be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called 'Construction Agreement' is parrallely executed under which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of service tax payment.

8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged.

4.4. The Appellant therefore submits that the demand raised for the period prior to the date of the explanation is inserted is incorrect. The explanation is inserted with effective from 01.07.2010 but the demand raised in the instant case is for the period 1.6.2007 to 31.12.2010and therefore the demand raised for the period prior to 01.07.2010 is bad in law. The clarification issued by board TRU vide D.O.F No. 334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in 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 prior to 01.07.2010.

4.5. The Appellants further submit that even for periods after 01.07.2010, the service tax could be demanded only under the category of Construction of Complex Services and not under the category of Works Contract Services because the deeming fiction to tax the service component embedded in the transaction is brought

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about only under the category of Construction of Complex Services and not under Works Contract Services

4.6. The Appellants further submit that the need to "deem" a transaction to be a service can arise only in a case where the transaction is not understood to be a service in normal parlance. Thus, through the insertion of the Explanation, the Legislature has clearly accepted the proposition that the transaction is not a service in normal parlance. As such, service tax can be demanded only under the deeming provision and not under any other normal provision like Works Contract Services.

4.7. The above submissions are without prejudice to our earlier submissions that in view of the fact that the transaction constitutes a sale of immoveable property, the same cannot be deemed to be a service at all.

4.8. Without prejudice to the foregoing, Appellant submits that Trade notice F. No. VGN(30)80/Trade Notice/10/Pune dated 15.02.2011 issued by Pune Commissionerate, has specifically clarified that no service tax is payable by the builder prior to 01.07.2010 and amounts received prior to that date are also exempted.

4.9. The Appellant further submits that the Honorable 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. The relevant extract of the subject case is reproduced here under:

"In other words, the present case is covered by the situation envisaged in the main part of the Explanation, thereby meaning that the appellant as a builder cannot be deemed to be service provider vis-a-vis prospective buyers of the buildings. The deeming provision would be applicable only from 1-7-2010. *Our attention, has also been taken to the texts of*

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certain other Explanations figuring under Section 65(105). In some of these Explanations, there is an express mention of retrospective effect. ***Therefore, there appears to be substance in the learned counsel's argument that the deeming provision contained in the explanation added to Section 65(105)(zzq) and (zzzh) of the Finance Act, 1994 will have only prospective effect from 1-7-2010.****Apparently, prior to this date, a builder cannot be deemed to be service provider providing any service in relation to industrial/commercial or residential complex to the ultimate buyers of the property.* ***Admittedly, the entire dispute in the present case lies prior to 1-7-2010. The appellant has made out prima facie case against the impugned demand of service tax and the connected penalty.***

4.10. Appellant submits from the above, it is evident that there shall be no liability for the receipts received for the period prior to 01.07.10.

4.11. The Appellant further submits the Honorable Tribunal of Delhi in the case of Ambika Paints Ply & Hardware Store Vs Commissioner of Central Excise, Bhopal 2012 (27) STR 71 (Tri-Del) has held as under:

"Hon'ble Gau. High Court in the case of Magus Construction Pvt. Ltd. v. Union of India (supra) has held that construction of residential complex by a builder/developer against agreement for purchase of flat with the customers is not service, but is an agreement for sale of immovable property.

4.12. Hon'ble Punjab & Haryana High Court in the case of G.S. Promoters v. Union of India (supra) cited by the learned SDR has only upheld the validity of the explanation added to Section 65(zzzh) by the Finance Act, 2010.

"Moreover, we find that it is only w.e.f. 1-7-2010, that explanation was added to Section 65(zzzh) of the Finance Act, 1994 providing that for the purpose of this sub-clause, construction of a complex which is intended for sale; wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authorized 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. ***This legal fiction introduced by explanation to Section 65(zzzh) has not been given retrospective effect. Therefore, for the period prior to 1-7-2010, the appellant's activity cannot be treated as service provided by them to their customers. In respect of the period prior to 1-7-2010 same view has been expressed by the Board***

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in its Circular No. 108/2/2009-S.T., dated 29-1-09. We are, therefore, of prima facie view that the impugned order is not correct."

4.13. The Appellant submits that the Ld. Respondent vide para 16.2 of the impugned order alleges that since the construction agreement is entered into by Appellant after the execution of the sale deed, the Explanation inserted with effect from 01.07.2010 is not applicable therefore Appellant is liable for the service tax. The Appellant wishes to rely on Board Circular D.O.F. No. 334/1/2010-TRU, dated 26-2-2010

8. Service tax on construction services
8.1 The service tax on construction of commercial or industrial construction services was introduced in 2004 and that on construction of complex was introduced in 2005.
8.2 As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no Service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/completion, pays the consideration in instalments and takes possession of the property when the entire consideration is paid and the construction is over.
8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called 'Agreement to Sell'. At that stage neither the full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called 'Sale Deed' is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.
8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as 'Sale of Undivided Portion of The Land'. This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called 'Construction Agreement' is parrallely executed under which the obligations of the promoter to get property

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constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of Service tax payment.

8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the Service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged.

4.14. The Appellant submits that the above Circular has covered both the situations whether the construction agreement is entered into or construction agreement is not entered into. Therefore even the separate construction agreement entered into by the builder prior to 01.07.2010 is not liable for the service tax. Therefore the allegation of the Ld. Respondent vide Para 16.2 of the impugned order is not tenable.

4.15. Further, the Appellants have already demonstrated in earlier submissions that the Construction Agreement cannot be looked at in isolation of the Sale Agreement.

4.16. The Appellant submits that all advances received prior to 01.07.2010 are not liable for the service tax. In this regard Appellant wishes to rely on Notification No. 36/2010-ST dated 28.06.2012.

"In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in clause (A) of section 76 of the Finance Act, 2010 (14 of 2010) other than services referred to in clause (zzc) and (zzzz) of sub-section (105) of section 65 of the Finance Act from so much of the service tax leviable thereon under section 66 of the Finance Act as is in excess of the service tax calculated on a value which is

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equivalent to the amount of advance payment received before the said appointed date".

