(7)

BEFORE THECOMMISSIONER OF CUSTOMS, CENTRAL EXCISE&SERVICE TAX, HYDERABAD-IICOMMISSIONERATE,7th FLOOR,
KENDRIYA SHULK BHAVAN, BASHEERBAGH, HYDERABAD – 500004

Sub: Proceedings under OR No.156/2014 Adjn (ST) (Commr) Adjn (ST) (Commr.) C.No. IV/16/197/2011 ST Gr.X dated 25.09.2014 issued to M/s Greenwood Estates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

We are authorized to represent M/s.Greenwood Estates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad – 500003 vide authorized letter enclosed along with this reply.

FACTS OF THE CASE:

A. M/s Greenwood Estates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003 (hereinafter referred as Noticee) is a partnership firm registered under the Partnership Act, 1932 mainly engaged in the sale of residential units to prospective buyers while the units are under construction.

B. The Noticee had registered with service tax department vide STC No. AAHFG0711BST001 under the category of construction of complex service. Later, on based on Additional Commissioner clarifications, it registered itself under the category of "Works Contract Service" also.

C. The flow of activity involved in the activity of the Noticee is as under:

   i. Noticee has jointly purchased the undivided land along with M/s Sri Saibuilders, it is engaged in development and sale of flats.

ii. Construction Permit/ Sanction Plan were applied by the Noticee and approval has also been obtained from Greater Hyderabad Municipal Corporation/HUDA under their own names.

iii. Noticee has entered into a 'Construction Agreement', it has also executed Sale Deed for 'Sale of Undivided Portion of Land'. Both the instruments are registered and appropriate 'Stamp Duty' has been discharged on the same.

iv. Noticee would collect the following consideration from the prospective buyers.

a. Receipt towards Sale deed i.e. sale of semi-finished flat

b. Receipt towards construction service i.e. works contract

c. Receipt towards payment of VAT, Service Tax, Stamp duty and registration charges that were remitted to the government either in advance or on a later date.

d. Receipts towards other charges like corpus fund, maintenance charges, electricity charges etc. received on behalf of the Owners Association or the electricity department, which were paid to them in advance or on a later date.

v. Receipts were first appropriated towards,

a. Sale deed

b. Then towards the agreement of construction

c. Towards additions and alterations and

d. Finally towards VAT, Service Tax, stamp duty, registration charges, excess consideration received etc.

D. For the earlier period, the department has issued four show cause notices for the period January 2009 to June 2012 and Noticee is contending their activity is not liable for service tax due to;

a. Residential units are used for personal use of the buyer and excluded from the definition of the complex service

b. As per circular no. Circular No. 108/2/2009- S.T. dated 29-01-2009 not liable for service tax.

c. Assuming but not admitting taxable, then not liable to prior to 01.06.2007 and 01.07.2010 as the works contract came only from 01.06.2007 and amendment to the definition of the taxable service from 01.07.2010.

E. The status of the four pending are as follows.

Period	SCN	Amount	Status
Jan 09 to Dec 09	HQPQR No. 77/2010 Adjn (ST) dated 21-05-2010	Rs.9,47,737/-	CESTAT waived the pre-deposit of the taxes and penalty
Jan 10 to Dec 10	OR No.61/2011, dated 23-04-2011	Rs.48,00,391/-	CESTAT and Com(A) has sent the matter back to the Adjudicating authority for de novo consideration for quantification of service tax liability
Jan 11 to Dec 11	OR No. 52/2012 Adjn (AddlCommr) dated 24-04-	Rs.46,81,850/-	CESTAT and Com(A) has sent the matter back to the Adjudicating authority

	2012		for de novo consideration for quantification of service tax liability
Jan 12 to June 12	OR No.83/2013 Adjn (ST) ADC dated 02.12.2013	Rs.16,53,853/-	Heard and pending for Adjudication

F. For the present period, even though their case has not reached finality and in order to avoid litigation, the Noticee has paid service tax on amount received for agreement of construction under the category "Works Contract Service" under Works Contract (Composition Scheme for Payment of Service tax) Rules, 2007. Further, w.e.f. 01-07-2012, service tax has been deposited as per Rule 2A of Service Tax (Determination of Value) Rules, 2006 as their transaction is covered under the definition of works contract as provided under Finance Act, 1994.

