O/C

H N A & Co LLP
Chartered Accountants
(Formerly known as Hiregange & Associates LLP)

Date: 04.06.2024
To
The Commissioner of Central Tax (Appeals-II),
7th Floor, GST Bhavan, L.B Stadium Road,
Basheer Bagh, Hyderabad- 500004.

Dear Sir,

Sub: Filing of appeal against Order-in-Original.

Ref: Order-in-Original No. 107/2023-24-Sec-Adjn-ADC(ST) dated 27.03.2024 pertaining to M/s. Alpine Estates.

1. We have been authorized by M/s. Alpine Estates to submit an appeal against the above referred Order and represent before your good office and to do necessary correspondence in the above referred matter. A copy of authorization is attached to the appeal.

2. In this regard, we are herewith submitting the appeal memorandum against the Order passed by the Assistant Commissioner of Central Tax, Cenrtal Excise and Service Tax, GST Commissionerate, Secunderabad in Form ST-4 in duplicate along with authorization and annexures.

We shall provide any further information required in this regard. Kindly acknowledge the receipt of the appeal and post the matter for hearing at the earliest.

Thanking You
Yours truly
For HNA & Co. LLP,
Chartered Accountants.

R. Lakshman Kumar

CA Lakshman Kumar K
Partner

HNA & CO LLP Hyderabad Chartered Accountants

सीमा शुल्क एवं केन्द्रीय कर एवं सेवा कर प्रधान आयुक्त का कार्यालय
O/o. Principal Commissioner of Customs & GST
04 JUN 2024
I.C. No:.....
Appeals-II Commissionerate, Hyderabad.
अपील-II आयुक्तालय, हैदराबाद.

4th Floor, West Block, Srida Anushka Pride, R.No. 12, Banjara Hills, Hyderabad, Telangana - 500 034, INDIA.
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FORM ST-4

[Under Section 85 of the Finance Act, 1994 (32 of 1994)]

BEFORE THE COMMISSIONER OF CENTRAL TAX, (APPEALS- I), GST BHAVAN, 7TH FLOOR, L.B. STADIUM ROAD, BASHEER BAGH, HYDERABAD-500004

(1) Appeal No. _____ of 2024	
(2) Name and address of the Appellant	M/s. Alpine Estates, 5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003
(3) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	The Additional Commissioner of Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate. [OIO No. 107/2023-24-Sec-Adjn-ADC(ST) dated 27.03.2024
(4) Date of Communication to the Appellant of the decision or order appealed against	01.04.2024 by hand.
(5) Address to which notices may be sent to the Appellant	**CA. Lakshman Kumar K** **C/o. H N A & Co. LLP,** **Chartered Accountants,** **4th Floor, West Block,** **Anushka Pride, R. No.12, Banjara Hills, Hyderabad, Telangana-500034** Email:laxman@hnaindia.com Mob: 89781 14334 **(And also copy to the Appellant)**
(5A) (i) Period of dispute	Jan 2010 to Dec 2011
(ii) Amount of service tax if any demanded for the period mentioned in the Col. (i)	Rs. 8,99,823/- and 22,83,554/-
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	NA
(iv) Amount of Interest	Interest u/s. 75 of the Finance Act, 1994
(v) Amount of penalty	Rs.200 per day or 2% of tax to be paid and Rs.1,000/- under section 76 and 77 respectively of the Finance Act.
(vi)Value of Taxable Service for the period mentioned in Col. (i)	NA
(6) Whether Service Tax or penalty or interest or all the three have been deposited.	Rs.21,95,524/- paid vide Cheque/Challan No. 267251 dated 10.06.2011 & 435410 dated 13.02.2012 and Rs.19,72,916/- vide challan no. 922747 dated 13.01.2013 (Copies enclosed as Annexure I)
(6A) Whether the appellant wishes to be heard in person?	Yes, at the earliest
(7) Reliefs claimed in the appeal	To set aside the impugned order to the extent aggrieved and grant the relief claimed.

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Signature of Appellant

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STATEMENT OF FACTS

A. M/s. Alpine Estates, #5-4-187/3&4, II Floor, Soham Mansion MG Road, Secunderabad - 500003, (hereinafter referred as "Appellant") is a partnership firm registered with the Service Tax Department vide Registration No. AANFA5250FST001.

B. The Appellant is engaged in sale of residential houses in venture by name "Flower Heights" to prospective buyers while the units are under construction by entering into following agreements.

- Sale Deed for sale of undivided portion of land together with semi-finished flat. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.
- Construction agreement for undertaking construction.

C. Department has initially issued a Show Cause Notice dated 16.06.2010 covering the period January 2009 to December 2009 ("First SCN") proposing to demand service tax on amounts received towards construction agreement. The Hon'ble CESTAT vide Final order No. A/30172-30178/2019 dated 31.01.2019 set aside the demands raised in the above SCN holding that service tax is not applicable on sale of flats prior to 01.07.2010.

D. The above Show Cause Notice was followed by below periodical notices under Section 73(1A) for the period January 2010 to December 2011 which are in dispute in the Final Order No.ST/30699/2019 dated 19.06.2019.

SCN Reference	Time Period	Proposed Demand
SCN No. 62/2011-Adjn (S.T.) Gr.X dated 23.04.2011	Jan 2010 to Dec 2010	Rs.35,03,113/-
SCN No. 52/2012-Adjn (Addl.Commr)	Jan 2011 to Dec 2011	Rs.48,33,495/-
Total		**Rs.83,36,608/-**

Copy of SCN's enclosed as **Annexure** VII.

E. The above referred SCN's were adjudicated vide a common Order-in- Original No.49/2012-Adjn ST ADC dated 31.08.2012 wherein vide Para 17 it was accepted that service tax would not be demanded on sale deed value however OIO dated 31.08.2012 had included the amounts received towards Sale deeds also. (Copy of Order-in- Original No.49/2012-Adjn ST ADC dated 31.08.2012 is attached as **Annexure** VI).

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F. Appellant has filed an appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide Order-in-Appeal No.38/2013 (H-II) S. Tax dated 27.02.2013 upheld the OIO but remanded the matter for re- quantification. (Copy of Order-in-Appeal No.38/2013 (H-II) S. Tax dated 27.02.2013 is attached as **Annexure** V).

G. To the extent aggrieved by Order-in-Appeal, the Appellant has filed appeal before Hon'ble CESTAT, Hyderabad. The Hon'ble CESTAT, Hyderabad has heard the matter and set aside the demand for the period January 2010 to June 2010 and set aside the demand raised on registration fees, VAT etc for the period July 2010 to December 2011 vide its Final Order No. ST/30699/2019 dated 19.06.2019. (Copy of Final Order is attached as **Annexure** IV).

H. With respect to demand for the period July 2010 to December 2011, the Hon'ble CESTAT had remanded the matter to the original authority for denovo adjudication only to the limited extent to check whether the Show Cause Notice has given deduction towards sale deed value or not. If the deduction is not given, directed the adjudicating authority to pass the denovo order after giving the deduction.

I. Appellant has filed a Rectification of Mistake Application against the above referred Final Order and a clear finding has been provided by the CESTAT, Hyderabad vide Misc. Order No. M/30226/2022 dated 11.03.2022 wherein it is held at Para 4 to 5 as under

> *4. We have gone through the application for rectification of mistake and have perused the Final Order. We do not feel there is any error apparent on record. The Final Order must be read as a whole. The direction in the Final Order was neither to go beyond the scope of the SCN nor to consider levying service tax on sale deed value of immovable property. If the Final Order is read as a whole, it would be clear that the matter has been remanded for the purpose of computing the demand of service tax after 01.07.2010 and also reconsidering the penalty for this period and NOT to consider levying/charging Service Tax on value of sale of the property. The demand for the period prior to 01.07.2010 has already been set aside in the Final Order. Paragraph 17 of the impugned order of the Commissioner also indicates that the demand was only in respect of the service contract entered into after the sale deed has been executed and not on the sale*

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value of the immovable property. This was also reproduced in paragraph 4 of the Final Order.

5. In view of the above, we find that there is neither any error apparent on record nor is there any direction to the Commissioner in the Final Order to go beyond the scope of SCN and demand service tax on the value of transfer of Immovable property. The appeal was partly allowed up to 01.07.2010 and partly remanded for the period after 01.07.2010 for reconsideration of both the demand and the penalty. The application for rectification of mistake is accordingly dismissed.

J. In view of the above, this appellant made their denovo submissions vide letter dated 20.10.2020, 18.12.2020, 18.02.2021 and 21.03.2023 (Copy of the same are attached as **Annexure III**.

K. Accordingly, the appellant is in receipt of impugned Order in Original No. 107/2023-24-Sec-Adjn-ADC (ST) dated 27.03.2024 confirming the demand as under, without considering the submissions made by this appellant. (Copy of order is attached as **Annexure II**)

A. <u>In respect of Show Cause Notice OR. No.62/2011-Adjn(ST) dated 23.04.2011</u>

(i) Confirmed the demand of Rs.8,99,823/- in terms of Section 73 (2) of the Finance Act, 1994;

(ii) Dropped the demand of Rs.26,03,290/-;

(iii) Confirmed demand of interest at applicable rate on the services tax demanded at (i) above in terms of Section 75 of the Finance Act, 1994;

(iv) Imposed penalty @ Rs.200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of service tax under Section 76 of the Finance Act, 1994 on them. However, the total amount of penalty payable in terms of Section 76 shall not exceed the service tax payable.

(v) Imposed penalty of Rs. 1,000/- under Section 77 of the Finance Act, 1994.

B. <u>In respect of Show Cause Notice OR. No.51/2012-Adjn(ST) dated 24.04.2012</u>

(i) Confirmed demand of Rs.22,83,554/- in terms of Section 73 (2) of the Finance Act, 1994;

(ii) Dropped the demand of Rs.25,49,941/-;

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(iii) Confirmed the demand of interest at applicable rate on the services tax demanded at (B)(i) above in terms of Section 75 of the Finance Act, 1994 from them;

(iv) Imposed penalty @ Rs.200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of service tax under Section 76 of the Finance Act, 1994 on them. However, the total amount of penalty payable in terms of Section 76 shall not exceed the service tax payable.

(v) Imposed penalty of Rs.1,000/- under Section 77 of the Finance Act, 1994.

L. Aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the Appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.

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GROUNDS OF APPEAL

1. Appellant submits that the impugned order is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.

In Re: Impugned Order is not valid

2. Appellant submits that various submissions on facts and law were made before the Ld. Adjudicating authority which were not considered. Hence, the impugned order being non-speaking, should be set aside on this ground alone.

3. Appellant submits that with due respects, the impugned order is passed without appropriately considering the challans paid towards the liability and documents on record, but creating **its own assumptions**, presumptions and surmises, ignoring the statutory provisions. Supreme Court in the case of ***Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC)*** has held that such orders are not sustainable under the law.

In Re: There is no short payment of tax

4. The Appellant submits that the adjudicating authority at Para 10 of the impugned order gave the applicable deductions as per the directions of the Hon'ble CESTAT, vide Final Order No. A/30178/2019 dated 19.11.2019 as under:

Period	Amount	Service Tax @ 4.12% on Works Contract Services
Sale Deed Value		
July, 2010 to December 2011	3,07,28,504/-	Not Taxable
January, 2011 to December 2011	5,46,49,500/-	Not Taxable
Construction Agreement Value		
July, 2011 to December, 2011	2,15,58,925/-	8,88,228/-
January, 2011 to December, 2011	5,52,74,294/-	22,77,300/-
Other Taxable Receipts		
July, 2010 to December, 2010	2,81,431/-	11,595/-
January, 2011 to December, 2011	1,51,796/-	6,254/-
VAT, Registration Charges, etc		
July, 2010 to	40,32,173/-	Not Taxable

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December, 2010		
January, 2011 to December, 2011	66,20,485/-	Not Taxable
Other Non-Taxable receipts (Electricity etc)		
July, 2010 to December, 2010	28,41,781/-	Not Taxable
January, 2011 to December, 2011	15,89,331/-	Not Taxable

Showing payable amounts as Rs.8,99,823/- for period July 2010 to December 2010 and Rs.22,83,554/- for the period January 2011 to December 2011.

5. As submitted above, though the adjudicating authority has provided the appropriate deductions as directed by the Hon'ble CESTAT, Hyderabad, but failed to acknowledge the payments made and gave the impugned findings at Page 11 of the impugned order as follows:

Submissions made by the assessee			
Cheque/Pay order No.	***Amount (Rs.)***	***Remarks***	***Adjudicating authority Findings***
267251 dated 10.06.2011 & 435410 dated 13.02.2012	*21,95,524/-*	*Paid through Cash*	*The amount and challans details are not mentioned in the ST-3 returns submitted by them for 2010-11. And also, the assessee has not submitted any other documentary evidences to prove that this payment is paid towards the demand raised for the period July, 2010 to December, 2011. Further, it is seen from both challans that total amount of both challans is Rs.21,95,398, not Rs. Rs.21,95,524/-*
ST-3 Returns	*36,958/-*	*Paid through CENVAT*	*As seen from ST-3 returns for the period 2010-11, the Credit is not availed/utilized by the assessee.*
922747 dated 13.01.2013	*19,72,916/-*	*Paid in consequent to order in Stay Petition No.63/2012 (H-II) S. Tax dated 07.12.2012 before Commissioner (Appeal- II)*	*The assessee have not submitted any evidence in this regard.*
	42,05,398/-		

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6. The Appellant submits that the payment of Rs.21,95,524/- by giving the finding that the payments made cannot be co-related to the period of dispute is incorrect, as the adjudicating authority did not ask for co-relation any time at the time of passing the impugned order.

7. The Appellant submits the Appellant has already paid Rs.21,95,524/- towards the demand raised for the period July 2010 to December 2011 vide Cheque/Challan No. 267251 dated 10.06.2011 & 435410 dated 13.02.2012. (Copy of challans are attached as **Annexure 1**). Further, the finding of the adjudicating authority that the amount shown as paid and copy of challans when compared leading to difference of mere Rs.126/- is incorrect, rather acknowledging the short-paid amount is the right course of action.

8. The appellants have also submitted that they gave the payment of Rs.36,958/- is through CENVAT credits availed in the books of accounts, though the books of accounts were given same has not been considered on the ground that the same is not reflected in ST-3 returns is highly incorrect.

9. It is judicially settled that availing the credit in books of accounts is a valid mode of taking the credit. Reliance is placed on: Arya logistics vs Commissioner of C. Ex.& S.T ., Rajkot 2024 (80) G.S.T.L. 108 (Tri. - Ahmd.)

4.1 We find that the issue involved in this case is regarding the demand of service tax for the period April 2008 to March 2011 on the ground that the appellant has availed ineligible benefit of Notification No. 1/2006-S.T., dated 1-3-2006 by discharging the service tax liability by availing Cenvat Credit and paid service tax after availing abatement of 70% of the gross amount. We find from the records and copy of ST-3 produced before us that appellant had been filing the ST-3 returns regularly to the Jurisdictional Range Officers. It is on record that the appellant shown all the details in ST-3 Returns. We find that Appellant has shown the category of Transport of Goods by Rail services in all the ST-3 Returns and has also shown the fact that they were availing Cenvat Credit. In the said ST-3 Return, admittedly against the "Column A1 -Name of Taxable Service" Appellant have shown name of service as Goods Transport Agency and Transport of Goods in Container by Rail Service. Further in

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column 5B appellant have shown the details of Cenvat Credit Taken and utilized.

