Received on 2/6/17 10 By Local

सेवा कर प्रधान आयुक्त का कार्यालय
OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX
सेवा कर आयुक्तालय : : SERVICE TAX COMMISSIONERATE

11-5-423/1/A:: सीताराम प्रसाद टावर:: रेड हिलस:: हैदराबाद – 4

11-5-423/1/A:: SITARAM PRASAD TOWER::RED HILLS::HYDERABAD-4

O.R.No.108/2014-Adjn(ST)(ADC) Date:9.06.2017

मूल आदेश सं. **ORDER IN ORIGINAL No: 82/2016 – Adjn(ST)(ADC)**

(Passed by P.Anand Kumar, I.R.S., Additional Commissioner)

प्रस्तावना

PREAMBLE

1. निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति विना मूल्य के दी जाती है

This copy is granted free of charge for the private use of the person to whom it is issued.

2. जो भी व्यक्ति वित अधिनियम, 1994 के अंतर्गत धारा 85(3A) से दुषप्रभावित हो, इस प्रकार प्राप्त आदेश निर्णय के खिलाफ आदेश की प्राप्ति के दो महीनों के भीतर आयुक्त (अपील), मुख्यालय कार्यालय, 7 वॉ तल, एल.बी. स्टेडियम रोड, बशीरबाग, हैदराबाद 500 004 को अपनी अपील प्रस्तुत कर सकता है ।

Under Section 85(3A) of the Finance Act, 1994, any person aggrieved by this order can prefer an appeal within two months from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs. Office, 7th floor, L.B.Stadium Road, Basheerbagh, Hyderabad – 500 004.

3. धारा 85 के के अंतर्गत आयुक्त (अपील) को की जानेवाली अपील फार्म एस.टी-4 में हो और इसकी जॉच निर्धारित पद्धति के अनुसार की जानी चाहिए ।

An appeal under Sec.85 to the Commissioner (Appeals) shall be made in form ST-4 and shall be verified in the prescribed manner.

4. एस.टी-4 फार्म में की गई अपील अनुलिपि में प्रस्तुत की जानी चाहिए और उसके साथ जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उसकी एक प्रति भी संलग्न की जानी चाहिए;

The form of appeal in Form No: ST-4 shall be filed in duplicate and shall be accompanied by a copy of the decision or the order appealed against.

5 अपील पर और जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उस आदेश की प्रति पर भी समुचित मूल्य के अदालती टिकट लगाए जाने चाहिए । केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की संशोधित धारा 35फ के अधीन 7.5% की अनिवार्य पूर्व जमा राशि के साथ किया जाना चाहिए अपील मांग की है या जुर्माना लगाया या दोनों और देय पूर्व जमा की गई राशि 10 करोड़ रुपये की सीमा के अध्यधीन होगा.

The appeal as well as the copy of the decision or order appealed against must be affixed with court fee stamp of the appropriate amount. Under Section 35 F of Central Excise Act, 1944, the appeal also must be accompanied by mandatory pre-deposit amount of 7.5% of the duty demanded or penalty imposed or both and the amount of pre-deposit payable would be subject to a ceiling of Rs.10 Crore.

OR.NO.108/2014-Adjn (ST) ADC

Sub: Service Tax-Non payment of Service tax on taxable services rendered M/s. Paramount Builders, Hyderabad – Issue of OIO – Reg.

* * *

M/s. Paramount Builders, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad-500 003 (here in-after referred as "**M/s Paramount**" or "**the assessee(s)**") are engaged in providing "**Works Contract Service**". The asssessee is a registered partnership firm and got themselves registered with the department vide **Servicer Tax Registration Number AAHFP4040NST001.**

2. As seen from the records, the assessee entered into 1) sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) 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 the assessees 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 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".**

3. Accordingly, the following Show Cause Notice have been issued to the assessee:

S.No	SCN O.R. No. Date	Period	Amount of Service Tax demanded Rs.	Status
1	HQPOR No. 87/2010-Adjn(ST)(ADC) dt. 24.6.2010	09/ 2006 to 12/2009	11,80,439/-	Confirmed vide OIO No:49/2010-ST dt. 29.11.2010. Party's appeal was dismissed vide OIA No.09/2011(H-II) dt. 31.1.2011. Party filed before CESTAT vide Appeal No. ST/700/2011 DT. 15.3.2011 & assessee paid Pre-deposit as directed in Stay Order No. 697 to 699 Dt. 18.4.2012. Issue pending in CESTAT

