Bang
- Marsha Pharma Pvt. Ltd. Vs Commissioner of C. Ex., Vadodara 2009 (248) ELT 0687 Tri.-Ahmd
- Jagriti Industries Vs Collector of Central Excise, Aurangabad 2001 (127) ELT 0841 Tri.-Del

(xli) Vide their letter dated 18.11.2009, they disclosed that it was in receipt of the consideration for the consideration, however based on the circular Service Tax was not paid and hence such allegation that fact reveled only after investigation is not factual and hence on such ground extended period should not be invoked. In this regard, they placed reliance on the following judicial decisions to support their contention:

- Mercantile & Indus. Development Co.Ltd. Vs C.C.E. Mumbai-II
- Cosmic Dye Chemical v. CCE, 1995 (75) ELT 721 (SC)
- T.N. Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC)
- Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)
- Padmini Products v. CCE, 1989 (43) ELT 195 (SC)
- Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC)
- Gopal Zarda Udyog v. CCE, 2005 (188) ELT 251 (SC)
- Kolety Gum Industries v. CCE, 2005 (183) ELT 440 (T)
- GTN Enterprises Ltd., Vs. CCE, 2006(200) E.L.T. 76(Tri. Bang)

(xlii) Balance sheet of companies being a publicly available document, allegation of suppression of such information, not sustainable and extended period is not invokable. In this regard, they relied on the following case laws:

- Martin & Harris Laboratories Ltd. v. CCE 2005 (185) E.L.T. 421 (Tri)
- Hindalco Indus. Ltd., v. CCE, Allahabad, 2003 (161) E.L.T. 346 (T)
- Rama Paper Mills vs Commissioner of C. Ex., Meerut 2011 (022) STR 0019 Tri.-Del

(xliii) The Hon'ble Supreme Court in case of CCE Vs. Alcobex Metals 2003 (153) ELT 241 (SC) held that once the notice is issued under the proviso for larger period, it cannot be treated as notice under main Section 11A ibid for shorter period of six months. On this ground, since the notice is issued under proviso to section 73(1), it cannot be converted into regular period and demand the Service Tax under Section 73(1).

(xliv) When the tax itself is not payable, the question of penalty under Section 78 does not arise. Further, assuming but not admitting, that there was a tax liability as envisaged in SCN as explained in the previous paragraphs, when they were not at all liable for Service Tax and further also there was a basic doubt about the liability of the Service Tax itself, they were acting in a bona fide belief, that they are not liable to collect and pay Service Tax, there is no question of penalty under Section 78 resorting to the provisions of Section 80 considering it to be a reasonable cause for not collecting and paying Service Tax.

(xlv) All the grounds taken for "extended period of limitation" above is equally applicable for penalty as well. There is lot of confusion of applicability of service on their activity. Suppression or concealing of information with intent to evade the payment of tax is a requirement for imposing penalty. It is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be intention of evasion and penalty cannot be levied. In this regard, they relied on the following case laws:

- Hindustan Steel Ltd. V. State of Orissa - 1978 (2) ELT (J159) (SC)
- Akbar Badruddin Jaiwani V. Collector - 1990 (47) ELT 161(SC)
- Tamil Nadu Housing Board V Collector - 1990 (74) ELT 9 (SC)

13.2 Dates for personal hearing were fixed on 06.12.2012 and 18.12.2012. Shri V.S.Sudhir, Chartered Accountant and authorised representative along with Shri Soham Modi, Partner of M/s. Modi Ventures, Secunderabad appeared for personal hearing on 18.12.2012. They reiterated the written submissions made vide their letter dated Nil received by the Department on 22.02.2012. They submitted additional written reply dated 18.12.2012 and stated that the cost of material transferred be allowed as

deduction while calculating the taxable value. In this context, they requested for two days time for submitting additional information in the case and requested to decide the case taking into consideration their submissions in the case.

13.3 In the additional written reply dated 18.12.2012 filed during the course of personal hearing, wherein, while reiterating the submissions made in their reply dated 21.02.2012, they, interalia, submitted as follows:

(i) The demand under the "Construction of complex service" for period prior to 1.6.2007 and under "Works contract service" after 1.6.2007 is not sustainable.

