

ANNEXURE - 1

**ORDER IN ORIGINAL NO.
HYD-SVAX-COM-02-04-15**

DATE: 20.02.2015

	order of the Commissioner (Appeals)	
08.	Address to which notices may be sent to the appellant	Hiregange & Associates, Chartered Accountants # 1010, 1st Floor, Above Corporation Bank, 26th Main, 4th T Block, Jayanagar, Bangalore - 560 041. (Also to Appellant as stated in cause title supra.)
09.	Address to which notices may be sent to the respondent	The Commissioner of Service Tax, Service tax Commissionerate, 11- 5-423/1/A, Sitaram Prasad Tower, Red Hills, 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 service
12.	Period of Dispute	January 2012 to December 2013 (referred to in SCN as March 2014)
13(i)	Amount of service tax, if any Demanded for the period of dispute	Rs. 1,05,22,560 /-
(ii)	Amount of interest involved up to the date of the order appealed against	Rs. _____ /- (Apprx.)
(iii)	Amount of refund if any, rejected or disallowed for the period of dispute	Not Applicable
(iv)	Amount of penalty imposed	Penalty imposed under Section 76 & 77 of the 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. (A copy of the Challan under which the deposit is made shall be furnished)	An amount of Rs. 52,39,666/- is already paid (Rs. 51,81,397/- by Cash and Rs. 58,269/- paid by CENVAT utilization). And same was adjusted for payment in terms of section 35F of Central Excise Act, 1944. (Challans enclosed as annexure II)
(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	No



	demand, and related fine or penalty, so far as the appellant is concerned?	
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 1 – Taxability Priority 2 –Valuation
18.	Central Excise Assessee Code, if registered with Central Excise	Not registered with Central Excise
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.	
21.	Whether the respondent 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.

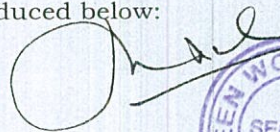
For GREENWOOD ESTATES

Appellant

Partner

STATEMENT OF FACTS

- A. M/s. Greenwood Estates, Secunderabad (hereinafter referred to as 'The Appellant') is mainly engaged in the sale of residential houses to prospective buyers while the units are under construction. For the said purpose, the **Appellant enters into two separate agreements with their customers one is for sale of undivided portion of land together with semi-finished flat (sale deed) and another one is construction agreement for undertaking construction. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.**
- B. The levy of service tax on such arrangements has seen a fair share of litigation and amendments. In 2009, there was no clarity on whether service tax was payable or not. However, the Appellants chose to pay service tax under protest on the amount received towards the "construction agreement" on the basis of law as understood by them. Thereafter, based on Circular No. 108/2/2009 ST dated 29.01.2009, the Appellants believed that service tax was not payable and therefore discontinued the payment of service tax on the said "Construction agreements".
- C. Not satisfied with the non payment of Service Tax, the Anti Evasion department initiated the proceedings against the appellants and various statements were recorded.
- D. In the above context, a Show Cause Notice (SCN) dated 21.05.2010 for the period from January 2009 to December 2009("First SCN") was issued against the Appellants. Para 7 of the Show Cause brings out the case built by the SCN. The relevant para is reproduced below:




As seen from the records submitted, the assessee have entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the **construction service rendered by assessee thereafter to their customers under agreement of construction are taxable under service tax** as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of 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 vide sale deed are taxable services under "works contract service"**

E. The appellants submitted a detailed response to the said SCN wherein they had raised various alternate agreements as to why tax cannot be demanded on the agreements. Their primary emphasis was on the benefit available on account of "personal use exemption" as per clarification issued by CBEC vide circular 108.

