also apply in case of penalties not imposed under Section 76 for which revenue is in appeal."

e. Sneha Minerals VsCCE, Belgaum 2011 (21) S.T.R 657 (Tri-Bang)it was held that *"It is submitted that, as soon as the appellant was instructed to pay Service tax with interest, they paid it forthwith, which fact was brought to the department's knowledge, which is evident from the very show-cause notice issued by the Dy. Commissioner. In the circumstances, according to the learned counsel, the Dy. Commissioner* ***should not have issued the notice*** *in view of the provisions of* Section 73(3) *of the Act."* In the present case also payment of the service tax 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.

8.7. The Appellant submits that Proviso to Sub section (3) of Section 73 of the finance Act, 1994 deals with the issuance of SCN when the Appellant made the payment of service tax along with the interest before the issuance of SCN. The proviso is extracted here for your ready reference

Provided that the Central Excise officer may determine the amount of short payment of service tax or erroneously refunded service tax if any which in his opinion has ***not been paid*** *by such person and then the Central Excise officer shall proceed to recover such amount in the manner specified in this Section and the period of one year referred to in Sub section (1) shall be counted from the date of receipt of such information of payment.*

8.8. The Appellant submits that from the above it is clear that the department has a right to issue the SCN for the remaining amount which was not paid. In this case Appellant has paid Rs. amounts before the issuance of SCN. The Central Excise office has right to issue the SCN only for remaining amount if at all there is due which is not paid before the issue of SCN. Therefore from the above it is clear that

issuance of SCN itself is volition of the Section 73(3) of the Finance Act, 1994 and above quoted case laws.

8.9. Appellant submits that an amount of Rs.47, 73, 858 is already paid before issuing the show cause notice out of which SCN has acknowledged only Rs.20, 46, 743/- is only considered and this anomaly was brought to the notice of the Ld. Adjudicating authority who has not made any findings of the same in the order. However, appellant prays that the Hon'ble CESTAT takes the above plea into cognizance and set aside the interest and penalty on the amounts already paid prior to issue of SCN.

9. *Extended period of limitation cannot be invoked*

9.1. Without prejudice to the foregoing Appellant submits that 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. Impugned order alleged *"the fact of nonpayment of service tax would not have seen light of the day but for the detailed investigation carried out by the department."*. The allegation of the impugned order is not sustainable in as much it contained the contradictory findings and SCN has not proved how the Appellant has suppressed the fact to the department and has not proved such suppression coupled with the intent to evade the payment of the service tax. In such a scenario the allegation of the impugned order regarding the invocation of extended period of limitation is not sustainable.

9.2. The Appellant submits that they have received a written instruction from the Ld. Additional Commissioner of Service Tax Hyderabad II Commissionerate, asking them to change the Classification to 'Works

Contract Service' with effective from 01.06.2007. (The copy of the letter of the Additional Commissioner is enclosed along with this reply.)

9.3. Since all the residential units are sold personal use purposes the Appellant had written to the Jurisdictional Assistant Commissioner of Service Tax, Hyderabad-II Commissionerate stating that in view of the Circular 180/02/2009-ST dated 29.01.2009 issued by TRU, they understood that Service Tax was not applicable for their transaction and sought clarifications on above issue.

9.4. Subsequently, Appellant received Correspondence No. CON.166 dated 08.07.2011 from the Ld. Assistant Commissioner of Service Tax, Hyderabad –II Commissionerate stating that circular applies only in case the entire complex is put to use by a single person. The copy of the letter is enclosed along with this appeal.

9.5. The Appellant responded to the said letter stating their stand that the circular did not intend the same and sought clarification, the copy of the Correspondence was also sent to The Commissioner of Service Tax, Hyderabad-II Commissionerate and sought clarification, however no clarification has been issued till date. The copy of the letter is enclosed along with this appeal.

9.6. The Appellant submits that from the above it is clear that there is clear and continuous correspondence between the service tax department and the Appellant which has also been brought out chronologically in the **"Statement of Facts"** It is settled position of the law that when there is continues correspondence between the Appellant and the service tax department suppression of the facts cannot be applicable. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. In the case of Andhra Pradesh Paper Mills Ltd Vs CCE, Visakhaptnam-II 2006 (200) E.L.T 326 (Tri-Bang). It was held that

"The correspondence on this point is on record. The Commissioner has merely held that the assessee is trying to take advantage of those ***correspondences*** *at the cost of revenue. The finding is not just and proper. Once the Department was fully aware of the fact of the activity of conversion of paper, the larger period for confirming demand is not attracted"*

b. In the case of Collector Of Central Excise, Hyderabad Vs I.T.W. Signode India Ltd. 2005 (188) E.L.T 65 (Tri-Del) it was held that *Demand - Limitation - Correspondence with department indicating their knowledge about product and manufacturing processes - Held : There was no fraud, wilful misstatement etc. for invoking extended period of limitation - Section 11A of Central Excise Act, 1944. [para 7]"*

c. In the case of Commissioner Of Central Excise, Indore VsRajkamal Plastics 2004 (163) E.L.T 312 (Tri-Del) it was held that *"The perusal of the record shows that all the necessary facts regarding the manufacture of the goods bearing brand name "Kamal" were known to the Department from the correspondence exchanged between both the sides and the declaration furnished by the respondents. The Commissioner (Appeals) has recorded detailed reasons for holding that all the necessary facts were within the knowledge of the Department regarding the manufacture of the goods under the brand name "Kamal" by the respondents and that the demand from 1-3-97 to 10-1-98 was time-barred".*

d. In the case of Vir Rubber Products Pvt. Ltd. Vs CCE, Mumbai-III 2003 (161) E.L.T 623 (Tri-Mum) it was held that *"Demand - Limitation - Extended period - Samples of the goods showing the nature of the markings that is put on the goods sent to the Department - Correspondence between the appellant and the jurisdictional*

Superintendent made it very clear that the appellant was putting the initial of the buyers and not their brand name on the goods - Extended period of limitation not available - Section 11A of Central Excise Act, 1944. [para 9]"

Therefore the Appellant submits that they have not suppressed the details to the department as there is correspondence between the departments and appellant hence in light of the above judicial pronouncements extended period of limitation is not invocable.

