ST 10v.

OFFICE OF THE
COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, (APPEALS-II)
7th Floor KENDRIYA SHULK BHAVAN OPP. L.B.STADIUM, BASHEERBAGH
HYDERABAD- 500 004

Appeal No. 199 / 2012 (H-II) S.TAX **Date: 30.01.2013.**

ORDER-IN-APPEAL No.14 / 2013 (H-II) S.TAX
(Passed By Dr.S.L.Meena, Commissioner (Appeals-II)

PREAMBLE

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2. Any assessee aggrieved by this order may file an appeal under Section 86 of the Finance Act, 1994 to the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, 1st Floor, WTC Building, FKCCI Complex, Kemp Gowda Road, Bangalore-560 009.

3. Every appeal under the above Para (2) shall be filed within three months of the date on which the order sought to be appealed against is received by the assessee, the Board or by the [Commissioner] of Central Excise, as the case may be.

4. The appeal, as referred to in Para 2 above, should be filed in S.T.5/S.T.-7 proforma in quadruplicate; within three months from the date on which the order sought to be appealed against is communicated to the party preferring the appeal and should be accompanied by four copies each (of which one should be a certified copy), of the order appealed against and the Order-in-Original which gave rise to the appeal.

5. The appeal should also be accompanied by a crossed bank draft drawn in favour of the Assistant Registrar of the Tribunal, drawn on a branch of any nominated public sector bank at the place where the Tribunal is situated, evidencing payment of fee prescribed in Section 86 of the Act. The fees payable are as under:-

(*a*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(*b*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(*c*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

No fee is payable in the case of Memorandum of Cross Objection referred to in Sub-Section 4 of Section 86 ibid.

6 Every application made before the Appellate Tribunal,

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or
(b) for restoration of an appeal or an application shall be accompanied by a fee of five hundred rupees:

No fee is payable in case of an application filed by Commissioner under this sub-Section.

7. Attention is invited to the provisions governing these and other related matters, contained in the Central Excise Act, 1944 and Central Excise Rules, 2002 and the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

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ORDER

Appeal No : 199 / 2012 (H-II)S.Tax

The subject appeal along with stay petition has been filed by M/s. Modi and Modi Constructions, 5-4-187/3&4, 2nd Floor, M.G.Road, Secunderabad-500 003 (hereinafter referred to as Appellants) against Order-in-Original No. 48/2012-Adjn.(ST) dated 31.08.2012 passed by

the Additional Commissioner of Service Tax, Hyderabad-II Commissionerate (hereinafter referred to as Respondent).

2. Brief facts of the case are that the appellants are engaged in providing works contract service. Verification of records revealed that they had undertaken a single venture by name M/s.Nilgiri Homes located at Rampally village, Keesara Mandal R.R. District and received amount from customers towards sale of land and agreement of construction of 18 houses for the period Jan., 2010 to Dec., 2010. The subject venture of M/s Modi and Modi Constructions qualified to be a residential complex as it contained more than 12 residential units with common area and common facilities like park, common water supply etc. and the lay out was approved by HUDA . They entered into a sale deed for sale of undivided portion of land together with semi-finished portion of the flat and an agreement for construction with their customers. On execution of sale deed the right in a property got transferred to the customer, hence the construction service rendered by the appellant thereafter to their customers under agreement of construction were taxable under service tax as there existed service provider and receiver relationship between them. Therefore a show cause notice was issued to the appellants covering the period Jan., 2010 to Dec., 2010 vide O.R.No. 59/2011-Adj(ST)Gr.X dt. 23.4.2011 for Rs. 12,06,447/- under Section 73 of FA,1994 along with interest under Section 75 FA,1994 and proposing penal action under Section 76 & 77 of FA,1994 and thereafter a periodical notice for subsequent period Jan, 2011 to Dec., 2011 vide O.R.No. 53/2012-Adj(ST)Gr.X dt. 24.4.2012 was issued for Rs. 27,61,048/- under Section 73 of FA,1994 along with interest under Section 75 of FA and proposing penal action under Section 76 & 77 of FA,1994.