(ii) Assuming but not admitting the Service Tax, if any, is payable in so far as levying Service Tax on the value of materials involved in the said Works Contract is concerned, it is Ultra-Vires the constitution as Article 265 of Constitution of India clearly stated that no tax can be collected without the authority of law. In the present case, Department has no authority to levy Service Tax on the materials portion involved in the contract.

(iii) The question came for consideration in Builders' Association of India & Ors, v. Union of India & Ors. [(1989) 2 SCC 645] and M/s. Gannon Dunkerley 3s Co. & Ors. Vs. State of Rajasthan & Ors. [(1993) 1 SCC 364]. It has expressly been laid down therein that the effect of amendment by introduction of clause 29A in Article 366 is that by legal fiction, certain indivisible contracts are deemed to be divisible into contract of sale of goods and contract of service.

(iv) Applying the same rationale, in the present case Service Tax should be collected on charges which appertain to the contract for supply of labour and services and should not be levied on the value of goods involved in the execution of the Works Contract.

(v) Assuming the benefit of composition scheme is available as articulated by Rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 is available only where an option has been exercised prior to payment of Service Tax in respect of a particular works contract. In this regards, it is pertinent to discuss what a contract is. Can it be said that entire project of Gulmohar Gardens is a Contract? According to Section 2 sub-section (7) of The Indian Contract Act, 1872, Contract is defined as "an agreement enforceable by law". In this regards, it is important to note that they enter into an individual agreement to sell for each unit in the Project Gulmohar Gardens. Later, a sale deed is executed to enforce each such agreement to sell. A sale deed is governed by The Registration Act, 1908 and is an important document for both the buyer or the transferee and the seller or the transferor. *A sale deed is executed after the execution of the agreement to sell,* and after compliance of various terms and conditions between the seller and the purchaser mutually. Therefore, each contract (sale deed) entered into with each owner is a separate works contract and benefit of composition should be given to each contract entered into on or after 01.06.2007 and where payment has not been made otherwise than for composition scheme.

(vi) Without prejudice to the foregoing, on close reading of Rule 3(1) and Rule 3(3) it clearly specified that instead of paying Service Tax at the rate specified under Section 66 composition rate may be opted and such option can be opted before paying Service Tax in respect of the said works contract, therefore the Service Tax so referred in Rule 3(3) is only the Service Tax paid at normal rates for the works contract service only and not under any other service.

(vii) It is also a well settled principle of law that the law does not compel a man to do that which he cannot possibly do and the said principle is well expressed in legal maxim "lex non cogit ad impossibilia" which is squarely attracted to the facts and

circumstances of the present case. The unforeseen circumstances beyond the control of the noticee if resulted in payment of Service Tax under taxable service as existed at that point of time, substantial benefit extended under another service introduced at later point of time cannot be denied. In this regard, they relied on the on the decision of the Hon'ble Tribunal in the case of Sundram Fasteners Ltd. v. Collector of Central Excise, Madras reported in 1987 (29) E.L.T. 275.

(viii) They paid an amount of Rs.38,13,888 However, notice has acknowledged only Rs.20,46,743.

(ix) In case Service Tax, if any, is payable by them and composition benefit is not extended, the Cenvat credit benefit on Input services should be extended and if at all such benefit is not extended to them they shall be eligible to avail benefit on inputs received by them as well.

(x) The penalty is not imposable on them and their case is a fit case for waiver of penalty under Section 80 on the following grounds:
   a. Reasonable Cause
   b. Bona fide Belief
   c. Confusion, Interpretation issues involved

13.4 Further, the noticee also made additional submissions vide their letters dated 24.12.2012 and 02.01.2013 giving the details of consumption of materials in the said project and accordingly computation of service tax and as well as on the basis of composition scheme.

14. I have carefully gone through the show cause notice, written reply submitted by the noticee, submissions made during the course of personal hearing held on 18.12.2012, additional submissions made subsequently and duly considered the case laws relied upon by them in their support.