2	OR No. 60/2011-Adjn(ST)(ADC) dt. 23.4.2011	Jan-Dec, 2010	4,46,403/-	Confirmed vide OIO No. 50/2012-Adjn (ST)(ADC), dated 31-8-2012. Party's appeal was dismissed vide OIANo. 187/2012{H-II) S.Tax. dt. 21.12.2012.Party filed before CESTAT & vide FO. No. 22090/2014 the case was remanded back to Commissioner (A) . Further vide OIA No. HYD-SVTAX-000-APP-0237-15-16-ST Dt. 28.1.2016 , Commissioner (A) remanded back the case to Original adjudicating authority.
3	OR No. 54/2012-Adjn(ST) (ADC) dt. 24.4.2012	Jan-Dec, 2011	46,81,850/-	
4	CNo.IV/16/16 /195/2011,ST - Gr.X	Jan- 2012 to June-2012	2,92,477/-	Pending Adjudication

4. As per information furnished by the assessee vide their letter dated 17.09.2014 along with statements, it is seen that "**the assessee**" have rendered taxable services under the category of "Works Contract Services" during the period **July, 2012 to March, 2014.** The assessee had rendered services for a taxable value of Rs. 1,09,32,414/-. After deduction of VAT of Rs.3,96,570/- the taxable value works out to **Rs. 1,05,35,844/-** on which service tax (including cess) works out to **Rs. 5,20,892/-.** As seen from the challans submitted by the assessee, an amount of **Rs. 1,70,371/-** was paid leaving an amount of **Rs. 3,50,521/-** unpaid/short paid for the services rendered during the said period.

5. Vide Finance Act, 2012, sub section (1A) was inserted in Section 73 which reads as under:

> ***SECTION 73 (1A)*** *- Notwithstanding anything contained in sub-section (1) (except the period of eighteen months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent*

to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

6. The sections **65B, 66B and 66D** as inserted in the Finance Act, 1994 by the Finance Act, 2012 w.e.f. 1-7-2012 are reproduced below :

6.1 ***Section 65B (44)*** *: "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-*

(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

(ii) such transfer, delivery or supply of any goods which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

6.2. ***SECTION 66B.*** *- There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

6.3. **SECTION 66D** : Contains the negative list of services. It appears that services provided by the assessee are not covered under any of the services listed therein.

6.4. Further, Notification No. 25/2012-ST, dated 20-06-2012, as amended specified services which were exempt from payment of Service Tax. It appears that services provided by the assessee are not covered under any of the services listed therein.

7. The grounds as explained in the show cause cum demand notices issued

above are also applicable to the present case; the legal position insofar as "Works Contract Service" is concerned, the said service and its taxability as defined under Sub-clause (zzzza) of Clause 105 of Section 65 of the Finance Act,1994 as existed before 01.07.2012 stands now covered by 65B(54) whereby the said service, for not being in the Negative List prescribed under 66D, continues to be a taxable service. But for the said changes in legal provisions, the status of Service and the corresponding tax liability remained same. Hence this statement of demand/show cause notice is issued in terms of **Section 73 (1A)** of the **Finance Act, 1994** for the period **July, 2012 to March, 2014.**

8. From the above recitals, a SCN has been issued to M/s. Paramount Builders, Hyderabad vide O.R. No. 108/2014-Adin -ST (JC) C.No: IV/16/195/2011-ST.Gr.X Dated 19.9.2014 requiring them to show cause to the Joint Commissioner, Service Tax, 11-5-423/1/A, Sitaram Prasad Towers, Red Hills, Hyderabad-4, within 30 (thirty) days of receipt of this Notice as to why:-

(i) an amount of Rs. 5,20,892/- (Rupees Five Lakhs Twenty Thousand Eight Hundred Ninety Two only) including Cesses should not be demanded on the "Works Contract" services rendered by them during the period from July, 2012 to March, 2014 and an amount of Rs. 1,70,371/- paid should not be adjusted against the above demand;

(ii). Interest should not be demanded under Section 75 of the Finance Act 1994;

(iii). Penalty should not be imposed on them under Section 76 of the Finance Act 1994; and

(iv). Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.

9. Written Submissions:-

Assesses have submitted written submissions vide their letter Dt.01.3.2015 and the same are as follows:

9.1 For easy comprehension, the subsequent submissions in this reply are made under different heads covering different aspects involved in the subject SCN.

A. Validity of the show cause notice

B. No Service tax on sale of semi-finished flat

C. No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department

D. Quantification of the tax liability

E. Benefit of cum-tax

F. Interest and penalties

G. Benefit under section 80

***In Re:* Validity of Show Cause Notice- section 73(1 A)**

9.2. The assessee submitted that the subject SCN has not at all alleged how aand why there is a short payment of service tax in the present case and proceeded with mere assumptions and presumptions without appreciating the fact that Appellant has paid entire amount of service tax to the department on the amount towards agreement of construction.