F. In the Adjudication Order, the Ld. Additional Commissioner has concisely and correctly summarized the issue in para 13 of the Order. The relevant part is reproduced as under:

The issue before me is to whether M/s. Greenwood Estates, are liable to pay Service Tax on Rs. 2,30,03,332/- being the amount received against agreements of construction during the period from Jan 2009 to Dec 2009 under Works Contract Service

G. The Ld. Commissioner ultimately held that the benefit of personal use is not available and therefore, demanded the tax and consequential penalties. Being aggrieved, the Appellants filed an appeal before the



Commissioner (Appeals) and thereafter before the CESTAT. The matter is currently pending before the CESTAT

- H. In the meantime, the second follow up Show Cause Notice dated 23.04.2011 ("Second SCN") was issued for the period from January 2010 to December 2010. The said Show Cause Notice also continued to make similar allegations relating to taxability of "Construction Agreements". The relevant part is reproduced below:

As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by assessee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of 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 vide sale deed are taxable services under "works contract service"

- I. While the Show Cause Notice continued on the same allegations as the first SCN dated 21.05.2010, it inadvertently also included for the purposes of calculation the amounts received towards the sale agreement. Therefore, in reply to the said notice, in addition to the earlier grounds, the appellants also highlighted the quantification error.
- J. The said Show Cause was also adjudicated against the Appellants. The Appellants filed an Appeal before the Commissioner (Appeals). While the Commissioner (Appeals) did not agree on the contentions of personal use,



he did find merit in the Appellants plea of quantification and therefore remanded the matter back to the Original Authority to requantify the value of taxable services.

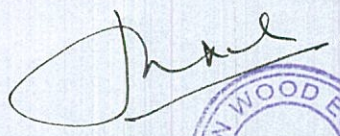
K. Similar fate was received by the third Show Cause Notice dated 24.04.2012 for the period from January 2011 to December 2011 wherein also while alleging that amounts received towards "Construction Agreements" were taxable, the Show Cause Notice ultimately also included the amounts for sale agreements.

L. In the meanwhile, the Appellants restarted the payment of Service Tax under protest on the "Construction Agreements". However, the Department continued to issue further Show Cause Notices.

M. Two further Show Cause Notices were issued dated 02.12.2013 for the period from January to June 2012 and another dated 25.09.2014 for the period from July 2012 to March 2014. Similar error of alleging liability towards payment of service tax on value of construction agreements but including the value of sale agreements also within the ambit existed in these Show Cause Notices as well.

N. The following table summarises the litigation history in this regard.

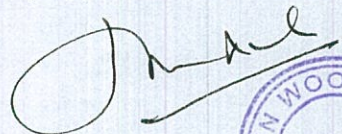
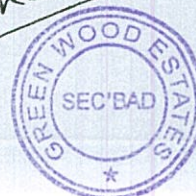
Period	SCN	Issue	Amount	Status
Jan 09 to Dec 09	HQPQR No. 77/2010 Adjn (ST) dated 21-05-2010	Whether construction agreements are liable for payment of service tax or are eligible for exemption under personal use?	Rs.9,47,737/-	Matter pending in the CESTAT
Jan 10 to Dec 10	OR No.61/2011, dated 23-04-	Whether construction agreements	Rs.48,00,391/-	Matter remanded back to the original




	2011	are liable for payment of service tax or are eligible for exemption under personal use? (However, the amount quantified also includes value of "sale deeds")		authority for re-quantification.
Jan 11 to Dec 11	OR No. 52/2012 Adjn (Addl Commr) dated 24-04-2012	Whether construction agreements are liable for payment of service tax or are eligible for exemption under personal use? (However, the amount quantified also includes value of "sale deeds")	Rs.46,81,850/-	Matter remanded back to the original authority for re-quantification.

O. Once again the Appellants responded to these Show Cause Notices and the matter was heard on 11.02.2015. The Ld. Commissioner for the first time in the entire set of proceedings has without giving any opportunity to Show Cause, held that the value received towards the "Sale Agreements" are also liable for payment of Service Tax.