2.1. The lower authority vide the impugned order has confirmed the demand of service tax of Rs. 12,06,447/- under Section 73 (2) of FA,1994 along with applicable interest under Section 75 of FA,1994 for the period Jan., 2010 to Dec., 2010 in respect of SCN O.R.No. 59/2011-Adjn.(ST) dt. 23.04.2011 and imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, under Section 76 and also imposed a penalty of Rs.1,000/- under Section 77 of the FA. Further in respect of SCN O.R.No. 53/2012-Adjn.(ST) dt. 24.4.2012, the lower authority confirmed the demand of service tax of Rs. 27,61,048/- under Section 73(2) of FA,1994 along with applicable interest under Section 75 of FA,1994 for the period Jan., 2011 to Dec., 2012 and imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, under Section 76 and also imposed a penalty of Rs. 1,000/- under Section 77 of the FA.

3. Aggrieved by the above order, the appellants have filed the present appeal along with stay petition mainly on the following grounds that:-

(i) The demand for the past period was confirmed vide OIO No. 47/2010-ST dated 24.11.2010 and the same was also upheld by Commissioner (Appeals) vide OIA No. 11/2011-(H-II) dated 31.01.2011, following the decision of the Commissioner (A), the demand of Service Tax is confirmed. The order has been passed with a presumed attitude and not considering the facts involved. Relied in the case of Uflex Ltd. vs CCE 2010 (19) S.T.R. 666 (Tri. - Del.)

(ii) The Adjudicating Authority had not dealt with the submissions made by them during the replies to the SCN. Hence, the order has been issued with revenue bias without appreciating the statutory provision, the relevant case laws cited by them and also the objective of the transaction/activity/agreement. The order has failed to examine the submissions which were made vide the reply to the notice which were meritorious. They relied in the following case laws:

- Classic Promoters & Developers vs CCE Mangalore 2009-TIOL–1106-CESTAT–Bang
- Virgo Properties Pvt Ltd vs CST, Chennai 2010) 2010-TIOL-1142-CESTAT-MAD
- Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. -CESTAT)
- Ocean Builders vs CCE., Mangalore 2010 (019) STR 0546 Tri.-Bang
- Mohtisham Complexes Pvt. Ltd. vs CCE, Mangalore 2009 (016) STR 0448 Tri.-Bang

- Shri Sai Constructions vs CST, Bangalore 2009 (016) STR 0445 Tri.-Bang

(iii) They also placed reliance on circular No. 108/02/2009 –ST dated 29.02.2009 and two other circulars F. No. B1/6/2005-TRU, dated 27-7-2005 and F. No. 332/35/2006-TRU, dated 1-8-2006.

(iv) The findings of the Adjudicating authority in the impugned order without taking into consideration the pleadings of appellant in their SCN reply, Various statutory provisions and Case Laws cited therein is a non-reasoned order which does not have the required sanctity and is liable to be quashed. Relied in the case of CCE, Indore v. Engineers Combine 2009 (15) S.T.R. 473 (Tri-Del) and Parle International Ltd Vs CCE, Raigad 2011 (22) S.T.R 255 (Tri-Mum)

(v) Without prejudice to the foregoing, nowhere in the findings in the order there was a discussion regarding whether the appellants are covered vide the Circulars 108 and other relevant circulars since there service is to ultimate customer who puts the flats for personal use and thus are out of service tax levy. Relied in the case of Macro Marvel Projects which was upheld by the Supreme Court in 2012 (25) S.T.R. J154 (S.C.). The activity carried out by them is Construction of individual residential unit and not that of residential complex, therefore there cannot be classified as works contract and no service tax is payable on the same.

(vi) They aren't rendering works contract service as defined in Section 65 (105) (zzzza) of the FA, 1994 which was also accepted by the subject order. The works contract service is provided in relation to construction of a new residential complex. The phrase 'residential complex' has been defined in Section 65 (91a) of the Finance Act, 1994. The flats constructed were put to personal use by the customers and hence outside the purview of the definition and consequently no service tax is payable.