G. The Notice voluntarily vide their letter dated 29th April 2013, 26th September 2013, 11th November 2013 and 1st June 2014, intimated the department (Copy of the said letter is enclosed for reference in annexure 1 to this reply) the receipts towards the following heads were excluded for computation of taxable amount under work contract services.

a. Receipts towards value of sale deed

b. Receipts towards payment of VAT, Service Tax, Stamp duty and registration charges that were remitted to the government either in advance or on a later date

c. Receipts that are in excess of the agreed sale consideration which were refunded or liable to refunded to the purchaser

d. Receipts towards the other charges like corpus fund, maintenance charges, electricity charges, etc, received on behalf of the Owners Association or the electricity department which were paid to them in advance or on a later date

H. Accordingly, the Noticee has discharged service tax only on the amount received towards agreement of construction and copies of challan is also submitted to the department in the above mentioned intimation made to the department.

I. Without appreciating the voluntarily disclosures made, the department vide their letter dated 10.09.2014 issued summons to furnish the information. Accordingly, on 17-09-2014, the Noticee has submitted(a copy of the same is enclosed for reference in annexure 2 to this reply) the details of amount received for agreement of construction and they also, enclosed earlier intimation made to the department which is as explained above.

J. Without understanding the fact that the service tax has been paid on amount received for construction of service, the subject show cause notice has excluded only the VAT amount from the total amount received

and proposed to tax the amount received towards agreement to sale of semi-finished flat, amount received for electricity charges, stamp duty etc.

K. Accordingly, the subject show cause notice has issued to show cause as to why;

a. An amount of Rs.92,38,975/- including cesses should not be demanded on the Works Contract services rendered by them during the period from July 2012 to March 2014 under section 73(1) of Finance Act, 1994 read with proviso thereto; and an amount of Rs.38,08,242/- already paid should not be adjusted against the above demand.

b. Interest on the amount of demand at (a) should not be recovered under section 75 of the Finance Act, 1994.

c. Penalty should not be imposed on them under section 76 of the Finance Act, 1994; and

d. Penalty should not be imposed on them under section 77 of the Finance Act, 1994.

In as much as:

(i) 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 execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of constructions to each of their customers to whom the land was already sold are taxable services under works contract service.

(ii) As per information furnished by the Noticee vide their letter dated 17.09.2014 along with statements it is seen that "the Noticee" have rendered taxable services under the category of Works contract service during the period July 2012 to March 2014. The Noticee had rendered services for a taxable value of Rs.22,53,43,191/-. After deduction of VAT of Rs.81,96,254/- the taxable value works out to Rs.21,71,46,937/- on which service tax (including cess) works out to amount of Rs.38,08,242/- was paid leaving an amount of Rs.54,30,733/- unpaid / short paid for the services rendered during the said period, as detailed in the annexure enclosed.

(iii) Referred the provisions of section 73(1A), section 65B, 66B and 66D, 65B(44), 66B, 66E, of the Finance Act, 1994.

(iv) 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 Noticee are not covered under any of the listed therein.

(v) 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 section 65B(54) whereby the said service is a declared service as per section 66E(h) of Finance Act, 1994 and the same is not being in the negative list prescribed under section 66D, continues to be a taxable service. But for said changes in legal provisions, the status of service and the correspondence 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.

Submissions:

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(1A)**

2. Noticee submits that the subject SCN has not at all alleged how and 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.

3. The Noticee submits that the subject show cause notice has issued by relying on the information submitted by the Noticee vide letter dated

17thSeptember 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.3,60,46,238/-
2	October 2012 to March 2013	Rs.4,26,58,417/-
3	April 2013 to September 2013	Rs.60,80,632/-
4	October 2013 to March 2014	Rs.69,45,059/-

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	January 2012 to March 2012	Rs.4,49,46,992/-
2	April 2012 to September 2012	Rs.5,93,70,068/-
3	October 2012 to March 2013	Rs.2,45,03,661/-
4	April 2013 to September 2013	Rs.2,37,07,665/-
5	October 2013 to March 2014	Rs.1,15,53,396/-

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.

5. Noticee submits that they 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 received 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 at all liable for service tax. On the basis of the same, Noticee submits that subject show cause notice is not sustainable and requires to be dropped.

6. The Noticee submits 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 show 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.