4.2 It becomes clear from the ST-3 Return that the fact that appellant were discharging Service tax on Transport of Goods in container by Rail service and availing Cenvat credit and utilized the Cenvat credit was in the knowledge of the Revenue. However show cause notice to the Appellant was issued on 26-2-2013. Inasmuch as the entire information was in the knowledge of the Revenue, the longer period of limitation is not available. In view of these facts the show cause notice should have been issued within the normal period of one year as prescribed under Section 73(1), whereas the show cause notice for the period April 2008 to March 2009 was issued on 26-2-2013 i.e. after prescribed limit of one year. As per the above fact, there is no suppression of fact on the part of the appellant. We also find that it is admitted fact that the appellant have taken service tax registration and are filing the periodical returns regularly. The appellant have maintained proper books of account in the normal course of business. It is pertinent to note that the entire case of the department on merit is that since appellant have availed Cenvat Credit, they violated the condition of abatement Notification No. 1/2006-S.T. As discussed above the facts that availment of Cenvat Credit and payment of Service Tax on the abated value were declared in the ST-3 Return. Hence, having all the facts were disclosed to the department, nothing prevented department from issue of show cause notice within normal period of one year. Therefore, the demand raised in the show cause notice is clearly time-barred.

10. Accordingly, payment of Rs.36,958/- should be considered while calculating the demand payable.

11. With regards to payment made for Rs.19,72,916/- vide challan no. 922747 dated 13.01.2013 it is submitted that the same has been paid as per the directions of the Appellate authority in compliance with stay application no. 63/2012 (H-II) S.Tax dated 07.12.2012 before Commissioner (Appeals). The copy of challan is once again submitted as **Annexure** I. Accordingly, payment of Rs.19,72,916/- should be considered while calculating the demand payable.

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12. Finally, the appellant submits that final demand determination and payable/excess will be as under:

Particulars	Jan 2010 to Dec 2010	Jan 2011 to Dec 2011
Gross receipts	11,45,70,426	11,82,85,406
Less: Amounts received for the period January 2010 to June 2010	5,51,27,612	Not Applicable
Amount received during the period July 2010 to December 2010	5,94,42,814	Not Applicable
Less: Sale Deed value	3,07,28,504	5,46,49,500
Less: VAT, Registration Charges and other non-taxable receipts	68,73,952	82,09,816
Taxable Value	2,18,40,358	5,54,26,090
ST Liability @4.12%	8,99,823	22,83,555
Total Service tax payable		**31,83,378**
Service Tax paid		**42,05,398**
Payable/(Excess paid)		**(10,22,020)**

In view of the above, it is submitted that there is no short payment of tax when payments made are considered appropriately.

Construction of Residential complex for "Personal Use" is excluded from definition of Residential Complex

13. Without prejudice to the foregoing, Appellant submits that the development and construction of the residential unit is intended to be used for personal use. 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. The explanation to Section 65 (91a) categorically states that personal use includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, it does not matter whether the individual buyer uses the flat himself or rents it out. Hence, no service tax is chargeable from the appellant on the agreements entered into by them with individual buyers for completion of their buildings as has been alleged in the SCN.

14. In this regard, reliance is placed on **Jurisdictional CESTAT decisions in case of**

a) Modi & Modi Construction Vs CCE, Hyderabad -II 2021 (45) GSTL 398 (Tri-Hyd) wherein it was held that "*11. The second question is the nature of the contract on which service tax is proposed to be charged. The SCN*

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itself states that the plots along with semi-finished buildings were sold to the buyers under the sale agreement. Thereafter, a separate agreement was entered into with the individual home owners for completion of the building/structure as per the agreement. In other words, there is no agreement for completion of the entire complex but there are a number of agreements with each individual house owner for completion of their building. In other words, the individual house owner is engaging the appellant for construction of the complex for his personal use as residence. ***The explanation to Section 65 (91a) categorically states that personal use includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, it does not matter whether the individual buyer uses the flat himself or rents it out. There is nothing on record to establish that the individual buyers do not fall under the aforesaid explanation. For this reason, we find no service tax is chargeable from the appellant on the agreements entered into by them with individual buyers for completion of their buildings as has been alleged in the SCN. Consequently, the demand needs to be set aside and we do so. Accordingly, the demands for interest and imposition of penalties also need to be set aside"***

b) IVRCL Assets and Holdings Ltd Vs CCE, Hyderabad 2021 (52) GSTL 304 (Tri-Hyd)

15. The appellant further submits that from the above referred decision, it is clear that there is no liability to pay service tax on the amounts received during the period July 2010 to December 2011. Thereby, the entire demand confirmed in the impugned order needs to be dropped.

In Re: Interest and penalties are not payable/imposable:

16. Appellant submits that when service tax itself is not payable, the question of interest does not arise. Appellant 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).

17. Appellant submits that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the penalty requires to be dropped.

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18. Appellant submits that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It settled position of the law that if the Appellant is under bonafide belief as regards to non taxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.

    a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)

    b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

19. Without prejudice to the foregoing, Appellant submits that the impugned Order has not explained the reason for imposition of penalties under Section 76 and 77 of the Finance Act, 1994. As the impugned order did not gave any findings, the proposition of levying penalty under section 76 and 77 is not sustainable and requires to be set aside.

20. Appellant submits that issue involves interpretation and the periodical notices has been issued to the Appellant, the imposition of penalties under Section 76 is not tenable and the same needs to be set aside. In this regard, Appellant relied on M/s. Phoenix IT Solutions Ltd Vs CCE 2017 (52) STR 182 (Tri-Hyd).

21. Further, there is bona fide litigation is going on and issue was also debatable which itself can be considered as reasonable cause for failure to pay service tax. Accordingly, waiver of penalty under section 80 of Finance Act, 1994 can be made. In this regard reliance is placed on C.C.E., & Cus., Daman v. PSL Corrosion Control Services Ltd 2011 (23) S.T.R. 116 (Guj.);

22. Appellant craves leave to alter, add to and/or amend the aforesaid grounds.

23. The Appellant wishes to be heard in person before passing any order in this regard.

For M/s. Alpine Estates

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Authorized Signatory

PRAYER

Wherefore it is prayed that

a. To set aside the impugned order to the extent aggrieved;
b. To hold that there is no short payment of service tax;
c. To hold that no interest and penalties are leviable;
d. To hold that service tax already paid should be appropriated;
e. Any other consequential relief shall be granted;

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Signature of the Appellant

VERIFICATION

I, SOHAM SATISH MODI, PARTNER of the Appellant herein do declare that what is stated above is true to the best of our information and belief.

Verified today 4th day of JUNE 2024

Place: Hyderabad

SOHAM SATISH MODI

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Signature of the Appellant

BEFORE THE COMMISSIONER OF CENTRAL TAX (APPEALS-I), GST BHAVAN, 7TH FLOOR, L.B. STADIUM ROAD, BASHEER BAGH, HYDERABAD-500004

Sub: Proceedings against Order in Original 107/2023-24-Sec-Adjn-ADC(ST) dated 27.03.2024 issued to M/s. Alpine Estates.

I, SOHAM SATISH MODI, PARTNER of **M/s. Alpine Estates** hereby authorize and appoint M/s. H N A & Co. LLP, Chartered Accountants, Hyderabad or their partners and qualified staff who are authorized to act as an authorized 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/Appellant do hereby agree to ratify and confirm acts done by our above-authorized 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 04.JUNE 2024 at Hyderabad

SOHAM SATISH MODI Digitally signed by SOHAM SATISH MODI Date: 2024.06.04 11:55:15 +05'30'

Signature of the appellant

I the undersigned partner of M/s. H N A & Co. LLP, Chartered Accountants (Formerly M/s. Hiregange & Associates LLP), do hereby declare that the said M/s. H N A & Co. LLP, Chartered Accountants (Formerly M/s. Hiregange & Associates LLP) 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. H N A & Co. LLP, Chartered Accountants (Formerly M/s. Hiregange & Associates LLP). 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: 04.06.2024

Address for service:
M/s. H N A & Co. LLP,
Chartered Accountants,
4th Floor, West Block, Anushka Pride,
Road Number 12, Banjara Hills,
Hyderabad, Telangana 500034

For M/s. H N A & Co. LLP,
Chartered Accountants

R Lakshman Kumar

Lakshman Kumar K
Partner (M.No. 241726)

I, Partner/Employee/Associate of M/s H N A Co. & LLP duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

Sl No.	Name	Qualification	Mem./Roll No.	Signature
1	Sudhir V S	CA	219109	
2	Revanth Krishna K	CA	262586	
3	Akash Heda	CA	269711	
4	Srimannarayana S	CA	261612	

BEFORE THE COMMISSIONER OF CENTRAL TAX (APPEALS-I), GST BHAVAN, 7TH FLOOR, L.B. STADIUM ROAD, BASHEER BAGH, HYDERABAD-500004

Sub: Proceedings against Order in Original 107/2023-24-Sec-Adjn-ADC(ST) dated 27.03.2024 issued to M/s. Alpine Estates.

I, SOHAM SATISH MODI, PARTNER of **M/s. Alpine Estates** hereby authorizes and appoint H N A Law Chambers, Hyderabad or their partners and qualified staff who are authorized to act as an authorized representative under the relevant provisions of the law, to do all or any of the following acts: -

- 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.
- 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.
- 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-authorized 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 04.JUNE 2024 at Hyderabad

SOHAM SATISH MODI

Digitally signed by SOHAM SATISH MODI Date: 2024.06.04 11:55:45 +05'30'

Signature of appellant

I, the undersigned partner of M/s. H N A Law Chambers, do hereby declare that the said M/s. H N A Law Chambers is a firm of Advocates duly qualified to represent in above proceedings under Section 116 of the CGST Act, 2017. I accept the above-said appointment on behalf of M/s. H N A Law Chambers. 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: 04.06.2024

Address for service:
H N A Law Chambers,
4th Floor, West Block, Anushka Pride,
Above Himalaya Book World,
Road Number 12, Banjara Hills,
Hyderabad, Telangana 500034

For H N A Law Chambers

HNA LAW CHAMBERS Hyderabad

Venkata Prasad. P
Partner

I, Partner/employee/associate of M/s H N A Law Chambers duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

S.No.	Name	Qualification	Membership No.	Signature
1	Venkata Prasad P	LLB	AP/3511/2023	
2	Md Shabaz	BA LLB	TS/2223/2016	
3	Ankita Mehta	BBA LLB	TS/1578/2021	
4	Anjum Salina Shaik	BBA LLB	TS/1011/2024	
5	Rashmi	LLM	DL/173/2019	
6	Jaishankar	BA LLB	K/104/2021	

HNA LAW CHAMBERS Hyderabad

04.06.2024

To,
The Commissioner of Central Tax (Appeals-I),
7th Floor, GST Bhavan, L.B Stadium Road,
Basheer Bagh, Hyderabad- 500004.

Dear Sir,

Sub: Application for condonation of delay in filing the Appeal

Ref: Appeal against Order dated 27.03.2024 pertaining to M/s. Alpine Estates.

1. We would like to bring to your notice that we have received the above referred Order-in-Original No. 107/2023-24-Sec-Adjn-ADC(ST) dated 27.03.2024.
2. As per Section 85 of the Finance Act, 1994, an appeal against the order of the adjudicating authority shall be filed within 60 days from the date of receipt of the order. In the instant case, the order was received on 01.04.2024 by post, thereby, the due date for filing the appeal falls on 03.06.2024 (which is on Monday). Accordingly, we have filed the appeal on 04.06.2023 with a delay of 1 day.
3. The delay in filing the appeal occurred due to the absence of the authorized signatory, who was out of station, resulting in a delay in obtaining the necessary signatures (Copy of travelling tickets is enclosed).

Hence, we humbly request your good self to consider the same and allow the application for condonation of delay.

We sincerely regret the inconvenience caused in this regard. Kindly acknowledge receipt of this letter and do the needful.

Thanking You,

Yours faithfully,

For M/s. Alpine Estates

SOHAM SATISH MODI

Digitally signed by SOHAM SATISH MODI
Date: 2024.06.04 11:56:14 +05'30'

ALPINE ESTATES SEC'BAD

Authorized Signatory

15B

make my trip

Flight Ticket (Round trip)
Booking ID: NN7LD3LQP1G9I9J21841, (Booked on 07 January 2024)

Hyderabad - Toronto

Fri, 24 May 2024 • 1 stop • 22h 5m duration

BRITISH AIRWAYS
BA-276

PNR JY95VJ

Hyderabad
HYD **07:20 hrs**
Fri, 24 May
Rajiv Gandhi International Airport

10h 30m

London (Heathrow)
13:20 hrs LHR
Fri, 24 May
Heathrow Airport Terminal 5

PREMIUM ECONOMY | Premium Economy | Regular Fare | **46 Kg(2 PC x 23Kg each)*** check-in | **7 Kgs*** cabin

*Baggage allowance shown above is per passenger

TRAVELLER	SEAT	MEAL	E-TICKET NO
MR. SOHAM MODI Adult		Hindu (Non Vegetarian) Meal	125-3545201247
MS. TEJAL MODI Adult		Vegetarian Hindu Meal	125-3545201248

3h 45m layover at London (Heathrow)

Change in flight

BRITISH AIRWAYS
BA-99

PNR JY95VJ

London (Heathrow)
LHR **17:05 hrs**
Fri, 24 May
Heathrow Airport Terminal 5

7h 50m

Toronto
19:55 hrs YYZ
Fri, 24 May
Pearson Intl-ON Terminal 3

PREMIUM ECONOMY | Premium Economy | Regular Fare | **46 Kg(2 PC x 23Kg each)*** check-in | **7 Kgs*** cabin

*Baggage allowance shown above is per passenger

TRAVELLER	SEAT	MEAL	E-TICKET NO
MR. SOHAM MODI Adult			125-3545201247
MS. TEJAL MODI Adult			125-3545201248

15C

Toronto - Hyderabad

Wed, 05 Jun 2024 • 1 stop • 21h 55m duration

BRITISH AIRWAYS
BA-98

PNR JY95VJ

Toronto
YYZ **21:55 hrs**
Wed, 05 Jun
Pearson Intl-ON Terminal 3

7h 15m

London (Heathrow)
10:10 hrs LHR
Thu, 06 Jun
Heathrow Airport Terminal 5

PREMIUM ECONOMY | Premium Economy | Regular Fare | **46 Kg(2 PC x 23Kg each)*** check-in | **7 Kgs*** cabin

*Baggage allowance shown above is per passenger

TRAVELLER	SEAT	MEAL	E-TICKET NO
MR. SOHAM MODI Adult			125-3545201247
MS. TEJAL MODI Adult			125-3545201248

4h 55m layover at London (Heathrow)