(vii) The non-taxability of the construction provided for an individual customer intended for his personal use was clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio.

(viii) The Board Circular No. 108/2/2009-S.T., dated 29-1-2009 states that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the Finance Act, 1994 and accordingly no service tax is payable on such transaction.

(ix) The clarification provided above is that in the under mentioned two scenario service tax is not payable, (a) For service provided until the sale deed has been executed to the ultimate owner and (b) For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

(x) The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore the clarification is applicable to them ibid and with the above exclusion from the definition, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

(xi) Assuming but not admitting that the personal use ground fails, they are not liable to pay service tax in as much as the demand raised for the period prior to the date of the explanation is inserted. The explanation is inserted with effective from 01.07.2010 but the demand raised in the instant case is for the period 08.05.2010 and therefore the demand raised is bad in law. In the clarification issued by board TRU vide D.O.F No. 334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in tax treatment among different practices, the said explanation of the same being prospective and also clarifies that the transaction between the builder and buyer of the flat is not taxable until the assent was given to the bill. Hence this shows that the transaction in question is not liable to service tax for the period prior to 01.07.2010.

(xii) Further Notification No. 36/2010-ST dated 28.06.2010 and Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010 exempts advances received prior to 01.07.2010, this itself indicates that the liability of service tax has been triggered for the construction

service provided after 01.07.2010 and not prior to that, hence there is no liability of service tax during the period of the subject notice. The Trade notice F.No VGN(30)80/Trade Notice/10/Pune dated 15.02.2011 issued by Pune Commissionerate, has specifically clarified that no service tax is payable by the builder prior to 01.07.2010 and amounts received prior to that is also exempted. Since part of the period in the issue involved is prior to such date the order to that extent has to be set aside. Relied in the case of Mohtisham Complexes (P) Ltd. vs CCE, Mangalore 2011 (021) STR 0551 Tri.-Bang stating that the explanation inserted to Section 65(105)(zzzh) from 01.07.2010 is prospective in nature and not retrospective and in the case of Ambika Paints Ply & Hardware Store vs Commissioner of Central Excise, Bhopal 2012 (27) STR 71 (Tri-Del).

(xiii) They filed the Nil returns for all the periods, since they believed that the activity carried out was not a taxable service and therefore not leviable to service tax. However, they had constantly corresponded with the department and submitted all the information asked for by the department. Penalty under Section 77 is not leviable in as much as they have filed the ST-3 returns for all the periods in the present order.

(xiv) For the period January 2010 to December 2010, the SCN had claimed that entire receipts of Rs.2, 92, 82,693/- are taxable, they were unable to understand how the said figures have been arrived at by the Adjudicating Authority. As per the statement submitted, the total receipts during the period are Rs.3,91,12,693/-. Out of the said amount Rs.15,21,000/- is received towards value of sale deed and Rs.45,19,486/- towards land development charges and Rs.1,32,43,968/- is towards taxes and other charges which shall not be leviable to service tax. They had given breakup of taxes and other charges amounts along with the documentary proof for all such amounts which are Rs.2, 00,000/- or above on a sample basis. With regards to electricity charges, it is their submission that these amounts have been collected for the electricity bills on those flats for which builder has discharged amounts to electricity department due to delay in transfer of electricity meters in customers name. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.2,43,47,725/- and not on the entire amount as envisaged in the order.

(xv) For the period January 2011 to December 2011, the SCN had claimed that entire receipts of Rs.6,70,15,724/- are taxable. Out of the said amount Rs.45,73,000/- is received towards value of sale deed and Rs.37, 64,435/- is towards taxes and other charges which shall not be leviable to service tax. They had given breakup of taxes and other charges amounts along with the documentary proof for all such amounts which are Rs.2, 00,000/- or above on a sample basis. With regards to electricity charges, it is their submission that these amounts have been collected for the electricity bills on those flats for which builder has discharged amounts to electricity department due to delay in transfer of electricity meters in customers name. An amount of Rs.5,81,28,289/- has only been received towards Construction agreement. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.5, 81, 28,289/- and not on the entire amount as envisaged in the order.

