

FORM ST - 5

[See rule 9(1)]

**Form of Appeal to the Appellate Tribunal under sub-Section (1) of
Section 86 of the Finance Act, 1994****IN THE CUSTOMS, CENTRAL EXCISE & SERVICE TAX APPELLATE
TRIBUNAL: HYDERABAD****APPEAL No. ST/.....of 2018****Between:**

**M/s. Paramount Builders,
#5-4-187/3 & 4, II Floor,
Soham Mansion, MG Road,
Secunderabad
Hyderabad -500 003,**

.....
Appellant

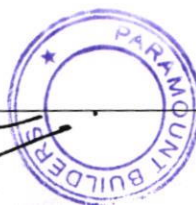
Vs.

**The Commissioner of Central Tax,
Secunderabad GST Commissionerate,
GST Bhavan, L.B.Stadium Road,
Basheerbagh,Hyderabad- 500 004**

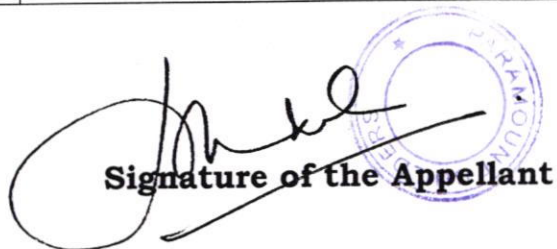
..... **Respondent**

01(a)	Assessee Code	AAHFP4040NST001
(b)	Premises Code	
(c)	PAN or UID	AAHFP4040N
(e)	E-mail Address	
(f)	Phone Number	
(g)	Fax Number	
02.	The Designation and Address of the Authority passing the Order Appealed against.	The Commissioner (Appeals-II), 7 th Floor, GST Bhavan, L.B.Stadium Road, Basheer Bagh, Hyderabad – 500004
03.	Number and Date of the Order appealed against	O-I-A No: HYD-EXCUS-SC-AP2-021-18-19-ST dated 27.04.2018
04.	Date of Communication of a copy of the Order appealed against	24.05.2018
05.	State of Union Territory and the Commissionerate in which the order or decision of assessment, penalty, was made	Telangana, Secunderabad GST Commissionerate, Hyderabad-500 04
06.	If the order appealed against relates to more than one Commissionerate, mention the names of all the Commissionerate, so far as it relates to the Appellant	No
07.	Designation and address of the Additional Commissioner of	

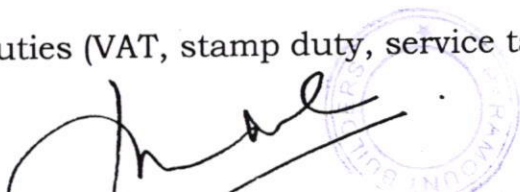
	adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals)	Service Tax, Service Tax Commissionerate, Sitaram Prasad Tower, Red Hills, Hyderabad-500 004.
08.	Address to which notices may be sent to the appellant	M/s Hiregange & Associates, "4th Floor, West Block, Anushka Pride, Opp. Ratnadeep Supermarket, Road Number 12, Banjara Hills, Hyderabad, Telangana 500034 (Also to Appellant as stated in cause title supra)
09.	Address to which notices may be sent to the Respondent	The Commissioner of Central Tax, Secunderabad GST Commissionerate, GST Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad-500 004
10.	Whether the decision or order appealed against involves any question having a relation to the rate of Service Tax or to the value of goods for the purpose of assessment.	Yes
11.	Description of service and whether in 'negative list'	Works Contract Services Not in Negative list
12.	Period of Dispute	July 2012 to March 2014
13(i)	Amount of service tax, if any Demanded for the period of dispute	Rs.5,20,892/- (To be requantified in remand proceedings)
(ii)	Amount of interest involved up to the date of the order appealed against	Interest u/s 75 of the Finance Act 1994
(iii)	Amount of refund if any, rejected or disallowed for the period of dispute	Not Applicable
(iv)	Amount of penalty imposed	Penalty under Section 76 of Finance Act, 1994
14(i)	Amount of service tax or penalty or Interest deposited. If so, mention the amount deposited under each head in the box.	Rs.1,70,371/- vide was already paid and appropriated in the OIO which can be adjusted towards mandatory pre-deposit under section 35F of Central Excise Act, 1944 to the extent required
(ii)	If not, whether any application for dispensing with such deposit has been made?	Not applicable
15.	Does the order appealed against also involve any central excise duty demand, and related fine or penalty, so far as the appellant is concerned?	No