Change in flight

BRITISH AIRWAYS
BA-277

PNR JY95VJ

London (Heathrow)
LHR **15:05 hrs**
Thu, 06 Jun
Heathrow Airport Terminal 5

9h 45m

Hyderabad
05:20 hrs HYD
Fri, 07 Jun
Rajiv Gandhi International Airport

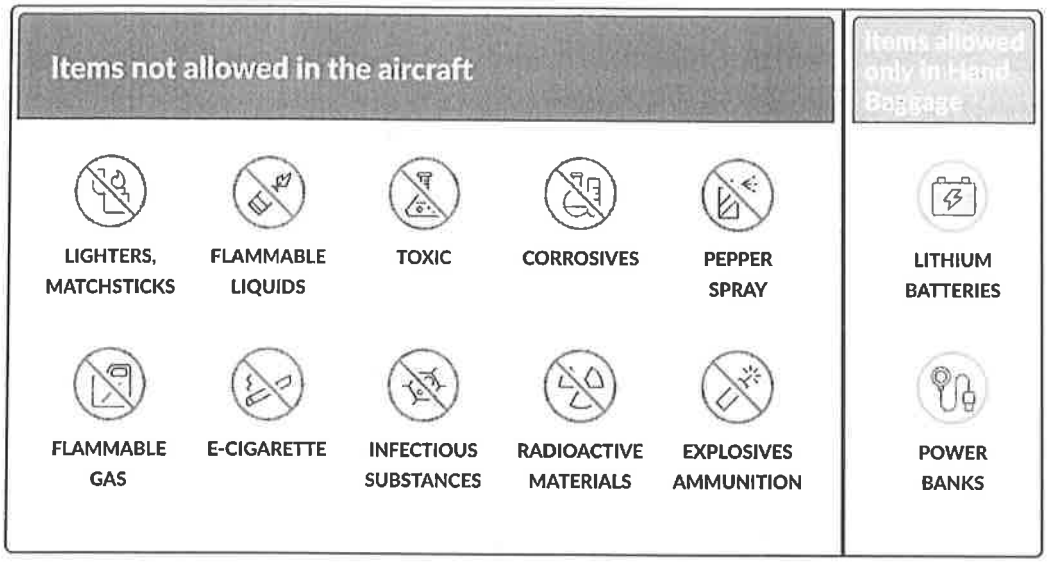
PREMIUM ECONOMY | Premium Economy | Regular Fare | **46 Kg(2 PC x 23Kg each)*** check-in | **7 Kgs*** cabin

*Baggage allowance shown above is per passenger

TRAVELLER	SEAT	MEAL	E-TICKET NO
MR. SOHAM MODI Adult		Vegetarian Hindu Meal	125-3545201247
MS. TEJAL MODI Adult		Hindu (Non Vegetarian) Meal	125-3545201248

You have paid **INR 362104** You saved INR 100

15P



IMPORTANT INFORMATION

- **Check-in Time :** Passenger to report 2 hours before departure. Check-in procedure and baggage drop will close 1 hour before departure.
- **DGCA passenger charter :** Please refer to passenger charter by clicking Here
- **Transit Visa Requirement :** Please note that travellers are solely responsible for ensuring their eligibility to enter the destination or transit countries. We accept no liability in this regard. Please check the travel rules of all regulatory websites before booking and commencing travel.
- **Passengers travelling from India, please note :** Please check travel rules and your eligibility for travel on the regulatory website of the respective destination country/transit country (if applicable) prior to booking as well as commencing travel.
- **Please Note :** Passengers travelling on a tourist visa are not allowed to travel with one-way ticket. They must show a return ticket else they may not be allowed to board the flight.You must adhere to baggage dimension (length, breadth, width etc.) guidelines of the airline, else you may have to pay additional charges or be even denied boarding. Kindly refer to the airline website for more details.
- **Travellers arriving in India must follow these guidelines: :** Who can travel? All travellers are advised to be fully vaccinated.Test on Arrival: A sub-section (2% of the total passengers in the flight), with the exception of children below 12 years, could be subject to random post arrival testing at the airport. All travellers may undergo random thermal screening upon arrival.Please Note: All travellers arriving from international destinations and connecting to a domestic destination must recheck-in their bags at the first port of entry, regardless of through check-in done till the final destination.
- **Visa Requirements :** Passport should be valid for minimum 6 months from the date of travel.All travellers must present hard copies of their foreign visa (soft copies won't be accepted) at the immigration counters during departure.MakeMyTrip holds no liability with respect to visa information. To get further details on visa and passport requirements, before booking your travel, click
- **A Note on Guidelines :** Please note that travellers are solely responsible for ensuring their eligibility to enter the destination or transit countries. We accept no liability in this regard. Please check the travel rules of all regulatory websites before booking and commencing travel.
- **No-Show Policy :** In the event that a user does not embark on the onward journey, the entire PNR pertaining to that booking shall be automatically cancelled by the airline. In such a scenario, MMT has no control in the said process

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nor will be obligated to provide alternate bookings to the user. The cancellation penalty in such an event shall be as per the applicable airline rules.

- **Valid ID proof needed :** Please carry a valid Passport and Visa (mandatory for international travel). Passport should have at least 6 months of validity at the time of travel

- **Ensure Compliance with Visa/Transit Visa Requirements :** Please ensure you verify and adhere to the visa and transit visa requirements based on your nationality, passport type, and destination country. MakeMyTrip holds our customers' best interests at heart; however, we cannot be held liable for any issues that may arise from a failure to seek and follow the necessary visa information. For the most reliable and up-to-date visa requirements, check reputable regulatory websites like IATA or with the airline.

- Please do not share your personal banking and security details like passwords, CVV, etc. with any third person or party claiming to represent MakeMyTrip. For any query, please reach out to MakeMyTrip on our official customer care number.

You can view all **cancellation, date change and baggage related information** here , If you want to manage your booking, you visit **MyTrips** section using this link

Contact MakeMyTrip +4480088631234 (United Kingdom Number),+91124 4628747 / +91124 5045105 (India Number)

Contact BRITISH AIRWAYS 18601803592, 0124-4120715

15F

Annexure - F

Accounting Code of the ice	Amount Tendered in Rupees
00440410	00019729160
00000000	00000000000
00000000	00000000000
00000000	00000000000
00000000	00000000000
00000000	00000000000
00000000	00000000000
Total	00019729160

TAX PAYER'S COUNTERFOIL

RECEIVING BANK BRANCH STAMP

175

778/14

9

Received from Assessee Code No. AANFA5253PST001

(In words) Rupees NINGHNTEEN LAKH SEVENTY THOUSAND NINE HUNDRED AND SIXTEEN Only)

By Cash/Cheque/Draft/Pay Order No 922747 Dated 08.01.2013 Drawn on HDFC Bank Ltd

on account of Union Service Tax as detailed in this taxpayer's counterfoil and on stamp affixed and signed therein

Alpine Estates
2010 - 2011
Dispute tax,

Accounting Code of the Service	Amount Tendered in Rupees
00440410	00002311234
00000000	00000000000
00000000	00000000000
00000000	00000000000
00000000	00000000000
00000000	00000000000
00000000	00000000000
Total	00002311234

TAX PAYER'S COUNTERFOIL

[illegible] BANK BRANCH STAMP

1074523

10 A

Received from Assessee Code No. AAHFG0711BST001

(In words) Rupees Twenty three lakhs eleven thousand two hundred & thirty four only Only)

By Cash/Cheque/Draft/Pay Order No. 933942 Dated 07.01.13 Drawn on Hdfc Bank Ltd

on account of Union Service Tax as detailed in this taxpayer's counterfoil and on stamp affixed and signed therein

Green wood
Estates
2010 - 2011
Dispute tax

89

Accounting Code of the Service								Amount Tendered in Rupees									
0	0	4	4	0	3	3	4			7	2	3	6	8	7	0	0
0	0	4	4								1	4	4	2	4	0	0
0	0	4	4								7	2	3	7		0	0
0	0	4	4														
0	0	4	4														
0	0	4	4														
							Total			7	4	5	3	3	8	0	0

TAXPAYER'S COUNTERFOIL

RECEIVING BANK BRANCH STAMP

STATE BANK OF ...
R.P. Road, Secunderabad
BSR Code No.: 0110084
JRNL. NO. 1863972
Challan No. 20

Received from Assessee Code No. AAMFA5250L5T001

(In words) Rupees Seven lakhs forty five thousand three hundred & sixty...

By Cash/Cheque/Draft/Pay Order No. 262251 Dated 4/08/011 Drawn on HDFC Bank Ltd

on account of Union Service Tax as detailed in this taxpayer's counterfoil and on stamp affixed and signed therein.

Mohd.

TAXPAYER'S COUNTERFOIL

Accounting Code of the Service	Amount Tendered in Rupees
00440010	1402760700
00440238	2815500
00440426	1402800
00440	
00440	
00440	
13 11 2012 Total	1450000700

RECEIVING BANK BRANCH STAMP

STATE BANK OF HYDERABAD
R P Road, Secunderabad
BSR Code No. 0110084
Date 13.11.12
Challan No. 2.6

Received from Assessee/Code No. AAWFA5250HST001

(In words) Rupees Fourteen Lakhs fifty thousand only

By Cash/Cheque/Draft/Pay Order No. 135910 Dated 09/02/2012 Drawn on HDFC BANK LTD

on account of Union Service Tax as detailed in this taxpayer's counterfoil and on stamp affixed and signed therein.

ACPIRE

Annexure-II

केन्द्रीय कर, केन्द्रीय उत्पाद शुल्क एवं सेवा करआयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CENTRAL TAX, CENTRAL EXCISE & SERVICE TAX
सिकंदराबाद जीएसटी आयुक्तालय,जीएसटी भवन , एलबी स्टेडियम रोड,
SECUNDERABAD GST COMMISSIONERATE, GST BHAWAN, L.B.STADIUM ROAD
बशीरबाग,हैदराबादBASHEERBAGH, HYDERABAD – 500 004.
Email. adjudication3@gmail.com

OR No.29/2019-20-Sec-Adjn-JC (ST) Date:27.03.2024
DIN-20240356YO000000BC83

मूल आदेश संख्या/**ORDER-IN-ORIGINAL No.107/2023-24-Sec-Adjn-ADC(ST)**
(Passed by Sri B. VIJAY, Additional Commissioner of Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate)

PREAMBLE

1. यह प्रति उस व्यक्ति के निजी उपयोग के लिए नि:शुल्क दी जाती है जिसे यह जारी किया गया है।

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

2. वित्त अधिनियम, 1994 की धारा 85 के तहत, संशोधित के रूप में, इस आदेश से पीड़ित कोई भी व्यक्ति आयुक्त (अपील), मुख्यालय, कार्यालय, 7 वें को इस तरह के आदेश / निर्णय के संचार की तारीख से 60 दिनों के भीतर अपील कर सकता है। मंजिल, एलबी स्टेडियम रोड, बशीरबाग, हैदराबाद - 500 004।

Under Sec.85 of the Finance Act, 1994, as amended, any person aggrieved by this order can prefer an appeal within 60 days from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs., Office, 7th floor, L.B. Stadium Road, Basheerbagh, Hyderabad – 500 004.

3. इस आदेश के खिलाफ एक अपील आयुक्त (अपील) के समक्ष मांग की गई शुल्क के 7.5% के भुगतान पर होगी, जहां शुल्क या शुल्क और जुर्माना विवाद या जुर्माना है, जहां अकेले दंड विवाद में है।

An appeal against this order shall lie before the Commissioner (Appeals) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute or penalty, where penalty alone is in dispute.

धारा 85 के तहत आयुक्त (अपील) के लिए एक अपील एसटी -4 के रूप में की जाएगी और निर्धारित तरीके से सत्यापित की जाएगी।

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

4. एस टी ४ फार्म में की गई अपील अनुलिपि में प्रस्तुत की जानी चाहिए और उसके साथ जिसने निर्णय या आदेश विरूध्द अपील की जा रही हो। उसकी एक प्रति भी संलग्न की जानी चाहिए।

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

5. अपील और जिसने निर्णय या आदेश के विरूध्द अपील की जा रही हो उस आदेश की प्रति पर भी समुचित मूल्य के अदालती टिकट लगाए जाने चाहिए.

The appeal as well as the copy of the decision or order appealed against must be affixed with their fee stamp of the appropriate amount.

****

Sub: Service Tax - Offence- Case against M/s Alpine Estates - Non-payment of Service Tax on taxable services rendered- Issuance of Order In Original (Denovo) - Reg.

****

BRIEF FACTS OF THE CASE:

M/s Alpine Estates, #5-4-187/3&4, II Floor, Soham Mansion, MG Road, Secunderabd-500003 (here-in-after referred as "Alpine" or the assessee), are engaged in providing works contract service. M/s Alpine Estates is a registered partnership firm and got themselves registered with the department with Service Tax Registration Number AANFA5250FST001.

2. A Show Cause Notice vide HQPOR No.82/2010-Adjn(ST) dt. 16.06.2010 was issued for the period from January 2009 to December 2009 for an amount of Rs.31,10,377/- including cesses and the same has been adjudicated and confirmed vide Order -in-Original No:44/2010-ST dt. 15.10.2010. Further, the assessee has gone an appeal, and the same has been dismissed vide OIA No. 08/2011(H-II) dt. 31.01.2011 by the Commissioner (Appeal), Hyderabad. Aggrieved from the said Order in Appeal, the assesee had filed an appeal before Hon'ble CESTAT. Hon'ble CESTAT vide Final order No.A/30172-30178/2019 dated 31.01.2019 has set aside the demands raised in the above SCN issued for the period from January, 2009 to December, 2009 holding that service tax is not applicable on sale of flats prior to 01.07.2010. Another two show cause notices were issued vide OR. No. 62/2011-Adjn(ST) Gr.X, dated 23.04.2011 and OR.No.51/2012 - Adjn (Addl. Commr.), dated 24.04.2012 for the period from January, 2010 to December, 2010 and January, 2011 to December, 2011

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respectively. The impugned above said both Show Cause Notices are sequel to the same for the period from January, 2010 to December, 2011.

3. Show Cause Notice OR No.OR. No. 62/2011-Adjn(ST) Gr.X, dated 23.04.2011: The Show Cause Notice is reproduce hereunder:-

"2. A Show Cause Notice vide HQPOR No. 82/2010-(ST) dt. 16.6.2010 was issued for the period from January 2009 to December 2009 involving an amount of Rs. 31,10,377/- including cess and the same has been adjudicated and confirmed vide Order-In-Original NO:44/2010-ST DT. 15.10.2010. Further, the assessee has gone an appeal and the same has been dismissed vide OIA No.08/2011(H-II) dt.31.1.2011 by the Commissioner (Appeal), Hyderabad. The present notice is issued in sequel to the same for the period from January 2010 to December 2010.

3. As per Section 65 (105) (zzzza) of the Finance Act, 1994 defines that 'taxable service 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 o9f 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.....,
    (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."

3. 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 the 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.

4. M/s Alpine Estates registered with the service tax department and not discharging the service tax liability properly and not filing the ST-3 returns, which are mandatory as per Service Tax Rules made there under. On verification of the records, it is found that M/s Alpines Estate have undertaken a single venture by name **M/s Flower Heights** located at Plot No.3-3-27/1, Mallapur Old Village, Uppal Mandal, RR District and received amount from customers towards sale of land and agreement of construction of 102 houses for the said period. Further, it is found that they have not filed ST-3 returns for the said period.

5. Further it is made clear on 01.02.2010 by Sri Shanker Reddy, Deputy General Manager (Admn) authorised representative of the assessee, that the activities undertaken by the company are providing services of construction of residential complexes and also stated that initially, they collected the amounts against booking and also stated that initially, they collected the amounts against booking form/agreement of sale. At the time of registration of the property, the amounts received till then will be allocated towards Sale Deed and Agreements of Construction. Therefore, service tax on amount received against Agreement of Construction portion of the amounts towards agreement of construction is aid on receipt basis. The agreement of sale constitutes the total amount of land/semi-finished flat with undivided share of land and value of construction. The Sale Deed constitutes a condition to go for construction with the builder. Accordingly, the construction agreement will also be entered immediately on the same date of sale deed. All the process is in the way fo sale of 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".