9.3. The assessee submitted that the subject show cause notice has been issued by relying on the information submitted by the Noticee vide letter dated 17th September 2014. The Noticee submits that in the said letter, they submitted the amount received towards agreement of construction as follows.

Sl. No.	Period	Total Receipts towards agreement of construction
1	April 2012 to September 2012	Rs.7,63,500/-
2	October 2012 to March 2013	Rs.25,70,857/-
3	April 2013 to September 2013	Rs.3,36,875/-
4	October 2013 to March 2014	Rs.3,08,500/-

However, the annexure to the show cause notice mentioned the details of receipts as follows which is entirely different from the details furnished by the Noticee which are as follows.

Sl. No.	Period	Gross amount received
1	July 2012 to September 2012	Rs.7,24,206/-
2	October 2012 to March 2013	Rs.61,87,392/-
3	April 2013 to September 2013	Rs. 17,76,976/-
4	October 2013 to December 2013	Rs.8,55,000/-
5	January 2014 to March 2014	Rs.13,88,840/-

9.4 From the above comparison of the information submitted and information considered by the subject show cause notice, it clear that the subject show cause notice is based on wrong understanding of the information submitted by the Noticee. On this ground alone, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

9.5 The assessee submitted that in the letter submitted to the department they have enclosed earlier correspondences made to the department where they have intimated the total gross amount received which is inclusive of amount towards sale of semi-finished flat, which is not liable for service tax. The show cause notice has computed service tax on the said amount which is not all liable for service tax .On the basis of same, noticee submits that the subject show case notice is not sustainable and requires to be dropped.

9.6 The assessee submitted that the subject show cause notice has also proposed demand under the new service tax law, where the activity should be covered under the definition of service to attract service tax liability. However, in the present case, the subject cause notice has not at all explained how and why the total gross amount received which is inclusive of amount received for sale of semi- finished flat, is covered under the definition of service as provided under section 65B(44) of finance Act,1994. As the subject show cause notice has not proved its

burden of proof, the proposition of demand of service tax is not sustainable and accordingly, the same requires to be dropped.

9.7 The assessee further submitted that the commissioner of central Excise & Service Tax (Appeals –II), Hyderabad and the Hon'ble CESTAT, Bangalore Bench in the previous period has categorically held that service tax should not be levied on the sale deed portion and remanded the matter back to the adjudicating authority for re-quantification of the duty liability. However , the subject show cause notice has not considered this aspect and demanded service tax on the Noticee. On the basis of the same, the assessee submits that the proposition of the subject show cause notice demanding the duty is not sustainable and requires to be dropped.

9.8 The assessee submitted that the subject show cause notice has not made any allegation as to how and why there is a short payment of service tax in spite of detailed submission made by them through way of correspondence , explaining their method of tax treatment for their activity. Further, the show cause notice merely considered the gross amount shown in the workings submitted by them ignoring the various deductions claimed by them for sale of semi –finished flat, amount received towards VAT, stamp duty, corpus fund, maintenance charges, electricity charges etc. As the subject show cause has not made any allegation as to how and why the deduction claimed by the Notice is not applicable, the same is not sustainable and requires to be dropped.

9.9 The assessee submitted that the subject show cause notice in para 5 extracted the provision of section 73(1A) of the Finance Act, 1994 and in para 7 mentions that the grounds as explained in the show cause notice issued for the earlier period is also applicable for the present case. Hence, this statement of demand / show cause notice is issued in terms of section 73(1A) of Finance act, 1994,for the period July 2012 to March 2013. For this, NoticeE submits that section 73(1A) of the Finance Act,1994 reads as follows.

"(1A) Not withstanding anything contained in sub-section (1) (except the period of eighteen months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, ***a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period****, on the person chargeable to service tax,*

then, service of such statement shall be deemed to be service of notice on such perso n ***subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notice."***

9.10. The assessee submitted that from the analysis provision of section 73(1A), it is clear that to issue show cause notice/statement under the section, the grounds relied upon for the subsequent period should be same in all aspects as mentioned in previous notices. Further, the subject show cause notice has not mentioned which earlier show cause notice it has referred i.e. show cause notice issued under the old service tax law. However, present show cause notice is issued for the period July 2012 to March 2014 i.e. under new service tax law where there is a substantial changes in the provision of service tax from positive list based taxation to negative list based taxation, thereby exemption and abatement has also undergone change. Accordingly, the grounds of the old period is not at all applicable for the new period due to the following substantial changes.