7. Noticee further submits that the Commissioner (A) and the Hon'ble CESTAT in the previous period has 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, Noticee submits that the proposition of the subject show cause notice demanding the duty is not sustainable and requires to be dropped.

8. Noticee submits that the subject show cause notice has not made any allegations as to how and why there is a short payment of service tax inspite of detailed submissions 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 notice has not made any allegations as to how and why the deductions claimed by the Noticee is not applicable, the same is not sustainable and requires to be dropped.

9. Noticee submits that the subject show cause notice in para 5 extracted the provisions 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)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."***

10. Noticee submits that from the analysis of provisions of section 73(1A), it is clear that to issue show cause notice / statement under this section, the grounds relied upon for the subsequent period should be same in all aspect as mentioned in the 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 provisions 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 ceases to effect.

c. There is no concept of 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 Notification24/2012-ST dated 20.06.2012 for determination of tax liability in 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 service)

11. Noticee submits 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 is 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(1A) is not applicable to the present case, which needs to be dropped.

12. Further the basic fundamental dispute for the previous periods(prior to 01.07.2012) was that the classification of the Noticee 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(1A) of the Finance Act, 1994 is not sustainable and need to be quashed.

13. Noticee submits 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.

14. Noticee submits that as the subject show cause notice is issued without any allegations, the same has not proved burden of proof of taxability, which is essential under new service tax law. In this regard to Noticee wishes to rely on the following decisions.

    a. In the case of Dewsoft Overseas Pvt. Ltd VsCommr. 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.

15. Noticee submits 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

16. The Noticee submits 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."***

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 Noticee 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, Noticee submits 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.

18. Noticee submits that the definition of service provided w.e.f 01-07-2012 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.

19. Noticee submits 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 an immovable 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.

20. Noticee submits that the show cause notice in para2 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.

21. The Noticee submits 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"

22. The Noticee submits that from the above it is clear that Article 265 prohibits the levy or collection of the tax except by authority of law. Therefore the law should be within the legislative 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.

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

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

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

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

25. From the above it is clear that the tax on transfer of immovable property is covered under entry no.3 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, Noticee submits that service tax is not applicable for sale / transfer of immovable property. As the subject show cause

notice has not considered this aspects, the same is not sustainable and requires to be dropped.

26. Noticee submits 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.

"SECTION67. Valuation of taxable services for charging service tax. *— (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —*

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

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

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

27. Noticee submits that from the analysis of section 67 of the Finance Act, 1994, it is clear that service tax requires to be paid on the value of the

services rendered. In the present case, the 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.

28. The Noticee submits that Hon'ble High Court in the decision of GD Builders VS Union of India 2013 (32) STR 673 held that in case of a composite contract, **the service element should be bifurcated and ascertained and then taxed.** In the present case service there are two separate transactions one is sale of semi-finished flat and second one is construction service. Accordingly, the proposition of the above case law can be 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**

29. Noticee submits 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.

30. Noticee submits 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(90) 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.

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

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

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

a. There should be a contract. (***Only a Single Contract)***

b. In such contract, there should be transfer of property in goods and

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

33. Noticee submits that in the present case, their agreement of construction may liable under the definition of works contract as provided under section 65B(54) of the Finance Act, 1994 and they are paying appropriate service tax as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006. Inspite 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.

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

a. The 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

35. Noticee submits 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 amount

received for corpus fund, electricity charges is not sustainable and requires to be dropped.

36. Noticee submits 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.

37. Noticee submits 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;

38. Noticee submits 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 Noticeedemanding 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.

39. Noticee submits 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.

40. Noticee submits 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.

41. Noticee further submits 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 &TechnocraftsPvt 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

42. Noticee submits 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

amount 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

43. Noticeesubmits that assuming but not admitting there is a liability under works contract service for sale of semi-finished flat, then as the Noticee has not collected service tax from the buyer, the benefit of cum-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.