9.7. The Appellant submits that in the preceding paragraphs mentioned the judicial pronouncements where in it was held that even the residential unit constructed for the single person for the personal use is not liable for the service tax. In the later case (LCS) the Hon'ble Tribunal has taken the contrary view. There are divergence views on the same matter. It is settled position of the Law that when there contrary views by the different Appellate forums for the same issue suppression of the facts and the extended period of limitation is not invokable. In this regard Appellant wishes to rely on following judicial pronouncements.

a. In the case of Commissioner Of C. Ex., JalandharVsAfcons Pauling Joint Venture 2009 (242) E.L.T 352 (P & H) it was held that ***"It has come on record as a fact that that there was divergence of opinion amongst various High Courts whether crushing of bigger stones or boulders into smaller pieces amounts to manufacture. Accordingly, there was bona fide doubt as to whether or not such an activity could attract the payment of duty and the dealer-respondent did not apply for licence."***

b. In the caseof Kay Kay Press Metal Corporation VsCommr. Of Cen. Ex., Valsad 2011 (270) E.L.T 691 (Tri-Ahmd) it was held that ***"Inasmuch as the law on the issue is clear, i.e. to the effect***

that when there are divergent views, many of which are in favour of the assessee holding the field, no suppression or mis-statement can be attributed to the assessee, to entertain the same belief. *As admittedly, in the present case, judgment prior to Larger Bench in the case of Mahindra & Mahindra Ltd., were laying that the processes allegedly adopted by the appellant did not amount to manufacture, we are of the view that the demand raised beyond the period of limitation, by invoking extended period, is barred. As such, irrespective of the fact as to whether the appellants themselves have undertaken the said activity or not, the demand is required to be quashed on the above issue itself. Ld. SDR appearing for the Revenue have placed on record the written submissions, which we find are mainly dealing with issues other than limitation. Inasmuch as we are not expressing any opinion on other issues, we do not deem it fit to deal with the various issues in the written submission of ld. SDR".*

c. In the case of Commissioner Of Central Excise, Hyderabad VsItwSignode (India) Ltd. 2005 (179) E.L.T 120 (Tri-Bang) it was held that ***"In view of the conflicting judgments on the issue, the appellants are entitled to seek the benefit of time bar.*** *Therefore, while upholding the matter on merits in the Revenue's favour, we have to hold that the demands are barred by time and not liable to recovery. The appeal is disposed off in the above terms."*

d. In the case of Supreme Rubber Inds.VsCommissioner Of Central Excise, Mumbai-V 2011 (273) E.L.T 301 (Tri-Mumbai) it was held that ***"Further we find that as has been stated in para 4 of the judgment of the Larger Bench of the Tribunal in the case of M/s. Namtech Systems Ltd. (supra) there were conflicting***

judgments on the issue involved in this case. As held by the Apex Court in the case of Mentha& Allied Products Ltd. (supra), longer period of limitation under Section 11A would not be available in a situation where on some issue of excisability, classification, valuation or rate of duty involved in a case of alleged short payment of duty, there are conflicting judgments of Tribunal and High Courts. We find that the same view has been taken by the Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture (supra) (para 11 of the judgment). We, therefore, hold that longer limitation period under proviso to Section 11A was not available to the department and the duty can be demanded only for normal limitation period."

In light of the above judgments since there are the divergent views expressed in the same the suppression of the facts and extended period of limitation is not applicable.

9.8. The Appellant submits that they have stopped the payment of service tax on the impugned activity because of the bonafide interpretation of the Board Circular No. 108/02/2009-ST dated 29.01.2009 that service tax is not applicable on the construction activity undertaken for personal use purposes. It is settled position of the Law that when the conclusion is arrived on the basis of bonafide belief on the basis of the circular the allegation of the suppression of the facts and thereby the allegation of the extended period of limitation is not sustainable. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. Jagdambay Concast Pvt. Ltd. Vs. Commissioner Of C. Ex., Jalandhar 2009 (246) E.L.T 393 (Tri-Del) it was held that

"dispute relates as to whether the steel former is input or capital goods. The Board resolved the issue vide circular dated 20-1-2003. So, the contention of the learned Advocate that the appellant acted on a bona fide belief regarding non-levy of duty is justifiable. The case law relied upon by the learned D.R. are not applicable in the present case, where Board circular reveals doubt regarding the leviability of duty. In view of that the impugned order is set aside on limitation. Both the appeals are allowed with consequential relief.

b. In the case of R.B. Precision ComponentsVsCommissioner Of C. Ex., Bangalore 2009 (241) E.L.T 408 (Tri-Bang) it was held that ***"Demand - Limitation - Interpretation of Board Circular regarding classification can lead to bona fide belief of assessee regarding non-payment of duty - In such cases, extended period is not invocable - Section 11A of Central Excise Act, 1944. [para 9.1]"***

c. PowericaLtdVs Commissioner Of Central Excise, Daman 2009 (236) E.L.T 274 (Tri-Ahmd) it was held that *"As such, it is seen from the above, there is a clear finding by the appellate authority that there was no mala fide intent to evade duty by undervaluation of the impugned goods. As such, he has set aside penalty imposed under Section 11AC.* ***He has also observed that there was scope of difference in interpretation in the CBEC circular operative at the material time.*** *We are of the view that the same ingredients which are required for imposing penalty in terms of Section 11AC, would be relevant for the purposes of invocation of longer period. In view of a clear finding of the appellate authority that there was no mala fide on the part*

of the appellants, the proviso to Section 11A cannot be invoked. We accordingly on this ground itself set aside the impugned order and allow the appeal with consequential relief to the appellants"

d. In the case of Alps Industries Ltd. Vs Commissioner Of Central Excise, Ghaziabad 2005 (185) E.L.T 405 (Tri-Del) it was held that *"Demand - Limitation - Declaration filed regularly by assessee -* ***CBEC circular existing inducing bona fide belief*** *- Correspondence with department indicating confusion about correct interpretation of words in exemption notification - HELD :Extended period not invocable - Section 11A of Central Excise Act, 1944. [para 6]"*

e. In the case of Vishal IndustriesVsCommissioner Of Central Excise, Kanpur 2000 (121) E.L.T 319 (Tribunal) it was held that **"Even in the case of *Vivek Re-rolling Mills* and *RehalIndustrial Corporation*, the demands were set aside as time-barred due to *bona fide* belief based upon CBEC circulars".**

Since the non-payment of service tax happened on the basis of the bonafide interpretation of Board Circular therefore in light of the above judgments allegation of the suppression of the fact is not sustainable.

9.9. The Appellant submits that it is not in dispute that there are various circulars operating at different points of time regarding taxability of residential complexes put to personal use therefore the allegation of the suppression of the facts are not sustainable. In this regard wishes to rely on Continental Foundation Jt. Venture Vs. Commr. Of C. Ex., Chandigarh-I 2007 (216) E.L.T 177 (S.C).

9.10. The Appellant submits that the Chapter 13 of the Central Excise Manual *Demand notice/Show Cause Notice, Adjudication, Interest, Penalty,*

confiscation, Duty payment under protest Part 1 of Para 2.9 states that *"Invoking of the extended period under the Proviso to Section 11A in the Show Cause Notice proposed to be issued should be resorted to only in the event of fraud, collusion, willful mis-statement, suppression of fact or contravention of any of the Excise Act/Rules with the intent to evade payment of duty and* ***not as matter of routine.*** *[Circular No. 5/92 dated 13.10.1992]".* In the present case Ld. Respondent hasconfirmed the impugned demand with an extended period of limitation as matter of routine.