4.17. Based on the above developments, the Appellants submit that the service tax law has consistently provided for a differential treatment for contractors as compared to builders and developers. This is further evident from the fact that a different rate of abatement is provided for the builders and developers as compared to the contractors.

4.18. The intention of the Legislature is further evident from the fact that in 2010, when the Explanation was inserted to the definition of taxable service relating to Construction of Complex Service, the Legislature was aware of the two entries pertaining to Construction of Complex Service and Works Contract Service. Though both the entries are similarly worded, the Legislature amended the definition of Construction of Complex Service and also suitably notified a new abatement rate for builders, simultaneously providing for exemption for receipts prior to 01.07.2010, but consciously abstained from undertaking similar amendments under the category of "Works Contract Services"

4.19. The above action of the Legislature of bringing about selective amendments and also clarifying through the TRU Circular clearly suggests that at no point of time, the Legislature intended to tax the transactions undertaken by the Appellants under the category of "Works Contract Services"

4.20. It is an important proposition in law that once the classification alleged in the SCN is incorrect, the entire SCN is bad in law and the entire demand has to fail.

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4.21. The Appellants further submit that since the SCN only alleges categorisation under Works Contract Services, the tax cannot be demanded under any other category either. The demand cannot be confirmed under a category of service different than the one alleged under the show cause notice. For the said purpose, the Appellants rely on the decision of the Delhi Tribunal in the case of Motherson Pudenz Wickmann Limited vs. CCE 2006 (2) STR 63 (Del Trib) wherein it was held that if the allegation in show cause notice is for management consultant only, question whether nature of services provided that of Consulting Engineer could not to be considered in the adjudication order.

4.22. The following observations of the Supreme Court[8] are very relevant:

It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed.

5. *The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer*

5.1. The Appellant submit that the notice has been issued alleging liability under "works contract service" defined vide Section 65(105) (zzzza) of the Finance Act, 1994 and the explanation of the said clause defines "works contact" for the purpose of levy of service tax which inter alia includes construction of a new residential complex or a part thereof. The definition of the "residential complex" has been defined vide section 65(91a) of the Finance Act, 1995 which the taxable object, in case the construction is performed by any

[8] Reckitt and Coleman of India Limited vs. CCE 1996 (88) ELT 641 (SC)

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person which does not fit the definition of residential complex, then such construction would not be covered under the purview of works contract unless specially covered elsewhere.

5.2. Appellant submits that the definition of the "residential complex" is common for both the definition of "Construction of Complex Service" defined under section 65(zzp) of the Finance Act and also the for the definition of "Works Contract Service" defined vide Section 65(105) (zzzza) of the said Act and hence any clarification provided for the "residential complex" is equally applicable for both "Construction of Complex Service" & "Works Contract Service"

5.3. Appellant submits that it has been specifically clarified vide Board ***Circular No. 108/2/2009- S.T. dated 29-01-2009*** that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of residential complex as defined under 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction. The relevant extract of the circular is reproduced here for easy reference:

"Further, if the ultimate owner enters into a Contract for construction if 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 would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of residential complex...."`

Appellant reiterates that the activity undertaken by them is squarely covered by the Board's Circular i.e. they have entered into a construction contract with the Ultimate owner who shall use the said property for his personal use subsequently.

5.4. The Appellant. submits that 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

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provided based on the examination of the above argument among others.

5.5. The Appellant submits the final clarification was provided by the board based on the preamble and the arguments. The relevant portion of the circular is provided here under for the ready reference.

"... The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, 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 would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)*

5.6. The Appellant submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.

a. For service provided until the sale deed has been executed to the ultimate owner.

b. For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

5.7. The Appellant submits that it is exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to

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construction in the construction agreement portion. Therefore this clarification is applicable to them ibid.

5.8. The Appellant submits that the circular has very narrowly interpreted by the department without much application of mind and has concluded in Show Cause Notice 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.

5.9. The Appellant submits that 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 persons**" Such interpretation would be totally against the principles of interpretation of law and also highly illogical. Appellant submits that 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 impugned is void abinitio.

5.10. Without prejudice to the foregoing, the Appellant submits that 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

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interpreted by the impugned order, 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.

5.11. Appellant submits that the impugned order is silent on the allegation as per SCN relating to usage of the complex by a single person, and has concluded that *"However, the said exclusion is not applicable to the individual residential units in a complex having more than twelve residential units"* but has admitted the complex intended for the personal use is excluded, the impugn notice has failed to give the reasoning as the logic or reasoning for such conclusion but has just plainly extracted the definition and has come to such conclusion and hence the same improper. In the instant case all the residential units are for the personal use and hence the complex cumulative of such residential units which is used for the personal use becomes a complex for personal use which has been totally ignored.

5.12. Appellant submits that 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. If the interpretation given by the Ld. Respondent is correct the Board could have clarified that much only. The interpretation given by the ld. Respondent is nowhere whispered in the Circular and it is a bland statement therefore the allegation of the Ld. Respondent is not tenable.

5.13. Appellant further submits that non-taxability of the construction provided for an individual customer intended for his personal was

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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 from abinitio.

Relevant Extract

"13.4 However, residential complex having only 12 or less residential units would not be taxable. Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is also not covered under the scope of the service tax and not taxable"

5.14. Appellant further submits that Supreme Court in *Commissioner of Customs, Calcutta & Others* v. *Indian Oil Corporation Limited & Another,* (2004) 3 SCC 488, after examining the entire case law, culled out the following principles:

"Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it Is contrary to the terms of the statute.
2. Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.
*3 .**A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.***
4. It Is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."

In the Instant case, the show cause notice has been issued contrary to the directions of the **CBEC Circular 108/02/2009 S.T. dated 29.01.2009.** Based on the above judgment the entire proceedings under the subject order is void abinitio and should be quashed.