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6. As per the exclusion provided in Section 65(91a) of the Service Tax Act, 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. Here "personal use" includes permitting the complex for use as residence by another person on rent or without consideration. It is further clarified in para 3 of the Circular No. 108/02/2009-ST dt. 29.01.2009 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, 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 constructs entire complex for one person for personal use as residence by such person would not be subjected to service tax. Further, the builder/promoter/developer normally enters into construction /completion agreement after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self-services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore, there is no levy of service tax on the services rendered till sale deed. i.e. on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements/contract against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements of construction are invariably attracts service tax under Section 65(105(zzzza) of the Finance Act 1994.

7. As per the definition of "Residential Complex" provided under Section 65(91a) of the Finance Act 1994, it constitutes any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s Alpine Estates qualifies to be residential complex as it contains more than twelve residential units with common area and common facilities like park, common water supply etc., and the layout was approved by HUDA vide permit No. 14014/P4/PLG/H/2006 dt. 23.3.2007. As seen from the records, the assessee entered into 1) a sale deed for a sale of undivided portion of land together with semi-finished portion of the flat and 2) 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 assesses thereafter to their customers under agreement of construction are taxable under Service Tax as there exists service provider and receiver relation between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under works contract service.

8. M/s Alpine Estates, Hyderabad vide their statement received in this office on 22.4.2011 has submitted the Flat-wise amounts received for the period from January 2010 to December 2010. The total amount received is Rs. 85027011/- against agreements of construction during the period and are liable to pay service tax including cess works out to Rs. 3503113/- and the interest at appropriate rates under Works Contract Service respectively.

9. M/s Alpine Estates, Hyderabad are well aware of the provisions and of liability of service tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly with an intention to evade payment of Service Tax. They have intentionally not filed the ST-3 returns for the said period. Hence, the service tax payable by M/s Alpine Estates appears to be recovered under Sub-Section (1) of Section 73 of the Finances Act 1994.

10. From the foregoing, it appears that M/s Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad-3 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 the 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 filed statutory returns for the taxable services rendered 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 provisions to the Section 73(1) of the Finance Act 1994 and thereby they have rendered themselves liable for penal action under Section 77 & 76 of the Finance Act 1994.

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11. Therefore, M/s Alpine Estates, Hyderabad, are hereby required to show cause to the Additional Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad, within 30 days of receipt of this notice as to why:-

i. An amount of Rs.3503113/-(Rupees Thirty five lakhs three thousand one hundred thirteen only) including cess should not be demanded on the works contract service under the Sub-Section (1) of Section 73 of the Finance Act 1994 for the period from January 2010 to December 2010; and

ii. Interest is not payable by them on the amount demanded at (i) above under Section 75 of the Finance Act 1994; and

iii. Penalty should not be imposed on them under Section 77 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 76 of the Finance Act 1994.

4. Show Cause Notice OR.No.51/2012- Adjn (Addl.Commr.), dated 24.04.2012: The Show Cause Notice is reproduced hereunder:

"2. A Show Cause Notice vide HQPOR No.82/2010-Adjn(ST) dt. 16.06.2010 was issued for the period from January 2009 to December 2009 for an amount of Rs.31,10,377/- including cesses and the same has been adjudicated and confirmed vide Order -in-Original No:44/2010-ST dt. 15.10.2010. Further, the assessee has gone an appeal, and the same has been dismissed vide OIA No. 08/2011(H-II) dt. 31.01.2011 by the Commissioner (Appeal), Hyderabad. Another show cause was issued vide OR No.62/2011-2010-Adjn (ST) dt.23.04.2011 for the period from January, 2010 to December, 2010. The present notice is issued in sequel to the same for the period from January 2011 to December 2011.

3. As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of Land together with semi-finished portion of the flat and 2) 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 assesses thereafter to their customers under agreement of construction are taxable under Service Tax as their exists service provider and receiver relationship between them. As there involved the transfer of property in goods in

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execution of the said construction agreements. It appears that the services rendered by them after execution of the sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under "Works Contract Service".

4. As per Section 65 (105) (zzzza) 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 the execution of a works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation: For the purpose 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 purpose of carrying out,-

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise.....,

(b) construction of a new building or a civil structure or a part thereof, or 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) Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects.

4.1 An optional composition scheme for payment of Service Tax in relation to Works Contract Service is provided by the Notification No.32/2007-ST dated 22-05-2007, effective from 01-06-2007, under the "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 per cent 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. W.e.f. 1-3-2008 onwards, the said rate of 2% is changed to 4% vide Notification No.7/2008-S.T. dated 1-3-2008.

5 M/s Alpine, Hyderabad vide their statement received in this office on 07.02.2012 has informed that they received an amount of Rs. 11,73,17,845/- for the period from January 2011 to December 2011. The total consideration received by them for the period is Rs. 11,73,17,845/- during the period and are liable to pay service tax including cess on the same works out to Rs. 48,33,495/-. The assessee further submitted that

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they have paid service tax of Rs. 21,95,524/- (Rs.745524 Dt. 7.6.2011 and RS. 14,50,000/- Dt. 09.02.2012) under protest.

6. M/s Alpine registered with the service tax department and not discharging the service tax liability properly and also not filing the ST-3 returns, which are mandatory as per Service Tax Rules made there under. On verification of the records, it is found that M/s Alpine Estate have undertaken a single venture name M/s Flower Heights located at Plot No. 3-3-27/1, Mallapur Old Village, Uppal Mandal, RR District and received amount from customers towards sale of land and agreement of construction of 102 houses.

7. M/s Alpine, are well aware of the provisions and liability of Service Tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly. They have not filed the ST-3 returns for the period up to 03/2011. Hence, the service tax payable by M/s Alpine, appears to be recovered under Sub-Section (1) of Section 73 of the Finance Act 1994.

8. From the foregoing, it appears that M/s Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad-3 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 the 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 filed statutory returns for the taxable services rendered and also did not truly and correctly asses the tax due on the services provided by them and also did not disclose the relevant details/information. Hence the Service is liable for recovery under provisions of Section 73(1) of the Finance Act 1994 and they have rendered themselves liable for penal action under Section 76 of the Finance Act 1994 and Section 77 of the Finance Act 1994. They are also liable for Interest under Section 75 of the Finance Act, 1994.

9. Therefore, M/s Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad, Hyderabad are hereby required to show cause to the Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, 11-5-423/1/A, Sitaram Prasad Towers, Red Hills, Bazarghat Road, Hyderabad, within 30 (thirty) days of receipt of this notice as to why:-

i. an amount of Rs. 48,33,495/- (Rupees Forty Eight Lakhs Thirty Three Thousand Four Hundred Ninety Five only) including cess should not be demanded on the "Works Contract Service" under the Sub-Section (1) of Section 73 of the Finance Act, 1994 for the period from January 2011 to December 2011. An amount of Rs.21,95,524/- (Rs.745524 Dt. 7.6.2011 and Rs.14,50,000/- Dt. 09.02.2012) by them should not be adjusted against the demand discussed supra: and

ii. Interest is not payable by them on the amount demanded as (i) above under Section 75 of the Finance Act 1994; and

iii. Penalty should not be imposed on them under Section 77 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 76 of the Finance Act 1994."

5 The above said both Show Cause Notices were adjudicated vide Order in Original No.49/2012-Adjnc(ST)ADC, dated 31.08.2012 and the entire demands proposed in the notices were confirmed. The assessee had filed an appeal before Commissioner (Appeal) against the said order. The Commissioner (Appeals) vide Order-in-Appeal No.38/2013 (H-II) S. Tax dated 27.02.2013 upheld the OIO but remanded the matter for re-quantification. To the extent aggrieved by Order in Appeal, the assessee filed an appeal before Hon'ble CESTAT, Hyderabad. The Hon'ble CESTAT has set aside the demand raised for the period prior to 01.07.2010 and set aside the demand raised on registration fees, VAT etc for the period from 01.07.2010 vide its Final Order No.ST/30699/2019 dated 19.06.2019. With respect to the demand for the period July, 2010 to Decmber, 2011, the Hon'ble CESTAT had remanded the matter to the original authority for denovo adjudication only to the limited extent to check whether the Show Cause Notice has given deduction towards sale deed value or not. If the deduction is not given, directed the adjudication authority to pass the denovo order after giving the deduction. To clear the doubt as to whether the direction in the Final Order is for reconsideration as to whether the sale deed value is also subject to service tax, the assessee had filed a rectification of mistake application against the above referred Final Order and a clear findings has been provided by the CESTAT, Hyderabad, vide the Misc. Order No.M/30226/2022 dated 11.03.2022. Vide this Final Order, Hon'ble

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CESTAT has cleared that the demand on registration fees, VAT etc are set aside for the period from 01.07.2010.

6 Personal Hearings and Submissions made by the assessee:

6.1 A personal hearing was fixed on 26.11.2019, 19.06.2020, 20.10.2020, 16.11.2020, 10.12.2020, 20.02.2023 and 08.12.2023. On behalf of the assessee, Sri Venkata Prasad P, CA, Hiregange & Associates had attended personal hearing on 11.12.2020, 20.07.2021 and 20.02.2023.

6.2 The assessee made their submissions vide letter dated 20.10.2020, 18.12.2020, 18.02.2021 and 21.03.2023.

6.2.1 The assessee's submission dated 18.02.2021: The relevant portion of the submission is reproduced hereunder:

"2. Further, during the course of personal hearing on 11.12.2020, your good self has asked us to submit the sample copies of customer ledgers, sale deeds and receipt wise statement for the period January 2010 to December 2011. In this regard, we are herewith submitting the following

a. Sample copies of sale deeds along with ledger accounts of customers for the period January 2010 to December 2011
b. Receipt wise statement for the period January 2010 to December 2011

3 In this regard, we would like to submit that the details of stamp duty and VAT paid was clearly mentioned on the sale deed by the Sub-registrar office which can be considered while passing the order. Further, the details of other reimbursements can be evidenced from the customer ledger accounts. Hence, we request you to drop the demand to that extent."

6.2.2 The assessee's submission dated 21.03.2023: The assessee's submission is reproduced hereunder:

Brief facts:

A. Noticee is engaged in sale of residential houses in venture by name "Flower Heights" to prospective buyers while the units are under construction by entering into following agreements
   - Sale Deed for sale of undivided portion of land together with semi-finished flat. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.

- Construction agreement for undertaking construction

B. Department has initially issued a Show Cause Notice dated 16.06.2010 covering the period January 2009 to December 2009 ("First SCN") proposing to demand service tax on amounts received towards construction agreement. The Hon'ble CESTAT vide Final order No. A/30172-30178/2019 dated 31.01.2019 set aside the demands raised in the above SCN holding that service tax is not applicable on sale of flats prior to 01.07.2010.

C. The above Show Cause Notice was followed by below periodical notices under Section 73(1A) for the period January 2010 to December 2011 which are in dispute in the Final Order No.ST/30699/2019 dated 19.06.2019

SCN reference	Time period	Proposed Demand
SCN No. 62/2011-Adjn (S.T.) Gr.X dated 23.04.2011	Jan 2010 to Dec 2010	Rs.35,03,113/-
SCN No. 52/2012-Adjn (Addl.Commr) dated 24.04.2012	Jan 2011 to Dec 2011	Rs.48,33,495/-
Total		**Rs.83,36,608/-**

D. The above referred SCN's were adjudicated vide a common Order-in-Original No.49/2012-Adjn ST ADC dated 31.08.2012 wherein vide Para 17 it was accepted that service tax would not be demanded on sale deed value however OIO dated 31.08.2012 had included the amounts received towards Sale deeds also.

E. Noticee has filed an appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide Order-in-Appeal No.38/2013 (H-II) S. Tax dated 27.02.2013 upheld the OIO but remanded the matter for re-quantification.

F. To the extent aggrieved by Order-in-Appeal, the Noticee has filed appeal before Hon'ble CESTAT, Hyderabad. The Hon'ble CESTAT, Hyderabad has heard the matter and set aside the demand for the period January 2010 to June 2010 and set aside the demand raised on registration fees, VAT etc for the period January 2010 to December 2011. With respect to demand for the period July 2010 to December 2011, the Hon'ble CESTAT had remanded the matter to the original authority for denovo adjudication only to the limited extent to check whether the Show Cause Notice has given deduction towards sale deed value or not. If the deduction is not given, directed the adjudicating authority to pass the denovo order after giving the deduction.

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G. Noticee has filed an Rectification of Mistake Application against the above referred Final Order and the same is pending for disposal.

H. The Noticee is herewith making following submissions for *denovo* adjudication.

Submissions for the *Denovo* adjudication:

1. Noticee at the outset submits that the Noticee has filed the Rectification of Mistake Application against the Final Order No. ST/30699/2019 dated 19.06.2019 and the same is pending before the CESTAT. As the issue is pending before Hon'ble Tribunal and matter is *sub-judice*, Noticee humbly requests Ld. Adjudicating authority to keep the proceedings in abeyance till the disposal of Rectification of Mistake Application by Hon'ble CESTAT, Hyderabad. In this regard, reliance is placed on

   a. Vilsons Roofing Products Pvt Ltd Vs CCE, Kolhapur 2013-TIOL-2023-CESTAT-MUM wherein it was held that_"*4. Brief facts of the case are that the appellants filed a refund claim before the adjudicating authority which was sanctioned and the refund was given to the appellants. Against the said order, the Revenue preferred an appeal before the Commissioner (Appeals) who set aside the order of sanctioning the refund claim and remanded the matter back to the adjudicating authority for reconsideration. The said order was challenged by the appellants before the Tribunal on the ground that the Commissioner (Appeals) has no power to remand the matter to the adjudicating authority and obtained stay from the Tribunal. While the matter is pending before the Tribunal, the adjudicating authority, on the matter on remand by the Commissioner (Appeals), has rejected the refund claim of the appellants. On appeal before the Commissioner (Appeals) the rejection was upheld. Aggrieved by the said order the appellants are before me.*

   5. When the issue before this Tribunal is sub judice therefore, the remand proceeding was not warranted. Hence, the impugned order passed by the adjudicating authority has no legal sanctity. Accordingly, the impugned order is set aside and the appeals are allowed. The stay applications are also disposed of in the above terms."

   b. Agro Tech Foods Pvt Ltd Vs CC(I), Nhavasheva 2017 (345) ELT 668 (Tri-Mum)

   c. Fiberfill Engineers Vs CCE, Delhi 2016 (332) ELT 478 (Del)

   d. P K International Vs CCE, Thane-II 2014 (301) ELT 3 (Bom)

   e. CC, Uttar Pradesh Vs Pidilite Industries Limited 2014 (309) ELT 598 (All)

2. Without prejudice to above, As stated in the background facts, the Hon'ble CESTAT vide Para 7 of the Final Order No. ST/30699/2019 dated 19.06.2019 set aside the demand prior to 01.07.2010 and remanded the matter to the adjudication authority for reconsideration to verify the quantification of the demand for the period July 2010 to December 2011. Further, Noticee submits that the Hon'ble CESTAT vide Para 4 and 5 held as follows

"4. Heard both sides. The finding of Commissioner in Para 17 is reproduced as under

> *'various flats have been sold by them to various customers in two states. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customers. Appropriate stamp duty was paid on the sale deed. No Service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"*

"5. After hearing the submissions of the learned A.R we are of the view that the matter requires to be reconsidered as to whether the amounts included in the sale deed value of immovable property would be subject to levy of service tax under construction services. The computation in the Order-in-Original has to be looked into on the basis of the sale deed executed by the Noticee with customer which includes the semi-finished flat. Other charges like registration fees, VAT, etc needless to say will not be subject to service tax as being reimbursable."