9.11. The Appellant submits that the department cannot automatically invoke the larger period of limitation. The department has the duty to prove beyond the doubt that the ingredients specified under the Proviso to Section 73(1) are satisfied in the facts and circumstances of the case of the Appellant. It is clear from the SCN that the department has extracted the one of the ingredient specified in the Proviso to Section 73(1) on one hand and the fact of nonpayment of service tax in time was noticed during the enquiry on one hand concluded the appellant had suppressed the facts to the department. Further it is clear from the SCN and in the impugned order that, the SCN nowhere discussed any other ingredients specified in Proviso to Section 73(1) to invoke the extended period of limitation.

9.12. The Appellant submits that it was held in the case of CCE, Bangalore Vs. Gowri Computers (P) Ltd. 2012 (25) S.T.R.380 (Tri-Bang) *"Though, in the show-cause notice, there was a proposal to impose penalty under Section 78 of the Act "for willful suppression of the value of taxable services rendered by them", there was no allegation of any such suppression elsewhere in the notice in the context of demanding/appropriating Service Tax. Nowhere in the show-cause notice*

was there any specific allegation of suppression of taxable value, nor was it stated as to how much of the taxable value was suppressed. The show-cause notice also did not allege any of the other ingredients of the proviso to Section 73(1) of the Act for invoking the extended period of limitation. In this scenario, it can hardly be inferred that the show-cause notice invoked the proviso to Section 73(1) of the Act. ***Mere mention of the proviso to Section 73(1) of the Act in the operative part of the show-cause notice would not suffice.*** *It has, therefore, to be held that the proviso was not invoked by the department. Consequently the appellant's prayer for imposing penalty on the respondent under Section 78 is not acceptable."* From the above case law it is clear that mere mention of the Proviso to Section 73(1) is not sufficient, the department has to prove beyond the doubt that the Appellant has indulged in suppression of the facts with intent to evade the payment of the service tax. It was not happened in the present case therefore the proceedings under the impugned order in original require to be dropped on this count alone.

9.13. The Appellant further submits that suppression of the facts may also be explained as "to hold back the facts." However such holding back should be with intent to evade the payment of duty. Appellant acting upon to avoid the payment of duty which he was entitled to pay has to be proved. Intent should show that mens-rea should be present. The Appellant has made all the records before the Anti-evasion officers and hence it is not the case where the suppression of facts with the intent to evade the payment of service tax and hence the imposition of penalties are not justified.

9.14. The Appellant submits that the impugned order has not proved that failure to the payment of the service tax within the due dates does with intention to evade payment of service tax. The Honorable Supreme

Court in *Jaiprakash Industries Ltd. v. CCE,* 2002 (146) ELT 481 (SC) has held in para-6 of the decision *that mere failure or negligence on the part of the manufacturer in not taking out a licence and in* ***not paying*** *duty does not attract the extended period of limitation. There must be evidence to show that the manufacturer knew that the goods were liable to duty and that he was required to take out a license. For invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, willful mis-statement, suppression of fact or contravention of any provision or rules. These ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilfulmis-statement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation.* It is submitted that there is nothing in the SCN or in the impugned order to establish that there was any **positive act** on the part of my client in not paying Service Tax. Further in my clients case they have taken registration and filing the returns with in the due dates and it is not a possible case of suppression at all. Therefore proceedings under impugned order barred by time.

9.15. The Appellant submits that the only one allegation in the SCN for invoking extended period of limitation was suppression of facts which is not proper in view of the Supreme Court decision in as much as there is no intention to evade the payment of service tax, therefore the SCN is barred by limitation and requires to be set aside.

9.16. The Appellant places reliance on the following judicial decisions to support their contention, that under the above circumstances there cannot be any allegation or finding of suppression:

a. Cosmic Dye Chemical v. CCE, 1995 (75) ELT 721 (SC) *wherein at para-6 of the decision it was held that – "Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts is concerned, they are clearly qualified by the word "willful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not willful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be willful"*

b. T.N. Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC) *wherein it was held that - To invoke the proviso three requirements have to be satisfied, namely, (1) that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded; (2) that such a short-levy or short-payment or erroneous refund is by reason of fraud, collusion or willful mis-statement or suppression of facts or contravention of any provisions of the Central Excise Act or the rules made there under; and (3) that the same has been done with intent to evade payment of duty by such person or agent. These requirements are cumulative and not alternative. To make out a case under the proviso, all the three essentials must exist. Further it was held that burden is on the Department to prove presence of all three cumulative criterions and the Revenue must*

have perused the matter diligently. It is submitted none of the ingredients enumerated in proviso to section 11A(1) of the Act is established to present in our client's case.

c. Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC) *wherein it was held that proviso to section 11A(1) is in the nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualized by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. Further, when the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word `intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.*

d. Padmini Products v. CCE, 1989 (43) ELT 195 (SC) *wherein it was held that mere failure or negligence on the part of the manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation. Unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a licence. For invoking extended period of five*

years limitation duty should not had been paid, short-levied or short paid or erroneously refunded because of either any fraud, collusion or wilfulmis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a ***positive act****, therefore, failure to pay duty or take out a licence is not necessary due to fraud or collusion or wilfulmis-statement or suppression of facts or contravention of any provisions of the Act. Likewise suppression of facts is not failure to disclose the legal consequences of a certain provision.*

e. Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC) *wherein it was held that mere failure to declare does not amount to mis-declaration or willful suppression. There must be some* ***"positive act"*** *on the part of party to establish that either willful mis-declaration or willful suppression and it is a must. When the party had acted in bonafide and there was no positive act, invocation of extended period is not justified.*

f. GopalZardaUdyog v. CCE, 2005 (188) ELT 251 (SC) *where there is a scope for believing that the goods were not excisable and consequently no license was required to be taken, then the extended period is not applicable. Further, mere failure or negligence on the part of the manufacturer either not to take out the license or not to pay duty in cases where there is a scope for doubt, does not attract the extended period of limitation. Unless there is evidence that the manufacturer knew that the goods were liable to duty or he was required to take out a license, there is no scope to invoke the proviso to Section 11A(1).*

g. Kolety Gum Industries v. CCE, 2005 (183) ELT 440 (T) *wherein it was held that when the assessee was under bonafide belief that the goods in question was not dutiable, there was no suppression of fact and extended period is not invokable.*

h. GTN Enterprises Ltd., Vs. CCE, 2006(200) E.L.T. 76(Tri. Bang) *wherein it was held that when Department informed of activities of appellant by of way of filing declaration/returns, suppression of facts not proved, hence extended period of limitation not invokable.*

9.17. The Appellant submits that the above mentioned Supreme Court judgments have been relied by various Tribunals for Service Tax also, therefore irrespective of the difference in language of section 11A of the Central Excise Act and Section 73 of the Finance Act, all such citation are applicable to service tax also. Therefore extended period of limitation is not invokable.