a. Taxable service list provided under section 65(105) of the Finance Act, 1994 ceases to effect w.e.f 01-07-2012.

b. Section 65A pertaining to classification of service cease to effect.

c. There is no concept classification of service.

d. Definition of service introduced under section 65B(44) where it contains certain exclusions

e. Negative list introduced in section 66D of the Finance Act, 1994.

f. Concept of bundled service introduced in section 66F.

g. New definition of works contract has been introduced under section 65B(90) of the Finance Act,1994.

h. Mega exemption notification provided under Notification No. 25/2012-ST dated 20.06.2012, which is available irrespective of classification of service.(earlier exemption was subject to classification of service).

i. New valuation Rule provided vide Rule 2A of the service Tax (determination of value) rules, 2006 vide Notification 24/2012-ST dated 20.06.2012 for determination of tax liability case of works contract service.

j. Abatement for various services issued under notification no 26/2012-ST dated 20.06.2012 is issues based on the nature of the service irrespective of its classification (earlier abatement was subject to classification of services)

9.11. The assessee submitted that from the above it is clear that there is a substantial changes in the service tax law w.e.f. 01-07-2012. Accordingly, the allegations made in the previous show cause notice for the period upto 31.03.2012 are not applicable and not relevant for the period from 01.07.2012 onwards. As the subject show cause notice has considered various irrelevant and non-applicable grounds provisions of section 73(1 A) is not applicable to the present case, which needs to be dropped.

9.12. Further the basic fundamental dispute for the previous periods (prior to 01.07.2012) was that the classification of the assessee under "Works Contract Service / Construction of Residential Complex Service". However, since for the present period section 65A is not applicable for the services provided and there is no separate classification of service as works contract service. The present show cause notice has demanded service tax under Works contract service which is not at all applicable for the present period. Now for the impugned SCN issued for the period after 01.07.2012 in the absence of Section 65A, Section 65(105), the exemption and abatement not based on the any classification of service such allegation in the previous notice is totally irrelevant and hence the notice issues under section 73(1 A) of the Finance Act, 1994 is not sustainable and need to be quashed.

9.13. The assessee submitted that the show cause is issued on the wrong assumption that the provisions and allegations of show cause notice issued for the earlier period is applicable to the present case. However, as explained above, as there is a substantial change under new service tax law, the provisions and allegations of earlier show cause notice is

not applicable to the present case. As the subject show cause notice is issued on assumptions and presumptions, the same is not sustainable as per the decision of Hon'ble Supreme Court in the case of Oudh Sugar Mills Ltd Vs Union of India 1978(2) ELT (J172) (SC). On the basis of the same, Noticee submits that subject show cause notice is not sustainable and same requires to be dropped.

9.14. The assessee submitted that as the subject show cause notice is issued with extraction of the statutory provision and with broad allegations, however has not discharge the burden of proof of taxability, which is essential for proposing the demand. In this regard the assessee wishes to rely on the following decisions.

a. *In the case of Dewsoft Overseas Pvt. Ltd Vs Commr. Of Service Tax, New Delhi 2008 (12) S.T.R 730 (Tri-Del) it was held that* ***"Tax liability (Service tax) - Burden of proof - Revenue to prove liability on particular person if service tax sought to be imposed ".***

b. *In the case of United Telecom Ltd. Vs Commissioner Of Service Tax, Bangalore 2008 (9) S.T.R 155 (Tri-Bang) it was held that* **"The fundamental rule is that Revenue should discharge the burden pertaining to taxability for placing the activity under one head or another.** *In a case of this type which is highly technical in nature, the Revenue ought to have referred the entire technical information furnished by the appellants to an expert body like National Informatics Centre. The same has not been done. To arrive at conclusion on reading the contract may lead to certain assumption and presumption. It may not be scientific also to crush aside the technical information given by the appellants by making our own reading of the terms of the contract. In view of Revenue not having produced any technical opinion, the appellant's contention that Revenue has failed to discharge their burden has to be taken into account ".*

c. In the case of Jetlite (India) Ltd. Vs Commissioner Of C. Ex., New Delhi 2011 (21) S.T.R 119 (Tri-Del) it was held that ***"In case of classification burden was squarely upon the department".***

In light of the above judgments where the Department alleges that the service is taxable, the burden lies upon the Department to establish

the taxability. In the present case, the department failed to discharge the burden as no evidence was placed on record to establish that the service is taxable. On the basis of the same, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

9.15. The assessee submitted that subject show cause notice in para 6 merely extracted the definition of service as provided under section 65B(44) of the Finance Act, 1994, but not at all explained how and why the activity of the Noticee is covered under the definition of service. As the subject show cause notice has not proved the coverage of the activity of the Noticee under the definition of service, the same is not sustainable and requires to be dropped.