3. Noticee submits that on combined reading of Para 5 and 7 of the Final Order, it is clear that the entire demand on amounts received towards Construction Agreement and Sale deed has been set aside for the period January 2010 to June 2010 and the demand on registration fees, VAT etc are set aside for the entire period i.e, January 2010 to December 2011. Therefore, demand to that extent needs to be reduced.
4. With respect to demand on sale deed values for the period July 2010 to December 2010, Noticee submits that the Hon'ble CESTAT has remanded the matter to lower authority to check whether the deduction was actually given for the sale deed values as stated in Para 7 of SCN No. 62/2011-Adjn (ST) Gr.X dated 23.04.2011 and SCN No.52/2012-Adjn (Addl Commr) dated 24.04.2012, Para 17 of OIO No. 49/2012-Adjn-ST ADC dated 31.08.2012

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5. The Show Cause Notice dated 23.04.2011 vide Para 7 and Show cause notice dated 24.04.2012 vide Para 3 alleged that

"As there involved the transfer of property in goods in execution of the said construction agreements, ***it appears that the services rendered by them after execution of sale deed against agreement of construction*** *to each of their customers to whom the land was already sold vide sale deed are taxable services under "Works Contract Services".*

As seen from the operative part of SCN, the sole allegation of SCN is that the amounts received towards construction agreements are subject to service tax under the category of "Works Contract".

6. The same was confirmed by the OIO vide Para no. 17as follows *"No Service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the* ***service tax demand is confined to this agreement"***
7. However, while quantifying the demand, the SCN and OIO has included the value of sale deeds and other reimbursements such as VAT, registration charges etc though the same was never the allegation in the SCN.
8. It is therefore apparent that the SCN represents an error in quantification of the demand. Once the same is rectified, there is no short payment of service tax. The details of amounts received towards construction agreement, sale deed value, VAT, registration etc are as follows:

Particulars	Jan 2010 to Dec 2010	Jan 2011 to Dec 2011
Gross receipts	11,45,70,426	11,82,85,406
Less: Amounts received for the period January 2010 to June 2010	5,51,27,612	Not Applicable
Amount received during the period July 2010 to December 2010	5,94,42,814	Not Applicable
Less: Sale Deed value	3,07,28,504	5,46,49,500
Less: VAT, Registration Charges and other non-taxable receipts	68,73,952	82,09,816
Taxable Value	2,18,40,358	5,54,26,090
ST Liability @4.12%		

	8,99,823	22,83,555
Total Service tax payable		**31,83,378**
Service Tax paid		**42,05,398**
Payable/(Excess paid)		**(10,22,020)**

The detailed statement showing the flat wise calculations would be submitted. It is humbly requested Ld. Adjudicating authority to inform any further documents required for verification of the above calculations.

As seen from the above table, an amount of Rs. 42,05,398/- has already paid towards service tax on the amounts received from customers against the liability of Rs. 31,83,378/- resulting in excess payment of Rs.10,22,020/-. Since Noticee has discharged the appropriate Service tax (even excess amount), the demand needs to be dropped.

9. Noticee submits that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

Construction of Residential complex for "Personal Use" is excluded from definition of Residential Complex

10. Without prejudice to the foregoing, assuming but not admitting the same is covered under the tax net. The term "Construction of Complex" is defined under section 65 (30a) as under

(30a) "construction of complex" means —

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

(b) completion and finishing services in relation 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

(c)repair, alteration, renovation or restoration of, or similar services in relation to, residential complex

11. Noticee submits that the construction service of the semi-finished flat is provided for the owner of the semi-finished flat/customer, who in turn used such flat for his personal use therefore the same is excluded from the definition of 'construction of complex service'.

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12. The Noticee submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 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 Ac, 1994 and accordingly no service tax is payable on such transaction.

Relevant extract

"...***Further, 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'...***"

13. Noticee submits that issue of payment of service tax on agreements entered with individuals for completion of the semifinished houses who in turn used such flat for personal use is *no more res integra* in view of the **Jurisdictional CESTAT decision in case of**

a. **Modi & Modi Constructions Vs CCE, Hyderabad-II 2019 (10) TMI 171 -CESTAT Hyderabad** wherein it was held that *"11. The second question is the nature of the contract on which service tax is proposed to be charged. The SCN itself states that the plots along with semi-finished buildings were sold to the buyers under the sale agreement. Thereafter, a separate agreement was entered into with the individual home owners for completion of the building/structure as per the agreement. In other words, there is no agreement for completion of the entire complex but there are a number of agreements with each individual house owner for completion of their building. In other words, the individual house owner is engaging the Noticee for construction of the complex for his personal use as residence. The explanation to section 65(91a) categorically states that personal use includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, it does not matter whether the individual buyer uses*

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the flat himself or rents it out. There is nothing on record to establish that the individual buyers do not fall under the aforesaid explanation. For this reason, we find no service tax is chargeable from the Noticee on the agreements entered into by them with individual buyers for completion of their buildings as has been alleged in the SCN. Consequently, the demand needs to be set aside and we do so. Accordingly, the demands for interest and imposition of penalties also need to be set aside."

b. Modi Ventures Vs Commissioner of Central Tax, Hyderabad in Final Order No.30882/2020 dated 03.03.2020

14. Noticee submits that from the above referred decision, it is clear that there is no liability to pay service tax on the amounts received during the period July 2010 to December 2011. Thereby, the entire demand proposed in the impugned Show Cause Notices needs to be dropped.

15. Without prejudice to above, Noticee submits that sale deed is executed for semi-finished flat represents the construction work already done prior to booking of flat by the prospective buyer. The work undertaken till that time of booking flat is nothing, but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self-service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be bought into the realm of works contract. In this regard, reliance is placed on the following:

a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.)wherein it was held that ***"115.*** *It may, however,* ***be clarified that 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****. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."*

b. CHD Developers Ltd vs State of Haryana and others, 2015 -TIOL-1521-HC – P&H-VAT wherein it was held that *"45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which*

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VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property."

16. It is further submitted that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi finished flat is not chargeable to VAT and it is mere sale of immovable property (same was supported by above cited judgments also). Therefore said sale cannot be considered as works contract and consequently no service tax is liable to be paid. All the goods till the prospective customer become owner have been self consumed and not transferred to anybody. Further goods, being used in the construction of semi-finished flat, have lost its identity and been converted into immovable property which cannot be considered as goods therefore the liability to pay service under 'works contract service' on the portion of semi-constructed villa represented by *'sale deed'* would not arise.

Interest and penalties are not imposable

17. Noticee submits that when service tax itself is not payable, the question of interest does not arise. 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)
18. Noticee submits that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the penalty requires to be dropped.
19. Noticee submits that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It settled position of the law that if the Noticee is under bonafide belief as regards to non taxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.
    a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)
    b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

20. Without prejudice to the foregoing, Noticee submits that the SCN/OIO has not explained the reason for imposition of penalties under Section 76 and 77 of the Finance Act, 1994. As the subject show cause notice has not considered these essential aspects, the proposition of levying penalty under section 76 and 77 is not sustainable and requires to be set aside.
21. Noticee submits that issue involves interpretation and the periodical notices has been issued to the Noticee, the imposition of penalties under Section 76 is not tenable and the same needs to be set aside. In this regard, Noticee relied on M/s. Phoenix IT Solutions Ltd Vs CCE 2017 (52) STR 182 (Tri-Hyd).
22. Further, there is bona fide litigation is going on and issue was also debatable which itself can be considered as reasonable cause for failure to pay service tax. Accordingly, waiver of penalty under section 80 of Finance Act, 1994 can be made. In this regard reliance is placed on C.C.E., &Cus., Daman v. PSL Corrosion Control Services Ltd 2011 (23) S.T.R. 116 (Guj.);
23. Noticee craves leave to alter, add to and/or amend the aforesaid grounds.

DISCUSSION AND FINDINGS:

7. I have carefully gone through the impugned Show Cause Notices dated 23.04.2011 & 24.04.2012, Order in Original No.49/2012-Adjn ST ADC dated 31.08.2012, Order in Appeal No. 38/2013 (H-II) S.Tax dated 27.02.2013, Hon'ble CESTAT's Final Order No.ST/30699/2019 dated 19.06.2019, Hon'ble CESTAT's Rectification of Mistake Order No.M/30226/2022 dated 11.03.2022, submissions made by the assessee, oral submissions made by the assessee during personal hearings, and records available in the file.

8. Brief of the case: A Show Cause Notice vide HQPOR No.82/2010-Adjn(ST) dt. 16.06.2010 was issued for the period from January 2009 to December 2009 for an amount of Rs.31,10,377/- including cesses and the same has been adjudicated and confirmed vide Order -in-Original No:44/2010-ST dt. 15.10.2010. Further, the assessee has filed an appeal, and the same has been dismissed vide OIA No. 08/2011(H-II) dt. 31.01.2011

by the Commissioner (Appeal), Hyderabad. Aggrieved from the said Order in Appeal, the assesee had filed an appeal before Hon'ble CESTAT. Hon'ble CESTAT vide Final order No.A/30172-30178/2019 dated 31.01.2019 has set aside the demands raised in the above SCN issued for the period from January, 2009 to December, 2009 holding that service tax is not applicable on sale of flats prior to 01.07.2010. Further, two periodical Show Cause Notices were issued vide OR. No. 62/2011-Adjn(ST) Gr.X, dated 23.04.2011 for the period from January, 2010 to December, 2010 and OR.No.51/2012 - Adjn (Addl. Commr.), dated 24.04.2012 for the period from January, 2011 to December, 2011, and demanded service tax of Rs.35,03,113/- and 48,33,495/- respectively. The impugned above said both Show Cause Notices are sequel to the same for the period from January, 2010 to December, 2011. Both Show Cause Notices issued covering period from January, 2010 to December, 2011 were adjudicated vide OIO No.49/2012-Adjn (ST) ADC, dated 31.08.2012 and the entire demand proposed in the both periodical notices was confirmed. The assessee filed an appeal before Commissioner (Appeal) against the said order. The Commissioner (Appeals) vide Order-in-Appeal No.38/2013 (H-II) S. Tax dated 27.02.2013 upheld the OIO but remanded the matter for re-quantification. To the extent aggrieved by Order in Appeal, the assessee filed an appeal before Hon'ble CESTAT, Hyderabad.

9. The case is remanded back to the original adjudication authority for denovo proceedings by Hon'ble CESTAT, Hyderabad. I would like to reproduce the judgement made by the Hon'ble CESTAT vide its Final Order No.ST/30699/2019 dated 19.06.2019 and Rectification of Mistake Order No.M/30226/2022 dated 11.03.2022, first.

Final Order No.ST/30699/2019 dated 19.06.2019:

Brief facts are that appellants were issued show-cause notice proposing to demand short-paid service tax under works contract service.

2. Learned consultant Shri Sudhir V.S. appearing on behalf of the appellant submitted that the appellants were engaged in construction of residential complexes. During the disputed period, they had entered into two separate agreements with the customers. Firstly, the appellant would execute the sale-

deed for sale of undivided portion of land together with semi-finished portion of the flat. Thereafter an agreement for construction was entered for completion of construction of the flat. The appellant has discharged the entire service tax liability as per the agreement of construction. The present show-cause notice is issued including the value shown in the sale-deed and also other reimbursable charges in the nature of registration fee etc. It is submitted by him that though the jurisdictional authority has made a categorical finding in para 17 of the impugned order that no service tax has been demanded on the sale-deed value in the light of the Board Circular dated 29.01.2009, at the time of confirmation of demand the said value as per the sale-deed also has been included. He therefore requested that the matter may be remanded so as to requantify the amount after giving the deductions as per the show-cause notice in respect of value shown in sale-deed as well as other reimbursable expenses such as VAT, registration fee etc.

3. Learned A.R. Shri B. Natesh appeared on behalf of the department and argued the matter. He adverted to the amendment brought forth in the definition of residential complex service with effect from 01.07.2010 to argue that whenever an advance is received by the assessee prior to issuance of the completion certificate, the said amount would be taxable and therefore in the present case, the amount in the sale-deed for the period post 01.07.2010 would be taxable. The amount shown in the sale-deed has been rightly subjected to levy of service tax and confirmed by the original authority.

4. Heard both sides. The finding of the Commissioner in para 17 is reproduced as under:-

> *"various flats have been sold by them to various customers in two states. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customers. Appropriate stamp duty was paid on sale deed value. No service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"*

5. After hearing the submissions of learned A.R. we are of the view that the matter requires to be reconsidered as to whether the amounts included in the sale-deed value of immovable property would be subject to levy of service tax under construction services. The computation in the order-in original has to be looked into on the basis of the sale-deed executed by the appellant with customer which includes the semi-finished flat. Other charges like registration

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fee, VAT, etc. needless to say will not be subject to service tax as being reimbursable expenses.

6. For the period prior to 01.07.2010, the learned consultant submitted that in the appellant's own case for the earlier period, the Tribunal as reported in 2019 (2) TMI 772 (CESTAT-Hyd) had held as under:-

> *"5. On careful consideration of the submissions made by both sides, we find that the facts are not much in dispute and the demand is further period January, 2009 to December, 2009 in some cases June, 2007 to December, 2009 in some cases and June, 2005 to February, 2007 in some cases and in some cases June, 2005 to March, 2008. All these demands are in respect of the service tax liability on the builders for the services provided before 01.07.2010. The self same issue was considered by the Bench in detailed in the case of M/s Mehta & Modi Homes and as also in the case of M/s Kolla Developers & Builders and held that prior to 01.07.2010 service tax liability will not arise on the builders. We do not find any reason to deviate from such a view already taken on the issue. Accordingly, we hold that all the impugned orders are unsustainable and liable to be set aside and we do so. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any."*

7. From the above, we hold that the impugned order is modified to the extent of setting aside the demand prior to 01.07.2010 and remanding the matter after 01.07.2010 to the adjudicating authority for reconsideration. The adjudicating authority in such remand proceedings shall also reconsider the issue of penalty. Appeal is partly allowed and partly remanded in above terms, with consequential relief if any.

Hon'ble CESTAT's Rectification of Mistake Order No.M/30226/2022 dated 11.03.2022:

1. This application has been filed by the applicant under Section 35C of the Central Excise Act seeking rectification of alleged mistakes in the Final Order No. A/30699/2019 dated 19.06.2019 by which the matter was remanded for de novo adjudication. Paragraph 5 of the Final Order dated 19.06.2019 reads as follows:

> *"5. After hearing the submissions of learned A.R. we are of the view that the matter requires to be reconsidered as to whether the amounts included in the sale-deed value of immovable property would be subject to levy of service tax under construction services. The computation in the order-in-original has to be looked into on the basis of the sale-deed*

executed by the appellant with customer which includes the semi-finished flat. Other charges like registration fee, VAT, etc. needless to say will not be subject to service tax as being reimbursable expenses."