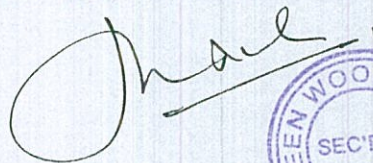
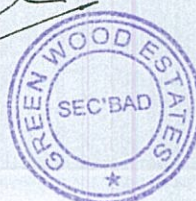
P. Despite the detailed submissions made vide written reply as well as during the personal hearing, the Ld. Respondent has passed a common order vide Order-In-Original No. HYD-SVTAX-000-COM-02-14-15 dated 20.02.2015 for the both the notices as under (Copy of the order enclosed as Annexure I) :

- 9
- i. Confirmed the service tax liability of Rs.1,05,22,560/- under the category of works contract service for the period upto 30.06.2012 and thereafter as a taxable service/declared service of works contract (upto December 2013)
 - ii. Confirmed the demand of Interest at applicable rates in terms of Section 75 of the Finance Act, 1994 in respect of the service tax liability as confirmed above
 - iii. Imposed Penalty of Rs.100 for every day of failure to pay or 1% of confirmed service tax per month whichever is higher, starting with the first day after due date till the date of actual payment of all dues in terms of section 76 Finance Act, 1994.
 - iv. Imposed a penalty of Rs.10,000/- in terms of Section 77 of the Finance Act, 1994

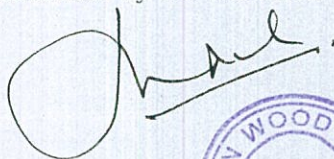
Q. The Ld. Respondent passed the impugned Order mainly on the basis of the following grounds:

- a. An explanation has been inserted by the Finance Act, 2010 with effect from 01.07.2010 under sub-clause (zzzb) of clause 105 of Section 65 of the Finance Act, 1994. The said explanation makes it very clear that construction of a complex which is intended for sale, wholly or partly by a builder before, during or after construction shall be deemed to be service provided by the builder to the buyer.
- b. The legal provision relating to nature of transaction in construction service has been made explicitly clear by the insertion of the said explanation and the earlier Board's clarifications are relevant only prior to said explanation. As such for the period 01.07.2010 to 30.06.2012, the nature of transaction liable for taxation under

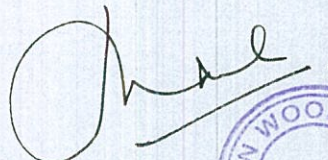
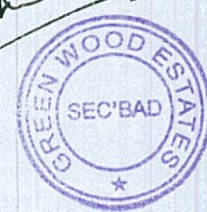
construction service will be governed by the service category definition read along with the explanation as stated above.

- c. For the period after 01.07.2012, it is seen that construction of a complex, building, civil construction etc., is a declared service under Section 66 F(b) Section 66 B(54) defines 'works contract' and Section 66K(h) states service portion in the execution of works contract as a declared service. The above legal provisions read together will explain the scope of taxable activity.
- d. Further, Section 66E(h) talks about the service portion in the execution of works contracts to be liable for tax. The execution of works contract is a method of rendering service of various categories. Construction of immovable property involving transfer of property in goods in the execution of such contract is leviable to service tax under works contract service.
- e. The explanation inserted with effect from 01.07.2010 and the scope of declared service make it clear that construction of complex or building intended for sale to a buyer except where the entire consideration is received after issuance of completion certificate by the competent authority is a taxable service.
- f. The scope of service rendered by them cannot be included under section 65B(44)(a) as claimed by the assessee. "Service" shall not include the activity which constitutes merely a transfer of title in immovable property by way of sale. In the present context; the transaction now under consideration is not mere transfer of title by way of sale. It involves the service of construction before and after such sale. The service tax liability is on such service and not on sale of immovable property as mis-constructed. by the assessee.