15. In the case on the hand, demand of service tax was made against the noticee on the provision of service under the category of Works Contract Service during the period from 01.06.2007 to 31.12.2010. The nature of activity in the instant case is that the noticee undertook construction of residential complex having more than 12 residential units by name and style as Gulmohar Gardens. Consequent to sale deed for semi-finished flats, they entered into agreement of construction/completion with individual buyers of residential units.

16.1 It is contended by the noticee that the construction of residential units for individual prospective buyers intended for personal use and are outside purview of Service Tax in terms of Section 65(91a)(iii) of the Finance Act, 1994 and Board's Circulars No.108/2/2009-ST dated 29.01.2009, F.No. 332/35/2006-TRU dated 01.08.2006 and Board's letter F.No. B1/6/2005-TRU dated 27.07.2005 and as such there is no levy of service tax. Here, it would be pertinent to look into relevant provisions of the Finance Act, 1994, which are reproduced hereunder:

Section 65(91a) of the Finance Act, 1994:

"(91a) "residential complex" means any complex comprising of—

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

(ii) a common area; and

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

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

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

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

On a careful reading of the above provisions, it is clear that if a complex is constructed by a person directly engaging any other person for designing or planning and the construction of the said complex is intended for personal use then such service is excluded from the levy of service tax. However, the said exclusion is not applicable to the individual residential unit in a complex having more than twelve residential units. Further, as rightly contended by the noticee that while interpreting the statutory provisions of the law no words should be added or deleted. Further, when the law is unambiguous, the same needs to be implemented in letter & spirit and without any deviations to it. From the above, the intent of the legislature is very clear that construction of entire residential complex which is intended for personal use is excluded from levy of service tax and not the single residential unit in a complex. In this regard, the following case laws are relied upon;

(i) State Vs. Parmeshwaran Subramani [2009 (242) ELT 162 (SC)]

"15. In a plethora of cases, it has been stated that where, the language is clear, the intention of the legislature is to be gathered from the language used. ***It is not the duty of the court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain.*** *The court cannot rewrite the legislation for the reason that it had no power to legislate. The court cannot add words to a statute or read words into it which are not there.* ***The court cannot,***

on an assumption that there is a defect or an omission in the words used by the legislature, correct or make up assumed deficiency, when the words are clear and unambiguous. *Courts have to decide what the law is and not what it should be. The courts adopt a construction which will carry out the obvious intention of the legislature but cannot set at naught legislative judgment because such course would be subversive of constitutional harmony".*

(ii) UOI Vs. Dharmendra Textile Processors [2008 (231) ELT 3 (SC)]

"It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements."

Thus, the contention of the noticee in this regard is not acceptable. In this regard, it would be pertinent to draw the reference to the Hon'ble CESTAT, Chennai Bench, in case of M/s.LCS City Makers Pvt. Ltd., vs. CST, Chennai (Final Order No. 507/12 dated 03.05.2012), wherein, it has been held that the exclusion in the definition of the service is for a complex intended for personal use and the clause cannot be applied to individual flats in a complex. Further, in the circulars relied upon by the noticee, it has categorically been clarified that when the ultimate owner enters into a contract for construction of a ***residential complex*** (emphasis supplied) with a builder and after such construction the owner receives such property for personal use then the same is excluded as per the definition provided under Section 65(91a) of the Finance Act, 1994. Thus, it appears that the noticee failed to understand the provisions of statute and content of the said circulars. It is also pertinent to mention that it has clearly been brought out in the show cause notice that the demand of service tax is in consonance with the Board's Circular dated 29.01.2009. Thus, the contention of the noticee is not acceptable and the case laws are clearly distinguishable to the facts of the case. For instance, in case of M/s Classic Promoters and Developers, M/s Classic Properties Vs. CCE Mangalore [2009-TIOL-1106-CESTAT-Bang], it is only an interim order while disposing the stay application and has not attained finality. In cases of Ardra Associates Vs. CCE, Calicut - [(2009) 22 STT 450 (BANG.-CESTAT)] and Shri Sai Constructions vs Commissioner of Service Tax, Bangalore [2009 (016) STR 0445 Tri.-Bang], the matter was remanded for denovo and the issue has not reached finality.