(xvi) The service tax for the period Jan to Dec,2011 if at all is to be levied is on Rs.5,81,28,289/-. The service tax liability on Rs.5,81,28,289/- @ 4.12% is Rs.23,94,886/- and not Rs.27,61,048/- as demanded for the period in the impugned order. Out of the Rs.23, 94,886/-, Rs.1,73,124/- was acknowledged by show cause notice and Rs.7,000/- was paid by utilization of Cenvat Credit and Rs.7,00,000/- was paid in installments vide Challan dated 02.04.2012, 07.04.2012, 14.04.2012, 30.04.2012, 03.05.2012, 21.05.2012 and 02.06.2012.

(xvii) Without prejudice to the foregoing, when service tax itself is not payable, the question of interest and penalty does not arise. 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) and in the case of CCE v. Bill Forge Pvt. Ltd. 2012 (279) E.L.T. 209 (Kar.)

(xviii) The service tax liability on the builders till date has not been settled and there is full of confusion on the correct position till date. With this background 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. They relied in the case of CCU vs Unitech Exports Ltd. 1999 (108) E.L.T. 462 and HUL Ltd. vs CCE 2010 (250) E.L.T. 251 (Tri. - Del.)

(xix) Para 23 of the impugned order has made a finding that the appellant's have made out a reasonable cause so as to exonerate them from the penalties by invoking Section 80. They relied in the following case laws:

- Guardian Leisure Planners Pvt. Ltd. 2007 (6) S.T.R. (Tri-Kolkata Trans (India)
- Shipping Pvt. Ltd. 2005 (188) E.L.T. 445 (Tri-Chennai
- SPIC & SPAN Security and Allied Services 2006 (1) S.T.R.

(xx) It was under bonafide belief that their activity was a works contract. There was confusion as to interpretation of the words in different taxing statues differently, They had a reasonable cause for the failure to pay the service tax. Therefore, penalties under various sections should be set-aside. They relied in the following case laws:

- CCE vs. Ess Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (New Delhi – CESTAT
- ABS Inc. vs Commr. of C. Ex., Ahmedabad 2009 (016) STR 0573 Tri.-Ahmd
- Jay Ganesh Auto Centre vs CCE, Rajkot 2009 (015) STR 0710 Tri.-Ahmd,

4. The stay petition filed by the appellants was disposed off vide OISP No.66/2012 (H-II) ST dated 07.12.2012, as the appellants had made an amount of Rs.21,00,000/-, pre deposit of the balance amount, interest and penalties were waived.

5. This office vide letter A.No.199/2012 (H-II)ST dt 20.12.2012 has called for the comments on the grounds of appeal as well as the submissions made during the personal hearing but till date no comments had been offered on the subject matter by the adjudicating authority as such it can be assumed that there are no comments to be offered and the appeal has been taken up for disposal.

6. When the main appeal was posted for personal hearing on 20.12.2012, Shri. Sri Harsha CA, appeared on behalf of the appellants for disposal of the appeal and made the following submissions:

(i) Reiterated the submissions made in the grounds of appeal.

(ii) The department arrived to the figure of Rs.2,92,82,693/- for taxable value of services to demand service tax for the period Jan,2010 to Dec,2010. It is understood as to on what basis such figures were arrived at to demand service tax. As per their view the taxable value should be Rs.2,43,47,725/-. A computation chart is available.

(iii) For the period Jan,2011 to Dec,2011 the taxable value as per the notice is Rs.6,70,15,724/- whereas as per their view it should be Rs.5,81,28,289/- . The details of computation will be submitted by 21.12.2012.

(iv) It is also alleged in the SCN that the appellants has not filed statutory returns. They submitted that they had filed all the returns by due date and copies of the same are enclosed. Hence requested to drop the penalty imposed for such allegations.