- g. It is a fact that the assessee collected and discharged service tax partly as mentioned in demand notices. Hence, the question of extending cum tax value benefit to part value for short payment of tax does not arise.
- h. Construction under works contract service is taxable on gross receipts basis and considering the scope of construction service, receipts of all amounts are liable for service tax, except where entire consideration is received after issue of completion certificate. Since construction of semi-finished flats, for which completion certificates have not been issued by the competent authority, are arising due to taxable activity, the amounts received as consideration are taxable.
- i. In the absence of any substantial and specific grounds to invoke the provisions of Section 80, the assessee's liability for penalty under Section 76 for failure to pay tax in time and under Section 77 for Various contraventions of miscellaneous nature, is to be upheld. Penalty under Section 76 is attracted if a person liable to pay service tax fails to pay such Tax as per the provisions of Finance Act, 1994.

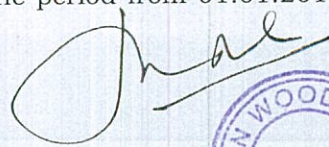
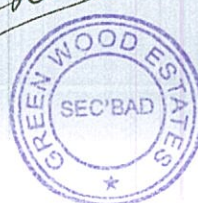
Aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the Appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice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

GROUND OF APPEAL

During the period under consideration, the allegation in SCN that we have not paid service tax on value of "construction agreements" is incorrect. Therefore, the SCN needs to be dropped on this ground itself.

1. As stated in the background facts, the Appellants started paying service tax on the value of "construction agreements" in the month of December 2011. Thereafter, the said taxes have been regularly paid. This is also evident from the fact that the current SCN proposes appropriation of taxes already paid by them. The details of the taxes paid are also acknowledged in para 4 of the SCN dated 25.09.2014 and the SCN dated 02.12.2013. On a perusal of the SCNs, 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 demand is quantified based on statements submitted by the Appellants. The said statements for the periods are marked as Annexure "IV".
2. On going through the statements provided by the Appellants, it can be seen that a detailed breakup of the receipts into receipts towards "sale deeds", receipts towards "construction agreements", receipts towards other taxable receipts and receipts towards other non-taxable receipts was provided.
3. However, on going through the annexure to the SCN, it can also be observed that though the allegation is to demand a tax on construction agreements, the quantification is based on gross amounts mentioned above for all the activities including amount towards the "sale deeds".
4. It is therefore apparent that the SCN represents an error in quantification of the demand. Notwithstanding our argument that no Service Tax was payable on "construction agreements" for the period from 01.01.2012 to

30.06.2012 (in view of the amendment in the law, the Appellants believe that exemption for personal use is no longer available from 01.07.2012 and therefore the payment thereafter is not made under protest), it may be noted that the Appellants have regularly and diligently discharged Service Tax on the value of "construction agreements"

5. The SCN has used a backdoor entry by acknowledging that value of "sale deeds" are not taxable but value of "construction agreements" are taxable but at the same time, included the value of "sale deeds" into the alleged value of taxable services.
6. The Appellants submit that if this starching and 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.

The value adopted in the SCN also includes the value of the sale deeds, for which there is no allegation in the SCN

7. Appellant submits that both impugned SCN's were issued under section 73(1A) of Finance Act, 1994 giving reference to the earlier SCN's and stating that grounds for raising demands are similar applicable for the disputed period involved.
8. Appellant submits that grounds mentioned in earlier SCN's are as follows:

SCN vide O.R. No. 77/2010- ST dated 21.05.2010 (Para 7): (copy of the SCN enclosed as annexure V)

As seen from the records submitted, the assessee have entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by



assessee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of 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 vide sale deed are taxable services under "works contract service"

SCN vide O.R. No. 61/2011-Adjn (S.T.) Gr. X dated 23.04.2011 (Para 7):
(copy of the SCN enclosed as annexure VI)

As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by assessee thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of 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 vide sale deed are taxable services under "works contract service"

SCN vide O.R. No. 52/2012-Adjn (Addl. Commr.) dated 24.04.2012
(Para 3): (copy of the SCN enclosed as annexure VII)

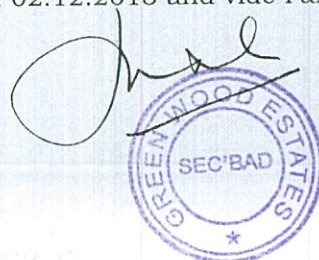


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9. Appellant further submits that Order in original No. 51/2012-Adjn (ST) ADC dated 31.08.2012 (common order for second & third SCN enclosed as annexure VIII) vide Para 22 states that "I find that the demand of service tax has been made after excluding the sale deed value. **The total amount collected from a customer minus sale deed value has been taken as gross amount charged for the works contract**"

10. Appellant submits that from the above it is clear that earlier SCN's alleged a demand of service tax on amounts received towards construction agreement only and not on amounts received towards sale deed.

