



**OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS &
SERVICE TAX**

HYDERABAD II COMMISSIONERATE

L.B.STADIUM ROAD BASHEERBAGH::HYDERBAD - 500 004

O.R.No.128/2011-Adjn(ST)(Commr.)

Date : 24.10.2011

C.No.IV/16/179/2011-Adjn.(ST)(Commr.)

SHOW CAUSE NOTICE

**Sub : Service Tax - Construction of Complex Service &
Works Contract Service - M/s Mehta & Modi Homes-
Non payment of Service tax on taxable services rendered
- Issue of Show Cause Notice - Reg.**

M/s Mehta & Modi Homes, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003 [here in after referred to as '**the assessee**'] are engaged in providing **Construction of Complex service** and **Works Contract Service**. **M/s Mehta & Modi Homes** is a partnership firm and got themselves registered with department on **17.08.2005** under **Construction of Complex service** and under **Works Contract Service** on **29.02.2008** for payment of service tax with **STC No. AAJFM0647CST001**.

2. On gathering intelligence that **M/s Mehta & Modi Homes**, is not discharging the service tax liability properly, investigation has been taken up by the department. Summons dated **13.01.2010** for submission of relevant record /documents / information have been issued to them. On verification of records submitted by the assesseees, it is found that **M/s Mehta & Modi Homes** have under taken **3 (three)** projects in the year **2004** viz; **Silver Oak Bungalows (Phase I)** at Cherlapally village, Ghatkesar mandal, Ranga Reddy District; **Silver Oak Bungalows (Phase II)** at Cherlapally village, Ghatkesar mandal, Ranga Reddy District and **Silver Oak Bungalows (Phase III)** at Cherlapally village, Ghatkesar mandal, Ranga Reddy District and received amounts from customers from **April 2006 to December 2010** towards **sale of land**, and **agreements for**

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construction. In the said projects, they have entered into **sale deed**, and **agreement for construction** with their customers in respect of **290 flats**. It is found that they have paid the Service Tax including Education Cess and Secondary and Higher Education cess, of **Rs.54,57,473/-** towards Service tax on **Construction of complex service and Works Cotnract Services during the period from July,2006 to Janaury,2009** against **agreements for construction**. They have paid the Service Tax under **Construction of Complex service** availing **abatment** under **Notification No. 1/2006-ST, dated 1-3-2006** (as amended) and under **Works Contract service** availing the option under **Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007**. They have informed that they have not availed Cenvat credit during the period **01.04.2006 to 31.12.2010**. It is also found that they have stopped payment of Service Tax on receipts from **01.01.2009** by misinterpreting the clarification of the Board vide **Circular No. 108/02/2009 - ST dated 29.01.2009**.

3. A Statement has been recorded from **Sri. A. Shanker Reddy, Deputy General Manager (Administration)** authorized representative on **01.02.2010** under **Section 14 of the Central Excise Act,1944** made applicable to Service Tax vide Section 83 of the Finance Act,1994. Sri. Reddy vide his Statement dated **01.02.2010** had, interalia, stated that; the activities undertaken by the company are providing services of construction of residential complexes; they purchased the land under **sale deed** and have constructed the residential complexes on the said land; initially, they collect the amounts against **booking form/agreement of sale** and at the time of registration of the property, the amount received till then will be allocated towards Sale Deed and agreement of construction; service tax on amounts received against agreement of construction up to registration was remitted immediately after the date of agreement; the service tax on remaining portion of the amounts towards Agreement of construction is paid on receipt basis; the activities undertaken by the company are providing services of construction of Residential Complexes; the agreement of sale constitutes the total amount of the land / semi finished flat with undivided share of land and the value of construction; the sale deed

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constitutes a condition to go for construction with the builder and accordingly, the construction agreement will also be entered immediately on the same date of sale deed; all the process is in the way of sale of the constructed unit as per the agreement of sale but possession was given in two phases one is land / semi finished flat with undivided share of land and other one is completed unit; this is commonly adopted procedure as required for getting loans from the banks. He further stated that the services to a residential unit / complex which is a part of a residential complex, falls under the exclusion clause in the definition of residential complex; they have stopped collection and payment of service from **01.01.2009** in the light of the clarification of the Board vide circular **No. 108/02/2009 – ST dated 29.01.2009.**

4. As per **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 the 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 purpose 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.