16.2 It is also contended by the noticee that the explanation under Section 65(105)(zzzh) was inserted only with effect from 01.07.2010 and the same is prospective in terms of the clarification issued by the Board vide letter D.O.F.No.334/1/2010-TRU dated 26.02.2010 and as such levy of Service Tax on the construction service prior to that date is not tenable. Before going into the merits of contention, it would be relevant to look into the said explanation which is reproduced hereunder:

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

On plain reading of the above explanation, it is clear that any amount received towards construction of complex intended for sale is subjected to levy of Service Tax under the category of construction of complex service, if the said amount is received before grant of completion certificate by the competent authority. In other words, even sale of constructed complex is deemed service and the same is subjected to levy of Service Tax in case the same has taken place before grant of completion certificate by the competent authority, which was hitherto exempted from levy of Service Tax under the category of construction of complex service. However, in the instant notice, the amounts received from each individual customer to the extent of sale deed value were already excluded from the value of taxable services for the purpose of computation of service tax. Thus, there is no demand of Service Tax on the value corresponding to the sale of residential units and demand was made only on the amounts received from the customers towards construction agreement i.e., post execution of sale deed. Hence, there is no case for the noticee inasmuch as their contention was already considered positively in the demand notice itself. Similarly, the reliance placed on Notification No.36/2010-ST dated 26.08.2010 is also of no help to their case. As regards to the reliance placed by the noticee on the Board's Circular No.151/2/2012-ST dated 10.02.2012, the said circular clarified the issues relating to Tripartite Business Model. However, in the instant case, there is no such business model and accordingly reliance on the said circular is misplaced by the noticee. Thus, there is no case for noticee inasmuch as the same was already considered in the show cause notice itself.

16.3 It is also contended by the noticee that the construction of

complexes undertaken by them cannot be classified under two categories based on the period of provision of service and accordingly the demand is not sustainable. It is not in dispute that the service category of 'construction of residential complex' was introduced with effect from 16.06.2005 and was very much in existence during the material period. Works Contract Service came into being w.e.f 1.6.2007 and includes services such as construction of residential complex, erection, commissioning or installation, etc., with a specific condition that there should be transfer of property in goods involved in the execution of such contract and the same should be liable to sale tax. The only new activity brought in the ambit of Service Tax under Works Contract service was services relating to carrying out turnkey projects including EPC projects. The very purpose of introduction of works contract service was to enable the service provider to pay the Service Tax on the service portion alone where there was a possibility of bifurcation of materials and service values. This will in no way imply that services provided are classified under two categories. Further, there is no dispute that the noticee undertook the construction of residential complex having more than 12 residential units. It would be pertinent to mention that clause (c) of the explanation of works contract service as provided under Section 65(105)(zzzza) of the Finance Act, 1994 covers services relating to construction of a new residential complex or a part thereof only. In this regard, reliance is placed on the following judicial pronouncements:

(i) Alstom Projects India Ltd Vs CST, Delhi [2011 (23) STR 489(Tri-Del)], wherein it was held as follows:-

"(2) The entry "Service in relation to execution of work contract" as defined in Section 65(105)(zzzza) is different from services defined in other sub-clauses of Section 65(105). In fact, as discussed above, Section 65(105) (zzzza) read with Rule 2A of Service Tax (Determination of Value) Rules, 2006 and Work Contract (Composite Schemes for Payment of Service Tax) Rules, 2007 only provide a new machinery provision for assessment of Service Tax on "Erection, installation or Commissioning Contracts", "Commercial or industrial construction contracts", "Residential Construction Service Contracts" and "EPC Contracts" involving transfer of property in goods on which Sales Tax/VAT is chargeable. But it does not mean that these contracts were not liable to Service Tax prior to 1-6-07 as, as discussed above, "erection, installation or commissioning services", "commercial or industrial construction service", Residential constructions services were taxable even prior to 1-6-07, even if the same involved use/supply of goods on which Sales tax/VAT was payable. Similarly in respect of EPC contracts which are divisible contracts for design & engineering, procurement of goods, erection, installations & commissioning, Service Tax was chargeable even prior to 1-6-07 on these taxable service component. The taxable services covered by Section 65(105)(zzzza) and the services covered by Section 65(105)(zzd) [erection, installation or commission services], Section 65(105)(zzq) (Commercial or industrial construction service) and Section 65(105)(zzzh) [residential construction service] are overlapping. While w.e.f. 1-6-07, following the principle of harmonious construction, it can be said that while Section 65(105)(zzzza) would cover the services defined by Section 65(105)(zzd), Section 65(105)(zzq), Section 65(105)(zzzh) and EPC contracts which involve transfer of property is goods on which tax as sale of goods is leviable, and Section 65(105)(zzd), 65(105)(zzq) and Section 65(105)(zzzh) will cover erection, installation or commissioning service, 'commercial or industrial construction