16.	Does the order appealed against also involve any customs duty demand, and related penalty, so far as the appellant is concerned?	No
17.	Subject matter of dispute in order of priority (please choose two items from the list below) [i) Taxability – Sl. No. of Negative List. ii) Classification of Services iii) Applicability of Exemption Notification No., iv) Export of Services v) Import of Services vi) Point of Taxation vii) CENVAT viii) Refund ix) Valuation x) Others]	Priority ii) – Classification of Services Priority x) - Others
18.	Central Excise Assessee Code, if registered with Central Excise	Not Applicable
19.	Give details of Importer/Exporter Code (IEC), if registered with Director General Of Foreign Trade	Not Applicable
20.	If the appeal is against an Order-in-appeal of Commissioner (Appeals), the Number of Order-in-original covered by the said Order-in-Appeal.	Order in Original No.82/2016 – Adjn (ST) (ADC) dated -09.06.2017
21.	Whether the Appellant has also filed Appeal against the order against which this appeal is made.	No, as per the knowledge of the Appellant.
22.	If answer to serial number 21 above is 'Yes', furnish details of appeal.	Not Applicable
23.	Whether the appellant wishes to be Heard in person?	Yes. At the earliest convenience of this Honorable Tribunal.
24.	Reliefs claim in appeal	To set aside the impugned order to the extent aggrieved and grant the relief claimed


Signature of the Appellant

STATEMENTS OF FACTS

- A. M/s. Paramount Builders, # 5-4-187/3& 4, II Floor, Soham Mansion, MG Road and Secunderabad - 500 003 is a partnership firm (hereinafter referred to as "Appellant") mainly engaged in the sale of residential flats to prospective buyers during and after construction.
- B. Occupancy certificate (OC) for the project was obtained in the year 2010. For the flats booked after receipt of occupancy certificate (OC), sale deed is executed for the entire sale consideration and amounts received towards the additional works (on the flats booked after OC) carried out were assessed for service tax under the category of 'works contract' adopting the taxable value in terms of Rule 2A of Service tax (determination of value) Rules, 2006 i.e. on a presumed value of 40% of the contract value. For the flats booked before OC, Sale deed is being executed for semi-finished construction while construction agreement was executed for balance construction work. In all cases, sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.
- C. Appellant collects amounts from their customers towards:
- a. Sale deed for sale of semi-finished villa along with land;
 - b. Construction agreement;
 - c. Other taxable receipts (additions/alternations works)
 - d. Other non-taxable receipts (Corpus fund, electricity deposit, water deposit & service tax);
 - e. Taxes/duties (VAT, stamp duty, service tax etc.,);
- 

- D. The levy of service tax on such arrangements has seen a fair share of litigation and amendments. The Appellant is also a party to the litigation process and matters for earlier periods are pending at various adjudication/judicial forums.
- E. In July 2012, the service tax law underwent a paradigm shift and importantly, the exemption for personal use available for construction of residential complexes was removed. Accordingly, it became evident that service tax was payable on the construction agreement as per valuation prescribed under Rule 2A of the Service Tax (Determination of Value) Rules, 2012 i.e. on a presumed value of 40% of the contract value. The Appellant regularly discharged the service tax on the said value in normal course. However, it did not discharge service tax on sale deed value, which is in the nature of immovable property and on the value of taxes collected.
- F. The detailed working of the receipts and the attribution of the said receipts was already provided to the Department authorities, identified receipt wise and flatwise. The summary of the same is provided hereunder:

Description	Receipts	Non-taxable	Taxable
Sum of towards sale deed	Rs.60,20,500/-	Rs.60,20,500/-	
Sum of towards agreement of construction	Rs.36,31,857/-		Rs.36,31,857/-
Sum of towards other taxable receipts	Rs.79,375/-		Rs.79,375/-
Sum of towards VAT, Registration charges, etc	Rs.12,00,682/-	Rs.12,00,682/-	
Total	Rs.1,09,32,414/-	Rs.72,21,182/-	Rs.37,11,232/-

G. Accordingly, the value of taxable services constituted 40% of Rs.37,11,232/- i.e. Rs.14,84,492/- and service tax thereon @ 12.36% constituted Rs.1,83,483/-. It was also explained that the actual payment of service tax amounted to Rs.2,35,522/- leading to excess payment of service tax of Rs.52,038/- when compared with actual liability.

H. Previously several SCN's were issued covering the period up to June 2012 with the sole allegation that "services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under 'works contract service'.

a. Vide Para 2 of SCN dated 24.06.2010

b. Vide Para 2 of Second SCN dated 23.04.2011

c. Vide Para 2 of third SCN dated 24.04.2012

In all the above SCN's, there is an error in as much including the value of sale deeds within the ambit taxable value while alleging service tax is liable only after execution of sale deed i.e. on construction agreements.