4.1. The subject ventures of **M/s Mehta & Modi Homes.**, qualifies to be a **residential complex** as they contain more than **12(twelve)** residential

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units with **common area and common facilities** like common water supply etc., and the layouts were approved by the concerned authorities. As seen from the records submitted, the assesseees have 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 the sale deed, the right in a property got transferred to the customer, hence the construction service rendered by the assesseees thereafter to their customers under agreement of construction are taxable under service tax as there exists service provider and service recipient relationship between them. As transfer of property in goods is involved in the execution of the contract, it appears that the services rendered by them after execution of sale deed against agreements of construction are taxable services under **Construction of Complex Service and Works Contract Service**.

4.2. As per the **exclusion** provided in **Sec 65(91a)** of the Finance Act,1994 the residential complex 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. It is clarified in **para 3** of the **Circular No.108/02/2009-ST dated 29th January 2009** 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 is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for a single person for personal use as residence by such person would not be subjected to service tax. Normally, a builder/promoter/developer constructs residential complex consisting of number of residential units and sells those units to different customers. So, in such cases the construction of complex is not meant for one individual entity. Therefore, as the whole complex is not constructed for single person the exclusion provided in **Sec 65(91a)** of the Finance Act,1994 doesn't apply. Further, the builder/promoter/developer normally enters into

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construction / completion agreements after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/developer and the stamp duty is paid on the value consideration shown in the sale deed. As regard the agreements / contracts against which they render services to the customer after execution of sale deeds, there exists service provider and service recipient relationship between the builder/promoter/developer and the customer and such services are leviable to service tax. Thus it appears that the contention and interpretation of the definition of the Construction of Complex services and Board Circular dated **29.1.2009** by the assesses appears to be, incorrect.

5. CBEC vide Circular No.128/10/2010-ST dated 24/08/2010 has clarified as under:

*With effect from 01/06/2007 when the new service "**Works Contract service**" was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 01/06/2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date. As regards applicability of composition scheme, the material fact would be whether such a contract satisfies **rule 3(3) of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007**. This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract. Once such an option is made, it is applicable for the entire contract and cannot be altered. Therefore, in case a contract where the provision of service commenced prior to 01.06.2007 and any payment of service tax was made under the respective taxable service before 01.06.2007, the said condition under rule 3(3) was not satisfied and thus no portion of that contract would be eligible for composition scheme. On the other hand, even if the provision of service commenced before 01.06.2007 but no payment of service tax was made till the taxpayer opted for the composition scheme after its coming into effect from 01.06.2007, such contracts would be eligible for opting of the composition scheme".*

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5.1 As clarified by the above Board Circular, the service rendered by **M/s.Mehta & Modi Homes** during the period **01.04.2006 to 31.5.2007** are classifiable under **Construction of Complex Services** and services rendered during the period **01.06.2007 to 31.12.2010** are classifiable under **Works Contract Services**.

**6. Service tax payable under of Construction of Complex service:
(Period from 01.04.2006 to 31.05.2007)**

6.1. As per **Sec 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**. As per **Sec 65 (30a)** of the Finance Act,1994 "**construction of complex**" means construction of a new residential complex or a (a) part thereof; or completion and finishing services in relation (b) to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or repair, alteration, renovation or restoration (c) of, or similar services in relation to, **Residential complex is as defined under Section65(91a)** of the Finance Act, 1994.

6.2. As **M/s Mehta & Modi Homes** have not furnished the month wise particulars of amounts received exclusively on agreements for Construction, the tax liability has been arrived at on the basis of soft copies of the books of accounts provided by the assessee vide their letter dated **25.01.2010**. Board vide Circular No.**108/02/2009-ST**, dated **29.01.2009** has clarified that service tax is not chargeable upto the stage of **Sale deed**. Therefore receipts of amounts from each customer, to the extent of the **sale deed value** were excluded from the total receipts of the individual customer to arrive at the taxable value of Construction services rendered post execution of sale deed. The amounts received before **01.06.2007** towards Construction services are classifiable under **Construction of Complex Services**.