9.18. The Appellant submits that in case of Martin & Harris Laboratories Ltd. v. CCE 2005 (185) E.L.T. 421 (Tri.), and in case of Hindalco Indus. Ltd., v. CCE, Allahabad, 2003 (161) E.L.T. 346 (T), it was held that "*Balance sheet of companies being a publicly available document, allegation of suppression of such information, not sustainable and Extended period is not invokable.*" Further if at all part of the activity was to be suppressed then why not suppress the other activities also is a point requiring ponder. As the only basis for invoking the extended period of limitation is this demand under proviso to Section 73(1), which is not sustainable and the same requires to be set aside.

9.19. The Appellant submits that the Ld. Respondent vide Para 17 of the impugned order denied the applicability of the above case law by the relying on CCE, Calicut Vs Steel Industries Kerala Ltd 2005 (188) E.L.T

33 (Tri-Bang). In the above case it was held that the theory of the universal knowledge of balance sheet being public document is not attracted when the Appellant has not filed the initial declaration. In the present case Appellant has filed the declaration stating that why they are not liable to pay the service tax therefore the reliance on placed on casse law by the Ld. Respondent is distinguishable.

9.20. The Appellant further submits that when the demand was raised on the basis of Balance sheet, ledger accounts and bank statements of the Appellant, it is bad in law to say the assessee indulged in suppression of the facts with an intention to evade the payment of service tax. In this regard Appellant wishes to rely the following judgments.

a. In the case Rama Paper Mills Vs Commissioner of C. Ex., Meerut 2011 (022) STR 0019 (Tri.-Delit) was held that *"Demand based on figures in appellant's ledger and balance sheet - Reflection of income and activity in ledger account and balance sheet points to absence of wilful suppression - Extended period not invocable."*

b. In the case of Kirloskar Oil Engineers Ltd Vs CCE, Nasik, 2004, (178) ELT .998 (Tri-Mum) it was held that *"since the balance sheet of the company being publicly available document, the allegation of suppression of such information is not sustainable. Therefore, extended period cannot be invoked under proviso to Section 11A(1) of the Act ibid. In my considered opinion, the provisions of Section 11AC for imposition of penalty and the provision of Section 11AB for demanding duty are not applicable to the facts of this case"*

c. In the case of Hindalco Industries Ltd Vs CCE Allahabad 2003, (161) ELT 346 (Tri-Del) it was held that *"Balance Sheets of*

companies is a publicly available document. Therefore, the allegation that data stated in the Balance Sheet was suppressed from Central Excise authorities is not a viable allegation. The demand has to fail on the ground of limitation itself."

d. In the case of U.T Ltd Vs CCE, Calcutta -1, 2001 (130) ELT 791 (Tri-Kolkata) it was held that ***"Further, had there been any intention on the part of the appellants to suppress the above fact, they would not have reflected the factum of receiving of commission in their balance sheets.*** *This shows the bona fides of the appellant. Accordingly, we hold the demand as barred by limitation. Appeals are thus allowed on merits as well as on limitation and the impugned order is set aside in toto."*

9.21. In the instant case also since entire demand raised is on basis of the records of the appellant there is no suppression hence extended period cannot be invokable and penalty under section 77and 78 cannot be invokable.

9.22. Without prejudice to the foregoing the Central Government does not have any power to tax the material sold during the course of service and construction of the residential complex for the personal use are kept out of taxability of service and this information is not required to disclose in ST-3 Returns. It is a settled position of law that the information not required to be supplied under law, when not supplied does not amount to suppression [Apex Electricals Pvt. Ltd., Vs. UOI 1992 (61) ELT 413 (Guj)], Appellant have acted under a bonafide belief that their activity did not attract service tax.

10. *Interest under Section 75 of Finance Act, 1994 cannot be demanded*

10.1. Appellant further submits that in the case of Blue Star Limited v. UOI 2010 (250) ELT 0179 it was clearly held- *"As noted earlier interest is compensatory.* ***It is to recompensate a party. In the instant case the State for not recovering its monies (duties) on time. At the point of time interest becomes due the interest there must be an ascertained amount of duty which a party needs to pay. If there is no ascertained duty, there is no question of compensating the State by way of interest."*** Hence, in the present case where the amount has been paid to the Government although under wrong accounting code there is no need pay interest as the nature of interest is essentially compensatory and not mandatory.

10.2. Appellant further submits that it is well-settled position in law that the interest is compensatory in character and it has to be paid by a party, who has withheld the payment of principal amount payable to the person to whom he has to pay the same. This basic concept about 'interest' should be borne in mind. This difference between 'tax', 'interest' and 'penalty' has been expounded by the Supreme Court in the case of A. C. C. v. Commercial Tax Officer. Hence where the Service Tax itself is not payable, the question of paying of interest on the same does not arise as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

10.3. The Appellant further submits that in the case of CCE v. Bill Forge Pvt. Ltd. 2012 (279) E.L.T. 209 (Kar.) it was held that the-"*Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest."* Therefore, the appellant submits that

where there is no liability of tax on them due to reasons mentioned aforesaid, there cannot be a levy of interest.

11. *Penalties cannot be imposed*

In re: Penalty under Section 77 (2) of the Finance Act, 1994

11.1. Appellant submits that the impugned order intends to levy penalty under Section 77(2) for not furnishing the true and complete facts in the statutory returns. Appellant submits that what is true and complete facts is a 'subjective issue' and there cannot be levied any penalty under the act for it, as what is true and complete for the appellant may not be so for the adjudicating authority. In this regards, reliance is placed on Godavari Khore Cane Transport Co. P. Ltd v.CCE, Aurangabad 2012 (26) S.T.R. 310 which stated that- "Penalty Imposition of Mis-representation of facts in ST-3 returns No penalty was imposable under Section 77 of Finance Act, 1994, which could be invoked only for failure to furnish Service tax return in due time."

11.2. Appellant submits that in the case of Cement Marketing Co. India Pvt. Ltd. v. Assistant Commissioner of Sales Tax 1980 (6) E.L.T. 295 (S.C) held that- "If the assessee entertained belief that he was not liable to include the amount of freight in the taxable turnover, it could not be said to be mala fide or unreasonable nor it can be dubbed as frivolous contention taken up merely for the purpose of avoiding liability to pay tax. What the law requires is that the assessee should not have filed a false return. A return cannot be said to be `false' unless there is an element of deliberation in it. It is true that where the incorrectness of the return is claimed to be due to want of care on the part of assessee and there is no reasonable explanation forthcoming from him for such want of care, the court may in a given case infer deliberateness and the

return may be treated as a false return. **But, where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to brand the return as a `false return' inviting penalty**" Therefore, appellant submits that when there is a bonafide belief on their part that the service tax is not attracted on a particular activity that they have filed returns under NIL Category.