44. The Noticee submits that in light of the 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

a. In the case of P. Jani& Co. vs. CST, Ahmedabad 2010 (020) STR 0701 Tri.-Ahmd. It was held that *"I agree with the contention of the learned advocate that the decision of the Tribunal in the case of Advantage Media Consultant applies and in view of the provisions of Section 67 of Finance Act, 1994, the* ***amount received has to be treated as inclusive of tax.***"

b. In the case of Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del it was held that ***"However, since they have not recovered service tax separately from their customers, value received by them should be taken as cum-tax value and tax should be re-determined.*** *Accordingly, impugned order is set aside. Matter is remanded back to the original authority for re-calculation of the demand"*

c. In the case of Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590 it was held that "*We also find strong force in the contention raised by the learned counsel that the amount collected by them should be considered as cum-duty amount.* ***The lower authorities need to recalculate the amount of Service Tax liability considering the entire amount received by the assessee as the cum-tax amount."***

d. In the case of BSNL Vs CCE, Jaipure 2011 (24) S.T.R 435 (Tri-Del) it was held that *"In view of our findings as above, we set aside the impugned order and remand the matter to the original authority for verifying as to whether the service tax amount has been separately paid by service recipient and* ***for allowing*** *cum-tax* ***benefit in such of those cases where no service tax has been separately paid".***

On the basis of above decisions, Noticee submits that the benefit of cum-tax requires to be provided to the Noticee. On the basis of the same, Noticee submits that the proposition of the subject show cause notice

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

In Re: Interest and penalties

45. Without prejudice to the foregoing, noticee submits that when service tax itself is not payable, the question of interest does not arise.

46. Noticee 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)

47. Without prejudice to the foregoing, Noticee submits 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.

48. Noticee 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." In the present case, as the subject show cause notice has not provided any reason for imposition of penalty under section 76, the subject show cause notice is not sustainable and requires to be dropped.

49. Noticee submits that, they may not interpret the Law as interpreted by the Authority that does not mean that they have an intention to evade the payment of service tax. The dispute regarding the taxability of service tax on land owner share is pending before various Appellate forums. Accordingly, it always involves the interpretation of legal provisions and judicial pronouncements. It is a settled position of Law that when there is an issue of interpretation of the provisions of the Finance Act, 1994 there is no question of imposition of the penalty under Section 76 of the Finance Act, 1994. In this regard Appellant wishes to rely on the following judgments pronouncements:

a. In the case of Suprasesh G.I.S. & Brokers P. Ltd Vs CST, Chennai 2009 (013) S.T.R 641 (Tri-Chennai) it was held that *"We have however found a good case for vacating the penalties. By and large, the dispute agitated before us was highly* ***interpretative of the various provisions of the Finance Acts 1994*** *and 2006, the IRDA Act, 1999 and the IRDA (Insurance Brokers) Regulations, 2002. In the circumstances, it will not be just or fair to inflict any penalty on the assessee"*

b. In the case of Ispat Industries Ltd Vs CCE, Raigad 2006 (199) E.L.T 509 (Tri-Mumbai) it was held that *"Apart from holding that the credit was admissible to the appellants on merits, we also find that the demand raised and confirmed against them is hopelessly barred by limitation. Admittedly, the appellant had reflected the fact of availing the balance 50% credit in the subsequent financial year, in their statutory monthly returns filed with the revenue. This fact is sufficient to reflect knowledge on the part of the revenue about the fact of taking balance 50% credit and is also indicative of the bona fides of the appellant. The appellants having made known to the department, no suppression or mis-statement on their part can be held against them.* ***The issue, no doubt involves bona fide interpretation of provisions of law and failure on the part of the appellants to interpret the said provisions in the way in which the department seeks to***

interpret them cannot be held against them so as to invoke extended period of limitation. *When there is a scope for doubt for interpretation of legal provisions and the entire facts have been placed before the jurisdictional, Central Excise Officer, the appellants cannot be attributed with any suppression or misstatement of facts with intent to evade duty and hence cannot be saddled with demand by invoking the extended period of limitation.As much as the demand has been set aside on merits as also on limitation, there is* ***no justification for imposition of any penalty*** *upon them.*

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

d. In the case of Itel Industries Pvt. Ltd Vs CCE, Calicut 2004 (163) E.L.T 219 (Tri-Bang) it was held that *"In view of the facts of this case, we do not find any case or cause to invoke the penal liabilities, as we find that the Commissioner has held "It is essentially,* ***a question of interpretation of law*** *as to whether Section 4 or Section 4A would be applicable...." and not sustained*

the penalty under Section 11AC. We concur with the same. Therefore we cannot uphold the Revenue's appeal on the need to restore the penalty under Section 11AC as arrived at by the Original Authority. As regards the penalty under Rules 173Q & 210, we find the Commissioner (Appeals) has not given any finding why he considered the same as correct and legal in Para 8 of the impugned order. Imposition of penalty under Rules 173Q &210 ***on matters of interpretation,*** *without specific and valid reasons, is not called for".*

On the basis of the above judgments it is clear that whenever due to bonafide interpretation of law service tax not paid (assuming but not admitting service tax may be liable on the constructional services for public infrastructure) penalty is not leviable under section 76 and 77 of the Finance Act, 1994.