7. I have gone through the impugned order, grounds of appeal, submissions made at the time of personal hearing and findings made by the lower authority in the impugned order. The issues to be decided in these appeals are (i) whether construction activity undertaken by the appellants falls under Construction of Residential Complex Service or under Works Contract Service ? (ii) whether service tax is payable by the appellants in the light of the Board's Circular No.108/2/2009 – ST dt.29.01.2009? (iii) whether re-quantification of demand is required or not ? (iv) whether penalties are imposable for the impugned period ? and (vi) whether cenvat credit is available on capital goods and input services ?

8. As far as classification and taxability aspects are concerned, it is pertinent to look into the relevant statutory provisions of the Finance Act, 1994.

Section 65 (91a) of the Finance Act,1994 : "residential complex" means any complex comprising of —

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

Section 65 (105) (zzzh) of the Finance Act,1994 "taxable service" means any service provided or to be provided to any person, by any other person, in relation to construction of complex;

Explanation. — For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;

Section 65 (105) (zzzza) of the Finance Act,1994: Taxable Service under **Works Contract** means to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation. — For the purposes of this sub-clause, **"works contract" means a contract wherein, —**

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out, —

(a) -----; or

(b) -----; or

(c) **construction of a new residential complex or a part thereof; or**

8.1. In view of the above definition of Construction of Residential Complex Service and scope of Works Contract Service , I find no merits in the contention of the appellants regarding classification of same construction service as Construction of Residential Complex Service and Works Contract Service since the appellants themselves had paid service tax under Works Contract Service upto December 2008 in respect of construction activity undertaken by them after availing option under Rule 3 (1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules,2007. As per Works Contract Service, option is given to the assessees to pay service tax of 4% instead of regular payment of service tax at 10% leviable for Construction of Residential Complex Service. Further, it is also envisaged in Rule 3 (3) of the Works Contract

(Composition Scheme for Payment of Service Tax) Rules,2007 that for the same contract, payment of service tax under both these services is not payable simultaneously. On perusal of the challans it was observed that the appellants had made service tax payments upto Dec,2008 under Works Contract Service. In view of this, I hold that payment of service tax made by the appellants under Works Contract Service is proper and just and thereby their above mentioned contention is defeated.

8.2. As per the above statutory provisions, the appellants are liable to pay service tax on the onstruction of residential complex undertaken by them since the above mentioned definition of Residential Complex service squarely applicable and no exemption whatsoever can be allowed for such construction activity as it is not meant for self use and "taxable service" means any service provided or to be provided to any person, by any other person, in relation to construction of complex. It is observed from the records that the appellants had paid service tax on the amounts attributable to the value received by them over and above the sale deed values till Dec,2008 under Works Contract Service during the impugned period in respect of construction activity undertaken by them and not paid service tax for the period from January 2010 to December 2011 under the pretext that there is no service tax liability on the service rendered by them in view of the Board's Circular No.108/02/2009-ST dt.29.01.2009. Thereby, it is evident that the appellants had not paid service tax on the amount pertaining to the sale deed till December 2008 and paid service tax only on the part of amounts received towards construction agreements entered with their customers. Further, it is also observed that the appellants had collected total value of the independent houses from the customers and entered into sale deed agreements and construction agreements simultaneously and paid service tax amount to the department on the value excluding the value of sale deed and not paid any service tax for the period January 2010 to December 2011. From these two agreements, it is evident that construction of flat is not yet completed to treat it as a sale of flat. Board's Circular *No.108/102/2009-ST* dated 29.0i.2009 states that ***"it is only after the completion of construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' consequently would not attract service tax."*** It implies that three conditions should be satisfied for not attracting service tax (i) construction should be completed, (ii) full payment of the agreed sum should be paid, and (iii) sale deed should be executed for the full value of the residential unit. In the present appellant' case, though full payments were made construction was not complete and sale deed was executed for part amount of the total consideration. As such, the appellants are not covered by the situation explained in the Board's circular referred to above. In view of this position, the appellants' argument that they are covered by the impugned Board's Circular is without any basis.