6.3. **M/s. Mehta & Modi Homes** have collected an amount of

Rs.17,64,09,931/- towards agreements of construction during the period **01.4.2006 to 31.5.2007** and the taxable value after allowing an abatement of **67%** on the gross value amounts under **Notification No. 1/2006-ST dated 01.03.2006**, works out **Rs.5,82,15,277/-**. The service tax payable on this amount works out to **Rs.71,30,452/-**. (As detailed in **Annexure-I** to the notice). However, **M/s.Mehta & Modi Homes** have paid an amount of **Rs.48,57,473/-** during the said period. Thus they have short paid an amount of **Rs.22,72,979/-** towards Service tax on **Construction of Complex services**. They are also liable to pay **interest** on the said amount under the provisions of **Section 75** of the **Finance Act, 1994**. They have willfully misstated their taxable value in their **ST3** returns filed and thereby resorted to short payment of service tax with an intention to evade payment of service tax and hence the same is liable for recovery under **Section 73(1) of the Finance Act,1994 read with proviso thereto** and also for penal action under **Section 78** of the Finance Act,1994.

7. Service tax payable under Works Contract Service: (Period from 01.06.2007 to 31.12.2010)

7.1. As per **Section 65(105(zzzza))** of the Finance Act, 1994 "**taxable service**" under **works contract** means any service provided or to be provided 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) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound

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insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) Construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

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

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

7.2. An **optional Composition scheme** for payment of Service Tax in relation to **Works Contract Service** has been framed by the Notification **No.32/2007-ST dated 22.5.2007**, effective from **01.06.2007**, under **Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007**. Under the said scheme, an assessee has to pay an amount equivalent to **two percent** of the gross amount charged for the Works Contract, excluding the **Value Added Tax (VAT) or Sales Tax** paid on transfer of property of goods involved in the execution of Works Contract. With effect from **01.03.2008** onwards, the said rate of **2 %** has been changed to **4%** vide **Notification No.7/2008-S.T. dated 01.03.2008**.

7.3. In terms of Board **Circular dated 24.08.2010**, the amounts received towards construction agreement **after 0.1.06.2007** are classifiable under **Works contract services**. **M/s. Mehta & Modi Homes** have executed works in respect of three projects **3 (three)** projects during the period **01.06.2007 to 31.12.2010** viz; **Silver Oak Bungalows (Phase I) Silver Oak Bungalows (Phase II) Silver Oak Bungalows (Phase III)** and all the **three** projects were started in the year **2004** and hence are classifiable as **ongoing works contracts**. As clarified vide Board Circular dated **24.8.2010**, the subject projects are **ongoing works contracts** and assessee **have already paid service tax** under Construction of Complex services, hence these projects are not eligible for **Composition Scheme**

under **Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007**.

7.4. As per Rule 2A of Service Tax (Determination of Value) Rules, 2006 the value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract and the gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract;

7.5. As M/s. Mehta & Modi Homes have not furnished the particulars of **value of transfer of property of goods** involved in the execution of the **Works contract**. Hence, the deduction of value of materials as envisaged under **Rule 2A of Service Tax (Determination of Value) Rules, 2006** can not be extended. Hence the value of the amounts received towards **agreement of constructions after 01.06.2007** are the taxable values and service tax is calculated @**12.36% / 10.30%**.

8.1 For the period from **01.06.2007 to 31.12.2010**, **M/s Mehta & Modi Homes.**, have collected an amount of **Rs.47,19,75,506/-** against **agreements of Construction** related to **on-going works contracts**. The Service Tax liability on these amounts works out to **Rs.5,66,04,153/-** (Service Tax of **Rs.5,49,55,488./-**, Education Cess of **Rs.10,99,110/-** and Secondary & Higher Education Cess of **Rs.5,49,555/-**) (As detailed in **Annexure** to this notice.). However, **M/s. Mehta & Modi Homes** have paid only an amount of **Rs.11,00,000/-** towards service tax during the period after **01.06.2007**. Thus they have **short paid/ not paid** an amount of **Rs5,66,04,153./-** on the **Works Contract services** provided by them during the period **01.06.2007 to 31.12.2010**.

9. M/s Mehta & Modi Homes are well aware of the provisions and of liability of Service tax on receipts against the agreements for Construction and have not assessed and paid service tax properly by suppression of facts and contravened the provisions of **Section 68 of Finance Act, 1994 with an intent to evade payment of tax**. They have intentionally not shown

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any receipts towards construction in their **ST3** returns. Further, they misinterpreted the definition of the works contract service with an intent to evade payment of Service Tax. The fact of receipt of the amounts towards construction has come to light only after the department has taken up the investigation. Hence, the service tax payable by **M/s Mehta & Modi Homes** appears to be recoverable under **proviso to Sub Section (1) of Section 73 of the Finance Act, 1994.**