5.15. Without prejudice to the foregoing, the Appellant further submits that various decision have been rendered relying on the Circular 108 as under

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5.15.1. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL–1106-CESTAT–Bang,

5.15.2. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,

5.15.3. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)

5.15.4. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

5.15.5. Mohtisham Complexes Pvt. Ltd. vsCommr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

5.15.6. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

5.16. The Appellant submits that Ld. Respondent vide Para 16.1 of the impugned order alleges that *"For the instance in the case of M/s. Classic Promoters and Developers, M/s. Classic Properties Vs. CCE Mangalore [2009-TIOL-1106-CESTAT-Bang] it is only interim order while disposing the stay application and has not attained finality"*.

5.17. The Appellant submits that Ld. Respondent has not relied on the Stay order given by the Hon'ble CESTAT since it is interim order. The stay order of the Tribunal has categorical finding that the individual flats constructed for personal use covered under the exclusion clause and hence the Appellant has prima facie of the case and hence the amounts adjudicated in the order are waived. Just because it is an order of stay, the intention of the decision and prima facie of the case cannot be ignored.

5.18. The Appellant submits that submits that Ld. Respondent vide Para 16.1 of the impugned order relied on M/s LCS City Makers Pvt. Ltd

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Vs CST, Chennai Bench, (Final order No. 507/12 dated 03.05.2012) to conclude that one person should use the total complex for the personal use. It is submitted the said circular 108 deals with two portion viz. "self- construction" i.e. construction upto sale deed and "personal use" i. e. construction intend for the personal use of the customer, the decision relied on by the Respondent deals only with the self-construction and the ground taken by the Appellant here is the personal use and hence this decision is not having any bearing in the present case.

6. There *are fundamental errors in the quantification of the service tax demand*

6.1. The Appellants have to submit that notwithstanding the basic ground that service tax is not payable at all, even if it is ultimately held that service tax is indeed payable, there are fundamental errors in the manner of quantification of the service tax demand. The said errors are summarized hereunder:

6.1.1. There is a mismatch in the calculation of the gross receipts on which service tax is demanded

6.1.2. The benefit of reduction on account of materials as statutorily provided under Rule 2A of the Service Tax (Determination of Value) Rules, 2006 has not been granted. In the alternative, the benefit of composition scheme should be granted

6.1.3. Composition Benefit

6.1.4. CENVAT Credit is not granted

6.2. Each of the above aspects are explained in detail in subsequent submissions.

In Re Compilation of the gross receipts

6.1.1.1 The gross receipts has been compiled by the Department based on the books of accounts submitted by the Appellant, however there seems to be a gross error in compilation of the receipts since the same is not matching with to our books of accounts. The SCN has estimate of receipts excluding the value of sale deeds is Rs. 13,81,56,949/- against the actual receipts of Rs,9,77,97,154/-. For instance in the month of April 2008 the actual receipt is Rs.22,97,172/- whereas the receipts considered by SCN is Rs.33,32,201/-.The compilation of the gross amount received and the bifurcation thereof towards Sale Deed, Construction Agreement and other amounts has been given in the annexure to this appeal which has been duly certified by the Chartered Accountant and the certificate has been enclosed.

6.1.1.2 Appellant submits that the fact finding authority is the original adjudication authority and in case the same has been erred by him or ignored by him then the last resort for the fact finding would be the CESTAT. In case such facts are not considered at this stage the same would not be admitted by any higher Judicial forum and this would lead to gross injustice to the appellant.

In re: Quantification of Demand - Rule 2A of Service Tax (Determination of Value) Rules, 2006

6.1.2.1 Appellant submits that the demand had been confirmed on the gross amount at the full rate of service tax. However if at all service tax has to be paid, the same under Works Contract Service, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, which is equivalent to the gross

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amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

6.1.2.2 The Appellant submits that in so far as levying service tax on the value of materials is 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.

6.1.2.3 The Appellant submits that 6th line of the Para 16.5 of impugned order alleges that *"it is also pertinent to mention that it has clearly be brought out in the notice that the gross receipts were taken in to account as noticee fails to submit the details of the value of transfer of property in goods."*

6.1.2.4 The Appellant submits that in reply to show cause notice they have given the material consumption statement showing the total value of the material consumed during the material period. But the Ld. Respondent has not given the benefit of the Rule 2A of Service Tax (Determination of the value) Rules, 2006.The Appellant submits that the allegation of the Ld. Respondent in this regard vide 16.5 of the impugned order *"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".*

6.1.2.5 The Appellant submits that Ld. Respondent is alleging that Appellant has not produced the meaningful documentary evidence therefore the

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benefit of deduction has not given. The Ld. Respondent has made bland allegation and has not explained what constitutes the meaningful documentary evidence and what not constitutes meaningful documentary evidence. It is obvious that in works contract material should be transferred along with provision of the service. The Ld. Respondent has not came with different figure of value of material consumed to oppose the figure of material consumption given by the Appellant, in that scenario it is unreasonable to deny the deduction provided under the Rule 2A of the Service tax (Determination of value) Rules, 2006 to the Appellant.

6.1.2.6 The Appellant submits that Ld. Respondent vide 16.5 of impugned order alleges that *"further the statement does not specify at least that the said consumption pertains to impugned project."* The allegation in the show cause notice pertains to only one project. When the subject matter is only about one project there should not be any doubt about the value of material produced pertains to which project. **The value of material consumed statement along with invoices (documentary proof) has been enclosed along with this appeal memo therefore there shall not be service tax on value of the material.**

6.1.2.7 The Appellant submits that in the case of Indian Railways C & T Corp. 2010 (20) S.T.R. 437 (Delhi HC)–

"The legal propositions, which emerge from a careful analysis of the above-referred decisions, can be summarized as under :-
(a) It is open to the States to levy sales tax/ Value Added Tax, on the whole of the consideration, in transactions of sale of goods, such as sale to a customer in a restaurant, irrespective of the incidental element of service which is necessarily involved in sale of goods of this nature;
(b)If the transaction between the parties is covered under Article 366 (29A) of the Constitution, it is permissible for the States to levy and collect sales tax/Value Added Tax on the value of the goods involved in the execution of the transaction. It is not permissible to levy sales tax/Value Added Tax in respect of service component of such composite transactions"

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Appellant submits that what emerges from the above judgment is that in case of a composite transaction the state are not permitted to levy sales tax/ VAT in respect of service component of such composite transactions. Therefore, similarly applying this rationale in case of Construction contracts which is covered under Article 366 (29A) of the Constitution service tax cannot be levied by the Union on the component of goods. Therefore, impugned order levying service tax at 12.36% on amounts received from the customer is void ab initio and not legally sustainable, which should be quashed in the hands of Hon'ble Tribunal.