I. The status of pending Show Cause Notices are as follows

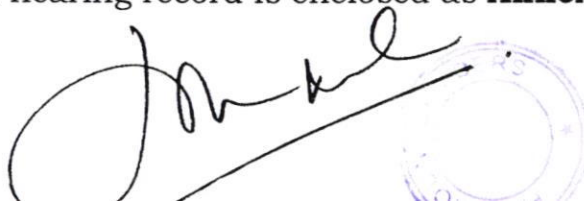
Period	SCN	Amount	Status
Sep 06 to Dec 09	HQPQR No. 87/2010 Adjn (ST)(ADC) dated 24.06.2010	Rs.11,80,439/-	Stay granted by CESTAT vide stay order dated 18.04.2012
Jan 10 to Dec 10	OR No.60/2011-Adjn (ST) (ADC), dated 23.04.2011	Rs.4,46,403/-	Pending before CESTAT, Bangalore
Jan 11 to Dec 11	OR No. 54/2012 Adjn (ADC) dated 24.04.2012	Rs.46,81,850/-	Pending before CESTAT, Bangalore
Jan 12 to Jun 12	C.No.IV/16/16/195/2011 .ST-Gr.X	Rs. 2,92,477/-	Pending before CESTAT

J. Another SCNO.R. No. 108/2014-Adjn-ST(JC) dated 19.09.2014 (Copy of SCN is enclosed as **Annexure__**) was also issued covering the period from July 2012 to March 2014 with similar error of quantifying the proposed demand of service tax in as much treating the sale deed values & other taxes as taxable value of services (Annexure to SCN) while alleging that service rendered after execution of sale deed alone liable for service tax (Para 2 of SCN).

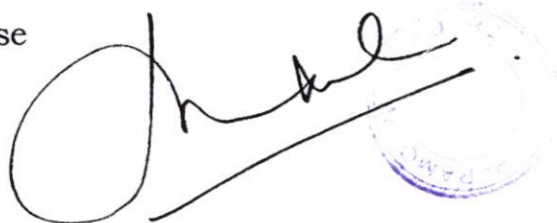
K. The liability for the impugned period and the details of the payments are summarized in the below-mentioned table for ready reference:

SI No	Particulars	Amount (Rs.)
1	Gross Receipts	Rs.1,09,32,414/-
2	Less: Deductions	
	a) Sale Deed Value	Rs.60,20,500/-
	b) VAT, Registration charges, stamp duty and other non taxable receipts	Rs.12,00,682/-
3	Taxable amount (1-2)	Rs.37,11,232/-
4	Abatement @ 40% (3 * 40%)	Rs.14,84,493/-
5	Service Tax @ 12.36% (4 * 12.36%)	Rs.1,83,483/-
6	Actually Paid	
	a) CENVAT	Rs.65,148/-
	b) Cash	Rs.1,70,374/-
7	Excess Paid (5-6)	(Rs.52,038/-)

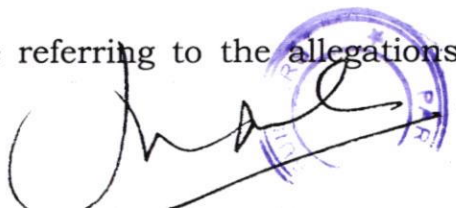
L. The Appellant had filed a detailed reply to show cause notice (Copy of SCN reply is enclosed as **Annexure__**) explaining as to how the service tax is not liable to be paid on the sale deed value which is a part of immovable property & also attended the personal hearing on 03.10.2016 (Copy of personal hearing record is enclosed as **Annexure__**)



- M. Subsequently, Order-in-Original No. 82/2016-Adjn (ST) (ADC) dated 09.06.2017 (Copy of OIO is enclosed as **Annexure**__) was passed upholding the total demand after appropriating the amount of service tax paid.
- N. Aggrieved by the order, Appellant has filed an appeal before Commissioner (Appeals-II) (Copy of ST-4 is enclosed as **Annexure**__) and appeared for personal hearing on 15.03.2018 (Copy of personal hearing record is enclosed as **Annexure**__)
- O. Subsequently, Appellant received the Order-in-Appeal No. HYD-EXCUS-SC-AP2-0021-18-19-ST dated 27.04.2018 (Copy of OIA is enclosed as **Annexure**__) confirming a part of the demand and remanded back for requantification.
- P. The impugned order confirmed the demands on the following grounds:
- a. The assessment is made in terms of clause 2(A)(ii)(A) of the Service Tax (Determination of Value) Rules, 2006. The cited Rule 2A underwent a retrospective amendment by Section 129 of the Finance Act, 1994 read with sixth schedule there under. In terms of this retrospective amendment. Where the composite contracts include the land value. The assessment under this Rule 2(A) [applicable for the material period in dispute in the instant case] would be in terms of Sl.No. 2 of the Table at Schedule VI of the Finance Act, 2017 since there is no dispute that clause (ii) under Rule 2A is to be applied only after exhausting clause (i) and the same has actually been applied in the instant case