11. Appellant further submits that above mentioned ground was also referred in Para 2 of both impugned SCN's and further vide Para 6 of SCN in O.R. No. 83/2013-Adjn-ST (ADC) dated 02.12.2013 and vide Para

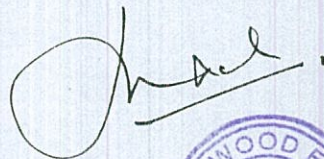


7 of SCN in O.R. No. 156/2014-Adhn. (ST)(Commr.) dated 25.09.2014 states that *"the grounds and legal position as explained in the show cause-cum-demand notices issued above are equally applicable to the present case"*

12. Appellant submits that undoubtedly they are discharging service tax on construction agreements thereby paying service tax on activity as proposed/demanded by earlier SCN's. That being a case **there is no need to serve impugned SCN's as total demand has already been discharged.**

13. The Appellants further submit that in view of the change in law w.e.f 01.7.2012, Service Tax on "construction agreements" for personal use also becomes taxable. Therefore, the payment of tax on "construction agreements" after 01.07.2012 is not disputed by the Appellants also.

14. Without prejudice to the foregoing, Appellant submits that from the present two SCN's read with earlier SCN's (since present SCN's were issued merely referring the earlier SCN's u/s 73(1A) of Finance Act, 1994), it can be inferred that the impugned SCNs proposed Service Tax only on value of "construction agreements" and not on value of "sale deeds". Contrasting to this and travelling beyond the limits of said SCN's the impugned order confirms the demand of service tax not only on value of "construction agreements" but also on the value of "sale deeds". Thus impugned order has been passed travelling beyond the scope of SCN's. And it is a settled law that adjudication order is not allowed to go beyond SCN and such orders are void. In this regard, the Appellant wishes to rely on the following judicial pronouncements:




- a. Hindustan Polymers Co. Ltd. v. CCE, 1999 (106) ELT 12 (SC)
- b. Reckitt and Colman of India Ltd. v. CCE, 1996 (88) ELT 641 (SC)
- c. Prabhudas Kishordas Vs CST Ahmd 2011, (024) S.T.R 0711 (Tri-Ahmd)
- d. Ultratech Cement Vs CCE Nagpur 2011 (022) S.T.R 289 (Tri-Bom)
- e. Caliber Point Business Solutions Ltd. Vs CST, Mumbai 2010 (18) S.T.R 737 (Tri-Mumbai)
- f. M.K. Industries v. CCE 2013 (31) S.T.R. 59 (Tri. - Ahmd.)
- g. Kalyani Sharp India v. CCE — 2005 (187) E.L.T. 315 (Tribunal)

15. **Appellant reiterates the submissions made in Para 2-16 of reply to SCN no. 156/2014 dated 25.09.2014 emphasizing the invalidity of impugned SCN** (Copy of the SCN reply is enclosed as annexure "III")

The Order is passed by traversing the principles of natural justice and the Appellants never got an opportunity to represent their case in relation to the value attributable to the sale deed

16. As stated above, the Appellants submit that the OIO justifies the demand on value of "sale deeds" through various grounds. However, the said grounds were never a subject matter of SCNs. The SCNs hindered around on the applicability of tax on "construction agreements" and no where highlighted or alleged any demand of service tax on the value of "sale deeds". In fact, at one of the grounds of adjudication, the Order categorically said that the value of "sale deeds" is excluded from Service Tax.