services' and 'residential construction services' respectively not involving transfer of property in goods, but it does not mean that prior to 1-6-07, the services covered by Section 65(105)(zzd), 65(105)(zzq) and 65(105)(zzzh) involving transfer of property or goods were not taxable. Giving such an interpretation to Section 65(105)(zzzza) will be against the intention of the legislation to tax- "erection, installation or commissioning services", "commercial or industrial construction services", or "residential construction service' during the period prior to 1-6-07. Thus Section 65(105)(zzzza) is more like heading 98.01 of India Customs Tariff pertaining to Project Imports which provides a separate mode of assessment of Customs duty on a number of machines and other goods imported for initial setting up of a plant or a substantial expansion of an existing plant. The judgment of Hon'ble Bombay High Court in case of *Indian National Shipowners Association* (supra) is therefore not applicable to the services covered under Section 65(105)(zzzza) as services covered by this Section and Section 65(105)(zzd), 65(105)(zzq) and (zzzh) are overlapping. As regards the judgment of Hon'ble Karnataka High Court in case of *Turbotech Precisions Engineering P. Ltd.* (supra) since this judgment does not discuss as to how prior to 1-6-07, the type of contracts mentioned in *Explanation* to Section 65(105)(zzzza) were not taxable under Section 65(105)(zzd), 65(105)(zzq) or 65(105)(zzzh), the same is not a binding precedent.

(3) Tribunal in case of *Sunil Hi-tech Engineers Ltd.* v. *CCE, Nagpur* (para 5 of the judgment), reported in 2010 (17) S.T.R. 121 has held that construction service was taxable even during period prior to 1-6-07, the date from which Section 65(105)(zzzza) regarding 'works contract service' was introduced."

(ii) M/s.LCS City Makers Pvt. Ltd., vs. CST, Chennai (Final Order No. 507/12 dated 03.05.2012), wherein, it was held as follows:

"10.2. We have examined this argument. What we find is that the entry in section 65 (105) (zzzza) of Finance Act, 1994, called as "Works Contract Service" covers certain services which are covered by entries in section 65(105)(zzd), 65 (105) (zzq), 65 (105)(zzt), 65(105) (zzzh), etc of the said Act, before and after the introduction of the new entry for works contract. So this cannot be interpreted as an altogether new entry. It only provides a new method of determining the liability on such services at the option of the service provider....."

Following the ratio of the above referred decisions of the Hon'ble Tribunal and going by the facts of the case, the activity of construction service provided by the noticee clearly falls under clause (c) of the explanation of works contract service in terms of Section 65(105)(zzzza) of the Finance Act, 1994. Thus, the contention of the noticee in this regard is not acceptable.

16.4 It is further contended by the noticee that the benefit of payment of tax under composition scheme should be extended to them under the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007. The service tax paid by the noticee under construction of complex service for the provision of services pertaining to impugned project prior to 01.06.2007 should be considered as payment of service tax. Before going into the merits of the contention, it would be pertinent to look into the relevant statutory provisions of the Act, which are as follows:

Rule 3 of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007:

(1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay Service Tax in relation to works contract service ***shall have the option*** *to discharge his Service Tax liability on the works contract service provided or to be provided, instead of paying Service Tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two percent of the gross amount charged for the works contract.*

Explanation: For the purpose of .....