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- b. The department viewed that the activity carried out by the appellant after the execution of sale deed is taxable under the category of Works Contract Merely because the notice differentiates the activity of the appellant in respect of the sale of the semi-finished flats sold by the appellant and the subsequent activity of Works Contract Services as per the contract agreements; this in itself is insufficient to conclude the value of semi-finished flats is inconsequential for arriving at the gross receipts for the assessment to tax. If the appellant's view is accepted, there would have been no need to issue the Show Cause Notice in the first place since, the liability on the finishing contract is undisputed; It is only inclusion of the value of the sale deed (including unfinished flat built on composite contract of land+ unfinished flat) that is disputed in the instant case.
- c. The activity of the appellant, Works Contract Service agreed upon by the appellant and only objection to the notices issued was regarding the valuation of the contract undertaken by him. This being the case, when the changes in the law were effected, the basic definitions of the activities were not changed and remained the same though the liability was governed by the new provisions. As submitted by the appellant themselves. Works Contract Services was defined under Section 65B (90) and abatements provided under Notification referred to. Further the grounds mentioned in the earlier periodical notices were also the same demanding tax on the Works Contract Services provided by the appellant. Therefore, I do not find any infirmity in the notice referring to the allegations in the earlier

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notices and making the same applicable to the present notice in terms of Section 73(1A) of the Act.

- d. Post 01.07.2012, there has been no doubt regarding the payment of Service Tax under the category of works contract, and the appellant cannot hide behind the excuse of the disputed issue being under litigation. If the appellant has already paid tax on the activity for which the demand is raised, then the penalty would be accordance to the Short paid/ not paid demand quantified based on the remand made. Furthermore, I am also restrained from allowing the benefit of Section 80 as the same has been omitted from the statute as on the date of adjudication, without saving/ repeal in respect of the existing impositions, by Section 116 of the Finance Act, 2015. The waiver provision is therefore not available for invocation. The penalty under Sec 76 is specific to non discharge of tax and does not require allegation of gross violations; and imposable for the malfeasance where the notice is issued for normal period of limitation

To the extent aggrieved by impugned order, which is contrary to facts, law and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the Appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.

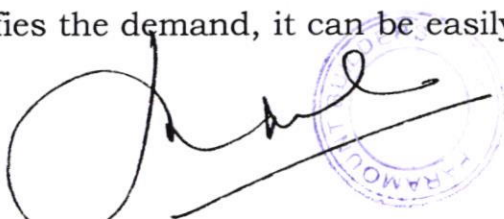
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GROUND OF APPEAL

1. Appellant submits that the impugned order (to the extent aggrieved) is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.

In re: The allegation in SCN and the finding of impugned OIA is that Appellant has to pay service tax on the “construction agreements”, which has been paid properly by Appellant. Therefore, the demand needs to be set aside on this ground itself:

2. Appellant submits that undoubtedly they are discharging service tax on construction agreements thereby paying service tax on activity as proposed by impugned SCN read with earlier SCN's and as confirmed by the impugned OIA. The SCN included the value of sale deeds only at the time of quantifying the demand. As seen from the operative part of both SCN & OIA it is clear that it is only sole allegation of SCN (Para 2) & finding of OIA(Para 9) that construction agreements are subject to service tax under the category of “works contract”, no allegation has been raised to demand service tax on the sale deed value.
3. As stated in the background facts, the Appellant started paying service tax on the value of “construction agreements” from July 2012 onwards. Thereafter, the said taxes have been regularly paid. The details of the taxes paid are also acknowledged in Para 4 of the SCN. On a perusal of the SCN, it is evident that the issue in the current SCNs is therefore limited to the aspect of quantification of demand. On a perusal of Para 4 of the SCN which quantifies the demand, it can be easily inferred that the

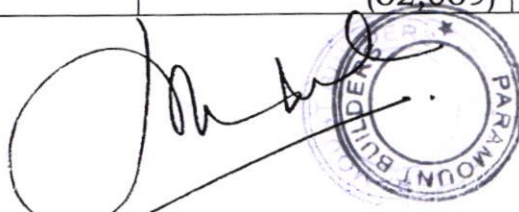
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demand is quantified based on statements submitted by the Appellant.

The said statements for the periods are enclosed as **Annexure**__.

