

GREENWOOD ESTATES

Shop No.1, 2 & 3, Ground Floor, Hariganga Complex, Ranigunj, Secunderabad - 500 003.

To,
THE ADDITIONAL COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE & SERVICE TAX,
HYDERABAD II COMMISSIONERATE,
L.B. STADIUM ROAD, BASHEERNAGH,
HYDERABAD 500 004.

Date: 16.06.2010

Sub: Reply to Show Cause Notice (SCN) viz., No. 77/2010-ST (HQST No. 56/09 - AE IV)
dated 21.05.2010 issued to M/s Greenwood Estates, Secunderabad.
Ref.: Our Service Tax registration no. AAHFG0711B-ST001.

1. M/s. Greenwood Estates is a partnership firm engaged in the business of construction of residential units. M/s. Greenwood Estates had undertaken a venture by name Greenwood Residency. M/s. Greenwood Estates had obtained service tax registration and made payments of service tax for the receipts pertaining to the period December 2007 to December 2008.
2. With respect to residential units constructed and sold M/s. Greenwood Estates has entered into two agreements, namely 'Sale Deed' for conveying the title of land along with the semi-constructed apartments and another "Construction Agreement" for construction of the semi finished house.
3. Initially, upto December 2008, when amounts were received by the M/s. Greenwood Estates some amount was paid towards service tax in spite of having doubt and lot of confusion on the applicability of service tax. Later, on the issue of the clarification vide the circular No. 108/02/2009 dated 29.01.2009 by the department the M/s. Greenwood Estates had stopped collecting and discharging service tax liability on the amounts collected in respect of the construction agreement as they were of the bonafide belief that they were excluded vide the personal use clause in the definition of residential complex.
4. Investigation was taken up by the department and summons dated 13.01.2010 were done for the submission of relevant records/documents/information for which the M/s. Greenwood Estates had extended full cooperation.
5. Subsequently, the Additional Commissioner has issued a show cause notice dated 21.05.2010 to the M/s. Greenwood Estates to show cause as to why:
 - a. An amount of Rs.9,20,133/- payable towards Service Tax, Education Cess and Secondary and Higher education cess should not be demanded under section 73(1) of the Finance Act, 1994 (hereinafter referred to as the Act) for the period January 2009 to December 2009;
 - b. Interest on the above should not be demanded under section 75 of the Act;
 - c. Penalty under sections 76, 77 and 78 of the Act should not be demanded from them.

Customs Central Excise and
Service Tax Hyderabad
Commissionerate.

18 JUN 2010

Signature

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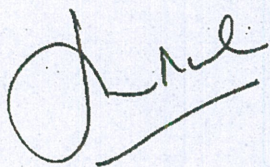
In as much as :

- a. Whether the M/s. Greenwood Estates is liable to service tax in respect of the amounts received during the above period?
- b. Whether the M/s. Greenwood Estates had intended to evade the payment of duty?
- c. Whether penalty under section 76 and 78 be imposed simultaneously?

Submissions:

In reply to the above propositions –

1. M/s. Greenwood Estates submits that the SCN has been issued without considering the factual position and the relevant provisions and hence the same has to be set aside.
2. The facts in respect of the project in the subject SCN are that the M/s. Greenwood Estates has constructed flats and the transaction with the customer was in two folds as under:
 - a. M/s. Greenwood Estates sold the undivided share of land along with the semi-constructed residential unit to the customer.
 - b. Subsequently the customer/owner of the land along with the semi-built up unit gets the construction done by the M/s. Greenwood Estates.
3. Whereas the SCN has assumed that the M/s. Greenwood Estates constructs HOUSES and that it sells the land in the first agreement entered with the client. It can be seen from this that the SCN has been issued without considering the actual facts and has been issued just for the purposes of creating an issue. Hence for this reason itself it shall be set aside. It was held in the case of SCT v BPL Ltd. [2010] 24 STT 220 (KAR) by the Honourable High Court that *"Without ascertaining the actual facts, the substantial questions of law could not be answered."*
4. In respect of the first fold there is no construction service provided by the M/s. Greenwood Estates to their customer as there is no distinct service provider and receiver. Therefore there is no service tax on the same. This is not disputed by the department as well.
5. In your SCN you have claimed that Rs. 9,20,133/- payable towards service tax, education cess and secondary and higher education cess. The amount you are narrated is wrong and the actual amount payable is only Rs. 2,38,589/- towards service tax, education cess and secondary and higher education cess from January 2009 to December 2009.



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6. In respect of the second fold of the transaction there was always a doubt regarding the applicability of service tax as the definition of residential complex mentioned in section 65(91a) states that where such a complex is for personal use then no service tax is payable. The definition is extracted below:

"residential complex" means any complex comprising of—

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

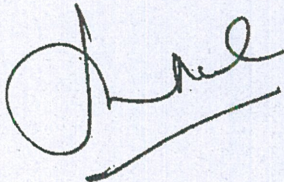
Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause,—

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

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

In this case where it says that where the complex is used for personal use of 'SUCH PERSON' then no liability. But who is SUCH PERSON was not clear.