In re: Penalty under Section 78 of the Finance Act, 1994

11.3. The Appellant submits that explanation 2 to Sub section (3) to Section 73 of the Finance Act, 1994 deals with the issuance of SCN and levy of the penalty when the Appellant makes the payment of service tax along with the interest the same is reproduced here for your ready reference.

*For the removal of the doubts it is here by declared that **no penalty** under any of the provisions of this Act or the Rules made there under **shall** be imposed in respect of payment of service tax under this Sub section and interest thereon.*

11.4. The Appellant further submits that the above explanation clearly says that no penalty shall be imposed on service tax when the Appellant makes the payment before the issuance of SCN. In this case there is no allegation regarding the fact of payment of service tax of Rs. 38,13,888/- by the Appellant. Therefore benefit under Section 73(3) of the Finance Act, 1994 shall be granted.

11.5. The Appellant submits that if any shortage found in the amount so paid, SCN may be issued for the short amount of tax so paid if any. But if the payment of tax is found correct then no penalty can imposed as per the true legislative spirit of section 73(3).

11.6. Appellant submits without prejudice to the foregoing that 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 the impugned order as explained in the preceding

paragraphs, when appellant were not at all liable for service tax and further also there was a basic doubt about the liability of the service tax itself, Appellant is acting in a bona fide belief, that he is 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 as there was reasonable cause for not collecting and paying service tax.

11.7. Appellant further submits that penalty under Section 78 is imposable when the duty should not have been paid, short levied or short paid or erroneously refunded ***because of*** either fraud, collusion, willful mis-statement, suppression of fact or contravention of any provision or rules. These ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a license which is not due to any fraud, collusion or willful mis-statement or suppression of fact or contravention of any provision is not sufficient to attract the penalty under Section 78. In the appellants case there is no intention to evade duty , particularly where all information asked by the department was promptly made available and audit was conducted by the department and report issued thereon , It cannot be a case of suppression of facts and no penalty under Section 78 is payable.

11.8. Without prejudice to the foregoing, Appellant submits that all the grounds taken for ***"Extended period of limitation"*** above is equally applicable for penalty as well.

11.9. Assuming but not admitting that there is a contravention of the rules or provisions attracting penalty under Section 78, the appellants submit that a detailed analysis of the provisions of Section 78 assumes significance in the instant case. The relevant extract of the Section 78 is reproduced here under for ready reference:

78. Penalty for suppressing, etc. of value of taxable services

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, *by reason of—*

(a) fraud; or
(b) collusion; or
(c) willful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, ***as determined under subsection (2) of section 73, shall also be liable to pay a penalty,*** in addition to such service tax and interest thereon, if any, payable by him, ***which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or*** erroneously refunded.

11.10. Appellant submits that the Section provides for imposition of a penalty which shall be equal to the amount of such **'service tax thathas not been levied or paid or has been short-levied or short -paid''as determined under sub-section (2) of section 73'**. The amount that could be determined under Section 73(2) shall mean **'the amount of service tax that has not levied or paid or short-levied or short-paid'.**

11.11. Appellant submits that from the above, it is evident that the penalty under the Section 78 is on the amount as determined under Section 73(2). Therefore the provisions of Section 73(2) assume examination. The extract of Section 73 (2) is reproduced hereunder for ready reference:

> (2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), **determine the amount of service tax due from,** or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and **thereupon such person shall pay the amount so determined.**

11.12. Appellant submits on combined reading of Section 78 and 73(2), it can be seen that the penalty under Section 78 can be levied only on the amount found payable by the appellant as determined under Section 73(2). The words "service tax due', "short levied" and "short paid" in both these Sections clearly indicate the service tax amount found to be

due after taking into account the amounts already paid and the penalty could be levied on such amounts as are short paid or found payable.

11.13. Without prejudice to the foregoing, Appellant submits that 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 we wish to rely upon the following decisions of Supreme Court.

(i) Hindustan Steel Ltd. V. State of Orissa – 1978 (2) ELT (J159) (SC)

(ii) Akbar BadruddinJaiwani V. Collector – 1990 (47) ELT 161(SC)

(iii) Tamil Nadu Housing Board V Collector – 1990 (74) ELT 9 (SC)

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 78.

11.14. The Appellant submits that in the case of DCM TextilesVs CCE, Gurgaon 2012 (26) S.T.R 359 (Tri-Del) it was held that *"The provisions of Section 78 of the Finance Act, 1994 are in parimateria with the provisions of Section 11AC and proviso to Section 11A(1) of the Central Excise Act, 1944. The Hon'ble Supreme Court in the case of Cosmic Dye Chemical v. C.C.E., Bombay (supra) has held that for invoking extended period under Section 11A(1) of Central Excises Act & Salt Act, 1944, the intention to evade the duty must be proved and for this purpose, the mis-statement or suppression of facts must be wilful and mere omission to provide some information or omitting to do something which the person is required to do*

would not be sufficient to invoke the provisions to Section 11A(l). ***Since the wordings of Section 78 of the Finance Act, 1994 are identical to the wordings of the proviso to Section 11A(1) of the Central Excise Act, 1944, the ratio of the judgment of the Hon'ble Supreme Court in the case of Cosmic Dye Chemical (supra) would be applicable to the question of imposition of penalty under Section 78 of the Finance Act, 1994. In this case, there is no dispute about the fact that the appellant were disclosing the information about the receipt of taxable service of procuring export orders on commission basis from commission agents abroad, in their balance sheets and as soon as the information in this regard was asked for by the department, the same was provided. Not only this, they also applied for and obtained the service tax registration and paid the substantial part of the same, Rs. 7,62,349/- plus interest though their liability to service tax was much less as the service tax liability*** *upheld by the Commissioner (Appeals) from 18-4-2006 comes to only Rs. 88,650/-. From the conduct of the appellant, it cannot be said that nonpayment of service tax was wilful or with intention to evade service tax. In view of this, merely on account of not obtaining service tax registration or non-payment of tax, it cannot be concluded that the same was with intention to evade the tax. Therefore, following the judgment of Hon'ble Supreme Court in the case of Cosmic Dye Chemical (supra), I hold that provisions of Section 78 of the Act are not attracted and as such the order of the Commissioner (Appeals) upholding the penalty under Section 78 is not sustainable. The same is set aside. The appeal is allowed."*

11.15. The Appellant submits that in the case of Krishna Security & Detective Services Vs CST Ahmadabad 2011 (24) S.T.R 574 (Tri-Del) it was held

that *"Further the learned advocate also drew my attention to the circular issued by the Board in this regard. According to the Board's Letter F.No. 137/167/2006-CX-4, dated 3-10-2007, once the service tax due has been paid with interest before issue of show cause notice, as provided in Section 73 discussed above, no show cause notice can be issued. When no show cause notice can be issued as per the provisions of law, there cannot be any justification for imposition of penalty. Further, I also find that the reliance of the learned advocate on the decisions of this Tribunal in the case of Nishchint Engineering Consultants Pvt. Ltd. v. C.C.E, Ahmedabad reported in 2010 (19) S.T.R. 276 (Tri. - Ahmd.) and is applicable to the facts of the present case. In view of the above, the imposition of penalty is not justified. Accordingly appeal is allowed with consequential relief to the appellant.*