In Re: No Service tax on sale of semi-finished flat and Stamp duty, registration charges

9.16. The assessee submitted that the para 2 of the subject show cause notice reads as follows.

"As seen from the records, the Noticee entered into 1) Sale deed for sale of undivided portion of land together with semi-finished portion of the flat and 2) 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 the Noticee 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 is transfer of property in goods in the 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 service under Works Contract service.***"

9.17. From the analysis of the above para i.e. 2 of the subject show cause notice it is clear that the show cause notice admitted the fact that ***only services rendered by the assessee after execution of sale deed***

against agreements of construction to each of their customers is liable for service tax under works contract service and the subject show cause notice has accepted the fact that service tax is not applicable for the sale of semi-finished flat. Inspite of this admittance in para 2, the subject show cause notice in annexure while quantifying the demand has considered the total gross receipts which also includes the amount received for sale of semi-finished flat. On the basis of the same, The assessee submitted that the proposition of the subject show cause notice demanding service tax on sale of semi-finished flat is not sustainable and requires to be dropped.

9.18. The assessee submitted that the definition of service provided w.e.f 01-072012 reads as follows.

(44)"Service" means any activity carried out by a person for another for consideration, and includes a declared service, **but shall not include -**

(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

(ii)such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii)a transaction in money or actionable claim;

(b).a provision of service by an employee to the employer in the course of or in relation to his employment;

(c).fees taken in any Court or tribunal established under any law for the time being in force.

9.19. The assessee submitted that from the above exclusive portion of 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 animmovable property. Accordingly, the amount received for sale of semi-finished flat, stamp duty and registration charges is excluded from the definition of service.On the basis of same also,Noticee submits that the proposition of subject show cause notice demanding

service tax on the Noticee is not sustainable and requires to be dropped .

9.20. Noticee submits that the show cause notice in para 2 admitted the fact that there is a sale of semi-finished flat and construction activity has been done on the land of buyers. It substantiates the fact that the activity of sale of semi-finished flat is covered under exclusive portion of definition of service as provided under section 65B(44) of the Finance Act, 1994. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the sale of immovable property is not sustainable and require to be dropped.

9.21. The assessee submitted that Article 265 of the Constitution of India is extracted here for ready reference.

"No tax shall be levied or collected except by authority of law"

9.22. The assessee submitted 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 competence of the legislature being covered by 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.

9.23. The assessee submitted that the 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.

9.24. The assessee submitted 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.

9.25. From the above it is clear that the tax on 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, the assessee submitted that service tax is not applicable for sale / transfer of immovable property. As the subject show cause notice has not considered this aspect, the same is not sustainable and requires to be dropped.

9.26 The assessee submitted that the subject show cause notice has computed service tax liability also on the receipts received for sale of semi-finished flat under works contract service. For this Noticee 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."

9.27. The assessee submitted 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 subject show cause notice has gone beyond the valuation provisions and

demanding service tax even on the amount received for sale of semi-finished flat. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax beyond the provisions of section 67 is not sustainable and requires to be dropped.

9.28. The assessee submitted 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 applicable. On the basis of same also, Noticee submits that demand of service tax on the sale of immovable property is not sustainable and requires to be dropped.

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

9.29. The assessee submitted that para 2 alleges that the liability of service tax is only on the construction agreement and not on the sale deed portion, however the computation of service tax there is no deduction given towards the sale deed and hence without prejudice to the findings of the impugned SCN the submission has been made to justify that the value of sale deed is not a works contract.

9.30. The assessee submitted that the subject show cause notice in para 2 mentions that the Noticee is providing "works contract service" and liable for service tax and extracted the definition of works contract as provided under section 65B(54) of the Finance Act, 1994. For this Noticee submits that the subject show cause notice has not explained how and why, the transaction of the Noticee is liable for service tax under works contract service. As the subject show cause notice has not proved burden of proof, the same is not sustainable and requires to be dropped.

9.31. The assessee further submitted that the definition of works contract provided under new service tax law .

9.32. The assessee submitted 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 contract, there should be transfer of property in goods and

c) Such contract is for the purposes of carrying out, - specified services.

9.33. The assessee submitted 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. In spite of appreciating the voluntarily service tax payment made by the Noticee, the subject show cause notice is demanding Service tax on the sale of semi-finished flat under works contract service, which is not beyond the definition of works contract service. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the value of sale of semi-finished flat is not sustainable and requires to be dropped.