7. The same was clearly clarified in the recent circular no. 108/02/2009 -ST dated 29.02.2009. This was also clarified in two other circulars as under :
- a. F. No. B1/6/2005-TRU, dated 27-7-2005
 - b. F. No. 332/35/2006-TRU, dated 1-8-2006
8. M/s. Greenwood Estates submits that Board Circular No. 108/2/2009-S.T., dated 29-1-2009 states that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction.



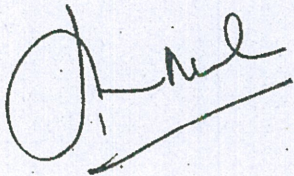
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Relevant extract

"...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'..."

9. M/s. Greenwood Estates 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 SCN is void abinitio.
10. Further the notice has bought a new theory that the exemption for personal use as stated in the definition would be available only if the entire complex is for personal use of ONE person. The M/s. Greenwood Estates wishes to state that while interpreting the law no words should be added or deleted. The law should be read as it is in its entirety. The relevant part of the circular is as under
"...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'..."
11. The M/s. Greenwood Estates wishes to highlight that neither in the definition nor in the clarification, there is any mention that the entire complex should be used by one person for his or her residence to be eligible for the exemption. The exemption would be available if the sole condition is satisfied i.e. personal use.
12. The M/s. Greenwood Estates submits the preamble of the referred circular for understanding what issue exactly the board wanted to clarify. The relevant part of the said circular (para 1) is extracted hereunder for ready reference.
"....Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction linked payment..." (Para.1)



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13. The M/s. Greenwood Estates submit that from the above extract, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the notice.

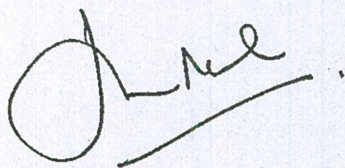
14. The M/s. Greenwood Estates submits that it is important to consider what arguments are considered by board for providing this clarification. The relevant part as applicable in the context has been extracted as under for ready reference.

"...It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax..." (Para 2)

15. The M/s. Greenwood Estates 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 provided based on the examination of the above argument among others.

16. The M/s. Greenwood Estates 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)

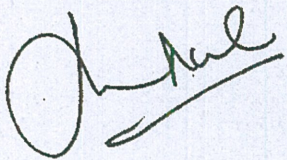


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17. The M/s. Greenwood Estates submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.
- For service provided until the sale deed has been executed to the ultimate owner.
 - For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.
18. The M/s. Greenwood Estates 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 construction in the construction agreement portion. Therefore this clarification is applicable to them *ibid*.
19. The M/s. Greenwood Estates has very narrowly interpreted by the department without much application of mind and has concluded that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex.
20. Where an exemption is granted, 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.
21. The M/s. Greenwood Estates submits that the entire amount of service tax paid is eligible for refund. Further M/s. Greenwood Estates submits that when the levy does not exist, then payment of penalty does not arise and hence the SCN has to be set aside.
22. Without prejudice to the foregoing, M/s. Greenwood Estates further submits that non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from abinito.

Relevant Extract



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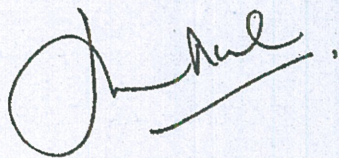
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"13.4 However, residential complex having only 12 or less residential units would not be taxable. Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services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

23. Without prejudice to the foregoing, M/s. Greenwood Estates further submits that the board in between had clarified in an indicative manner that the personal use of a residential complex is not liable for service tax in the Circular F. No. 332/35/2006-TRU, dated 1-8-2006.

2.	Again will service tax be applicable on the same, in case he constructs commercial complex for himself for putting it on rent or sale?	Commercial complex does not fall within the scope of "residential complex intended for personal use". Hence, service provided for construction of commercial complex is leviable to service tax.
	Will the construction of an individual house or a bungalow meant for residence of an individual fall in purview of service tax, is so, whose responsibility is there for payment?	Clarified vide F. No. B1/6/ 2005-TRU, dated 27-7-2005, that residential complex constructed by an individual, intended for personal use as residence and constructed by directly availing services of a construction service provider, is not liable to service tax.

24. Without prejudice to the foregoing, M/s. Greenwood Estates further submits that Honorable CESTAT, Bangalore, has granted the stay in the case of M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL-1106-CESTAT-Bang relying on the Circular No. 108/02/2009-ST dated 29.01.2009, therefore the impugned notice is not in order.
25. Based on the above the M/s. Greenwood Estates was of the bonafide belief that service tax was not payable and stopped collecting and making payment. Hence where service tax is itself not payable then the question of non payment raised by the SCN is not correct and the entire SCN has to be set aside based on these grounds only.
26. Without prejudice to the foregoing M/s. Greenwood Estates submits that the SCN states that in respect of the construction agreement services are provided by the M/s. Greenwood Estates and there exists service provider and receiver relationship between them and hence it invariably attracts service tax.