11.16. The Appellant submits that in the case of Hajarilal Jangid Vs. CCE, Nagpur 2011 (24) S.T.R 510 (Tri-Mum) it was held that *"A plain reading of the above provisions makes it abundantly clear that if the assessee has discharged the service tax liability on his own ascertainment or on the basis of ascertainment by the Central Excise officers and inform the Central Excise officer of payment of such service tax then, no notice under sub-section (1) in respect of the amount so paid shall be served. In the instant case, the assessee discharged the tax liability for the period April to September, 2007 in August 2007 and March 2008 along with interest of Rs. 2,300/- on 8-8-2007. The balance amount of interest of Rs. 3,321/- was paid by them on 25-5-2009. They had filed the return due on 25-10-2007 by 28-8-2008. They also paid the late fee of Rs. 2,000/- for the delayed filing of the return as per the instructions of the officer who received the return. The above conduct of the assessee make it abundantly clear that there was no willful mis-statement or suppression*

of fact on the part of the assessee. Therefore, the provisions of sub-section (3) of Section 73 is clearly attracted in the facts of the case and issuance of a show-cause notice for demand of service tax and imposition of penalties was not at all warranted."

11.17. The Appellant submits that in the case of CST New Delhi Vs Competent Automobiles CO. LTD. 2011 (24) S.T.R 561 (Tri-Del) it was held that *"Penalty - Imposition of - Suppression of facts, etc. - Since Section 78 of Finance Act, 1994 is within the scope of Section 80 ibid, even in cases involving suppression, adjudicating authority can exercise discretion under Section 80 ibid to waive penalty - On facts, as assessee had paid Service tax and interest immediately when Revenue pointed it out, and thereafter cooperated with Revenue authorities, discretion exercised by adjudicating authority to waive of penalty found to be correct even though there was finding of suppression also. [para 4]"*In light of the above case laws the penalty under Section 78 of the Finance Act, 1994 requires to set aside.

11.18. The Appellant submits that taxability of service under the residential complex service depends on interpretation of "Residential complex" definition, Circular No. 108/02/2009-ST dated 29.01.2009, Circular No. D.O.F 334/03/2010-TRU dated10.02.2010 and various judicial pronouncements. It is settled position of the Law that whenever there is any scope for interpretation of the provisions of Finance Act, 1994 there cannot be extended period of limitation and imposition of Penalties. In this regard Appellant wishes to rely on the following judicial pronouncements.

a. In the case of Suprasesh G.I.S. & Brokers P. Ltd Vs CST, Chennai 2009 (013) S.T.R 641 (Tri-Chennai) it was held that *"We have however found a good case for vacating the penalties. By and large,*

the dispute agitated before us was highly ***interpretative of the various provisions of the Finance Acts 1994*** *and 2006, the IRDA Act, 1999 and the IRDA (Insurance Brokers) Regulations, 2002. In the circumstances, it will not be just or fair to inflict any penalty on the assessee"*

b. In the case of Ispat Industries Ltd Vs CCE, Raigad 2006 (199) E.L.T 509 (Tri-Mumbai) it was held that *"Apart from holding that the credit was admissible to the appellants on merits, we also find that the demand raised and confirmed against them is hopelessly barred by limitation. Admittedly, the appellant had reflected the fact of availing the balance 50% credit in the subsequent financial year, in their statutory monthly returns filed with the revenue. This fact is sufficient to reflect knowledge on the part of the revenue about the fact of taking balance 50% credit and is also indicative of the bona fides of the appellant. The appellants having made known to the department, no suppression or mis-statement on their part can be held against them.* ***The issue, no doubt involves bona fide interpretation of provisions of law and failure on the part of the appellants to interpret the said provisions in the way in which the department seeks to interpret them cannot be held against them so as to invoke extended period of limitation.*** *When there is a scope for doubt for interpretation of legal provisions and the entire facts have been placed before the jurisdictional, Central Excise Officer, the appellants cannot be attributed with any suppression or misstatement of facts with intent to evade duty and hence cannot be saddled with demand by invoking the extended period of limitation.As much as the demand has been set aside on*

merits as also on limitation, there is ***no justification for imposition of any penalty*** *upon them.*

c. In the case of Haldia Petrochemicals Ltd Vs CCE, Haldia 2006 (197) E.L.T 97 (Tri-Del) it was that the "*extended period of limitation cannot be invoked under the proviso to Section 11A(1) of the Central Excise Act, 1944. There is also no case for imposition of penalty, firstly for the reason that the demand of duty is unsustainable and secondly for the reason that the case involves* ***a question of interpretation of law.***"

d. In the case of Itel Industries Pvt. Ltd Vs CCE, Calicut 2004 (163) E.L.T 219 (Tri-Bang) it was held that *"In view of the facts of this case, we do not find any case or cause to invoke the penal liabilities, as we find that the Commissioner has held "It is essentially,* ***a question of interpretation of law*** *as to whether Section 4 or Section 4A would be applicable...." and not sustained the penalty under Section 11AC. We concur with the same. Therefore we cannot uphold the Revenue's appeal on the need to restore the penalty under Section 11AC as arrived at by the Original Authority. As regards the penalty under Rules 173Q & 210, we find the Commissioner (Appeals) has not given any finding why he considered the same as correct and legal in Para 8 of the impugned order. Imposition of penalty under Rules 173Q & 210* ***on matters of interpretation,*** *without specific and valid reasons, is not called for".*

On the basis of the above judgments it is clear that whenever due to bonafide interpretation of law service tax not paid extended period of limitation and penalty is not leviable.

In re: Benefit under Section 80 of the Finance, Act, 1994

11.19. Appellant further submits that under Section 80 of the Finance Act, 1994 which reads as under :

"***Notwithstanding*** *anything contained in the provisions of section 76, section 77 or first proviso to sub-section (1) of section 78* ***no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause*** *for the said failure.*"

On this ground the proceedings in the impugned order in so far as imposition of penalties is concerned should be dropped taking recourse to the Section 80 ibid.