8.3. Board has also clarified in the said circular that " ***if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex."*** Exclusion clause would apply to the "complex as a whole" and not to individual residential units. In other words, if the entire residential complex is meant for use by one person then it gets excluded from the definition of "residential complex". For example, if 'BHEL' gets their residential colony (having more than 12 units) for their employees constructed from a builder or Income Tax Department gets their residential colony constructed from a builder, then such construction would not attract service tax. However, this exclusion does not apply to individual residential units as in the instant case. In other words, if a builder constructs residential complex and sells the residential units to number of individuals under "two agreement system" viz., sale deed and construction

agreement as in the instant cases, then, even though such individual unit is for personal use of that customer, still the service tax is liable to be paid. As stated above, "entire complex as a whole" meant for use by one person is under 'exclusion' clause and not the 'individual residential unit'. Secondly, each "construction agreement" with the customer is a "works contract" independent of the agreement entered, with another customer. Therefore, the contentions of the appellants on this count cannot be agreed.

8.4. Further, the appellants are also not covered under of Notification No.24/2010 – ST dt.22.6.2010 read with Notification No.36/2010 – ST dt.01.7.2010, for exemption of service tax on advance payments made since the said two Notifications are issued by the Board for eight New Services and carrying out amendments to the existing services effective from 01.07.2010 and therefore, they are prospective amendments to be complied with effect from 01.07.2010 i.e., the advances made prior to 01.07.2010 are not taxable in respect of the taxable services mentioned in the Notification No.36/2010-ST dt.01.07.2010 rendered from 01.07.2010 since the said taxable services are effective only from 01.07.2010 on account of the provisions of the Finance Act,2010, whereas in the instant case issue involved was for the period January 2009 to December 2011, which is much earlier than 01.07.2010. Moreover, this aspect has been clarified by the Board vide its letter D.O.F.No.334/3/2010 – TRU dt.01.07.2010. In this context I draw attention to the Hon'ble Punjab & Haryana High Court's decision in the case of G.S. Promoters Vs. Union of India reported in 2011 (21) STR 10 (P & H), wherein the Hon'ble High Court has held as under:

> **10.This being the legal position, contention that there is no element of service of construction involved in a builder selling a flat cannot be accepted. Whether or not service is involved has to be seen not only from the point of view of the builder but also from the point of view of the service recipient. What is sought to be taxed is service in relation to construction which is certainly involved even when construction is carried out or got carried out before construction and before flat is sold.**
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> **11.In *Magus Construction Pvt. Limited*, challenge was to a notice requiring registration under Section 69 of the Act on the ground that construction service was rendered by the builder to itself prior to sale of the flat and no construction service was rendered to the buyer. Transaction with the buyer was of sale. Learned Single Judge of Gauhati High Court held that in view of circular dated 1-8-2006, issued by the CBDT, there could be no question of taxable service when a builder undertakes construction work without engaging services of any one else. In our view, the said circular will not apply when service recipient is purchaser of a flat. As already discussed, the levy of tax is on service and not on service provider and construction services are certainly provided even when a constructed flat is sold. Taxing of such transaction is not outside the purview of the Union Legislature as the same does not fall in any of the taxing entries of State list.**

8.5. Further, I find no merit in the case law cited by the appellants contending that construction of independent houses are not leviable to service tax, since the appellants had constructed 18 houses in a complex called Nilgiri Homes, which is having more than 12 houses having common area, having common facilities like common water supply and having layouts approved by HUDA. From this it is evident that Nilgiri Homes constructed by the appellants rightly fall under the definition of Works Contract Service read with Construction of Residential Complex Service as detailed in para above. Moreover, it was observed by the Hon'ble Tribunal in its decision vide last three lines of para 2 in the case of Macro Marvel Projects Ltd. Vs. CST, Chennai – 2008 (12) STR 603 (Tri.- Chennai) that **" These observations of ours with reference to ' Works Contract' have been occasioned by certain specific grounds of this appeal and the same are not intended to be a binding precedent for the future."** .