50. Without prejudice to the foregoing, Noticee submits that suppression or concealing of information with intent to evade the payment of tax is a requirement for imposing penalty. It is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be intention of evasion and penalty cannot

be levied. In this regard we wish to rely upon the following decisions of Supreme Court.

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

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

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

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 76.

51. The Noticee further submits that on going through the impugned SCN one 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 and intention to evade payment of service tax, the penalties proposed requires to be dropped.

In Re: *Benefit under section 80*

52. The Noticee submits 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."

53. Assuming but not admitting, noticee further submits 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.

54. Without prejudice to the foregoing, Noticee submits 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.

55. Noticee submits that 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. Further there cannot be intent to evade payment of duty in such cases and just because the Noticee has interpreted the law differently, it cannot be said that there is intent to evade payment of tax. This does not prove the malafide intent at all, as was decided in -

i. Vipul Motors (P) Ltd. vs Commissioner of C. Ex., Jaipur-I 2008 (009) STR 0220 Tri.-Del

ii. Commissioner of Service Tax, Daman vsMeghna Cement Depot 2009 (015) STR 0179 Tri.-Ahmd.

56. TheNoticee submits that in the case of Bajaj Travels Ltd Vs CST (Delhi) 2012 (25) S.T.R 412 (Del. HC) it was held that *"We are of opinion that in the instant case, the appellant has been able to prove its bona fides. Explanation of appellant for short payment was, already pointed out above, that it was paying the service tax as per its bona fide understanding that it was required to pay the same on commission retained by it and that method of calculation was not clear to the appellant. This explanation gains momentum from the conduct depicted by the appellant after the visiting team of the department had pointed out correct method of computing service tax.The said team of department visited the office of the appellant on 05th September, 2005 and pointed out*

the irregularity committed by appellant. Once this mistake was realized, without even waiting for the show cause notice, which was issued on 17thOctober, 2005 short fall was made good on 6th September, 2005 i.e. on the very next day after the search. Thus not only the entire tax was paid within two days, so much so, even interest on the delayed payment was made good. This has further to be seen under the surrounding circumstances prevailing at that time. The service tax was a new tax imposed on Air travel agent services. There were many misgivings and confusion which lead to committal of defaults by many such persons. In fact, the department itself issued circular accepting that there was confusion and on that basis penalties in all such cases were waived in respect of those who had paid service tax in response of the said scheme. On the basis of the above judgment of the Delhi High Court the Noticee is rightly eligible for the waiver of the penalty under Section 80 of the Finance Act, 1994.

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

58. Noticee 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.

59. The Noticee 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."

60. Therefore Noticee submits authority must exercise power under Section 80 and grant the waiver of the penalty under Section 77 and 76 of the finance Act, 1994.

61. Noticee craves leave to alter, add to and/or amend the aforesaid grounds.

62. Noticee wishes to be heard in person before passing any order in this regard.

For M/s Greenwood Estates,

Authorized Signatory

BEFORE THECOMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, HYDERABAD-II COMMISSIONERATE, 7th FLOOR, KENDRIYA SHULK BHAVAN, BASHEERBAGH, HYDERABAD – 500004

Sub: Proceedings under OR No.156/2014 Adjn (ST) (Commr) Adjn (ST) (Commr.) C.No. IV/16/197/2011 ST Gr.X dated 25.09.2014 issued to M/s Greenwood Estates, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

I,_____,---------- of M/s Greenwood Estates, 5-4-187/3 & 4, II Floor,Sohan Mansion, MG Road, Secunderabad–500003 hereby authorizes and appoint Hiregange& Associates, Chartered Accountants, Hyderabad 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: -

a. 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.
b. 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.
c. 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 on – November2014at 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: --.11.2014

Address for service:
Hiregange& Associates,
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Hyderabad-5000034

For Hiregange& Associates
Chartered Accountants

Sudhir V S
Partner (M.No.219109)