9.34. The assessee submitted 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 Noticee has entered two separate transactions with the customer,whereas the definition requires only one contract.

b. Transaction is for sale of semi-finished flat and not for construction.

As the present transaction of the Noticee is not covered under the definition of works contract, the proposition of subject show cause notice demanding service tax under works contract service is not sustainable and requires to be dropped.

In Re: No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department

9.35. The assessee submitted that the subject show cause notice also demanded service tax on the amount received towards, corpus fund, electricity charges, maintenance charges, which is received on behalf of the owners association or the electricity department. However, the subject show cause notice has not provided any reasons as to how and why the said amounts were liable for service tax under works contract service. It is settled provision of law that the burden of proof of tax liability is always on the department. As in the present case, as the subject show cause notice has failed to prove its burden, the proposition of the subject show cause notice demanding service tax on the amount received for corpus fund, electricity charges is not sustainable and requires to be dropped.

9.36. The assessee submitted that the subject show cause notice in para 2 has made allegation only for payment of service tax on the construction work undertaken by the Noticee. However, while quantifying the service tax liability, the subject show cause notice has also included the amount received for corpus fund and the electricity charges which is received on behalf of association / electricity board. Accordingly, the proposition of the subject show cause notice demanding service tax on the Noticee is not sustainable and requires to be dropped.

9.37. The assessee submitted that the definition of works contract as provided

under section 65B(54) reads as follows.

"(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 ;

9.38. The assessee submitted that in the present case, they have paid applicable service tax on the construction agreement , which may be liable under works contract service. However, the subject show cause

notice without appreciating the voluntarily service tax payment made by the Noticee demanding service tax on the amount received towards corpus fund and electricity charges which is not at all covered under the definition of works contract service. On the basis of same also, Noticee submits that the proposition of the subject show cause notice is not sustainable and requires to be dropped.

9.39. The assessee submitted that they have received amount received for corpus fund and electricity charges is on behalf of the owners association and electricity board. In this regard, Noticee wishes to extract Rule 5(2) of Service Tax (Determination of Value) Rules, 2006, which reads as follows.

(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party ;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

9.40. The assessee submitted that in the present case, as they have received the amount towards electricity charges and corpus fund as an agent of the service receiver, the amount received towards to be excluded from the valuation as per Rule 5(2) of Service Tax (Determination of Value) Rules, 2006. As the subject show cause notice has not considered this aspect, the proposition of the subject show cause notice demanding service tax on these items is not sustainable and same requires to be dropped.

9.41. The assessee submitted that the amount received towards corpus fund and electricity charges can also be considered as reimbursement of expenses collected at actuals. In this regard, they wishes to rely on the decision of Hon'ble Delhi High Court in the case of Intercontinental Consultants & Technocrafts Pvt Ltd Vs Union of India 2013(29) STR 9 (Del) where it is held that pure reimbursements of expenses is not liable for service tax and also it struck down Rule 5 of Service Tax (determination of value) Rules, 2006, as it is beyond the valuation provisions of service tax. On the basis of the same, Noticee submits that the proposition of the subject show cause notice demanding service tax on the Noticee for these reimbursement of expenses is not sustainable and same requires to be dropped.

In Re: Quantification of the tax liability

9.42. The assessee submitted that assuming but not admitting they are liable for service tax under works contract service and also as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then Noticee submits that as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, then the value of the land involved in the project should be excluded from the determination of service tax liability. For the said period, total mount of cost of land transferred and Noticee humbly request the adjudicating authority to exclude the value of land from determination of service tax liability.

In Re: Benefit of cum-tax

9.43. The assessee submitted that assuming but not admitting there is liability as the of cum- under works contract service for sale of semi-finished flat, then Noticee has not collected service tax from the buyer, the benefit tax requires to be provided to the Noticee. As the subject show

cause notice has not extended such benefit, the same is not sustainable and requires to be dropped.

9.44. The assessee submitted that in light of statutory backup as mentioned above and cases where it was held that when no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis

In Re: Interest and penalties

9.45. Without prejudice to the foregoing, assessee submitted that when service tax itself is not payable, the question of interest does not arise.

9.46. The assessee submitted 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. UOl, 1996 (88) ELT 12 (SC)

9.47. Without prejudice to the foregoing, assessee submitted that penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as to why how penalty is applicable under section 77 of the Finance Act, 1994. Further, the Noticee is already registered under service tax under works contract service and filing returns regularly to the department. Accordingly, penal provisions mentioned under section 77 is not applicable for the present case. As the subject show cause notice has not considered these essential aspects, the proposition of levying penalty under section 77 is not sustainable and requires to be dropped.

