OFFICE OF THE ASSISTANT COMMISSIONER OF SERVICE TAX
DIVISION-II :: SERVICE TAX COMMISSIONERATE
Room No -600, 5th Floor:: Kendriya Shulk Bhavan, Basheerbagh
HYDERABAD-500 004.

C.No: IV/16/195/2011-S.Tax(Gr.X) **Date. 30/12 /2016.**
O.R. No: 24/2016-Adjn (ST) (JC)

ORDER IN ORIGINAL NO. 45/2016-Adjn (ST)(AC)

(Passed by Shri. J.Vijaya Bhaskar, Assistant Commissioner, Service Tax)

PREAMBLE

1 यह आदेश जिसके नाम जारी किया गया है, उस व्यक्ति के निजी उपयोग के लिए यह प्रति मुफ्त में दी जाती

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2 इस आदेश से किसी भी व्यक्ति को हानि पहुनचती हो तो वे यथा संशोधित वित्त अधिनियम,199 4 की धारा 85 (3A)के अधीन, इस आदेश /निर्णय की प्राप्ति की तारीख से दो महीनों के भीतर आयुक्त)अपील(, मुख्यालय, सातवा तल, एल बी स्टेडियम रोड, बशीरबाग, हैदराबाद 4 के समक्ष अपील कर सकते हैं।

Under Section 85 (3A) of the Finance Act, 1994 as amended, any person aggrieved by this order can prefer 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, Basheer Bagh, Hyderabad-4

3 धारा 85 के अंतर्गत आयुक्त (अपील) को की जाने वाली अपील फॉर्म एस टी-4 में होगी और निर्धारित तरीके से इसका सत्यापन किया जाएगा ।

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 अपील का स्वरूप फॉर्म सं. एस टी-4 में दो प्रतियों में फ़ाइल किया जान है और जिस आदेश या निर्णय के विरोध में अपील की जा रही है उसकी एक प्रति भी अपील के साथ संलग्न की जानी है।

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 और जिस आदेश या निर्णय के विरोध में अपील की जा रही है उसकी एक प्रति के साथ निश्चित मूल्य का न्यायालय शुल्क टिकिट लगाना 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.

4.	C.No.IV/16/195/2011-ST-Gr.X (issued by AC,(ST), Division-II dt;02.12.2013	01/2012 to 06/2012	2,92,477	Pending Adjudication
5.	OR No.108/2014-Adjn.(ST)(JC) Dt.19.09.2014	07/2012 to 03/2014	5,20,892	Pending Adjudication

4. As per the information furnished by the Assessee vide their letter dated 13.04.2016 received by the Jurisdictional Range Superintendent on 13.04.2016, it is seen that **"the Assessee"** have rendered taxable services under the category of "Works Contract Services" during the period **April, 2014 to March, 2015**. The Assessee had rendered services for a taxable value of **Rs.43,18,635/- (Rupees Forty three Lakhs Eighteen thousand Six Hundred and Thirty Five only)**. After deduction of VAT of Rs.4,21,650/- the taxable value works out to **Rs.38,96,985/-** on which service tax works out to **Rs.1,92,667/-** (including cesses) for the services rendered during the said period, as detailed below:

	Before Occupancy Certificate is obtained	After Occupancy Certificate is obtained	**Total**
Gross Receipts	**77,575**	**42,41,060**	**43,18,635**
Less: Construction Agreement Value	--	11,985	
Gross Sale Deed Value	--	42,29,075	
Less: VAT & Registration	**77,575**	**3,44,075**	**4,21,650**
Net Taxable Value (Net of VAT)	nil	38,85,000	**38,96,985**
Tax Rate	4.944%	-	**4.944%**
Service Tax Payable		1,92,074	**1,92,667**

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), 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 section **65B, 66B, 66D** as inserted in the Finance Act, 1994 by the Finance Act, 2012 w.e.f. 01.07.2012 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) a transaction in money or actionable claim; (b) a provision of service by an*

i). an amount of **Rs.1,92,667/- (Rupees One Lakhs Ninety Two thousand Six Hundred and Sixty Seven only)** (including Cesses) should not be demanded as per Para-4 above towards "Works Contract Service" rendered by them during **April, 2014 to March, 2015**, in terms of Section 73 (1) of the Finance Act, 1994; on the grounds discussed supra; and

ii). **Interest** should not be demanded at (i) above, under Section 75 of the Finance Act, 1994; and

iii). **Penalty** should not be imposed on them under Section 76 of the Finance Act, 1994, for the contravention of Rules and provisions 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:-

The Assesses have submitted written submissions vide their letter Dt.20.09.2016, stating, interalia

1. That all flats were booked after the date of occupancy certificate and sale deed is being executed for the entire sale value; that being the case no service tax is liable on the amounts received towards said flats since same is 'sale of immovable property' and it was specifically provided in Section 66E(b) of Finance Act, 1994 that service tax is not liable for the flats booked after OC date. Hence proposal of present SCN to demand service tax on the flats booked after OC date is not sustainable and required to be dropped.