2. *According to the applicant, it appears from the above paragraph of the order that the matter was remanded for reconsideration as to whether the amounts included in the sale deed value would be subject to levy of service tax under construction services. It is submitted that the above referred paragraph does not reflect the decision in the open Court and is an apparent mistake in the face of record which needs to be rectified.*

3. *Learned Chartered Accountant for the appellant submits that in paragraph 7 of SCN (Show Cause Notice) dated 23.04.2011 and paragraph 3 of the impugned order dated 24.04.2012, it was alleged that the amounts received by the appellant towards construction under the agreements after executing the sale deeds are chargeable to Service Tax. However, while quantifying the demand, the SCN and the Order-in-Original had erroneously included the value of sale deeds and the reimbursements such as VAT, registration charges, etc., as the same was not part of the allegation in the SCN. He submits that after the matter was remanded by the Tribunal in its Final Order, the learned adjudicating authority has expressed a doubt as to whether the direction in the Final Order is for reconsideration as to whether the sale deed value is also subject to service tax. Learned Chartered Accountant therefore, prays that the Final Order may be modified.*

4. *We have gone through the application for rectification of mistake and have perused the Final Order. We do not feel there is any error apparent on record. The Final Order must be read as a whole. The direction in the Final Order was neither to go beyond the scope of the SCN nor to consider levying service tax on sale deed value of immovable property. If the Final Order is read as a whole, it would be clear that the matter has been remanded for the purpose of computing the demand of service tax after 01.07.2010 and also reconsidering the penalty for this period and NOT to consider levying/charging Service Tax on value of sale of the property. The demand for the period prior to 01.07.2010 has already been set aside in the Final Order. Paragraph 17 of the impugned order of the Commissioner also indicates that the demand was only in respect of the service contract entered into after the sale deed has been executed and not on the sale value of the immovable property. This was also reproduced in paragraph 4 of the Final Order.*

5. *In view of the above, we find that there is neither any error apparent on record nor is there any direction to the Commissioner in the Final Order to go beyond the scope of SCN and demand service tax on the value of transfer of*

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immovable property. The appeal was partly allowed up to 01.07.2010 and partly remanded for the period after 01.07.2010 for reconsideration of both the demand and the penalty. The application for rectification of mistake is accordingly dismissed.

From the above extract of Hon'ble CESTAT's orders, it evident that the Hon'ble CESATE has set aside the demand raised in the notice for the period from January, 2010 to June, 2010. With regard to Value of sale deed and other charges like registration fee, VAT, etc., Hon'ble CESTAT ordered not to consider levying of service tax on these value for the period from July, 2010 to December, 2011 and reminded back the case to the original adjudicating authority for denovo proceedings.

10. In light of the above, I drop the demand proposed in the notices for the period from January, 2010 to June, 2010. And, I proceed for denovo proceeding for demand of tax for the period from July, 2010 to December, 2011. Considering the Hon'ble CESTAT's Order, the calculation of Service Tax liability basing on ledger details submitted by M/s Alpine Estates is as under:

Period	**Amount**	**Service Tax @ 4.12% on Works Contract Services**
Sale Deed Value		
July, 2010 to December, 2010	3,07,28,504	Not taxable
January, 2011 to December, 2011	5,46,49,500	Not taxable
Construction Agreement Value		
July, 2010 to December, 2010	2,15,58,925	8,88,228
January, 2011 to December, 2011	5,52,74,294	22,77,300
Other Taxable Receipts		
July, 2010 to December, 2010	2,81,431	11,595
January, 2011 to December, 2011	1,51,796	6,254
VAT, Registration Charges, etc		

July, 2010 to December, 2010	40,32,173	Not taxable
January, 2011 to December, 2011	66,20,485	Not taxable
Other non taxable receipts (Electricity etc)		
July, 2010 to December, 2010	28,41,781	Not taxable
January, 2011 to December, 2011	15,89,331	Not taxable

As arrived in the above table, the assessee is liable to pay service tax Rs.8,99,823/- for the period from July, 2010 to December, 2010 and Rs.22,83,554/- for the period January, 2011 to December, 2011, totaling to Rs.31,83,377/-.

11. Further the assessee submitted that they have paid service tax of Rs.42,05,398/- and it can be seen from the ST-3 returns where no service tax was paid for the period January, 2010 to June, 2010. Evidencing their claim the assessee submitted challans and ST-3 Returns for the period 2010-11. On examination of these documents and submission made by the assessee I find followings:

Submission made by the assessee			
Cheque/Pay order No.	**Amount (Rs.)**	**Remarks**	**My findings**
267251 dated 10.06.2011 & 435410 dated 13.02.2012	21,95,524	Paid through Cash	The amount and challans details is not mentioned in the ST-3 returns submitted by them for 2010-11. And also, the assessee have not submitted any other documentary evidences to prove that this payment is paid towards the demand raised for the period July, 2010 to December, 2011. Further, it is seen from the both challans that total amount of both challans is Rs.21,95,398/-, not Rs. Rs.21,95,524/-.
ST-3 Returns	36,958	Paid through CENVAT	As seen from ST-3 returns for the period 2010-11, the CENVAT Credit is not availed/utilized by the assessee.
922747 dated 13.01.2013	19,72,916	Paid in consequent to order in Stay Petition No.63/2012 (H-II) S. Tax dated 07.12.2012 before Commissioner (Appeal-II)	The assessee have not submitted any evidence in this regard.
	42,05,398		

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In view of the findings as tabulated above, I deny the assessee's submission in this regard.

12. In light of the foregoing, I hold that the assessee is liable for payment of Service Tax amounting to Rs.8,99,823/- for the period from July, 2010 to December, 2010 and Rs.22,83,554/- for the period January, 2011 to December, 2011, totaling to Rs.31,83,377/- in terms of Section 73(2) of the Finance Act, 1994. Further, I also hold that the proposed demand of Rs.26,03,290/- for the period from January, 2010 to December, 2010 and Rs.25,49,941/- for the period from January, 2011 to December, 2011 is not sustainable as per laws.

13. Coming to the demand of interest, as per Section 75 of Finance Act 1994, if the person liable to pay service tax fails to pay the same by the due date, he is required to pay service tax along with interest at the applicable rates for the period of delay, i.e., for the period from the due date to the date of actual payment. In the present case, since M/s Alpine Estates has failed to discharge the service tax liability, I hold that the taxpayer is liable to pay interest at the applicable rate(s) on the service tax amount of Rs.31,83,377/- in terms of Section 75 of the Finance Act, 1994.

14.1. 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 wilful breach. Of course, just because penalty is prescribed that should not mechanically be levied following Apex Court's decision in the case of Hindustan Steel Ltd. V. State of Orissa reported in 1978 (2) ELT (J159) (S.C.) = AIR 1970 S.C. 253. Section 80 of the Finance Act, 1994 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. The submission of the assessee made vide letter dated 21.03.2023 does not constitute reasonable cause so as to exonerate them from the penalties by

invoking Section 80 of the Act. Reliance is placed on the following case laws:-

(i) 2007 (6) S.T.R. 32 (Tri.-Kolkata)- CCE., Kolkata-1 Versus GURDIAN LEISURE PLANNERS PRIVATE LIMIRED.

(ii) 2005 (188) E.L.T. 445 (Tri.- Chennai) - Trans (India) Shipping Private Limited Versus CCE. Chennali-1.

14.2 In view of the above, I hold that in the both notices penalty under Section 76 is rightly imposed.

15. In the show cause notices, it is mentioned that the taxpayer had contravened Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 and Section 70 of the Finance Act, 1994. As they have contravened the rules and provisions, they are liable to pay a penalty of Rs.1000/- in terms of Section 77 of the Finance Act, 1994.

16. Now I find it pertinent to extract and reproduce the saving provisions contained in Section 174 of the CGST Act, 2017 effective from 01.07.2017 for ease of reference and understanding. Section 174 reads as under:

> ***"Section 174.***
> *(1) .....*
> *(2) The* ***repeal of the said Acts and the amendment of the Finance Act, 1994****(hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173* ***shall not—***
> *(a) revive anything not in force or existing at the time of such amendment or repeal; or*
> *(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or*
> *(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts.*
> *Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or*
> *(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or*
> *(e)* ***affect any*** *investigation, inquiry, verification (including scrutiny and audit), assessment proceedings,* ***adjudication and any other legal proceedings*** *or recovery of arrears or remedy in respect of any such duty, tax, surcharge,*

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penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and ***any such*** *investigation, inquiry, verification (including scrutiny and audit), assessment proceedings,* ***adjudication and other legal proceedings*** *or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed* ***as if these Acts had not been so amended or repealed;***

(f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed".

[Emphasis Supplied]

17. Accordingly, in terms of the provisions of Section 174 (2) (e) of the CGST Act, 2017 and in view of my findings aforementioned, I pass the following orders:-

ORDER

(A) In respect of Show Cause Notice OR. No.62/2011-Adjn(ST) dated 23.04.2011:

(i) I **determine and order for recovery of Service Tax of Rs.8,99,823/-** (Rupees Eight Lakh Ninety Nine Thousand Eight Hundred Twenty Three Only) from them in terms of Section 73 (2) of the Finance Act, 1994.

(ii) I **drop the proposed demand of Rs.26,03,290/-** (Rupees Twenty Six Lakh Three Thousand Two Hundred Ninety Only) in view of my findings as discussed supra;

(iii) I demand interest at applicable rate on the services tax demanded at (A)(i) above in terms of Section 75 of the Finance Act, 1994 from them;

(iv) I impose as penalty @ Rs.200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of service tax under Section 76 of the Finance Act, 1994 on them . However, the total amount of penalty payable in terms of Section 76 shall not exceed the service tax payable.

(v) I impose a penalty of Rs.1,000/- under Section 77 of the Finance Act, 1994.

(B) In respect of Show Cause Notice OR. No.51/2012-Adjn(ST) dated 24.04.2012:

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(i) I **determine and order for recovery of Service Tax of Rs.22,83,554/-** (Rupees Twenty Two Lakh Eighty Three Thousand Five Hundred Fifty Four Only) from them in terms of Section 73 (2) of the Finance Act, 1994.

(ii) I **drop the proposed demand of Rs.25,49,941/-** (Rupees Twenty Five Lakh Forty Nine Thousand Nine Hundred Forty One Only) in view of my findings as discussed supra;

(iii) I demand interest at applicable rate on the services tax demanded at (B)(i) above in terms of Section 75 of the Finance Act, 1994 from them;

(iv) I impose as penalty @ Rs.200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of service tax under Section 76 of the Finance Act, 1994 on them . However, the total amount of penalty payable in terms of Section 76 shall not exceed the service tax payable.

(v) I impose a penalty of Rs.1,000/- under Section 77 of the Finance Act, 1994.

बी. विजय
27/3/24

(बी. विजय/ **B. Vijay**)

अपर आयुक्त/**Additional Commissioner**

सिकंदराबाद जीएसटी आयुक्तालय/**Secunderabad GST Commissionerate**

To
M/s. Alpine Estates.
5-4-187/3 & 4, II Floor,
Soham Mansion,
MG Road, Secunderabad-500003. (Through Range Officer)

Copy submitted to the Commissioner of Central Tax & Central Excise, Secunderabad Commissionerate, Hyderabad.

(Kind Attn.: Superintendent, Review)

Copy to:

1. The Assistant Commissioner of Central Tax, Secunderabad GST Division, Secunderabad Commissionerate.
2. The Assistant Commissioner of Central Tax (Arrears), Hqrs.Office, Secunderabad Commissionerate.
3. The Range Officer, Ramgopalpet-1 GST Range, Secunderabad GST Division, **with a direction to serve the order on the assessee and forward the dated acknowledgement obtained from them to this office**
4. Master Copy / Spare Copy/Office copy.

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Track Consignment

Quick help

* Indicates a required field.

* Consignment Number

JD406915467IN

Track More

Booked At	Booked On	Destination Pincode	Tariff	Article Type	Delivery Location	Delivery Confirmed On
BNPL Hyderabad	31/03/2024 11:43:01	500003	29.50	Inland Speed Post	Secunderabad H.O	01/04/2024 16:57:49

Event Details For : JD406915467IN

Current Status : Item Delivered(Addressee)

Date	Time	Office	Event
01/04/2024	16:57:49	Secunderabad H.O	Item Delivered(Addressee)
01/04/2024	10:48:05	Secunderabad H.O	Out for Delivery
01/04/2024	07:39:56	Secunderabad H.O	Item Received
01/04/2024	06:27:43	Hyderabad NSH	Item Dispatched
31/03/2024	16:40:48	BNPL Hyderabad	Item Dispatched
31/03/2024	16:03:05	BNPL Hyderabad	Item Bagged
31/03/2024	11:43:01	BNPL Hyderabad	Item Booked

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Serial No.	& Date	No.	Month	Date	from whom received	SUBJECT	File Head	Disposal
01	01/4/24	01	[illegible]		[illegible]	[illegible]		[illegible]
02	01/4/24	01	[illegible]		[illegible]	[illegible]		H/SJP
03	3/4/24	01	[illegible]		Booking from COHS	A-403		H/S top.
04	3/4/24	10	[illegible]		[illegible]	[illegible]		[illegible]
05	3/4/24	01	[illegible]		Booking from CHR	H-408		[illegible]
06	4	01	[illegible]		Booking for CHR	E-506		[illegible]
07	4	01	[illegible]		Booking from CHR	H-107		[illegible]

Annexure-III

Hiregange & Associates
Chartered Accountants

Date: 18.12.2020
To
The Joint Commissioner of Central Tax,
Secunderabad GST Commissionerate,
GST Bhavan, L.B.Stadium Road,
Basheer Bagh,
Hyderabad – 500 004.

Dear Sir,

Sub: Filing of remand submissions

Ref: Final Order No. ST/30699/2019 dated 19.06.2019 pertaining to M/s. Alpine Estates

1. We have been authorized by M/s. Alpine Estates to submit remand submissions for denovo adjudication as directed by the Hon'ble CESTAT Hyderabad vide Final Order No. ST/30699/2019 dated 19.06.2019 and represent before your good office and to do necessary correspondence in the above referred matter.
2. In this regard, we are herewith submitting the remand submissions, authorization letter along with this letter.
3. Further, we have appeared before your good self for personal hearing on 11.12.2020 wherein your good self has requested us to submit sale copies of customer ledgers, sale deeds and receipt wise statement for the periods January 2010 to December 2011. In this regard, we wish to bring to your notice that we are in the process of collating the documents and shall submit the same within a week.

We shall be glad to provide any other information in this regard. Kindly acknowledge the receipt of the reply and post the hearing at the earliest.

Thanking You,

Yours faithfully,

For Hiregange& Associates
Chartered Accountants

Venkata Prasad P
Partner

Received copy
18/12/20
Superintendent (Adjn.)

Head Office Bengaluru
1010, 2nd Floor, (Above Corporation Bank), 26th Main, 4th "T" Block, Jayanagar, Bangalore - 560 041. Tele : +91 080 4121 703, Telefax : 080 2653 6404 / 05 Email ID: rajesh@hiregange.com

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Chennai : T3, Amar Sindhur, Pantheon Road Egmore, Chennai - 600 008. Tele: +91 044 4858 0801 Email ID: vikram@hiregange.com

Website : www.hiregange.com

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BEFORE JOINT COMMISSIONER OF CENTRAL TAX, SECUNDERABAD GST COMMISSIONERATE, GST BHAVAN, LB STADIUM ROAD, HYDERABAD-500 004

Sub: Written submissions for *denovo* adjudication as directed by Hon'ble CESTAT, Hyderabad vide Final Order No.ST/30699/2019 dated 19.06.2019

Brief facts:

A. Noticee is engaged in sale of residential houses in venture by name "Flower Heights" to prospective buyers while the units are under construction by entering into following agreements

- Sale Deed for sale of undivided portion of land together with semi-finished flat. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.
- Construction agreement for undertaking construction

B. Department has initially issued a Show Cause Notice dated 16.06.2010 covering the period January 2009 to December 2009 ("First SCN") proposing to demand service tax on amounts received towards construction agreement. The Hon'ble CESTAT vide Final order No. A/30172-30178/2019 dated 31.01.2019 set aside the demands raised in the above SCN holding that service tax is not applicable on sale of flats prior to 01.07.2010.