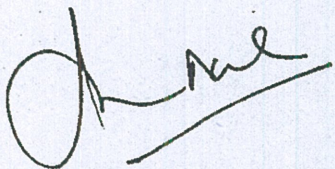
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27. M/s. Greenwood Estates wish to submit here that for any activity to be a taxable service few conditions mentioned below have to be satisfied:
- There must be a defined service provider
 - There must be a defined service receiver
 - The activity under question should be a defined activity
 - During the period that is under question the levy must be in existence.
- All these conditions have to be fulfilled simultaneously and cumulatively.
28. In the instant case the condition 'c' is not fulfilled as the complex that is constructed falls under the exclusion portion of the residential complex definition and for other reasons already mentioned above. Hence even though the other 3 conditions are satisfied it does not mean that the activity is a taxable service. Hence the SCN should be set aside.
29. Further the M/s. Greenwood Estates submits that in the Finance Bill 2010 there was an explanation added to the section 65(105)(zzzh) of the Act where the taxable service construction of residential complex is defined. In this respect, in the clarification issued by the TRU vide D.O.F. No.334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in tax treatment among different practices, the said explanation was inserted. The circular also clarifies that by this explanation the scope has been enhanced. This gives the conclusion 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 under question.
30. Without prejudice to the foregoing M/s. Greenwood Estates submits that if the transaction is considered as taxable and there is service tax liability then the M/s. Greenwood Estates would be eligible for CENVAT credit on the input services and capital goods used and hence the liability shall be reduced to that extent. The SCN has not considered this and has demanded the entire service tax.

INTEREST

31. Without prejudice to the foregoing M/s. Greenwood Estates submits that when service tax itself is not payable, the question of interest and penalty does not arise.
32. M/s. Greenwood Estates further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).



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PENALTY

33. Without prejudice to the foregoing, M/s. Greenwood Estates submits that service tax liability on the builders till date has not been settled and there is full of confusion as the correct position till date. With this background 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 Badruddin Jaiwani 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 76.

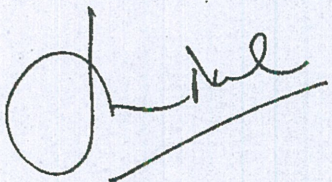
34. Further section 80 of Finance Act provides no penalty shall be levied under section 76, 77 or 78 if the assessee proves that there is a reasonable cause for the failure. The notice in the instant case was under confusion as to the service tax liability on their transaction, therefore there was reasonable case for the failure to pay service tax, hence the benefit under section 80 has to be given to them.

35. Further the SCN states that the M/s. Greenwood Estates was well aware of the provisions and that they have misinterpreted the provisions with an intent to evade payment of duty. But M/s. Greenwood Estates submits that when there is a confusion prevalent as to the levability and the mala fide not established by the department, it would be a fit case for waiver of penalty as held by various tribunals as under. Further there cannot be an intent to evade payment of duty in such cases and just because the M/s. Greenwood Estates has not interpreted the law properly it cannot be said that there was an intent to evade payment of tax. This does not prove the mala fide intent at all.

- a. The Financiers vs Commissioner of C. Ex., Jaipur 2008 (009) STR 0136 Tri-Del
- b. Vipul Motors (P) Ltd. vs Commissioner of C. Ex., Jaipur-I 2008 (009) STR 0220 Tri-Del
- c. Commissioner of Service Tax, Daman vs Meghna Cement Depot 2009 (015) STR 0179 Tri-Ahmd

36. The SCN has levied penalties under sections 76 and 78. M/s. Greenwood Estates wish to submit here that penalties under Sections 76 and 78 are mutually exclusive and both the penalties cannot be imposed simultaneously. In this regard reliance is placed on the following decisions:

- a. Opus Media and Entertainment Vs Commissioner of C. Ex., Jaipur 2007 (8) STR 368 (T).
- b. The Financiers Vs Commissioner of Central Excise, Jaipur 2007 (8) STR 7 (T).



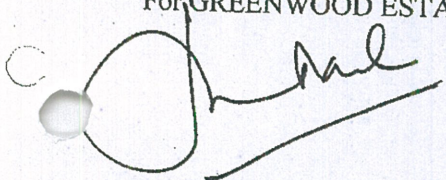
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37. M/s. Greenwood Estates crave leave to alter, add to and/or amend the aforesaid grounds.
38. M/s. Greenwood Estates wish to be heard in person before passing any order in this regard.

Thank You.

Yours sincerely,
For GREENWOOD ESTATES,



Soham Modi
Managing Partner.