11.20. Appellant submits that it is a undisputed fact that the levy of service tax on Construction of complex service had created lot of confusion and many questions have been raised about the constitutional validity, The following are the significant outcomes/events surrounding the levy of service tax right from date of introduction of this Service:

DATE	**PARTICULARS**
16.6.2005	Any service provided or to be provided to any person, by any other person, in relation to construction of complex is taxable under sub-clause (zzzh) of section 65(105) of the Finance Act, 1994. Provisions relating to levy of service tax by amending sections 65 and 66 of the Finance Act, 1994 have been made effective from 16th June, 2005.
1.8.2006	Circular F. No. 332/35/2006-TRU, dated 1-8-2006If no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of

	providing taxable service to any person by any other person does not arise
1.6.2007	The Finance Act, 1994 has sought to levy service tax for the first time on certain specified works contracts.
15.5.2008	Held in the case of Magus Constructions 2008 (11) S.T.R. 225 (Gau. That in the light of what has been laid down in the catena of decisions referred to above, it becomes clear that the circular, dated August 1, 2006, aforementioned, is binding on the department and this circular makes it more than abundantly clear that when a builder, promoter or developer undertakes construction activity for its own self, then, in such cases, in the absence of relationship of "service provider" and "service recipient", the question of providing "taxable service" to any person by any other person does not arise at all.
29.1.2009	Circular No. 108/2/2009-S.T., dated 29-1-2009 clarified that firstly that Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. Secondly, 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'.
1.7.2010	In the Finance Act, changes have been made in the construction services, both commercial construction and construction of residential complex, using 'completion certificate' issued by 'competent authority'. Before the issuance of completion certificate if agreement is entered into or any payment is made for sale of complex or apartment in residential complex, service tax will be leviable on such transaction since the builder provides the construction service.
15.2.2011	Trade Facility No. 1/2011, dated 15-2-2011 issued by Pune Commissionerate stated that Where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of para 3 of Boards Circular number 108/02/2009-S.T., dated 29-1-2009.

11.21. The Appellant submits that they have not paid the service tax on bonafide belief that as per the Circular 108/02/2009-ST dated 29.01.2009 they are not liable to when the construction undertaken for personal use and the also the value of the material is not liable for the service tax on which they have paid. In the case of CCE, Delhi Vs Softalk Lakhotia Infocom (P) Ltd. 2006 (1) S.T.R 24 it was held that *"The Revenue is relying upon the provisions of Section 75 of the Act whereas Section 80 of the Act provides that no penalty is imposable in case the assessee explains the reasonable cause for failure to comply with the*

provisions. In view of the above, I find no infirmity in the impugned order. The appeals are dismissed."

11.22. The Appellant further submits that the above reported case laws or the text of the Section 80 of the Finance Act, 1994 does not speak of proving to the satisfaction of Central Excise Officer regarding the reasonable cause. Therefore from the above it is clear that noticee is rightly eligible for the benefit under the Section 80 of the Finance Act, 1994.

11.23. The Appellant submits that in so far as Section 80 of the Act is concerned, it overrides provisions of Sections 76, 77, 78 of the Act and provides that no penalty shall be imposable (assuming but not admitting) even if any one of the said provisions are attracted if the assessee proves that there was reasonable cause for failure stipulated by any of the said provisions.

11.24. The Appellant submits that they have established the reasonable cause for the nonpayment of service tax. Once reasonable cause is established the authority has the discretion to hold that no penalty is imposable. The provision does not say that even upon establishment of reasonable cause, penalty is imposable. The provision only says no penalty is imposable.

11.25. The Appellant submits discretion to exercise the power under Section 80 of the Finance Act, 1994 to waive the penalty is an obligation on the authority. It is the duty of the authority to ascertain whether there is any reasonable cause for nonpayment of duty. In the case of KNR Contractors Vs CCE, Thirupathi 2011 (021) 436 (Tri-Bang) it was held that *"Perusal of Section 80 of the said Act, undoubtedly discloses that it will have overriding effect on the provisions of Sections 76, 77 & 78, in the sensethat imposition of penalty under any of those provisions is not mechanical exercise by the concerned authority. On the contrary, before*

proceeding to impose the penalty under any of those provisions of law, the authority is expected to ascertain from the records as to whether the assessee has established that there was reasonable cause for the failure or default committed by the assessee."

12. The appellant craves leave to alter, add to and/or amend the aforesaid grounds.

13. The appellant wish to be personally heard before any decision is taken in this matter.

For Hiregange & Associates
Chartered Accountants

Hiregange & Associates
Chartered Accountants
Hyderabad

Sudhir V S
Partner

For M/s Modi Ventures

Authorised Signatory

MODI VENTURES

PRAYER

Wherefore it is prayed that this Hon'ble CESTAT be Pleased to hold:

a. Set aside the impugned order of the Respondent.

b. The activity is sale of immovable property and not works contract

c. Service is not taxable in terms of Circular 108/02/2009 dated 29.01.2009.

d. Service tax cannot be demanded on gross receipts from the customer.

e. To hold that the benefit of composition scheme is extendable to the Appellant.

f. Extended period is not invocable.

g. Interest is not imposable.

h. No Penalty is imposable under Section 77 & Section 78

i. Any other consequential relief is granted.

Appellant

VERIFICATION

I, Soham Modi, Managing Partner of M/s Modi Ventures, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today the 13th of April, 2013

Place: Hyderabad

Appellant

STAY APPLICATION UNDER SECTION 35F OF THE CENTRAL EXCISE ACT, 1944.

BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL BANGALORE

Service Tax Appeal No. _____ Of 2013

Stay Application No. _____ Of 2013

Between:

M/s Modi Ventures .....**Appellant**
5-4-187/3 & 4, 2nd Floor,
MG Road,
Secunderabad- 500 003

Vs

The Commissioner (Service Tax) .....**Respondent**
Hyderabad-I Commissionerate,
Basheerbagh,
Hyderabad- 500 004

Application seeking waiver of pre-deposit and stay of recovery of Adjudication levies under section 35F of the Central Excise Act, 1944

The Appellant in the above appeal petition is the Applicant herein and craves to submit for kind consideration of this Hon'ble tribunal as under:

1. The Applicant/Appellant is now in appeal against Order-In-Original No. 6/2013- (Service tax)-Commr. (O. R. No. 53/2012-Hyd-1 Adjn (S.T) dated 17.01.2013, passed by the Commissioner of Customs, Central Excise & Service Tax, Hyderabad, Hyderabad I Commissionerate, L.B Stadium Road, Hyderabad- 500 004confirming the demand of service tax under provisions of Section 73 of the Finance Act, 1994.
2. The facts and events leading to the filing of this application and grounds of appeal have been narrated in the memorandum of appeal in Form ST-5 filed along with this application, and the Applicant/Appellant craves leave of this Honorable tribunal to adopt, reiterate and maintain the same in support of this application. The Applicant / Appellant maintain and reiterate the same grounds in support of this application.