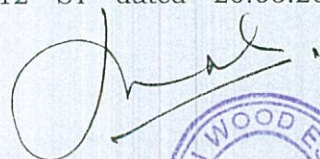
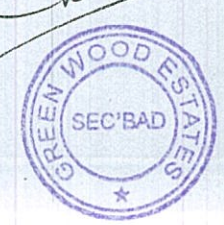
17. In the above background, the current OIO draws attention to various amendments in the law, specifically the explanation to Section 65(105)(zzzh), the insertion of declared service u/s 66E(b). With due




respect, it is submitted that the appellants were never put to cause on this aspects. Though in the replies to the SCNs, at various places, the Appellants have also emphasized the non-applicability of Service Tax on the "sale deed" value. The said emphasis is more in the nature of an alternative line of argument to amply justify the non-inclusion of these values within the purview of Service Tax.

18. However, at no point of time did the SCN specifically alleged that the demand is in the nature of construction services provided prior to completion of the building. Effectively, the Appellants were never put to cause and therefore the Appellants lost opportunity to represent their case on this crucial aspect. In fact, the Appellants believe that even on merits, they possess a very strong case even if the said clauses are taken into account. Specifically, the Appellants believe that if it is held that an OIO **can indeed** deviate from the allegations raised in the SCN and can justify a demand based on allegations which were never a part of the SCN, the Appellants would like to submit the following broad lines of arguments:

- a. 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.
- b. Till the stage of entering into a "sale deed", the transaction is essentially one of sale of immovable property and therefore excluded from the purview of Service Tax.
- c. In any case, the deeming fiction for construction services prior to completion cannot be classified under works contract services since doing the same would render Notification 01/2006 ST dated 01.03.2006 and Notification 26/2012 ST dated 20.06.2012 redundant.

d. If at all a view is taken that the value of "sale deed" is liable to service tax, the benefit of the above notification should be granted after reclassification of the service.

19. The Appellants also reserve their right to make additional arguments as felt necessary on this aspect of service tax on value of "sale deeds" if it is ultimately held that this aspect could be taken up without an allegation in the SCN.

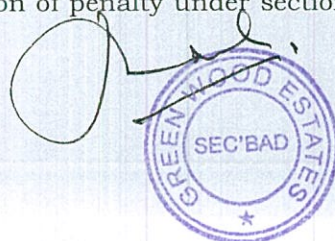
In Re: Interest under Section 75

20. Without prejudice to the foregoing, Appellant submits that when service tax itself is not payable, the question of interest and penalty does not arise.

21. Appellant 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).

In re: Penalty under Section 76 & 77 of the Finance Act, 1994

22. The Appellant submits that, when the tax itself is not payable, the question of penalty under section 76 does not arise. Further assuming but not admitting, that there was a tax liability as envisaged in SCN as explained in the previous paragraphs, when Appellant were not at all having the intention to evade the service tax and further also there was a basic doubt about the liability of the service tax itself on the construction activity, 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



76 resorting to the provisions of Section 80 considering it to be a reasonable cause for not collecting and paying service tax.

23. Appellant submits that service tax on amounts received towards construction agreements has been already discharged without any major delay & without intervention of department. ST-3 returns were also filed clearly showing the total amount received from customers and clearly bifurcating the amounts received towards sale deed value as amounts received for exempted service, and amounts received towards construction agreements as taxable amounts. Details of service tax computations, payment of service tax, utilization of CENVAT along with Challan copies has been submitted voluntarily to the department. They have not paid service tax on sale deed value on bonafide belief that same was not required to be paid as substantiated by the earlier SCN's & correspondence with department. It is settled law that if person acted on bonafide belief, imposition of penalties are not warranted.

24. The Appellant submits 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 appellant wishes to rely upon the following decisions of Supreme Court.