6.1.2.8 The Appellant submits that in the case of Deluxe Color Lab Pvt. Ltd Vs. CCE, Jaipur 2009 (13) S.T.R. 605 it was held that-

"***The Supreme Court found that out of various composite transactions envisaged in different sub-clauses of clause 29-A - 'works contract', 'hire purchase contract' and 'catering contract'- covered by sub-clauses (b), (c) & (f) of clause (29A) - involve the fiction of deemed sale, and out of these three, works contract and catering contract involve the elements of service and sale at the same time*** (see para 44 of the BSNL judgment above).

6.1.2.9 ***It would thus appear that the decision in BSNL case lays down the law that works contract (and also catering contract) involves the element of both sale and service contract and that the service and sale elements can be split up.*** That being so, we do not find any merit in the submission of the Revenue that the decision in BSNL case cannot be treated as an authority on the issue of service tax. ***If the photography service is a 'works contract', it would follow that it involves the element of both sale and service, and the sale portion of the activity or transaction cannot be included in the taxable value of service...............'Sale' and 'Service' cannot stand in the same box. Sale cannot be treated as service and vice versa."*** Appellant submits that from the above judgment it emerges that in case of a composite contract of nature

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specified in Article 366 (29A) particularly the Works Contract and Catering contract both the elements of sale as well as service is involved and the sale portion cannot be included in the taxable value portion for the purpose of service tax, therefore impugned order is levying service tax at 12.36% on amounts received from the customer which is ex-facie and illegal.

6.1.2.10 The Appellant further submits that 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& Co. &Ors.*v. *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. In *Gannon Dunkerley* case (supra), it had been held :

"Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services."

6.1.2.11 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.

In Re: Benefit of composition

6.1.3.1 Appellant submits that Rule 3 (1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

"Notwithstanding anything contained in section 67 of the Act and rule

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*2A of (1) the Service (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"*

** [increased to four per cent for the notice period]*

6.1.3.2 Appellant also wishes to draw attention to Rule 3 (3) of the said rules extracted as under

*"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"*

6.1.3.3 Appellant submit that from the above provision, it is clear that other alternative payment mechanism for the works contract in case not opted for Rule 2A valuation would be to pay at a composition rate of 2%/4% on the gross amount charged. However such composition has not been extend in the impugned order on the following regards

6.1.3.4 That service tax was already paid before exercising the option

6.1.3.5 Entire project has been treated as one contract and hence such benefit is not allowed for all the flats.

In re: Each residential unit is a works contract

6.1.3.6 The Appellant submits that restriction if at all applicable is for the ongoing works contract and not ongoing residential housing project. The impugn order has denied the ground of exclusion from the residential complex definition stating that in the instant case each residential unit is used for the personal use and not the complex, and hence it is evident that each unit is treated separately and governed by a separate contract and hence if at all the restriction is to be made the same is to be on those flats on which payment has been made prior to 01.06.2007 and not for those flats for which the first payment

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was received after 01.06.2007 and payment of ST was made under composition scheme.

6.1.3.7 The impugned order in Para 16.4 has brought out its own theory that construction of entire residential complex is subjected to levy of service tax and accordingly the entire complex is one works contract in terms of clause (c) of explanation under works contract service and Ld. Respondent has not assigned any reasons for such conclusion.

6.1.3.8 The Appellant submits term Contract has been defined in the *Black Laws Dictionary* as *an **agreement between two or more parties** creating obligations that are enforceable and otherwise recognizable at law. William R. Anson, Principles of law of contract (Arthur L.Corbined 3d Am ed 1919) defines as*

*"The term contract has been used indifferently to refer three different things (1) **series of operative acts by the parties resulting in new legal relations,** (2) the physical documents executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative facts in itself, (3) the legal relations resulting from the operative acts consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges and immunities."*

Therefore from the above, it is clear that for a contract there must be agreement between two or more parties, a housing project as whole cannot be termed as ***A WORKS CONTRACT.***

6.1.3.9 The Appellant submits that in Gerald Dworkin Odgers Construction of Deeds and statutes deeds were defined in following terms-

*"All deeds are documents but all documents are not deeds. For instance, a legend chalked on a brick wall or a writing tattooed on a sailor's back may be documents but they are not deeds. It must be in writing and writing on paper or its like eg.Vellum or parchment. **Any instrument under seal is a deed if made between private persons. It must be signed, sealed and delivered."***

Therefore, in the present case every sale deed is separate contract by itself and the rule intended to deny composition scheme for a works contract and not for all works contract in a housing project. Hence,

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since each contract (sale deed) entered into with each owner is a separate works contract and benefit of composition should be given to each contract (sale deed) entered into on or after 01.06.2007 and where payment has not been made otherwise than for composition scheme.

6.1.3.10 Appellant submits from the above flats on which no ST was paid prior to 01.06.0007 in Phase I of the Gulmohar Gardens would be eligible for the composition scheme and in the fact that the GHMC permit order to undertake the construction has only been issued for Phase-II on 01.04.2009 i.e. after 1.6.2007 the benefit of composition scheme should be made available in case of all the customers pertaining to Phase-II in toto. (Copy of the GHMC permit order enclosed for perusal).