2. that without prejudice to the foregoing, that the subject show cause notice in Para 5 extracted the provisions of section 73(1A) of the Finance Act, 1994 and in Para 6 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 April 2014 to March 2015; 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

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)

4. that from the above it is clear that there are 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(1A) is not applicable to the present case, which needs to be dropped.

5. that once SCN raises allegation/demand based on inapplicable provisions then such allegation/demand cannot sustain. In this regard reliance is placed on Maharashtra Industrial Development Corporation Vs CCE, Nasik 2014 (36) S.T.R. 1291 (Tri. - Mumbai) wherein it was held that *"With regard to the show cause notice in Appeal No. ST/85267/14 we find that the period involved is 1-10-2011 to 30-9-2012. In the said case, the demand is for two periods - one from 1-10-2011 to 30-6-2012 and the second is from 1-7-2012 to 30-9-2012 when the negative list came into effect but the show cause notice has been issued on the basis of definition of Management, Maintenance and Repair service has stood prior to 1-7-2012. Therefore, as post-1-7-2012 the provisions are not existing therefore, the demands for the period post-1-7-2012 are not maintainable"*

6. that as the subject SCN is issued without any allegations, the same has not proved the burden of proof of taxability, which is essential under new service tax law. In this regard to they to rely on the following decisions.

    a. United Telecom Ltd. Vs CST 2008 (9) S.T.R 155 (Tri-Bang)

    b. Jetlite (India) Ltd. Vs CCE 2011 (21) S.T.R 119 (Tri-Del)

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

making detailed grounds on the legal merits of the said claim and would like to submit the following broad lines of arguments:

a. In all cases, the "sale deed" is entered into after the completion of the building and therefore the demand cannot be justified under the said entries.

b. Till the stage of entering into a "sale deed", the transaction is essentially one of sale of immovable property and therefore excluded from the purview of Service Tax.

c. In any case, the deeming fiction for construction services prior to completion cannot be classified under works contract services since doing the same would render Section 66E(b) of Finance Act, 1994 & Notification 26/2012 ST dated 20.06.2012 redundant.

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

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

13. Similar to the claim for exclusion of sale deed value, the value attributable to stamp duty, electricity etc., need to be reduced. It is submitted that once the above deductions are allowed, the demand would be reduced to NIL

Interest and penalties

14. that without prejudice to the foregoing, when service tax itself is not payable, the question of interest does not arise; 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).

15. that without prejudice to the foregoing, penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as

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

a. Exclusion part of service definition given under section 65B(44) of Finance Act, 1994 in as much specifically excluding the sale of immovable property from levy of service tax.

b. Activity performed till the execution of sale deed is in the nature of self service and not liable for service tax.

c. Activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser and not prior to that.

d. Earlier SCN's demanding service tax on the value of construction agreement.

20. that they have established the reasonable cause for the non-payment of service tax. Since reasonable cause for the non-payment of the service tax, imposition of the penalty is not sustainable. In this regard they wish to rely on Commissioner of Service Tax, Bangalore Vs Motor World 2012 (27) S.T.R 225 (Kar).

10. Record of Personal Hearing :-

Personal Hearing has been granted to the assesse. Sri P. Venkata Prasad, Chartered Accountant has appeared for personal Hearing before me on 28.12.2016 and reiterated the submissions already made in the reply to the show cause notice Dt.20.09.2016.

11.Discussions And Findings:-

11.1. I have gone through the Show cause Notice, the relied upon document, reply submitted by the assessee and submissions made by them during personal hearing. The issue to be decided by me is whether the assessee is liable to pay service tax on the flats sold by them.

11.2. It is seen from the submissions of the assessee that one of the Show Cause Notice which was confirmed by the Original Adjudicating Authority vide 49/2010ST dt. 29.11.2010 was upheld by the Commissioner (Appeals) vide OIA no 09/2011 dt 31.01.2011 and the same was appealed against before the Hon'ble CESTAT, Bangalore which has stayed recovery proceedings vide stay order no 9697-699/2012 dt. 18.04.2012 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.

department has correctly quantified the duty amount. Therefore, assesses' contention is rejected on Quantification of the tax liability and I hold that the demand is sustainable.

11.7. I find the demand made in notice is sustainable and therefore the contention of the assessee that penalty proposed under section 76 and 77 of the Act and demand of interest under section 75 of the Act are not sustainable is rejected.

(i) Levy of penalty under Section 76 of the Act :

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

(ii). 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 eligible for the benefit of Section 80 of the Finance 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.

Further , the submissions made by the assessee do 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 and 77 of the Act. is imposable as they have contravened the provisions of law .

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