(the rate of two percent has been increased to four percent with effect from 01.03.2008 vide Notification No.7/2008-ST dated 01.03.2008)

(2) The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

(3) The provider of taxable service ***who opts to pay Service Tax under these rules shall exercise such option in respect of a works contract prior to payment of Service Tax in respect of the said works contract*** *and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.*

Rule 3(1) of the said Rules gives an option to the provider of taxable service to discharge the Service Tax on composition basis. Rule 3(2) specifies that credit on inputs used in providing such service shall not be allowed. Rule 3(3) mentions that the provider of taxable service shall exercise such an option prior to payment of Service Tax in respect of the works contract. Thus, the payment of Service Tax under composition scheme is subject to certain conditions as mentioned above. It is the responsibility of the service provider to follow the conditions to avail the benefit under the said scheme. The service provider has to exercise an option before making payment of Service Tax in respect of works contract for which they intend to avail the benefit under the said scheme. Since the option is to be exercised before making payment of service tax in respect of works contract and in the instant case the noticee already paid service tax under the category of construction of complex service in respect of such works contract, the noticee is not entitled for the benefit under the composition scheme. In this regard, the reliance is placed on the decision of the Hon'ble High Court of Andhra Pradesh in the case of M/s. Nagarjuna construction Company Limited vs. Government of India [2010 (19) STR 321 (A.P.)], wherein it was held that:

"On a true and fair construction of Rule 3(3) of the 2007 Rules, it is clear that where in respect of a works contract service tax has been paid, no option to pay service tax under the composition scheme could be exercised. There is no ambiguity in this provision. *The entitlement to avail the benefits of the composition scheme is only after an option is exercised under Rule 3(3) of the 2007 Rules and this provision specifically enjoins a disqualification for exercise of such option where Service Tax had been paid in respect of a works contract. To put it succinctly, where Service Tax has been paid in respect of a works contract, the eligibility to exercise an option to avail the benefits of the composition scheme under the 2007 Rules is excluded."*

The above said decision is affirmed by the Hon'ble Apex Court [2012-TIOL-107-SC-ST]. Further, the contention of the noticee that payment made under the category of construction of complex service should not be taken into consideration defies any logic. It is further contended by the noticee that the project undertaken by them is not covered under single works contract and that separate contracts for each residential unit were entered into with individual buyers as such the benefit of composition scheme should be extended to them in respect each such contract which was entered after 01.06.2007 and no payment of tax was made. In the instant case, there is no dispute that the noticee undertook the construction of complex having more than 12 residential units. The construction of entire residential complex is subjected to levy of service tax and accordingly the entire complex is one works contract in terms of the provisions of clause (c) of the explanation under Works Contract Service as provided under Section 65(105)(zzzza) of the Finance Act, 1994. Further, the construction of each residential unit is only a part of works contract i.e., entire complex and each such construction of residential unit cannot be construed as separate works contract. Thus, the contention of the noticee is not acceptable.

16.5 It is also contended by the noticee that the value of the materials involved in execution of impugned project should be allowed as deduction from the value of taxable services in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006. There is no dispute that the value of works contract service would be the gross amount charged for works contract less the value of transfer of property in goods involved in such works contract in terms of Rule 2A of the Rules, ibid. It is also pertinent to mention that it has clearly been brought out in the notice that the gross receipts were taken into account as the noticee failed to submit the details of the value of transfer of property in goods. Further, the onus lies on the tax payer to establish the value of transfer of property in goods involved in works contract to deduct the

value of the same from the taxable value. However, in the instant case, the noticee could not produce any meaningful documentary evidence except submitting a mere statement of consumption of the materials. On perusal of the same, it is observed that the statement was given without any supporting documentary evidence. Further, the statement does not specify at least that the said consumption pertains to the impugned project. It is also pertinent to mention that the Chartered Accountant has simply certified that the same is as extracted from their books of accounts on computer, but failed to mention the certificate is related to which project. It is not on record that the Chartered Accountant has verified the genuineness of the purchase transactions and subsequent consumption details. Thus, the statement submitted by the noticee without any meaningful supporting documentary evidence is not acceptable.