C. The above Show Cause Notice was followed by below periodical notices under Section 73(1A) for the period January 2010 to December 2011 which are in dispute in the Final Order No.ST/30699/2019 dated 19.06.2019

SCN reference	Time period	Proposed Demand
SCN No. 62/2011-Adjn (S.T.) Gr.X dated 23.04.2011	Jan 2010 to Dec 2010	Rs.35,03,113/-
SCN No. 52/2012-Adjn (Addl.Commr) dated 24.04.2012	Jan 2011 to Dec 2011	Rs.48,33,495/-
Total		**Rs.83,36,608/-**

D. The above referred SCN's were adjudicated vide a common Order-in-Original No.49/2012-Adjn ST ADC dated 31.08.2012 wherein vide Para 17 it was accepted that service tax would not be demanded on sale deed value however OIO dated 31.08.2012 had included the amounts received towards Sale deeds also.

E. Noticee has filed an appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide Order-in-Appeal No.38/2013 (H-II) S. Tax dated 27.02.2013 upheld the OIO but remanded the matter for re-quantification.

F. To the extent aggrieved by Order-in-Appeal, the Noticee has filed appeal before Hon'ble CESTAT, Hyderabad. The Hon'ble CESTAT, Hyderabad has heard the matter and set aside the demand for the period January 2010 to June 2010 and set aside the demand raised on registration fees, VAT etc for the period January 2010 to December 2011. With respect to demand for the period July 2010 to December 2011, the Hon'ble CESTAT had remanded the matter to the original authority for denovo adjudication only to the

limited extent to check whether the Show Cause Notice has given deduction towards sale deed value or not. If the deduction is not given, directed the adjudicating authority to pass the denovo order after giving the deduction.

G. Noticee has filed an Rectification of Mistake Application against the above referred Final Order and the same is pending for disposal.

H. The Noticee is herewith making following submissions for *denovo* adjudication.

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Submissions for the *Denovo* adjudication:

1. Noticee at the outset submits that the Noticee has filed the Rectification of Mistake Application against the Final Order No. ST/30699/2019 dated 19.06.2019 and the same is pending before the CESTAT. As the issue is pending before Hon'ble Tribunal and matter is *sub-judice*, Noticee humbly requests Ld. Adjudicating authority to keep the proceedings in abeyance till the disposal of Rectification of Mistake Application by Hon'ble CESTAT, Hyderabad. In this regard, reliance is placed on

   a. Vilsons Roofing Products Pvt Ltd Vs CCE, Kolhapur 2013-TIOL-2023-CESTAT-MUM wherein it was held that "*4. Brief facts of the case are that the appellants filed a refund claim before the adjudicating authority which was sanctioned and the refund was given to the appellants. Against the said order, the Revenue preferred an appeal before the Commissioner (Appeals) who set aside the order of sanctioning the refund claim and remanded the matter back to the adjudicating authority for reconsideration. The said order was challenged by the appellants before the Tribunal on the ground that the Commissioner (Appeals) has no power to remand the matter to the adjudicating authority and obtained stay from the Tribunal. While the matter is pending before the Tribunal, the adjudicating authority, on the matter on remand by the Commissioner (Appeals), has rejected the refund claim of the appellants.*

On appeal before the Commissioner (Appeals) the rejection was upheld. Aggrieved by the said order the appellants are before me.

5. When the issue before this Tribunal is sub judice therefore, the remand proceeding was not warranted. Hence, the impugned order passed by the adjudicating authority has no legal sanctity. Accordingly, the impugned order is set aside and the appeals are allowed. The stay applications are also disposed of in the above terms."

b. Agro Tech Foods Pvt Ltd Vs CC(I), Nhavasheva 2017 (345) ELT 668 (Tri-Mum)

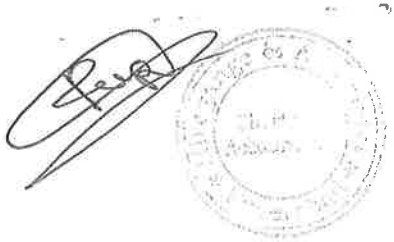
c. Fiberfill Engineers Vs CCE, Delhi 2016 (332) ELT 478 (Del)

d. P K International Vs CCE, Thane-II 2014 (301) ELT 3 (Bom)

e. CC, Uttar Pradesh Vs Pidilite Industries Limited 2014 (309) ELT 598 (All)

2. Without prejudice to above, As stated in the background facts, the Hon'ble CESTAT vide Para 7 of the Final Order No. ST/30699/2019 dated 19.06.2019 set aside the demand prior to 01.07.2010 and remanded the matter to the adjudication authority for reconsideration to verify the quantification of the demand for the period July 2010 to December 2011. Further, Noticee submits that the Hon'ble CESTAT vide Para 4 and 5 held as follows

"4. Heard both sides. The finding of Commissioner in Para 17 is reproduced as under



'various flats have been sold by them to various customers in two states. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customers. Appropriate stamp duty was paid on the sale deed. No Service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"

"5. After hearing the submissions of the learned A.R we are of the view that the matter requires to be reconsidered as to whether the amounts included in the sale deed value of immovable property would be subject to levy of service tax under construction services. The computation in the Order-in-Original has to be looked into on the basis of the sale deed executed by the Noticee with customer which includes the semi-finished flat. Other charges like registration fees, VAT, etc needless to say will not be subject to service tax as being reimbursable."

3. Noticee submits that on combined reading of Para 5 and 7 of the Final Order, it is clear that the entire demand on amounts received towards Construction Agreement and Sale deed has been set aside for the period January 2010 to June 2010 and the demand on registration fees, VAT etc

are set aside for the entire period i.e, January 2010 to December 2011. Therefore, demand to that extent needs to be reduced.

4. With respect to demand on sale deed values for the period July 2010 to December 2010, Noticee submits that the Hon'ble CESTAT has remanded the matter to lower authority to check whether the deduction was actually given for the sale deed values as stated in Para 7 of SCN No. 62/2011-Adjn (ST) Gr.X dated 23.04.2011 and SCN No.52/2012-Adjn (Addl Commr) dated 24.04.2012, Para 17 of OIO No. 49/2012-Adjn-ST ADC dated 31.08.2012

5. The Show Cause Notice dated 23.04.2011 vide Para 7 and Show cause notice dated 24.04.2012 vide Para 3 alleged that

   "As there involved the transfer of property in goods in execution of the said construction agreements, ***it appears that the services rendered by them after execution of sale deed against agreement of construction*** *to each of their customers to whom the land was already sold vide sale deed are taxable services under "Works Contract Services".*

   As seen from the operative part of SCN, the sole allegation of SCN is that the amounts received towards construction agreements are subject to service tax under the category of "Works Contract".

6. The same was confirmed by the OIO vide Para no. 17as follows *"No Service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into*

another agreement with the customer for completion of the said flats and the ***service tax demand is confined to this agreement"***

7. However, while quantifying the demand, the SCN and OIO has included the value of sale deeds and other reimbursements such as VAT, registration charges etc though the same was never the allegation in the SCN.

8. It is therefore apparent that the SCN represents an error in quantification of the demand. Once the same is rectified, there is no short payment of service tax. The details of amounts received towards construction agreement, sale deed value, VAT, registration etc are as follows:

Particulars	Jan 2010 to Dec 2010	Jan 2011 to Dec 2011
Gross receipts	11,45,70,426	11,82,85,406
Less: Amounts received for the period January 2010 to June 2010	5,51,27,612	Not Applicable
Amount received during the period July 2010 to December 2010	5,94,42,814	Not Applicable
Less: Sale Deed value	3,07,28,504	5,46,49,500
Less: VAT, Registration Charges and other non-taxable receipts	68,73,952	82,09,816
Taxable Value	2,18,40,358	5,54,26,090
ST Liability @4.12%	8,99,823	22,83,555
Total Service tax payable		**31,83,378**
Service Tax paid		**42,05,398**
Payable/(Excess paid)		**(10,22,020)**

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The detailed statement showing the flat wise calculations would be submitted. It is humbly requested Ld. Adjudicating authority to inform any further documents required for verification of the above calculations.

As seen from the above table, an amount of Rs. 42,05,398/- has already paid towards service tax on the amounts received from customers against the liability of Rs. 31,83,378/- resulting in excess payment of Rs.10,22,020/-. Since Noticee has discharged the appropriate Service tax (even excess amount), the demand needs to be dropped.

9. Noticee submits that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

Construction of Residential complex for "Personal Use" is excluded from definition of Residential Complex

10. Without prejudice to the foregoing, assuming but not admitting the same is covered under the tax net. The term "Construction of Complex" is defined under section 65 (30a) as under

(30a) "construction of complex" means —

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

(b) completion and finishing services in relation 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

(c)repair, alteration, renovation or restoration of, or similar services in relation to, residential complex

11. Noticee submits that the construction service of the semi-finished flat is provided for the owner of the semi-finished flat/customer, who in turn used such flat for his personal use therefore the same is excluded from the definition of 'construction of complex service'.

12. The Noticee submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 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 Ac, 1994 and accordingly no service tax is payable on such transaction.

Relevant extract

"...Further, 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'..."

13. Noticee submits that issue of payment of service tax on agreements entered with individuals for completion of the semifinished houses who in turn used such flat for personal use is *no more res integra* in view of the **Jurisdictional CESTAT decision in case of**

    a. **Modi & Modi Constructions Vs CCE, Hyderabad-II 2019 (10) TMI 171 -CESTAT Hyderabad** wherein it was held that "*11. The second question is the nature of the contract on which service tax is proposed to be charged. The SCN itself states that the plots along with semi-finished buildings were sold to the buyers under the sale agreement. Thereafter, a separate agreement was entered into with the individual home owners for completion of the building/structure as per the agreement. In other words, there is no agreement for completion of the entire complex but there are a number of agreements with each individual house owner for completion of their building. In other words, the individual house owner is engaging the Noticee for construction of the complex for his personal use as residence. The explanation to section 65(91a) categorically states that personal use includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, it does not matter whether the individual buyer uses the flat himself or rents it out. There is nothing on record to establish that the individual buyers do not fall under the*

aforesaid explanation. For this reason, we find no service tax is chargeable from the Noticee on the agreements entered into by them with individual buyers for completion of their buildings as has been alleged in the SCN. Consequently, the demand needs to be set aside and we do so. Accordingly, the demands for interest and imposition of penalties also need to be set aside."

b. Modi Ventures Vs Commissioner of Central Tax, Hyderabad in Final Order No.30882/2020 dated 03.03.2020

14. Noticee submits that from the above referred decision, it is clear that there is no liability to pay service tax on the amounts received during the period July 2010 to December 2011. Thereby, the entire demand proposed in the impugned Show Cause Notices needs to be dropped.

15. Without prejudice to above, Noticee submits that sale deed is executed for semi-finished flat represents the construction work already done prior to booking of flat by the prospective buyer. The work undertaken till that time of booking flat is nothing, but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self-service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be bought into the realm of works contract. In this regard, reliance is placed on the following:

a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.)wherein it was held that ***"115.*** *It may, however,* ***be clarified that 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****. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."*

b. CHD Developers Ltd vs State of Haryana and others, 2015 –TIOL-1521-HC – P&H-VAT wherein it was held that *"45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property."*

16. It is further submitted that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi finished flat is not chargeable to

VAT and it is mere sale of immovable property (same was supported by above cited judgments also). Therefore said sale cannot be considered as works contract and consequently no service tax is liable to be paid. All the goods till the prospective customer become owner have been self consumed and not transferred to anybody. Further goods, being used in the construction of semi-finished flat, have lost its identity and been converted into immovable property which cannot be considered as goods therefore the liability to pay service under 'works contract service' on the portion of semi-constructed villa represented by *'sale deed'* would not arise.

Interest and penalties are not imposable

17. Noticee submits that when service tax itself is not payable, the question of interest does not arise. 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)

18. Noticee submits that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the penalty requires to be dropped.

19. Noticee submits that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It settled position of the law that if the Noticee is under bonafide belief as regards to non taxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.

    a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)

    b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

20. Without prejudice to the foregoing, Noticee submits that the SCN/OIO has not explained the reason for imposition of penalties under Section 76 and 77 of the Finance Act, 1994. As the subject show cause notice has not considered these essential aspects, the proposition of levying penalty under section 76 and 77 is not sustainable and requires to be set aside.

21. Noticee submits that issue involves interpretation and the periodical notices has been issued to the Noticee, the imposition of penalties under Section 76 is not tenable and the same needs to be set aside. In this regard, Noticee relied on M/s. Phoenix IT Solutions Ltd Vs CCE 2017 (52) STR 182 (Tri-Hyd).

22. Further, there is bona fide litigation is going on and issue was also debatable which itself can be considered as reasonable cause for failure to

pay service tax. Accordingly, waiver of penalty under section 80 of Finance Act, 1994 can be made. In this regard reliance is placed on C.C.E., &Cus., Daman v. PSL Corrosion Control Services Ltd 2011 (23) S.T.R. 116 (Guj.);

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

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

For Alpine Estates

CA Venkata Prasad P
Authorized Representative
Date: 11.12.2020

Hiregange & Associates
Chartered Accountants

Date: 18.02.2021
To
The Additional Commissioner of Central Tax,
Secunderabad GST Commissionerate,
GST Bhawan, L.B.Stadium Road,
Basheerbagh,
Hyderabad – 500 004

Dear Madam,
Sub: Submission of documents after personal hearing

Ref:

a. Personal Hearing attended on 11.12.2020 at 03.00 PM in O.R.No.29/2019-20-Sec-Adjn-JC-ST dated 05.10.2020 pertaining to M/s. Alpine Estate
b. Remand submissions dated 18.11.2020

1. We are authorized to represent the above referred entity and have attended the personal hearing on 11.12.2020 at 03.00 PM with respect to remand proceedings directed by the Hon'ble CESTAT, Hyderabad vide Final Order No.ST/30699/2019 dated 19.06.2019. Subsequently, we have filed the remand submissions on 18.12.2020.

2. Further, during the course of personal hearing on 11.12.2020, your good self has asked us to submit the sample copies of customer ledgers, sale deeds and receipt wise statement for the period January 2010 to December 2011. In this regard, we are herewith submitting the following
   a. Sample copies of sale deeds along with ledger accounts of customers for the period January 2010 to December 2011
   b. Receipt wise statement for the period January 2010 to December 2011

Office of the Commissioner of Central Tax (Appeals) Secunderabad GST Commissionerate 19 FEB

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1010, 2nd Floor, (Above Corporation Bank), 26th Main, 4th "T" Block, Jayanagar, Bangalore - 560 041. Tele : +91 080 4121 703, Telefax : 080 2653 6404 / 05 Email ID: rajesh@hiregange.com

Branch Offices
Hyderabad : 4th Floor, West Block, Srida Anushka Pride (Above Lawrence and Mayo), Opp. Ratnadeep Supermarket Road Number 12, Banjara Hills, Hyderabad, Telangana - 500 034. Tele: +91 040 2331 8128, Email ID: sudhir@hiregange.com

Visakhapatnam : Flat No. 101, D.No. 9-19-18 Sai Sree Kesav Vihar, Behind Gothi Sons Show Room CBM Compound, Visakhapatnam - 530 003. Tele: +91 0891-2509235, Email ID: anil@hiregange.com

Gurgaon : # 509, Vipul Trade Centre Sector-48, Sohna Road, Gurgaon Haryana - 122 009. Tele: +91 85109 50400 Email ID: ashish@hiregange.com

Mumbai : Flat No. 409, Filix, Opp. Asian Paints LBS Marg, Bhandup (West), Mumbai - 400 078. Tele: +91 022 2595 5544, 022 2595 5533 Email ID: vasant.bhat@hiregange.com

Pune : Rajyog Creations Apts, # 5, 4th Floor (Above HDFC Bank), Anand Park, Aundh Pune - 411 007. Tele : +91 020 4120 2013 Email ID: ravikumar@hiregange.com

Chennai : T3, Amar Sindhur, Pantheon Road Egmore, Chennai - 600 008. Tele: +91 044 4858 0801 Email ID: vikram@hiregange.com

Website : www.hiregange.com

3. In this regard, we would like to submit that the details of stamp duty and VAT paid was clearly mentioned on the sale deed by the Sub-registrar office which can be considered while passing the order. Further, the details of other reimbursements can be evidenced from the customer ledger accounts. Hence, we request you to drop the demand to that extent.