Therefore, the case law relied by the appellants is not useful to them.

8.6. In view of the above, I find no merits or force in the grounds and contentions submitted by the appellants and the case laws relied are also not helpful to them. In this regard, I concur with the findings made in the impugned order by the lower authority.

9. Contention of the appellants that they are entitled for availing cenvat credit on input services and capital goods and the same has not been considered before arriving at the tax liability. I find that the lower authority has recorded that cenvat credit can be taken in the strength of valid documents on eligible capital goods and input services, the assessee has to take the credit in accordance with the ruels, the department is not obliged to determine their cenvat credit elgiblieity while demanding servcei tax on the taxable services accordingly their contention does not have substance. I do agree with the finding of the lower authority.

10. With regard to demand of service tax and imposition of penalties, it is pertinent to examine the relevant statutory provisions as reproduced below.

SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. — (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, [Central Excise Officer] may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

(a) fraud; or (b) collusion; or (c) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted.

SECTION [76. Penalty for failure to pay service tax. — Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of section 75, a penalty which shall not be less than [two hundred rupees] for every day during which such failure continues or at the rate of [two per cent] of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax :

However, w.e.f 8.4.2011 instead of two hundred rupees the words one hundred rupees has been substituted.

SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, —

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to five thousand rupees.

10.1. With regard to the demand of service tax and imposition of penalties I find no force in their submissions in view of the fact that the appellants had obtained service tax registration and paid service tax under works contract service stopped payment of service tax abruptly

misinterpreting the Circular No. 108/02/2009-ST dt.29.01.2009 issued by the Board even though they received taxable amounts from their customers during the said period, contravening the provisions of Works Contract (Composition Scheme for Payment of Service Tax) Rules;2007 with an intention to evade payment of duty since the clarification sought by them was negated by the department by issue of the subject show cause notice not accepting their contention regarding applicability of the said Board's Circular to them stopping payment of service tax. The fact of non-payment of service tax had come to light only after department conducted investigation proceedings. Accordingly two periodical notices from Jan,2010 to Dec,10 and Jan,11 to Dec,11 even though the appellants are filing ST-3 returns they had not shown the fact of receipt of taxable amounts from their customers in their ST 3 returns filed with the department, with an intention to evade / avoid payment of service tax as such on their part cannot be treated as bonafide act, as claimed by them. and imposition of penalties are rightly applicable in the instant case and I concur with the findings of the lower authority in this regard and the case laws relied are not helpful to theim.

11. **SECTION 80. Penalty not to be imposed in certain cases** — Notwithstanding anything contained in the provisions of section 76, [section 77 or section 78], no penalty shall be imposable on the assessee for any failure referred to in the said **provisions if the assessee proves that there was reasonable cause for the said failure**.