6.1.3.11 The Appellant relies on the case of Viswas Promoter Pvt. Ltd. Vs. Asst. Comm. Of Income Tax [2013] 29 taxmann.com 19 (Madras). Wherein the Hon'ble High Court has held that-*"Assessee claimed proportionate deduction under section 80-IB(10) for those blocks which were of less than 1500 square feet area - Assessing Officer denied proportionate deduction on ground that each block could not be considered as a separate 'housingproject' - Whether going by definition of 'housing project' as given in section 80HHBA each block in a larger project had to be taken as an independent 'housing project' for purpose of claiming deduction under section 80-IB(10) - Held, yes"* Appellant submits that the facts of the above case are applied to this case then each Phase can be considered as a separate project and the benefit of composition can be given to those receipts from flats which are in Phase-II.

6.1.3.12 Appellant submits that the impugned order has relied upon in Para 16.4 on the Nagarjuna Construction case by Hon'ble Apex Court vide 2012-TIOL-107-SC-ST. However, appellant submits that in the impugned case the court has categorically made a finding that the Court has merely held that whether the circular issued by the board is in line with the rules made in this regards and it has concluded that circular is not prejudicial to the rules, however the court has not discussed about the validity of the rules as such which was clearly stated by the Apex court in the said case. However, in the present case appellant is challenging the very rule which requires appellant to do an impossible thing and which is prejudicial to the assessee who are tax compliant and favorable to the assessee who have not been tax compliant.

6.1.3.13 Appellant submits that since every sale deed is separate contract by itself and each contract (sale deed) entered into with each owner is a separate then for all those sale deed prior to 01.06.2007 the classification should not be changed in view of the Circular No. 98/1/2008 and they should continue to be classified under Construction of Complex service and appellant should be entitled to take the abatement of 67% as specified under Notification No. 1/2006 amended from time to time.

6.1.3.14 The Appellant relies on the case of Lanco Infratech Vs. CST, Hyderabad 2011(23) S.T.R. 351 as affirmed by Andhra Pradesh High Court 2012 (275) E.L.T. 32 states that – "the learned Counsel submits that, even if it be assumed that the Department is entitled to demand Service Tax at the normal rate for the period of dispute, the quantum of demand is liable to be revised. It is submitted that abatement from taxable value to the extent of 67% should have been allowed to the appellant in terms of Notification No. 1/2006-S.T...

In the result, we are inclined to grant the benefit of abatement from taxable value of the works contract service under Notification No. 1/2006-S.T., for the present purpose" Therefore, in the present case the show cause notice dated 23-10-2008 proposing service tax, interest and penalty during the period from June, 2007 to March, 2008 to M/s Lanco Infratech on the ground that the petitioner was not eligible to avail the benefit under the Composition Scheme, and they had to pay service tax at the full rate of 12.36%. confirmed the demand of service tax of ` 7,78,34,714/-, however the Hon'ble CESTAT granted benefit of Notification No. 1/2006-ST, since the facts under the present case are similar to the above case the benefit of abatement should be granted for all those contract (sale deed) entered into with each owner prior to 01.06.2007.

In Re: CENVAT Credit has not been granted

6.1.4.1 The Appellant further submits that where the Value of Work Contract Service shall is determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, he shall also be entitled to utilize CENVAT Credit on Inputs, Input services and Capital goods **which is Rs.1, 92, 627/-.** The Ld. Respondent vide Para 16.6 of the impugned order has given the finding that Appellant can avail the Cenvat Credit and hence there is no dispute in this regard.

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7. Non consideration of submissions vis-à-vis violation of the principles of natural justice

7.1. The Appellant submits that the impugned order is *ex-facie* illegal and untenable in law since the same is contrary to facts and judicial decisions.

7.2. The Appellant submits that the SCN is issued based on mere assumption that Central Government has power to tax the sale of apartments and unwarranted inference without considering the facts, the scope of activities undertaken and the nature of activity involved, incorrect basis of computation, creating its own assumptions, presumptions and many other factors discussed separately Supreme Court in case Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC) has held "*we must hold that the finding that 11,606 maunds of sugar were not accounted for by the appellant has been arrived at without any tangible evidence and is based only on inferences involving unwarranted assumptions. The finding is thus vitiated by an error of law. Such show cause notices are not sustainable under the law*" Therefore, on this count alone the entire proceedings in the subject SCN requires to be set aside.

7.3. The Appellant submits that the impugned order is in violation of the principles of natural justice, as the submissions made by the Appellant, which are meritorious, have not been adverted to or rebutted. The Appellant submits that the following **vital submissions** were made before the Ld. Respondent vide SCN reply but Ld. Respondent has **totally ignored** the same while passing the impugned order:

a. Applicability of Circular No. 98/1/2008-S.T dated 01.04.2008

b. Board Circular D.O.F. No. 334/1/2010-TRU, dated 26-2-2010

c. Applicability of Trade Notice F. No. VGN/30/80/Trade Notice/10/Pune dated 15.02.2011

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d. The following judicial pronouncements has not been considered

   i. Ocean Builders Vs. CCE, Mangalore 2010 (019) STR 0546 (Tri-Bang)

   ii. Virgo Properties Pvt. Limited Vs. CST, Chennai 2010-TIOL-1142-CESTAT Mad

   iii. Mohtisham Complexes Pvt. Ltd. Vs. CCE Mangalore 2009 (016) STR 0448 (Tri-Bang)

e. The fact of error in determination of the gross receipts and computation thereof

f. Chartered Accountant certificate for Detailed break-up of consumption of material for benefit of Rule 2A valuation.

g. The fact of the payment of the service tax prior to the issuance of the show cause.

7.4. Appellant submits that the impugned order has not made findings as to the reason why the facts of those cases are not applicable in the present case and has merely stated that contention of appellant is not acceptable and case laws are clearly distinguishable to the facts of the case. In this regard appellant wishes to rely on Anil Products Limited Vs CCE, Ahmadabad 2011 (21) S.T.R 329 (Guj) it was held that "*In the above view of the matter, we are of the opinion that the sole reliance placed by the Tribunal in the decision of Shanpur Industries (supra) is not justified and the* ***Tribunal ought to have given its specific findings on the various submissions made, judgments relied upon and the distinguishing features pointed out by the appellant before the Tribunal.*** *We, therefore, set aside the impugned order passed by the Tribunal and remand the matter back to the Tribunal to decide the whole issue afresh after giving an adequate opportunity to the parties and after considering various submissions that may be made before it and to pass a reasoned*

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as well as speaking order." In light of the above judgments since the Ld. Respondent has not considered the relied Judgments it is gross violation of the principles of natural justice.