MODI VENTURES

3. The Applicant submits that they have paid an amount of Rs.47, 73, 858 is already paid before issuing the show cause notice out of which Rs.27, 27, 115 is not considered towards service tax this application is filed for the waiver of the remaining service tax, interest and penalty under Section 78 of the Finance Act, 1994.
4. The Applicant submit that for the reasons mentioned in the appeal it would be grossly unjustified and inequitable and cause undue hardship to the Appellants if the amount of demand raised is required to be paid.
5. The Applicant submits that they are entitled to be granted an order staying the implementation of the said order of the Respondent pending the hearing and final disposal of this appeal viewed in the light of the fact that the order is one which has been passed without considering the various submissions made during the adjudication. It has been held by the Calcutta High Court in *Hooghly Mills Co. Ltd., Vs. UOI 1999 (108) ELT 637* that it would amount to undue hardship if the Appellant were required to pre-deposit when they had a strong prima facie case which in the instant case for reasons stated above is present directly in favour of the Appellant.
6. Without prejudice to the foregoing, appellant further submits the various decision that has been rendered relying on the Circular 108 are as under
    a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009 (015) STR 0077 (Tri-Bang)
    b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,
    c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)
    d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

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

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

7. Appellant submits that demands raised will not stand the test of appeal as correct legal and factual position were not kept in mind while passing the adjudicating Order. It is judicially following across the country when the demand has no leg to stand it is right case for 100% waiver of the pre deposit of the service tax.

8. The Appellants have to submit that there are multiple alternative lines of arguments on merits and on quantification. Even if a few of the arguments are accepted, the demand is likely to be fully satiated. The following table summarises the impact on the demand based on the arguments

	Position held by the Hon'ble Bench	**Tax Payable**	**Annexure Reference**
(a)	The transaction is sale of immoveable property and cannot be made liable for payment of service tax at all.	Nil	- ~ NO reference -
(b)	The transaction is a sale of immoveable property but can be made taxable with effect from 01.07.2010 under the category of Construction of Complex Services, but reclassification of service after issuance of SCN is not permitted	Nil	- -NO reference -
(c)	The transaction is a sale of immoveable property but can be made taxable with effect from 01.07.2010 under the category of	Rs.10,14,144/-	XI

Construction of Complex Services, reclassification of service after issuance of SCN is also permitted, benefit of Notification 36/2010-ST is granted		
(d) The transaction is classifiable under Works Contract Services, reduction on account of materials transferred under Rule 2A is permitted	Rs.42,65,728	XI
(e) The transaction is classifiable under Works Contract Services, option of composition scheme is extended	Rs.33,77,102/-	XI
(f) The Sale Deed entered prior to 01.06.2007 and ST paid under "Construction of complex service" continues to be taxed under same classification with the same abatement. For the Sale deeds entered after 01.06.2007 and no ST paid prior such date will be classified under "works contract service" with composition.	Rs.50,28,263-	XI
(g) Demand within normal period of limitation (i.e. Period April 2010 to December 2010) (From SCN Annexure itself).	Rs.39,07,584	

9. As compared to the above, the Appellants have already paid service tax as under:

Amount paid by Cash	Rs.47,73,858
Amount entitled as CENVAT Credit	Rs.1,92,627

10. Applicant submits that there has been gross error in considering the receipts in the computation as compared to the 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 .

11. Without prejudice to foregoing Notification No. 36/2010-ST dated 28.06.2010 and Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010 exempts 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, hence excluding the receipts prior to 01.07.2010 the revised service tax liability without prejudice to submission would be Rs.10,14,144/-

12. Without prejudice to the foregoing, assuming but not admitting Service Tax, if any is payable under the head Works Contract, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006 would be Rs.42,65,728/-

13. Without prejudice to foregoing assuming but not admitting Service Tax liability, if any is payable under composition scheme, the same has to be restricted to only on those flats on which service tax was paid prior to 01.06.2007. On calculating the composition scheme for all flats entered after 01.06.2007 under composition scheme amount to and for the flats already paid service tax under the abatement scheme continued to be

calculated under abatement scheme amounts the entire total service tax liability amounts to Rs.50,28,263

14. In the case of *Silliguri Municipality and Ors.* v. *Amalendu Das and Ors.* (AIR 1984 SC 653) it was held that *"It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that* ***the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand.*** *There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief* ***may lead to public mischief,*** *grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given".*

15. The Applicant also plead financial hardship due to the reason that the service tax has not been reimbursed by the recipient and also that the Appellant is not a business entity as is required to pay out a portion of their earnings.

16. The Applicant crave leave to alter, ad to and/or amend the aforesaid grounds.

17. The Applicant wish to be personally heard before any decision is taken in this matter.

PRAYER

WHEREFORE, the Applicant pray that pending the hearing and final disposal of this appeal, an order be granted in their favor staying the order of the Respondent and granting waiver of pre-deposit of the entire amount.

For MODI VENTURES

Partner

Signature of the Applicant

VERIFICATION

I, Mr. Soham Modi, Managing Partner of M/s Modi Ventures, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today the 13th of April, 2013

Place: Hyderabad

For MODI VENTURES

Partner

Signature of the Applicant

MODI VENTURES

IN THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL BANGALORE

Sub: Appeal against the order of the. Commissioner of Customs, Central Excise and Service Tax (Appeal), Hyderabad in Order in Original No 6/2013 (H-I) S. Tax dated 17.01.2013

I/We, Mr. Soham Modi, Managing Partner of M/s Modi Ventures hereby authorise and appoint Hiregange & Associates, Chartered Accountants, Bangalore or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

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

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

Executed this13th day of April 2013 at Hyderabad

For MODI VENTURES

Signature

Partner

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

Dated: 13.04.2013

Hiregange & Associates,
No. 1010, 26th Main,
Above Corporation Bank,
4th T Block, Jayanagar,
Bangalore- 560 041

For Hiregange & Associates
Chartered Accountants

Hiregange & Associates Chartered Accountants Hyderabad

Sudhir V S
Partner (M. No. 219109)

MODI VENTURES

IN THE CUSTOMS, EXCISE AND SERVICE TAX APELLATE TRIBUNAL
BANGALORE

Sub: Appeal against the order of the. Commissioner of Customs, Central Excise and Service Tax (Appeal), Hyderabad in Order in Original No 6/2013 (H-I) S. Tax dated 17.01.2013

I/We, Mr. Soham Modi, Managing Partner of M/s Modi Ventures hereby authorise and appoint Hiregange & Associates, Chartered Accountants, Bangalore & S.B. Gabhawalla & Co. Chartered Accountants, Mumbai or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

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

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

Executed this 13th day of April 2013 at Hyderabad.

For MODI VENTURES

Signature

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

Dated: 13.04.2013

Hiregange & Associates,
No. 1010, 26th Main,
Above Corporation Bank,
4th T Block, Jayanagar,
Bangalore- 560 041.

For Hiregange & Associates
Chartered Accountants

Rajesh Kumar T.R
Partner (M. No. 211159)

S.B. Gabhawalla & Co.
B-12, "La Bella",
Azad Lane, Andheri (east)
Mumbai – 400069

For S B Gabhawalla & Co.
Chartered Accountants

Sunil Kumar Gabhawalla
Partner (M. No. _____)

MODI VENTURES