4. On going through the statements provided by the Appellant, it can be seen that a detailed breakup of the amount received towards "sale deeds", "construction agreements", 'other taxable receipts' and 'other non-taxable receipts' was provided.
5. However, on going through the quantification of demand provided through annexure to the SCN, it can also be observed that though the allegation is to demand service tax on construction agreements, the quantification is based on gross amounts mentioned above for all the activities including amounts received towards the "sale deeds".
6. It is therefore apparent that the SCN/order represents an error in quantification of the demand. It may be noted that the Appellant have regularly and diligently discharged Service Tax on the value of "construction agreements" after June 2012 onwards. The above is explained through a comparative chart provided below:

Particulars	As per Appellant	As per SCN
Gross Receipts	1,09,32,414	1,09,32,414
Less: Deductions		
Sale Deed Value	60,20,500	
VAT, Registration charges, stamp duty and other non taxable receipts	12,00,682	3,96,570
Taxable amount	37,11,232	1,05,35,844
Abatement @ 40%	14,84,493	42,14,338
Service Tax @ 12.36%	1,83,483	5,20,892
Actually Paid	2,35,522	1,70,371
Balance Demand	(52,039)	3,50,521



7. The Appellant submit that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

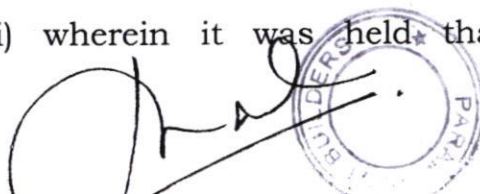
In Re: Impugned Order is beyond SCN

8. Appellant submits that the impugned order has went beyond the SCN in as much as confirming the demand on the portion of semi-finished flat in the sale deed which was never a proposition in the Show Cause Notice. For easy reference para 2 of the SCN is extracted as follows

*"As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the **services rendered by them after execution of sale deed** against agreements of construction to each of their customers to whom the land was already sold are taxable services under "Works Contract Service"*

9. It was never proposition of the SCN to tax the activities involved in the Sale deed and thus it can be seen that the impugned order has clearly traveled beyond the SCN and hence is not valid to that extent. Reliance is placed on the following in this regard.

- i. Ultratech Cement Vs CCE Nagpur 2011 (022) S.T.R 289 (Tri-Bom) wherein it was held that *"therefore the **proposition made** by the learned SDR, which is liable to be rejected as **beyond the scope of the show-cause notices, is not acceptable otherwise also**".*
- ii. Caliber Point Business Solutions Ltd. Vs CST, Mumbai 2010 (18) S.T.R 737 (Tri-Mumbai) wherein it was held that *"On careful*

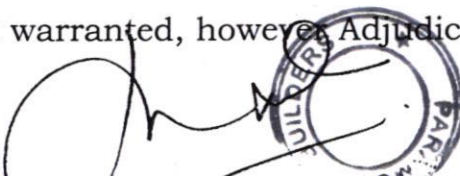


*examination of the issue involved in this case, I find that the **adjudicating authority has gone beyond the scope of show-cause notice, while denying the refund claim on the ground of non-utilization of Cenvat credit and difference in S.T.-3. The adjudicating authority cannot go beyond the allegation made in the show-cause notice**, hence the denial of Cenvat credit not utilized and the difference in S.T.-3 are not sustainable and the refund is allowed."*

10. Since there is no proposition in the SCN with respect to taxability of the Sale deed the impugned order passed on the basis of the same is not correct and on this count alone the impugned order needs to be set aside.

11. Impugned order vide para 10 stated that *"If the appellant's view is accepted, there would have been no need to issue the Show Cause Notice in the first place since, the liability on the finishing contract is undisputed; It is only inclusion of the value of the sale deed (including unfinished flat built on composite contract of land+ unfinished flat) that is disputed in the instant case"*

12. In this regard Appellant submits that as rightly stated by the impugned order, the liability after execution of sale deed is undisputed and it has been accepted by the Appellant also. Further Appellant has been submitting the same aspect from the inception of the proceedings that the Show Cause Notice is not warranted, however, Adjudicating authority

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has failed to appreciate the fact. When the issuance of Show Cause Notice is not warranted, the order passed based on the same is not valid and hence needs to be set aside.

In Re: Service tax liability on the sale of semi-finished

13. Without prejudice to the above, Appellant submits that operative part of SCN it is clear that it is the only sole allegation of SCN (Para 2) that construction agreements are subject to service tax under the category of "works contract", no allegation has been raised to demand service tax on the sale deed value. Whereas the value of sale deed is also included in the quantification of demand. However, the Hon'ble Commissioner (Appeals-II) has remanded back the case for requantification of demand after giving deduction towards land value involved in the sale deed and by making the remaining part of sale deed value as taxable.

14. In this regard, Appellant submits that semi-finished villa/house represents the construction work already done prior to booking of villa/house by the prospective buyer. The work undertaken till that time of booking villa/house is nothing but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self-service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be bought into the realm of works contract. In this regard, reliance is placed on the following:

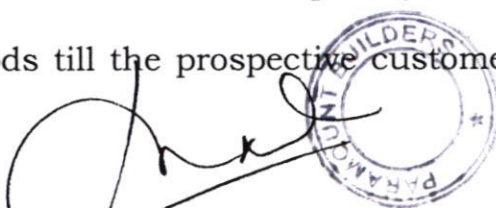
- a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.) wherein it was held that **"115.**



*It may, however, **be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser.** The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."*

- b. CHD Developers Ltd vs State of Haryana and others, 2015 –TIOL-1521-HC – P&H-VAT wherein it was held that "45. In view of the above, essentially, the value of the immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where the property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property."