7.5. The Appellant submits that all the above meritorious grounds apart from submissions have not been considered while passing the impugned order. The system of departmental adjudication is governed by the principles of natural justice. The impugned order neither analyses the submissions, nor discusses the relevant case law, but has given the order without proper reasoning making the same a non-speaking and predetermined order. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. In the case of Southern Plywoods Vs. Commissioner of C. Ex. (Appeals), Cochin 2009 (243) E.L.T 693 (Tri-Bang) it was held that *"Order - Sustainability of - Non-consideration of submission of parties makes order unsustainable. [paras 6.4, 9]"*

b. In the case of Kesarwani Zarda Bhandar Vs. Commissioner Of C. Ex., Thane-I 2009 (236) E.L.T 735 (Tri-Mum) it was held that *"I have considered the submissions made by both sides and perused the records. I find that the Commissioner (Appeals) has not dealt with any of submission made by the Appellant and simply stated that the same has been fully discussed by the original authority and clearly brought out in the Panchnama and show cause notice etc. This cannot be considered as speaking order and Commissioner (Appeals) should have dealt with the submissions made by the Appellant. The matter is, therefore, remanded back to the Commissioner (Appeals) with the direction that he should take into account the submissions made by the Appellant and after providing sufficient opportunity of hearing to the Appellant to pass a speaking*

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order. All issues are kept open. The Revenue's appeal is also likewise remanded."

c. In the case of Herren Drugs & Pharmaceuticals Ltd. Vs CCE, Hyderabad 2005 (191) E.L.T 859 (Tri-Bang) it was held *"In any case the adjudicating authority has violated the principles of Natural Justice, in not considering all the submissions of the Appellant"*

d. In the case of Youngman Hosiery Factory Vs. CCE, Chandigarh 1999 (112) E.L.T 114 (Tribunal) it was held that *"We have also heard the ld. SDR, Shri. A.K. Agarwal for the Revenue. We are of the view that the adjudicating authority in having ignored the main submission of the Appellant that they are not undertaking any dutiable process on the grey fabric and are therefore not liable to duty, principles of natural justice have been grossly violated. Consequently, the matter is fit for remand. Hence, we set aside the impugned order and allow the appeal by remand and direct the Addl. Collector to re-adjudicate the case taking into account the aforesaid plea of the Appellant."*

In light of the above judicial pronouncements, the order passed without considering the submissions and without discussing and distinguishing the case laws relied by Appellant is liable to be quashed.

7.6. The Appellant submits that the adjudication proceedings was rendered a solemn farce and idle formality, and the attitude of the Ld. Respondent shows that a made-up mind was his approach for confirming the demand and the order was merely a formality to complete the process with wholly irrelevant findings, and the order is therefore untenable in law. The act of confirmation of the demand of the service tax on value of the material even after accepting that tax cant be demanded indicates that the impugned order has been passed with a made up mind.

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In re: Non supply of relied upon documents vis-à-vis violation of the principles of natural justice

7.7. The Appellant submits that the show cause notice has placed reliance interalia, on the following documents which were not submitted to the Noticee:

a. Soft copy of the Bank statement, Books of Accounts, customer 2008-09 and 2010-11 (up to December 2010)

b. Service tax statement submitted by M/s. Modi Ventures vide letter dated 29.12.2009

c. The statement dated 01.02.2010 of Sri. A. Shankar Reddy, authorized person of M/s. Modi Ventures

d. Balance sheet of M/s. Modi Ventures of the years 2006-07 to 2010-11.

None of the above documents were furnished along with the show cause notice. It is the duty of the authority to serve the relied upon documents to Appellant along with the SCN.

7.8. The Appellant submits that the show cause notice on the one hand places reliance on the document, alleges contravention of the provision of service tax and requires to show cause and on the other hand not furnished the documents so relied, therefore this shows the clear mind of the Department of giving an opportunity is merely an eye wash and not actually an opportunity extended. Hence, there is clear violation of principles of Natural Justice and therefore Notice issued violating the Principles of Natural Justice is void ab initio.

7.9. The Appellant submits that the Circular 224/37/2005-Cx. Dated 24.12.2008 clearly states *"All relied upon documents should be referred to*

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in the SCN while preparing the draft SCN. Copies of all relied upon documents should accompany the draft SCN"

7.10.The Appellant submits that in the case of CCE, Calcutta Vs Indian Oil Corporation Ltd. 2004 (165) ELT 0257 S.C. – (Maintained in 2005 (186) ELT A119 (S.C.)) it was held that *"that circulars are binding on the department"*. Therefore, the said circular is binding on the department and the SCN issued violating such binding circular is not valid at all and requires to be set aside.

7.11.The Appellant submits that in this regard he wishes to place reliance on the following judicial pronouncements as support of their claim of violation of Principle of Natural Justice:

a. Kothari Filaments Vs CCE, (Port), Kolkata 2009 (233) ELT 0289 S.C. It was held that *"A person charged with mis-declaration is entitled to know the ground on the basis whereof he would be penalized. He may have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply."*

b. Rajam Industries (P) Ltd. Vs Addl. D.G, D.C.E.I., Chennai 2010 (255) ELT 0161 Madit was held that *"Nevertheless, the petitioner is entitled to have copies of those statements obtained during preliminary investigation to enable it to give proper explanation to the show-cause notice. If it is found that the petitioner has not been furnished with copies of those statements/documents which are relied upon by the authorities concerned in the show-cause notice, certainly this Court would interfere and compel the authorities to furnish copies of statements documents which are relevant before*

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made available to the respondents, we do not find any case for interference in the impugned order."