9.48. The assessee submitted that on going through the impugned SCN it cannot find any justification given by the Adjudicating Authority for imposition of severe penalties under Section 77 and 76. The impugned SCN is a non-speaking SCN. Since there is no finding of mala fide intention to evade payment of service tax, the penalties proposed requires to be dropped.

In Re: *Benefit under section 80*

9.49. The assessee submitted that Section 80 of the Finance Act, 1994 states that "notwithstanding anything contained in the provisions of section 76, or 77 or first proviso to section 78 of the Finance Act, 1994, 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."

9.50. Assuming but not admitting, the assessee submitted that no reasons have been adduced for imposing penalty under Section77 and 76. The authority has ignored the provisions of Section 80 of the Act, as per which no penalty under Sections 77 and 76 shall be imposed on the assessee for any failure, if the assessee proves that there was reasonable and sufficient cause for the said failure. In the present case, the assessee was under bona fide belief that the activities sought to be taxed by the impugned SCN are not liable for the service tax in as much as such activities are not covered under provisions of Finance Act, 1994 and therefore it is the right case for waiver of the penalty, under Section 80 of the Finance Act, 1994.

9.51. Without prejudice to the foregoing, the assessee submitted that when the tax itself is not payable, the question of penalty under section 78 and 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, and further also there was a basic doubt about the taxability of activities itself, Noticee is acting in a bona fide belief, that he is not liable to service tax on such activities, there is no question of penalty under section 77 and 76 and resorting to the provisions of Section 80 considering it to be a reasonable cause for not collecting and paying service tax.

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

9.53. The assessee submitted that they have established the reasonable cause for 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.

9.54. The assessee submitted 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 sense that 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."

9.55. The assessee submitted that the authority must exercise power under Section 80 and grant the waiver of the penalty under Section 77 and 76 of the finance Act, 1994.

10. <u>Personal Recordings:-</u>

Personal Hearing has been granted to the assesses. Sri P. Venkata Prasad, Chartered Accountant has appeared for personal Hearing before me on 03.10.2016. He has submitted that in addition to the submissions made on 01.03.2015, they have specified that the flats in question have been issued with Occupancy certificate by the Competent Authority before booking by the Customers. Hence the transaction involved amounts to sale of immovable property and the same is not taxable. Hence they have requested to drop further proceedings initiated against them.

<u>Discussions And Findings:-</u>

11. I have gone through the Show cause Notice and reply submitted by the assessee and submissions made by them during the course of personal

hearing. The issue to be decided by me is whether the assesses are liable to pay service tax on the flats sold by them under works contract service.

12. It is seen from the submissions of the assessee that one of the Show Cause Notice which was confirmed by the Original Adjudicating Authority was upheld by the Commissioner (Appeals) and the same was appealed against before the Hon'ble CESTAT, Bangalore which has stayed recovery of further proceedings. However there is no stay for adjudication of the current Show cause Notice. Therefore, I proceed to adjudicate the case in hand and now I examine the issues involved in the SCN.

The assesses contests the issue on the following;

A. Validity of the show cause notice

B. No Service tax on sale of semi-finished flat.

C. No Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department.

D. Quantification of the tax liability.

E. Benefit of cum-tax.

F. Interest and penalties.

G. Benefit under section 80

13. The Assesses contends that SCN is not sustainable on as much the SCN is issued on different details other than furnished by the assessee. It is seen that the SCN is issued after detailed investigation which includes the information from the assessee. Therefore assesses argument does not hold any water. I therefore reject the assessee's claim.

14. Assessee contends that there is no service tax on sale of semi-finished flat. The Honorable CESTAT in its Stay Order No's 697 to 699 Dated 18.4.2012 has held that the facts of the case requires to be gone in detail at the time of final disposal. Therefore it is not possible for me to accept the issue of non taxability on semi finished flats. Therefore assessee's contention is rejected.

15. Assessee contested that there is no Service Tax on amount received for Corpus fund, electricity charges, maintenance charges received on behalf of the owners association or the electricity department. This is totally

unsupported by any finding. In fact service tax is liable to be paid on all the amounts received by them including the amounts mentioned by the assessee if the amount is received for providing the service.

16. Assessee contested the quantification of the demand amount. It is observed that the department has correctly quantified the duty amount. Assesses has not given any data to support their claim. Therefore assesses contention is rejected on Quantification of the tax liability, Benefit of cum-tax, Interest and penalties and Benefit under section 80 as the same lacks sufficient evidence. Therefore the demand is sustainable.