15. Appellant further submits that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi-finished villa/house is not chargeable to VAT and it is mere sale of immovable property (same was supported by above-cited judgments also). Therefore said sale cannot be considered as works contract and consequently no service tax is liable to be paid. All the goods till the prospective customer become



owner have been self-consumed and not transferred to anybody. Further goods, being used in the construction of semi-finished villa/house, have lost its identity and been converted into an immovable property which cannot be considered as goods therefore the liability to pay service under 'works contract service' on the portion of semi-constructed villa represented by 'sale deed' would not arise.

16. Without prejudice to the foregoing, Appellant submits that there is no service tax levy on the sale of semi-finished villa/house as the same was excluded from the definition of 'service' itself. The relevant portion of definition *qua* section 65B(44) reads as follows:

a) *an activity which constitutes merely,—*

(i) ***a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or***

17. Appellant submits that to be covered under the above exclusion the following ingredients shall be satisfied:

a. There should be transfer of title:

Transfer of title means "change in ownership" and in the instant case, there is change in ownership from Appellant to their customer since after execution of 'sale deed' customer is the owner of "said immovable property" thereby this condition is satisfied.

b. Such transfer should be in goods or immovable property:

What constitutes immovable property was nowhere defined in the provisions of Finance Act, 1994 or rules made thereunder. It is

pertinent to refer to the definition given in section 3 of Transfer of property act 1882 which reads as follows:

"Immovable property" does not include standing timber, growing crops or grass"

Further section 3 of the General clauses act, 1897 which reads as follows:

"Immovable property" shall include land, benefits to arise out of the land, and things attached to the earth, or permanently fastened to anything attached to the earth.

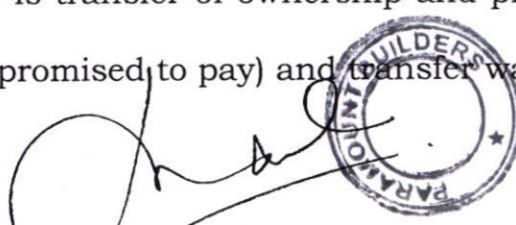
Reading of the above, undisputedly "land along with semi-finished villa/house" is immovable property thereby this condition was also met.

c. It is by way of sale, gift or other manner

In the instant case execution of 'sale deed' & payment of applicable stamp duty itself evidences that there is sale. Further, it is pertinent to consider the definition given under section 54 of the Transfer of Property Act, 1882. In absence of the definition of "sale" in the provisions of Finance Act, 1994 and relevant extract reads as follows:

*"Sale" is a **transfer of ownership in exchange for a price paid or promised or part-paid and part promised**. Sale how made — Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, **can be made only by a registered instrument**.*

In the instant case also there is transfer of ownership and price was also paid (part of the price is promised to pay) and transfer was made



by executing 'sale deed' which is validity registered with stamp authorities. Therefore, undoubtedly there is sale thereby this condition was also met.

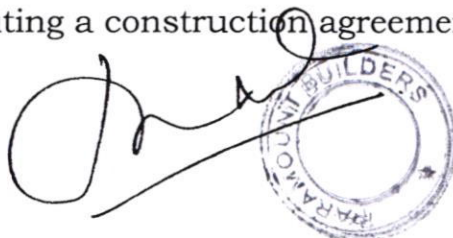
d. **Merely**

Undoubtedly 'sale deed' was executed to transfer the title in the immovable property only and such transaction (sale of immovable property) does not involve any other activity namely construction activity as the same done entering separate agreement Mis-constructed by the impugned SCN.

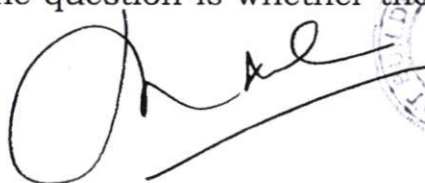
Therefore all the above conditions were satisfied in the instant case thereby making the transaction falling under said exclusion and hence amounts received towards 'sale deed' are not subject to service tax.