7.12. The Appellant submits that Ld. Respondent vide Para 18 of the impugned order observes that all the relied upon documents in fact submitted by the Appellant only and hence there is no question of the violation of the principles of the natural justice. There is no dispute that the documents were supplied by the Appellant only. In reply to the show cause notice they have given submission that there is error in calculation of the service tax liability but the Ld. Respondent has not considered the submissions and passed the impugned order. If the Ld. Respondent don't serve the relied upon documents how the Appellant can know the extent the department relied on the documents submitted by them. Since there is calculation error in the computation and the extent to which the department relied upon documents plays an important role for the Appellant to submit their case, which has been violated.

In re: Non-speaking order

7.13. The Appellant submits that the impugned order had stated that 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 clause (c) of explanation under works contract service. However, the impugned order has failed to explain the reasoning behind such conclusion.

7.14. The Appellant submits that the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give **reason for arriving at any conclusion showing proper application of mind**. Violation of either of them could in the given facts and circumstances of the case,

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vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that order of lower authorities should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the **reasons of rationality.**

*7.15.*The Appellant submits that it would neither be permissible nor possible to state as a principle of law, that while exercising power of quasi-judicial on administrative action and more particularly confirming the demand of duty in adjudication before the authority, providing of reasons can never be dispensed with.

*7.16.*The Appellant submits that the administrative authority is obliged to give reasons, absence whereof could render the order liable to judicial chastise. Thus, it will not be far from absolute principle of law that the Authority should record reasons for its conclusions to enable the appellate authority or higher Courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher appellate authority or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the lower authority whose order is impugned, whether sustainable in law and whether it has adopted the correct legal approach.

*7.17.*The Appellant submits that **reasons are the soul of orders.** Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of authority.

7.18.The Appellant submits that it needs to be emphasized that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the

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parties have a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the quasi-judicial authority in denying him the relief prayed for, the remedy of appeal will not be meaningful.

7.19. The Appellant submits that in the case of *State of Orissa* v. *Dhaniram Luhar* - (2004) 5 SCC 568 The Supreme Court while reiterating that "reason" is the heart beat of every conclusion and without the same, it becomes lifeless", observed thus :

> *Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court.* ***Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;........."***

7.20. The Appellant submits that Ld. Respondent failed to give the reasons as to how and why the individual contract entered by the customer for the every single customer with the builder does not constitute the single works contract. Ld. Respondent neither given statutory back up or nor given the legal back up to support his contention. Order without giving the reasons in recording is not sustainable under the Law. In this regard appellant wishes to rely on the following judgments.

a. *Siemens Engineering and Manufacturing Co. of India Ltd.* v. *Union of India and Anr.* AIR 1976 SC 1785 (S.C) it was held that "If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and **give sufficiently clear and explicit reasons in support of the orders made by them.** Then alone administrative authorities and tribunals exercising quasi-judicial

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function will be able to justify their existence and carry credibility with the people by **inspiring confidence in the adjudicatory process**. The rule requiring reasons to be given in support of an order is, like the principle of *audialterampartem*, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ..."

b. In the case of *State of Rajasthan v. Rajendra Prasad Jain Criminal Appeal No. 360/2008 (Arising out of SLP (Crl.) No. 904/2007)* stated that ***"reason is the heartbeat of every conclusion, and without the same it becomes lifeless."***

c. In the case of Sathyan A.V. VsGovt of Kerala 2011 (21) S.T.R 690 (ker) it was held that *"To grant or not, is within the power of the authority empowered to grant in terms of law. But, it is of the core principles of administrative law,**that a decision has to contain its reasons."***

d. In the case of Aspinwall & CO. LTD. Vs CCE, Maglr 2011 (21) S.T.R 257 (Tri-Bag) "*Here again, we find that the adjudicating authority has not given any reasoning for coming to a such a conclusion that the appellant had not paid the service tax on these two services rendered by him. In the absence of any reasoning or findings, we are constrained to remit the matter back in the case of this appellant-assessee to the adjudicating authority,"* From the above analysis and case laws it is clear that order is passed without reason therefore liable to be set aside.

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8. Benefit under Section 73(3) of the Finance Act, 1994

8.1. Without prejudice to the foregoing, Appellant submits that assuming but not admitting that there was a liability and it was not paid, the provisions of Section 73(3) reads as follows:

> *"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or* ***on the basis of tax ascertained by a Central Excise Officer before service of notice*** *on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information* ***shall not serve any notice*** *under sub-section (1) in respect of the amount so paid"*

8.2. Further Appellant submits that C.B.E.& C. Letter F. No. 137/167/2006-CX 4, dated 03.10.2007 & Commissioner of Central Excise, Madurai, Trade Notice No. 48/2008, dated 3-10-2008 clarifies that the no notice to be issued for recovery if the service tax and the interest has been paid voluntarily as provided in section 73(3) of the Finance Act. On this ground also the proceedings in the subject order requires to be dropped.

8.3. The Appellant submits that in the case of C.C.E & S.T., L.T.U, Bang Vs Adecco Flexione Workforce Solution LTD it was held that *"Unfortunately the assessing authority as well as the appellate authority seems to think. If an assessee does not pay the tax within the stipulated time and regularly pays the tax after the due date with the interest. It is something which is not pardonable in law.* ***Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings***

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against the persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of sec. 73. The parliament expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in governance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the tribunal and this court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this court hereafter, certainly it will be a case for taking proper action against those law breakers.

In that view of the matter, we do not see any merit in these appeals. The appeals are dismissed.

Mark a copy of this order to the commissioner of large tax payers unit who is in charge of collection of service tax to issue proper circular to all the concerned authorities, not to contravene this provision, namely sub-section (3) of section 73 of the act." From this it is clear that show cause notice is in contravention of Section 73(3) of the Finance Act, 1994 in as much as authority has issued show cause notice for the amount already paid before the issuing the SCN even though the Section 73(3) says not issue the SCN.