As per Section 80 of the Finance Act,1994, there is provision for not imposing any penalty if the appellants proved that there was a reasonable cause for said failure. They merely stated that with a bonafide belief they had not paid service tax on the basis of clarification issued in the Board's Circular No.108/02/2009-ST dt.29.01.2009, which is contrary to the statutory obligation cast upon the appellants under Works Contract Rules,2007. Such a bald statement cannot be acceptable. There should have cogent reasons as to what made to bonafidely believe that they were not liable to pay service tax on such defrayed amounts. This reason is not reasonable cause for attracting waiver of penalty under Section 80 of the Finance Act,1994. The scope and ambit of expression ' reasonable cause' has been well explained in a case under the Income Tax Act. '**Reasonable cause can be said to be cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bonafides**' as held in the case of Azadi Bachao Andolan Vs. Union of India 2001 (116) Taxman 249/252 ITR 471 (Delhi). Further, it is evident from the record that the Appellants had not shown the taxable amounts in their ST 3 returns filed with the department during January 2009 to December 2009 even though they received taxable amounts from their customers and not paid service tax on such taxable amounts as required under Works Contract (Composition Scheme for Payment of Service Tax) Rules,2007 and this fact came to the knowledge of the department after conducting investigation into their activities. In this regard, it can be noticed from the records of this case that the appellants vide their letter dt.08.7.2009 replied to the department's letter for non-filing of ST3 returns for Half Year ending 31.3.2009 that they were not required to pay service tax on the construction activity undertaken by them in the light of Hon'ble Gauhati High Court's decision in the case of Magus Construction (P) Ltd – 2008 (11) STR 225 (Gau) and Board's Circular No.108/02/2009-ST dt. 29.01.2009, but the department had issued subject show cause notice not accepting their contention. Therefore, it is evident on record that their bonafide belief for non-payment of service tax is defeated. Further the case law cited in their letter is distinguished by the Hon'ble Punjab & Haryana High Court's decision in the case of G.S. Promoters Vs. Union of India reported in 2011 (21) STR 10 (P & H) as detailed in para 8.4 supra. Thus, they had not paid service tax on the taxable amounts received from their customers with an intention to avoid / evade payment of tax contrary to the statutory provisions. Adhering to the ratio of the above decision, there is nothing on record to show that the Appellants were prevented by reasonable cause for non-payment of service tax to entitle them for grant waiver of penalty under Section 80 of the Finance Act,1994. It should be kept in mind that under Section 80 of the Finance Act,1994, where the person / assessee succeeds in proving reasonable cause for failure to pay service

tax , penalty may be waived altogether. But such is not the situation in the instant case. The Appellants had not proved reasonable cause for non-payment of service tax as required under Section 80 of the Finance Act,1994. Considering the gravity of the offence, I hold that their case is not a fit case for waiver of penalty under Section 80 of the Finance Act,1994.

12. With regard to the quantification of service tax, it is observed the lower authority vide para 22 of the impugned order, had held that neither they submitted that VAT amount has also been included in the gross amount nor they had furnished before him any evidence that they had paid VAT. However, the appellants had submitted that there is mistake in quantification of service demand for the two periods viz from Jan,2010 to Dec,2010 the service tax to be quantified on the value of Rs.2,43,47,725/- but not Rs.2,92,82,693/- and similarly for the period Jan,11 to Dec,11, the service tax be quantified on the value of Rs.5,81,28,289 but not on Rs.6,70,15,724/-. The appellants had submitted the computation chart for the above values. The lower authority was asked for comments an appellant's submission but no comments received so far. Therefore, the lower authority is directed to ascertain the factual position and extend the benefit if they are found otherwise eligible for the same and an opportunity of personal hearing may be given to the appellants before the limited matter is decided.

13. With regard to imposition of penalty under Section 76 of FA,1994 they are liable for imposition of penalty as imposed by the lower authority however, the penalty is to be reduced to Rs.100 from Rs.200 with effect from 8.4.2011, thus the penalty imposed under Section 76 is modified to the above extent. With regard to imposition of penalty under 77 of FA, 1994 by the lower authority as penalty under Section 76 has been imposed there is no need of penalty under Section 77. The impugned order passed by the lower authority is modified to the above extent.

14. The appeal is disposed of in above terms.

30/1/2013

(Dr.S.L.Meena)
Commissioner (Appeals-II)
Customs, Central Excise & Service Tax
Hyderabad

To,

1. M/s Modi and Modi Constructions, 5-4-187/3&4, 2nd Floor, M.G.Road, Secunderabad-3.
2. The Additional Commissioner of Service Tax, Hyderabad-II Commissionerate.

Copy submitted to,

1 The Chief Commissioner, Customs, Central Excise & Service Tax, Hyderabad Zone, Hyderabad.

Copy to,

1. The Commissioner, Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad.
2. Shri. Sri Harsha, C.A, M/s Hiregange & Associates, 'Basheer Villa', D.No. 8-2-268/1/16/B, 2nd floor, Sriniketan Colony, Road No. 3, Banjara Hills, Hyderabad-500 034.
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