18. Appellant further submits that if two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words, the discernible portion of the transaction, which constitutes a transfer of title in the immovable property would be excluded from the definition of service by operation of the said exclusion clause while the service portion would be included in the definition of service. In the instant case, it was well discriminated the activity involved & amounts received towards

- i. Sale of "land along with semi-finished villa" ('sale deed' separately)
- ii. Construction activity (by executing a construction agreement)

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19. Appellant submits that whatever the activity involved & amounts received towards construction agreement was suffered service tax and again taxing the associated transaction alleging that construction was involved is not warranted under the Finance Act, 1994 more so in case when there is clear separation/bifurcation/vivisection of activity involved & amounts received towards such associated transactions from the activity of construction.
20. Appellant submits that from the above exclusive portion of the definition of service it is clear that it specifically excluded the ***Sale/transfer of immovable property***. In the present case, the agreement of sale deed is entered for sale/register of semi-finished flat which is an immovable property. Accordingly, the amount received for sale of semi-finished flat, is excluded from the definition of service. On the basis of same, Appellant submits that the confirmation of demand by OIA on the Appellant is not sustainable and requires to be set aside.
21. Appellant submits that Article 265 of the Constitution of India is extracted for ready reference
- “No Tax shall be levied or collected except by authority of law”**
22. Appellant submits that from the above it is clear that Article 265 prohibits the levy or collection of the tax except by authority of law. Therefore the law should be within the legislative entries in the Seventh Schedule of the Constitution. The question is whether the Parliament is



empowered to levy the service tax on sale of materials, undivided share of land & others.

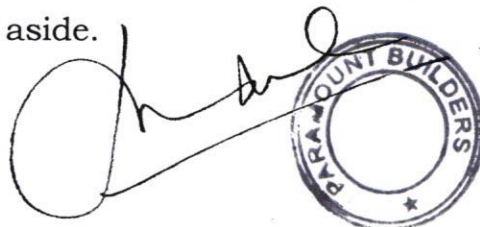
23. Appellant submits that Parliament is empowered to levy the service tax vide Entry No. 97 of List of Seventh Schedule to Constitution of India. The Entry No. 97 is extracted here for ready reference.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

24. Appellant submits that from the above it is clear that the Parliament under Entry 97 can levy the tax on matters, which are not covered under List II and List III. The question is whether the tax on sale of immovable property i.e., is not covered under List III. Relevant entries of the List III are extracted here for ready reference.

List III-6. Transfer of property other than agricultural land; registration of deeds and documents

25. From the above, it is clear that the tax on the transfer of immovable property is covered under List III and Service Tax which is levied under entry no. 97 is not applicable for the sale /transfer of immovable property. On the basis of the same, Appellant submits that Service Tax is not applicable for sale/transfer of immovable property. As the impugned order has not considered this aspect, the same is not sustainable and requires to be set aside.

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26. Appellant submits that the subject SCN has computed service tax liability also on the receipts received for sale of semi-finished flat under works contract service. For this Appellant submits that section 67 of the Finance Act, 1994 reads as follows.

“SECTION 67. Valuation of taxable services for charging service tax. — (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;”

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.”

27. Appellant submits that from the analysis of section 67 of the Finance Act, 1994, it is clear that service tax requires to be paid on the value of the **services rendered**. In the present case, the impugned order has gone beyond the valuation provisions and demanding service tax even on the amount received for sale of the semi-finished flat. On the basis of the same, Appellant submits that the impugned order demanding service tax beyond the provisions of section 67 is not sustainable and requires to be set aside.



28. Appellant submits that Hon'ble High Court in the decision of GD Builders VS Union of India 2013 (32) STR 673 held that in case of a composite contract, **the service element should be bifurcated and ascertained and then taxed.** In the present case service, there are two separate transactions one is sale of semi-finished flat and second one is construction service. Accordingly, the proposition of the above case law can be applied. On the basis of same also, Appellant submits that demand of service tax on the sale of immovable property is not sustainable and requires to be set aside

In Re: Sale of Semi-finished flats is not a works contract

29. The impugned OIA has stated to aggregate the value of the semi-constructed flat to the gross value of the finishing works contract in the second construction agreement.

30. Appellant further submits that the definition of works contract provided under new service tax law is as follows.

65B(54) "**works contract**" means a contract wherein transfer of **property in goods** involved in **the execution of such contract** is **leviable to tax as sale of goods** and such contract is for the purpose of carrying out **construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property** or for carrying out any other similar activity or a part thereof in relation to such property;

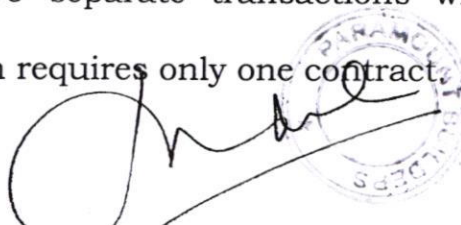
31. Appellant submits that from the definition of works contract as provided under section 65B(54) of the Finance Act, 1994, it is clear that to cover under the definition of works contract,

- a. There should be a contract. (**Only a Single Contract**)
- b. In such a contract, there should be transfer of property in goods and
- c. Such a contract is for the purposes of carrying out, - specified services.