- i. Commissioner of C.Ex., Aurangabad Vs. Pendhakar Constructions 2011(23) S.T.R. 75(Tri.-Mum)
- ii. Hindustan Steel Ltd. V. State of Orissa – 1978 (2) ELT (J159) (SC)
- iii. Akbar BadruddinJaiwani V. Collector – 1990 (47) ELT 161(SC)

iv. 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 of the Finance Act, 1994.

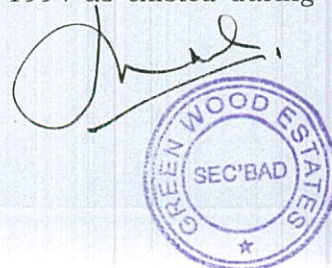
25. The Appellant submits that penalty is imposable when the appellant breaches the provision of statute with an intent to defeat the scheme of the Act, when there is a confusion prevalent as to the leviability and the mala fide not established by the department, it would be a fit case for waiver of penalty as held by various tribunals as under

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

26. The Appellant submits that in the following two cases, M/s Creative Hotels Pvt. Ltd. Vs CCE, Mumbai (2007) (6) S.T.R (Tri-Mumbai) and M/s Jewel Hotels Pvt Limited Vs CCE, Mumbai-1 (2007) (6) S.T.R 240 (Tri-Mumbai) it was held that *"The authorities below have not given any finding as to why penalty is required to be imposed upon them. Only because penalty can be imposed, it is not necessary that in all cases penalty is required to be imposed. In this case I accept the explanation of the appellant and therefore set aside the penalty and allow the appeal."*

27. The Appellant submits that liability of the service tax on the sale deed value is depends on the interpretation of

- a. Definition of Works contract as defined 65(zzzza) of Finance Act, 1994 and section 65B(54) of Finance Act, 1994 as existed during the relevant period



- b. Rule 2A of Service tax (determination of value) Rules, 2006
- c. Definition of service given under section 65B(44) of Finance Act, 1994
- d. Circular No. 108/02/2009-ST dated 29.01.2009

e. and other provisions of Finance Act, 1994 & 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 imposition of Penalties. In this regard Appellant wishes to rely on the following judicial pronouncements.

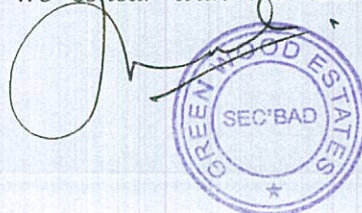
a. Commissioner Of Central Excise, Raipur Vs Ajanta Color Labs 2009 (14) S.T.R 468 (Tri-Del) it was held that *"Respectfully following the above decisions, we allow the appeals for the assessee on merits and hold that the portion of the value relating to photography materials would not be included in the levy of service tax. **It is a case of interpretation of the statutes and, therefore, extended period of limitation and imposition of penalties would not warrant**"*

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".*

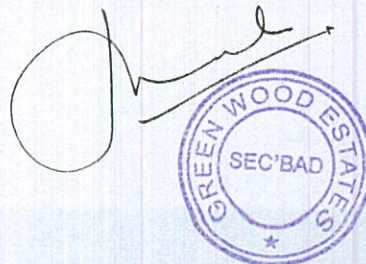
On the basis of the above judgments it is clear that whenever due to bonafide interpretation of law service tax not paid penalty is not leviable.

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

28. 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.**"*

29. The Appellant submits that in so far as Section 80 of the Act is concerned, it overrides provisions of Sections 76 and 77 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.



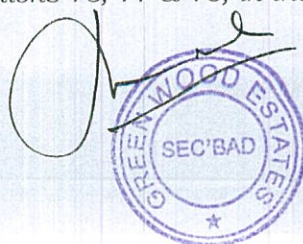
A handwritten signature in black ink is written over a circular purple stamp. The stamp contains the text "GREEN WOOD ESTATES" around the top edge, "SEC'BAD" in the center, and a small star at the bottom.