16.6 On their request for extending the benefit of Cenvat credit, it is seen that the issue is beyond the scope of the show cause notice and the noticee are open to claim the same subject to compliance of the legal provisions to this effect.

17.1 On the issue of limitation, it is contended by the noticee that the non-payment of service tax is only due to interpretation of statutory provisions and accordingly extended period of limitation is not invokable. In the instant case, in view of the discussions supra, it has clearly been established that the services provided by the noticee rightly classifiable under Works Contract Service and the same are subjected to levy of service tax. Further, there is no ambiguity in the law and no interpretation is required. The act of non-payment of service tax was unearthed only through the detailed investigation carried out by the department. Thus, the contention of the noticee is not acceptable and the case laws relied upon by the noticee in this regard are distinguishable to the facts of the case. For instance, in case of Jagriti Industries Vs Collector of Central Excise, Aurangabad [2001 (127) ELT 0841 Tri.-Del], the classification lists filed by the assessee were duly approved by the department.

17.2 It is further contended by the noticee that they informed the department about the receipts towards provision of the said services vide their letters and as such there is no suppression of facts on their part. Accordingly, extended period of limitation is not invokable. In the present Indian Tax Regime, many reforms have taken place in order to liberalise the system of

taxation and in the process faith is reposed on the tax payer. Accordingly, self-assessment system has been introduced. In the system of Self-Assessment, greater responsibility is shouldered on the tax payer to classify the taxable service, assess the liability of tax on the services provided by them, maintain their own set of records and discharge the appropriate amount of Service Tax by the due date and also to file the periodical returns i.e., ST-3 Returns in time. In the instant case, it is on record that the noticee got registered with the service tax department. As per Rule 7 of the Service Tax Rules, 1994, every registered person is required to file ST-3 Returns on half-yearly basis by 25th of the following month of that particular half-year. It is on record that though the noticee got registered, they did not file such half-yearly returns for the period from October, 2008 to March, 2010. This act of the noticee clearly establishes that they intentionally suppressed the true information from the department only with an intention to evade payment of service tax. Further, the noticee submitted that they disclosed the information to the department vide letter dated 18.11.2009, copy of the same is not submitted. However, they have furnished the copy of the letter dated 08.07.09 which was submitted by M/s.Mehta & Modi Homes and not by the noticee. Even on perusal of the said letter, it is observed that the said information was furnished by them only on being asked by the department and not on their own. Hence, the same cannot be construed that the noticee disclosed the information voluntarily. It is pertinent to mention that the fact of non-payment of service tax would not have seen light of the day but for the detailed investigation carried out by the department. The noticee on one hand failed to discharge the statutory obligation cast upon them and on other hand pleads that there is no suppression on their part and the same is not acceptable. In this regard, reliance is placed on the following judicial pronouncements:

(i) CCE, Surat-I, vs. Neminath Fabrics Pvt. Ltd [2010 (256) E.L.T 369 (Guj)]:

> *"16. The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.*

17. The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible."

(ii) CCE, Visakhapatnam Vs M/s. Mehta & Co [2011-TIOL-17-SC-CX/ 2011 (264) ELT 481 (SC)]:

"Central Excise – DEMAND – Intention to evade - Limitation – Show Cause Notice issued ***within five years from the date of knowledge of the Department is valid:*** *Although, the respondent has pleaded that it was done out of ignorance, but there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (1) of the Act would get attracted to the facts and circumstances of the present case. The cause of action, i.e., date of knowledge could be attributed to the department in the year 1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15.5.2000, the demand made was clearly within the period of limitation as prescribed, which is five years."*

As regard to the contention of the noticee that Balance Sheets of companies are public documents and extended period is not invokable, it would be pertinent to refer to the decision of the jurisdictional bench of Hon'ble Tribunal in the case of CCE, Calicut Vs Steel Industries Kerala Ltd [2005 (188) ELT 33 (Tri-Bang)] , wherein it was held that the theory of universal knowledge in respect of balance sheet being a public document, is not attracted to the Department of Revenue in absence of any declaration by the assessee. Thus, in view of the discussions, the invocation of extended period of limitation in terms of proviso to Section 73(1) of the Finance Act, 1994 in the instant case is just and the contention of the noticee is not acceptable and it is needless to say that the case laws relied upon by them in this regard are distinguishable to the facts of the case.