32. Appellant submits that in the present case, their agreement of construction may liable under the definition of works contract as provided under section 65B(54) of the Finance Act, 1994 and they are paying appropriate service tax as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006. The impugned order is demanding service tax on the sale of semi-finished flat under works contract service, which is beyond the definition of works contract service. On the basis of the same, Appellant submits that the confirming of the demand by the order on the value of sale of semi-finished flat is not sustainable and requires to be set aside.

33. Appellant submits that the transaction of sale of semi-finished flat is not covered under the definition of works contract due to the following reasons.

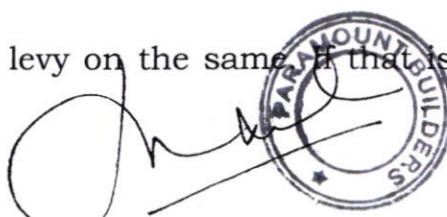
- a. The Appellant has entered two separate transactions with the customer, whereas the definition requires only one contract.

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- b. The transaction is for sale of semi-finished flat and not for construction.
- c. As the present transaction of the Appellant is not covered under the definition of works contract, hence service tax under works contract service is not sustainable and requires to be set aside.
- d. In many cases, the "sale deed" is entered into after the completion of the building and therefore the demand cannot be justified under the said entries.
- e. Until the stage of entering into a "sale deed", the transaction is essentially one of the sale of immovable property and therefore excluded from the purview of Service Tax.

34. In this regard, Appellant submits that the impugned order has rightly given the deduction to the land value involved in the sale deed since it is in the nature of the immovable property. However, the impugned order has failed to apply the same analogy to the semi-finished portion of the sale deed which acquired the character of the immovable property.

35. Appellant submits that para 9 of the impugned order has stated that the Notice has been rightly issued under section 73 (1A) of the Finance Act, 1994. In this regard, Appellant submits that the analogy of the order is not acceptable since the definition of the service has been changed and **certain exclusions** are provided for the definition of service. Since the activities under taken by the Appellant falls under the exclusion part of the definition of the Service, there is no levy on the same. It is the



position of the law that if the Appellant is under bonafide belief as regards to nontaxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.

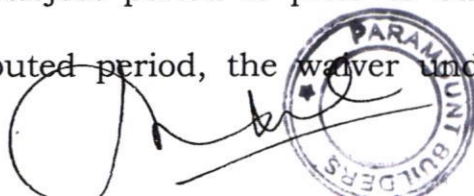
- CCE-II Vs Nita Textiles & Industries 2013 (295) E.L.T 199 (Guj)
- CCE, Bangalore-II Vs ITC Limited 2010 (257) E.L.T 514 (Kar)
- Larsen & Toubro Ltd Vs CCE., Pune-II 2007 (211) E.L.T 513 (S.C)
- Centre For Development Of Advanced Computing Vs CCE, Pune 2002 (141) E.L.T 6 (S.C).

41. Impugned order vide para 13 stated that *"I am also restrained from allowing the benefit of Section 8 as the same has been omitted from the statute as on the date of adjudication without saving/repeal in respect of the existing impositions, by section 116 of the Finance Act, 2015"*

42. In this regard, Appellant submits that above finding ignored the Article 20(1) of the Constitution of India which reads as under:

"20. (1) No person shall be convicted of any offense except for violation of a law in force at the time of the commission of the Act charged as an offense, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offense."

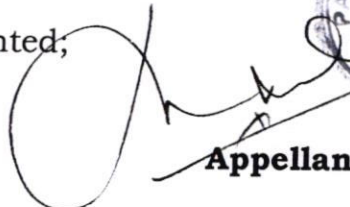
43. Appellant submits that section 80 was omitted by the Finance Act, 2015 only (with prospective effect) and the subject period is prior to such omission. Therefore at the time of disputed period, the waiver under



PRAYER

Wherefore it is prayed that

- a. To set aside the impugned order to the extent aggrieved;
- b. To hold that the service tax has been paid on the value of the construction agreement as alleged in the SCN and therefore the order needs to be set aside;
- c. If required, to hold that even on merits the amounts received towards sale deed is not taxable;
- d. To hold that no interest and penalties are leviable;
- e. To hold that Appellant is eligible for the benefit of waiver of the penalty under Section 80 of the Finance Act, 1994;
- f. Any other consequential relief shall be granted;


Appellant

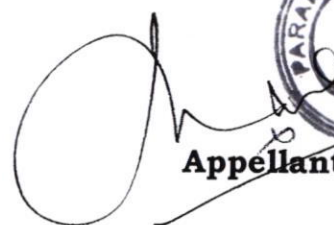


VERIFICATION

I, _____, _____ of M/s. Paramount Builders,
 the Appellants herein do declare that what is stated above is true to the best
 of our information and belief.

Verified today ___ day of September 2018

Place: Hyderabad


Appellant