30. Appellant submits that as explained in above Para's they are not paying service tax on bonafide belief that same was not liable to be paid in view of

- f. Exclusion part of service definition given under section 65B(44) of Finance Act, 1994 in as much specifically excluding the sale of immovable property from levy of service tax
- g. Activity performed till the execution of sale deed is in the nature of self service and not liable for service tax
- h. 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 and not prior to that
- i. Earlier SCN's demanding service tax on total amounts received after deduction of sale deed value

31. 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.

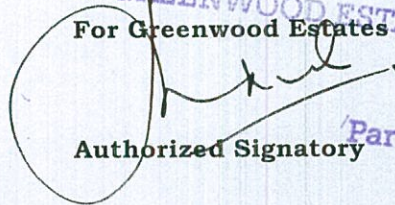
32. The Appellant submits discretion to exercise the power under Section 80 of the Finance Act, 1994 to waive the penalty is an obligation on the authority. It is the duty of the authority to ascertain whether there is any reasonable cause for nonpayment of duty. In the case of KNR Contractors Vs CCE, 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."

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

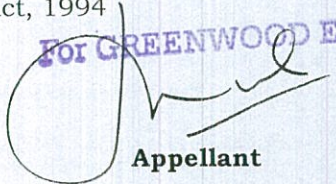
34. The appellant wish to be personally heard before any decision is taken in this matter.

For GREENWOOD ESTATES
For Greenwood Estates

Authorized Signatory **Partner**

PRAYER

Therefore it is prayed

- a. To hold that the impugned order is not valid and be set aside on the grounds that the same travels beyond the SCN
- b. To decide whether the quantification of the amount in the SCN is correct in the light of the allegations raised in the SCN and to remand the case with specific instructions on this aspect
- c. In case, it is held that the intention of the Department is to demand tax on the value of the "sale deeds" , to require the issuance of a SCN so that the Appellants get an opportunity to present their case and thereafter to decide the issue
- d. To hold that even on merits the amounts received towards sale deed is not taxable.
- e. To hold that no Penalty is imposable under Section 76 & Section 77 of the Finance Act, 1994.
- f. To hold that Appellant is eligible for the benefit of waiver of the penalty under Section 80 of the Finance Act, 1994
- g. Any other consequential relief is granted.

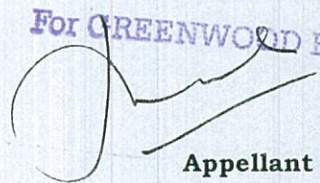

For GREENWOOD ESTATES
Appellant **Partner**

VERIFICATION

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

Verified today the 10th of May, 2015

Place: Hyderabad


For GREENWOOD ESTATES
Appellant **Partner**

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

Sub: Appeal against the order of the Commissioner of Service Tax in Order-In-Original No. HYD-SVTAX-000-COM-02-14-15 dated 20.02.2015

I, Soham Modi, Partner of M/s Greenwood Estates, hereby authorize 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 this 10th day of May 2015 at Hyderabad

Signature

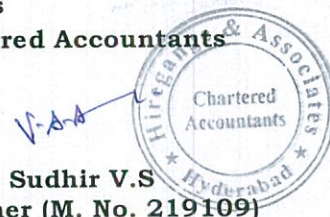
I the undersigned partner of M/s Hiregange & Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above 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: 10.05.2015 For Hiregange & Associates

Address for service :

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

Chartered Accountants



**Sudhir V.S
Partner (M. No. 219109)**

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

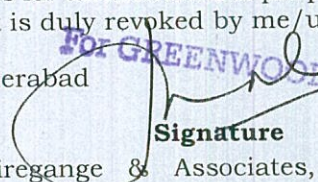
**Sub: Appeal against the order of the Commissioner of Service Tax in
 Order-In-Original No. HYD-SVTAX-000-COM-02-14-15 dated 20.02.2015**

I, Soham Modi, Partner of M/s Greenwood Estates, hereby authorize 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 this 10th day of May, 2015 at Hyderabad


Signature

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: 10.05.2015

Address for service :

**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)**