17. Levy of penalty under Section 76 of the Act :

Reliance for imposition of penalty is supported basing on the following case laws :

(i). 2007(6) S.T.R. 32 (Tri.-Kolkata)-CCE., Kolkata-1 Versus GUARDIAN LEISURE PLANNERS PVT LTD.

" Penalty is a preventive as well as deterrent measure to defeat recurrence of breach of law and also to discourage non-compliance to the law of any willful breach. Of course , just because penalty is prescribed that should not mechanically be levied following Apex Court's decision in the case of Hindustan Steels Ltd. Vs. State of Orissa reported in 1978 (2) ELT (J159) (S.C.)-AIR 1970 S.C. 253. Section 80 of the Act having made provision for excuse from levy of penalty under Section 76 if the assessee proves that there was a reasonable cause for failure under that section no other criteria is mandate of Law to exonerate from penalty. ***No reasonable cause*** *being patent from the record towards failure to deposit the tax due, duly, except the casual approach of aforesaid, the ld. Commissioner (Appeals) was not justified to set aside the penalty levied under Section 76 of the Act ".*

(ii). 2005 (1008) E.L.T.445 (Tri,- Chennai) –TRANS (INDIA) SHIPPING PVT. LTD. VERSUS CCE., CHENNAI-1:

" The remaining question to be looked into is whether the appellants were eligiable for the benefit of Section 80 of the Finanace Act,1994, which laid down that a service tax assessee could be exonerated from penalties imposable under Section 76 & 77 where he proves that there was reasonable cause for the default in payment of Service Tax or in filing returns, as the case may be. As regards the appellants default in the matter of filing of service tax returns, there could be no plea of financial

crisis as a reason for delayed filing of return. The question now is whether a plea of financial difficulties ("cash crisis" in this case) is a valid reason to be admitted under section 80 of the Finance Act, 1994. In this commercial world, it is too late for anybody to say that a "cash crisis" is insurmountable. It also appears from the record that the appellants were solvent enough to write off "bad debts" while continuing to do their business . Apparently, their financial was only in the matter of paying their dues to the exchequer. In the circumstances, their plea of "cash crisis" cannot be accepted as a ***reasonable cause*** *for exonerating them from the penal liability under Section 76 / 77 of the Finance Act, 1994.*

18. Further, the submission made by the assessees does not constitute reasonable cause so as to exonerate them from the penalties by invoking Section 80 of the Act. Accordingly, I hold the Penalty under Section 76/77 is imposable as they have contravened the provisions of law.

19. In view of the above, I pass the following order:

ORDER

(i) I Confirm the demand of Rs. 5,20,892/- (Rupees Five Lakhs Twenty Thousand Eight Hundred Ninety Two only) (including cess) being the service tax payable on the "Works Contract" services rendered during the period from July, 2012 to March, 2014 under sub section (2) of Section 73 of Finance Act,1994 against M/s. Paramount Builders, Secunderabad;

(ii). I appropriate an amount of Rs. 1,70,371/- paid by them towards the demand at (i) above;

(iii). I confirm the demand of Interest on the Service Tax demanded at (i) above, under Section 75 of the Finance Act 1994, at the appropriate rates, from M/s. Paramount Builders, Secunderabad

(iv). I impose a Penalty of Rs.52,089/- being the 10% of demand confirmed at (i) above, under Section 76 of the Finance Act, 1994 against M/s. Paramount Builders, Secunderabad. However the assessee have an option to pay reduced penalty i.e 25% of penalty

imposed provided they pay the service tax, interest and such reduced penalty within 30 days of receipt of this order.

(v). I impose Penalty of Rs. 10,000/- under sub section (2) of Section 77 of the Finance Act, 1994 against M/s. Paramount Builders, Secunderabad.

Accordingly the show cause notice issued vide OR No.108/2014-Adjn(ST) JC dated.19.09.2014 stands disposed off.

(P.ANAND KUMAR)
ADDITIONAL COMMISSIONER,

To,

M/s. Paramount Builders,
#5-4-187/3 & 4, II Floor,
Soham Mansion, MG Road,
Secunderabad-500 003 (By RPAD)

Copy to:

1. The Commissioner, Service Tax, Hyderabad- ST Commissionerate, Hyderabad. // By Name to Supdt (Review) //
2. The Deputy/Asst Commissioner, Central Excise, Customs and Service Tax, Division-II Service tax, Hyderabad.
3. The Superintendent of Service Tax, Range-II-B. He is directed to serve the order on the assessee and obtain dated acknowledgement.
4. Master Copy / Office Copy.