18. It is further contended by the noticee that relied upon documents were not supplied to them and on this count alone the show cause notice is

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18. It is further contended by the noticee that relied upon documents were not supplied to them and on this count alone the show cause notice is

not sustainable. As seen from the acknowledgement given by the noticee, wherein it has clearly been mentioned that the said show cause notice was received by them along with all the relied upon documents mentioned in it. Nevertheless, the relied upon documents such as Bank Statements and Books of Accounts of the noticee company, Balance Sheets of the noticee company etc., claimed to have been not supplied by the department were in fact provided only by them to the department. Thus, it is evident that the noticee are only trying to divert the issue from the merits of the case. Hence, the contention of the noticee is not acceptable.

19. In view of the discussions supra, the noticee have no case either on merits or on limitation and accordingly the Service Tax demanded in the notice is liable to be recovered for the extended period under proviso to sub-section (1) of Section 73 of the Finance Act, 1994 along with the applicable interest under Section 75 of the Act, ibid. In this situation, the noticee are also liable for penalty under Section 78 of the Act, ibid. Further, the noticee failed to furnish true and complete facts to the department as prescribed under Section 70 of the Act, ibid read with Rule 7 of Service Tax Rules, 1994 and accordingly rendered themselves liable for penalty under Section 77(2) of the Act, ibid.

ORDER

20. In view of the foregoing facts and findings, the following orders are passed:

(i) Demand of Rs.1,38,13,576/- (Rupees One Crore Thirty Eight Lakh Thirteen Thousand Five Hundred and Seventy Six only) being the Service Tax payable {including Education Cess & Secondary and Higher Education Cess} on the value of services rendered under Works Contract Service during the period from 01.06.2007 to 31.12.2010 is confirmed and ordered for recovery from M/s.Modi Ventures under Section 73(2) of the Finance Act, 1994 read with proviso to Section 73(1) of the Finance Act, 1994 and also read with Section 38A of Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of Finance Act, 1994.

Amount paid, if any, is adjusted against the above confirmed demand and the remaining amount is to be paid by them.

(ii) Interest at the applicable rate(s) on the amount confirmed at (i) above is ordered for recovery from M/s.Modi Ventures under Section 75 of Finance Act, 1994.

(iii) Penalty of Rs.1,38,13,576/- (Rupees One Crore Thirty Eight Lakh Thirteen Thousand Five Hundred and Seventy Six only) equivalent to amount confirmed at (i) above, is imposed on M/s.Modi Ventures under Section 78 of Finance Act, 1994 read with Section 38A of Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of Finance Act, 1994.

However, they may exercise the option for paying reduced penalty of 25% of the above penal amount subject to fulfillment of conditions prescribed therefor in Section 78 of the Finance Act, 1994 read with Section 38A of Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of Finance Act, 1994.

(iv) Penalty of Rs.5,000/- (Rupees Five Thousand only) is imposed on M/s.Modi Ventures under Section 77(2) of the Finance Act, 1994 for failure to furnish true and complete facts to the department within the time period as specified under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994.

17.01.13

(एस. एन. साहा)
(S.N.SAHA)
आयुक्त
Commissioner

To
M/s.Modi Ventures,
5-4-187/3&4, II Floor,
MG Road, Secunderabad-500 003 **(By RPAD)**

Copy submitted to the Chief Commissioner of Customs, Central Excise & Service Tax, Hyderabad Zone

Copy to:
1. The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate.
2. The Assistant Commissioner of Service Tax, Hyderabad-II Commissionerate.
3. M/s. Hiregange & Associates, Chartered Accountants, "Basheer Villa", H.No. 8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad-500 034 **(By RPAD)**

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