8.4. The Appellant submits that in the case of CST, Baglr Vs. Info Technologies India P. Ltd, while dismissing the C.E.A No. 100 of 2009 *proceeding with the adjudicating process.* ***On the facts of the present case, admittedly the process of adjudication has not commenced and the entire case stands at preliminary stage of giving show-cause notice.***

c. Robust Protection Forces Vs CCE, Hyderabad 2010 (019) STR 0117 (Tri.-Bang) it was held that *"On a careful consideration of the case records and submissions, we find that the show cause notice has specifically mentioned that all the relevant records are available with the Adjudicating* ***Authority and the appellants can have the copies of documents. There is no mention as to the relied upon documents are given with SCN. We find that there is a violation of principle of natural justice in this case in not providing*** *the relied upon documents to the appellant along with show cause notice. In order to meet ends of jusitce, we are of the considered view that the matter needs to be reconsidered by the Adjudicating Authority. Impugned order is set aside and the matter is remanded back to the Adjudicating Authority to reconsider the issue afresh, before coming to any conclusion. Adjudicating Authority will also grant an opportunity of personal hearing before coming to any conclusion. Since the issue is of 2006, Adjudicating Authority should try and dispose the matter within a period of 4 months from the date of receipt of this order.*

d. In the case of CCE, Ludhiana VsGulab Industries (P) LTD (Tri-Del) it was held that *"Once it is clear that the respondents were* ***sought to be issued show cause notice without furnishing copies of relied upon documents and even the efforts were made on the part of the respondents to get the same did not yield any fruitful result*** *and even today the copies of the documents are not*

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filed by the CST against the Hon'ble CESTAT order No. 1438/2008, dated 02.01.2009 by the Hon'ble Karnataka High Court held that ***"It is not in dispute that assessee has paid the entire service tax with interest before the issue of show cause notice. Once the penalty and interest is paid and duly intimated to the authorities, sub-section (3) of the section 73 comes into operation, which mandates that the authorities shall not serve any notice*** *under sub-section (1) in respect to the amount so paid and initiate proceedings to recover any penalty.*

In that view of the matter, the order passed by the tribunal is in accordance with law. No substantial question of law is involved. Hence, appeal is dismissed." The facts of the above case is exactly matches to the facts of the present case and hence it is not good in Law to issue the SCN for the amount already paid before the issuing the SCN.

8.5. The Appellant submits it was held by the Honorable Tribunal of Bangalore in the case of Commissioner of Service Tax, Bangalore vs Master Kleen 2012 (025) STR 0439 Kar as under:

"The material on record discloses that the assessee on being pointed out by the authorities for not paying the service tax, has paid the service tax with interest even before the issue of show cause notice. Sub-section (3) of Section 73 of the Finance Act, 1994, categorically states that if tax and interest is paid and the same is informed to the authorities, then the authorities shall not serve any notice calling upon the authorities to pay penalty. It is unfortunate that inspite of statutory provisions, the authorities have issued a show cause notice claiming penalty. So tax and interest was paid before issue of show cause notice. Therefore, the Tribunal was justified in setting aside those orders. As the said order is strictly in accordance with law we do not find any legal infirmity that calls for interference. Therefore this appeal is dismissed.

Hence, Appellant submits that the facts of the above case are identical to the instant case and the ratio of the judgment shall be applicable and hence the notice issued has to be kept aside and the order has to be quashed.

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8.6. The Appellant submits that it is being followed judicially that if the entire tax along with the interest has been paid before issue of show cause notice, then no need to issue the SCN and no penalty is leviable. The fact of payment of the entire service tax along with the interest is confirmed in order in original. Appellant wishes to rely on the following cases in this regard

a. Bhoruka Aluminium Ltd Vs CCE, Mysore 2008 (11) S.T.R 163 (Tri-Ban) it was held that *"In this case, it is not in dispute that the* ***Service Tax along with interest had been paid on 30-8-2006 and 12-9-2006 but the show cause notice itself had been issued much latter only 9-10-2006, hence, the issue is squarely covered by*** Section 73(3***) of the Finance Act and therefore, there would not have been any necessity even to issue the show cause notice.****This is also in consonance with the Board's Circular Lr., dated 3-10-2006 cited supra by the learned Advocate. In any case, the appellant was also having a bona fide doubt in the activity being subject to levy of Service Tax. In our opinion, this is a reasonable cause for not imposing penalty under Section 78 of the Finance Act. In these circumstances, the impugned order has no merit and therefore, we set aside the same and allow the appeal with consequential relief."* In the present case also payment of the service tax along with interest has been paid even before the issuance of SCN. On the basis of the above case law it is clear that there is no necessity even to issue of the SCN therefore it is rightly set aside the impugned order for amounts already paid.

b. CCE, Raj kotVs Port Officer 2011 (21) S.T.R 606 (Tri-Ahdm) it was held that *"First of all, I agree with the views taken by the*

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Commissioner (Appeals) that there was reasonable cause for delay in payment. In fact, if the assessee had considered the legal provisions properly, assessee could have paid the service tax with interest before the issue of notice and in such a case, provisions of Section 73(3) of Finance Act, 1994 would have become applicable." From the above, it can be seen that leave alone the imposition of penalty, as per the provisions of Section, even show cause notice could not have been served.

c. CCE Mangalore Vs. ShanthaSatelite Vision [2009 (13) S.T.R. 76 (Tri. - Bang.)] it was held that *"This Bench has considered the issue afresh in all similar appeals and upheld the view that when service tax and interest has been paid before the issue of show cause notice, in such circumstance, the penalty is not leviable"*

d. K. Prabhakar Reddy VsCCE, HYD-IV 2011 (24) S.T.R 0330 (Tri-Bang) it was held that "*We also find that the provisions of* Section 73(3*) would apply in this case as the appellant have discharged almost 90% of the Service Tax demand and are willing to discharge the balance amount of Service Tax. It is seen that the appellant has pre-deposited an amount of Rs. 5,00,000/- (Rupees Five Lakh only) as per direction of this Bench, which can be adjusted for recovery of balance dues. In our considered view, the bona fide view entertained by the appellants could not be faulted with. Hence, invoking the provisions of Section 80 of the Finance Act, 1994 we hold that the penalty imposed by the Adjudicating Authority under Sections 77 and 78 of the Finance Act, 1994 for not discharging the Service Tax liability under Rent-a-Cab services is liable to be set aside. The same provisions will*