10. From the foregoing it appears that **M/s Mehta & Modi Homes, 5-4-187/3 & 4, III Floor, MG Road, Secunderabad - 500 003** have contravened the provisions of **Section 68** of the Finance Act, 1994 read with **Rule 6 of the Service Tax Rules, 1994** in as much as they have not paid the appropriate amount of service tax on the value of taxable services and **Section 70** of the Finance Act, 1994 read with **Rule 7** of the Service Tax Rules, 1994 in as much as they have not shown the amounts received for the taxable services rendered in the statutory Returns and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details / information, with an intent to evade payment of service tax and are liable for recovery under **proviso to the section 73(1) of the Finance Act, 1994** and thereby have rendered themselves liable for penal action under **Section 77 and 78 of the Finance Act, 1994.** **M/s Mehta and Modi** are also liable for interest under **section 75 of the Finance Act, 1994.**

11. Therefore, **M/s Mehta & Modi Homes, 5-4-187/3 & 4, III Floor, MG Road, Secunderabad - 500 003**, are hereby required to show cause to the **Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, 3rd floor, Shakkar Bhavan, L.B. Stadium Road, Basheerbagh, Hyderabad-500 004,** within **30 (thirty)** days of receipt of this Notice as to why:

- (i) an amount of **Rs.22,72,979/- (Rupees twenty two lakh seventy two thousand nine hundred and seventy nine only)** should not be demanded towards Service Tax (including cesses) short paid on the Construction of Complex Services

provided by them during the period 01.04.2006 to 31.5.2007 under Section 73(1) of the Finance Act, 1994 read with proviso thereto;

- (ii) an amount of Rs.5,55,04,153/- (Rupees five crore fifty five lakh four thousand one hundred and fifty three only) towards Service Tax (including cesses) short paid/ not paid on the "Works Contract Services" provided by them during the period 01.06.2007 to 31.12.2010, should not be demanded under Section 73(1) of the Finance Act, 1994 read with proviso thereto;
- (iii) interest is not payable by them on the amounts demanded at (i) & (ii) above under the Section 75 of the Finance Act, 1994
- (iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994
- (v) Penalty should not be imposed on them under Section 78 of the Finance Act, 1994 for suppression of value of service tax and contravention of provisions of the Finance Act or the rules made there under, with intent to evade payment of service tax.

12. They are also required to produce at the time of showing cause, all the evidence upon which they intend to rely in support of their defense. They are also required to state whether they would like to avail of opportunity to be heard in person before the case is adjudicated. If they do not reply to the Show Cause Notice within **30(thirty) days** or do not appear in person when the case is posted for personal hearing, it would be presumed that the Notice does not have anything to state in their defense or they do not prefer any personal hearing and case will be decided on merit based on the evidence available on record.

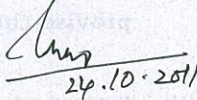
13. This show cause Notice is issued without any prejudice to any other

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that may be taken against the recipients of this Notice or any other persons concerned with the Finance Act or any other law time being in force.

14. The above Notice is issued placing Reliance on the following Records:

- (1) Soft copy of the bank statements, books of accounts, Customer documents 2008-09 and 2010-11 (upto Dec 2010) submitted by them vide their letters dated 25.1.2010.
- (2) The Statement dated 01-02-2010 of Sri. A Shankar Reddy, Authorised person of M/s Mehta & Modi Homes.
- (3) Balance Sheet of M/s Mehta & Modi Homes for the years 2006-07 to 2010-11.


24.10.2011
(P.N.RAO)
COMMISSIONER

To

✓ M/s Mehta & Modi Homes, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003 . (through Superintendent of Service Tax, AE-Gr.II)

Copy to:

1. The Additional Commissioner, Service Tax, Anti-Evasion, Hyderabad-II Commissionerate, Hyderabad.
2. The Assistant Commissioner, Service Tax, Anti Evasion Hyderabad-II Commissionerate, Hyderabad.
3. The Superintendent, Service Tax AE-Gr.II, Hyderabad-II Commissionerate, Hyderabad (w.r.t. file HQST 54/2009-ST AE-Gr.II) with a direction to serve the copy of the notice on M/s.Mehta & Modi Homes and forward a copy of the dated acknowledgement obtained from them.
4. The Superintendent of Service Tax, Gr.II, Hyderabad-II Commissionerate.

Master Copy / Office Copy.