We shall be glad to provide any other information required in this regard. Kindly acknowledge the receipt of this letter and do the needful.

Thanking You,

Yours Truly,

For Hiregange & Associates
Chartered Accountants

Venkata Prasad P
Partner

Enclosures

a. Sample copies of sale deeds along with ledger accounts of customers for the period January 2010 to December 2011
b. Receipt wise statement for the period January 2010 to December 2011

OIC L-46

Hiregange
& Associates LLP
Chartered Accountants

Date: 21.03.2023
To
The Joint Commissioner of Central Tax,
Secunderabad GST Commissionerate,
GST Bhavan, L.B Stadium Road,
Hyderabad-500004

Dear Sir,
Sub: Filing of Additional Submissions in continuation with the earlier remand submissions dated 18.12.2020 pertaining to **M/s. Alpine Estates.**
Ref:

a. Remand Submissions dated 18.12.2020
b. Final Order No. ST/30699/2019 dated 19.06.2019.
c. Miscellaneous Order No. M/30226/2022 dated 11.03.2022

1. We have been authorized by M/s. Alpine Estates to submit remand submissions to the above referred Final Order No. ST/30699/2019 dated 19.06.2019 and represent before your good office and to do necessary correspondence in the above referred matter.
2. In this regard, we have attended the personal hearing before your good self on 13.02.2023 wherein you goodself have asked us to submit certain information. In this regard, we are herewith submitting the remand submissions, the authorization letter along with the requested information.

We shall be glad to provide any other information in this regard. Kindly acknowledge the receipt of the reply and post the hearing at the earliest.

Thanking You,

Yours faithfully,

For M/s. Hiregange & Associates LLP
Chartered Accountants

K Lakshman Kumar

CA Lakshman Kumar K
Partner- Designate

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Alpine Estates

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Secunderabad – 500 003. Ph: +91 40 66335551

BEFORE JOINT COMMISSIONER OF CENTRAL TAX, SECUNDERABAD GST COMMISSIONERATE, GST BHAVAN, LB STADIUM ROAD, HYDERABAD-500 004

Sub: Written submissions for *denovo* adjudication as directed by Hon'ble CESTAT, Hyderabad vide Final Order No.ST/30699/2019 dated 19.06.2019 read with Misc. Order No. M/30226/2022 dated 11.03.2022

Brief facts:

A. Noticee is engaged in sale of residential houses in venture by name "Mayflower Heights" to prospective buyers while the units are under construction by entering into following agreements:

- Sale Deed for sale of undivided portion of land together with semi-finished flat. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.
- Construction agreement for undertaking construction

B. Department has initially issued a Show Cause Notice dated 16.06.2010 covering the period January 2009 to December 2009 ("First SCN") proposing to demand service tax on amounts received towards construction agreement.

C. The above Show Cause Notice was followed by below periodical notices under Section 73(1A) for the period January 2010 to December 2011 which are in dispute in the Final Order No.ST/30699/2019 dated 19.06.2019.

SCN reference	Time period	Proposed Demand
SCN No. 62/2011-Adjn (S.T.) Gr.X dated 23.04.2011	Jan 2010 to Dec 2010	Rs.35,03,113/-
SCN No. 52/2012-Adjn (Addl.Commr) dated 24.04.2012	Jan 2011 to Dec 2011	Rs.48,33,495/-
Total		Rs.83,36,608/-

(Copy of SCN's enclosed as Annexure V)

D. The above referred SCN's were adjudicated vide a common Order-in-Original No.49/2012-Adjn ST ADC dated 31.08.2012 wherein vide Para 17 it was accepted that service tax would not be demanded on sale deed value

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however OIO dated 31.08.2012 had included the amounts received towards Sale deeds also (Copy of Order-in-original is enclosed as Annexure **IV**) .

E. Noticee has filed an appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide Order-in-Appeal No.38/2013 (H-II) S. Tax dated 27.02.2013 upheld the OIO but remanded the matter for re-quantification (Copy of Order-in-Appeal is enclosed as Annexure **III**).

F. To the extent aggrieved by Order-in-Appeal, the Noticee has filed appeal before Hon'ble CESTAT, Hyderabad. The Hon'ble CESTAT, Hyderabad has heard the matter and set aside the demand for the period January 2010 to June 2010 and set aside the demand raised on registration fees, VAT etc for the period January 2010 to December 2011 vide its Final Order No. ST/30699/2019 dated 19.06.2019 (Copy of Final order is enclosed as Annexure **I**).

G. With respect to demand for the period July 2010 to December 2011, the Hon'ble CESTAT had remanded the matter to the original authority for denovo adjudication only to the limited extent to check whether the Show Cause Notice has given deduction towards sale deed value or not. If the deduction is not given, directed the adjudicating authority to pass the denovo order after giving the deduction.

H. Noticee has filed a Rectification of Mistake Application against the above referred Final Order and a clear finding has been provided by the CESTAT, Regional Bench, Hyderabad vide the Misc. Order No. M/30226/2022 dated 11.03.2022 wherein it was held at Paras 4 & 5 which are reproduced as under (Copy of ROM order is enclosed as Annexure -**II**):

"We have gone through the application for rectification of mistake and have perused the Final Order. We do not feel there is any error apparent on record. The Final Order must be read as a whole. The direction in the Final Order was neither to go beyond the scope of the SCN nor to consider levying service tax on sale deed value of immovable property. If the Final Order is read as a whole, it would be clear that the matter has been remanded for the purpose

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of computing the demand of service tax after 01.07.2010 and also reconsidering the penalty for this period and NOT to consider levying/charging Service Tax on value of sale of the property. The demand for the period prior to 01.07.2010 has already been set aside in the Final Order. Paragraph 17 of the impugned order of the Commissioner also indicated that the demand was only in respect of the service contract entered into after the sale deed has been executed and not on the sale value of the immovable property. This is also reproduced in paragraph 4 of the Final Order.

5. In view of the above, we find that there is neither any error apparent on record nor is there any direction to the Commissioner in the Final Order to go beyond the scope of SCN and demand service tax on the value of transfer of immovable property. The appeal was partly allowed up to 01.07.2010 and partly remanded for the period after 01.07.2010 for reconsideration of both the demand and the penalty. The application for rectification of mistake is accordingly dismissed".

I. The Noticee is herewith making following submissions for *denovo* adjudication.

Submissions for the *Denovo* adjudication:

1. As stated in the background facts, the tribunal in its Final Order No. ST/30699/2019 dated 19.06.2019 **set aside the demand prior to 01.07.2010 and remanded the matter to the adjudication authority for reconsideration to verify the quantification of the demand for the period July 2010 to December 2011.** Further, Noticee submits that the Hon'ble CESTAT vide Para 4 and 5 held as follows

   "4. Heard both sides. The finding of Commissioner in Para 17 is reproduced as under 'various flats have been sold by them to various customers in two states. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the

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customers. Appropriate stamp duty was paid on the sale deed. No Service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"

"5. After hearing the submissions of the learned A.R we are of the view that the matter requires to be reconsidered as to whether the amounts included in the sale deed value of immovable property would be subject to levy of service tax under construction services. The computation in the Order-in-Original has to be looked into on the basis of the sale deed executed by the Noticee with customer which includes the semi-finished flat. Other charges like registration fees, VAT, etc needless to say will not be subject to service tax as being reimbursable."

2. Noticee submits that the even the Misc. Order No. M/30226/2022 dated 11.03.2022 held at Paras 4 & 5 which are reproduced as under:

"4. We have gone through the application for rectification of mistake and have perused the Final Order. We do not feel there is any error apparent on record. The Final Order must be read as a whole. The direction in the Final Order was neither to go beyond the scope of the SCN nor to consider levying service tax on sale deed value of immovable property. If the Final Order is read as a whole, it would be clear that the matter has been remanded for the purpose of computing the demand of service tax after 01.07.2010 and also reconsidering the penalty for this period and NOT to consider levying/charging Service Tax on value of sale of the property. The demand for the period prior to 01.07.2010 has already been set aside in the Final Order. Paragraph 17 of the impugned order of the Commissioner also indicated that the demand was only in respect of the service contract entered into after the sale deed has been executed and not on the sale value of the

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immovable property. This is also reproduced in paragraph 4 of the Final Order.

5. In view of the above, we find that there is neither any error apparent on record nor is there any direction to the Commissioner in the Final Order to go beyond the scope of SCN and demand service tax on the value of transfer of immovable property. The appeal was partly allowed up to 01.07.2010 and partly remanded for the period after 01.07.2010 for reconsideration of both the demand and the penalty. The application for rectification of mistake is accordingly dismissed".

3. Noticee submits that on combined reading of Para 5 and 7 of the Final Order No./30699/2019 dated 19.06.2019 and Para 4 and 5 of the Misc. Order No. M/30226/2022 dated 11.03.2022, it was clearly stated that the entire demand on amounts received towards Construction Agreement and Sale deed has been set aside for the period January 2010 to June 2010 and the demand on registration fees, VAT etc are set aside for the entire period i.e, January 2010 to December 2011. Therefore, it is requested before your good self that demand to that extent for the period January 2010 to June 2010 needs to be reduced.

4. In this regard, it is submitted that with respect to demand on sale deed values for the period July 2010 to December 2010, Noticee submits that the Hon'ble CESTAT has remanded the matter to lower authority to check whether the deduction was actually given for the sale deed values as stated in Para 7 of SCN No. 62/2011-Adjn (ST) Gr.X dated 23.04.2011 and SCN No.52/2012-Adjn (Addl Commr) dated 24.04.2012, Para 17 of OIO No. 49/2012-Adjn-ST ADC dated 31.08.2012

5. The Show Cause Notice dated 23.04.2011 vide Para 7 and Show cause notice dated 24.04.2012 vide Para 3 alleged that

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"As there involved the transfer of property in goods in execution of the said construction agreements, ***it appears that the services rendered by them after execution of sale deed against agreement of construction*** *to each of their customers to whom the land was already sold vide sale deed are taxable services under "Works Contract Services".*

As seen from the operative part of SCN, the sole allegation of SCN is that the amounts received towards construction agreements are subject to service tax under the category of "Works Contract".

6. The same was confirmed by the OIO vide Para no. 17 as follows *"No Service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the* ***service tax demand is confined to this agreement***"

7. However, while quantifying the demand, the SCN and OIO has included the value of sale deeds and other reimbursements such as VAT, registration charges etc though the same was never the allegation in the SCN.

8. It is therefore apparent that the SCN represents an error in quantification of the demand. Once the same is rectified, there is no short payment of service tax. The details of amounts received towards construction agreement, sale deed value, VAT, registration etc are as follows:

Particulars	Jan 2010 to Dec 2010	Jan 2011 to Dec 2011
Gross receipts	11,45,70,426	11,82,85,406
Less: Amounts received for the period January 2010 to June 2010	5,51,27,612	Not Applicable
Amount received during the period July 2010 to December 2010	5,94,42,814	Not Applicable
Less: Sale Deed value	3,07,28,504	5,46,49,500
Less: VAT, Registration Charges and other non-taxable receipts	68,73,952	82,09,816

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Taxable Value	2,18,40,358	5,54,26,090
ST Liability @4.12%	8,99,823	22,83,555
Total Service tax payable		**31,83,378**
Service Tax paid		**42,05,398**
Payable/(Excess paid)		**(10,22,020)**

9. The detailed statement showing the flat wise calculations is enclosed as **Annexure-VI.** It is humbly requested before the Ld. Adjudicating authority to inform any further documents required for verification of the above calculations (Copy of ledgers along with sale deed copies are enclosed as **Annexure-VII)**.
10. As seen from the above table, an amount of Rs. 42,05,398/- has already paid towards service tax on the amounts received from customers against the liability of Rs. 31,83,378/- resulting in excess payment of Rs.10,22,020/-. Since Noticee has discharged the appropriate Service tax (even excess amount), the demand needs to be dropped (Copy of challans are enclosed as **Annexure-VIII)**.
11. Further, it can also be seen from the ST-3 Return (Copy of the ST-3 Return is enclosed as **Annexure-IX)** filed by the Noticee for FY 2010-11 wherein no service tax was paid for the period January 2010 to June 2010. The details of the payments made to the extent of Rs. 42,05,398/- are as follows

SI No	Cheque/ Pay Order No.	Amount (Rs.)	Remarks
A	267251 dated 10.06.2011 & 435410 dated 13.02.2012	21,95,524	Paid through cash
B	ST-3 returns	36,958	Paid through CENVAT Account
C	922747 dated 13.01.2013.	19,72,916	Paid in consequent to order in Stay Petition No. 63/2012 (H-II) S. Tax dated 07.12.2012 before Commissioner (Appeals-II)
	Total	**42,05,398**	

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12. It is submitted that as can be seen from the above referred table, the payments are pertaining to the period from July 2010 to December 2011. This fact is also evident from the SCN OR No. 51/2012-Adjn (Addl. Commr.) dated 24.04.2012 (Copy of the SCN is enclosed as **Annexure-V)** wherein the Noticee was asked to show cause as to why *"An amount of Rs. 21,95,524/- (Rs. 745524 Dt. 7.6.2011 and Rs. 14,50,000/- Dt. 09.02.2012) by them should not be adjusted against the demand supra"*. Thus, the department has already looked into this fact regarding the amount of Rs. 21,95,524/- and why it should be apportioned for the period January 2011 to December 2011, hence, it can be concluded that the service tax paid pertains to the period July 2010 to December 2011 and does not pertain to the period January 2010 to June 2010.

13. Noticee submits that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

Construction of Residential complex for "Personal Use" is excluded from definition of Residential Complex

14. Without prejudice to the foregoing, assuming but not admitting the same is covered under the tax net. The term "Construction of Complex" is defined under section 65 (30a) as under

(30a) "construction of complex" means —

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

(b) completion and finishing services in relation 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

(c)repair, alteration, renovation or restoration of, or similar services in relation to, residential complex

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15. Noticee submits that the construction service of the semi-finished flat is provided for the owner of the semi-finished flat/customer, who in turn used such flat for his personal use therefore the same is excluded from the definition of 'construction of complex service'.

16. The Noticee submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 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 Ac, 1994 and accordingly no service tax is payable on such transaction.

Relevant extract

*"...**Further, 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'..."***

17. Noticee submits that issue of payment of service tax on agreements entered with individuals for completion of the semifinished houses who in turn used such flat for personal use is *no more res integra* in view of the **Jurisdictional CESTAT decision in case of**

a. **Modi & Modi Constructions Vs CCE, Hyderabad-II 2019 (10) TMI 171 -CESTAT Hyderabad** wherein it was held that "*11. The second question is the nature of the contract on which service tax is proposed to be charged. The SCN itself states that the plots along with semi-*

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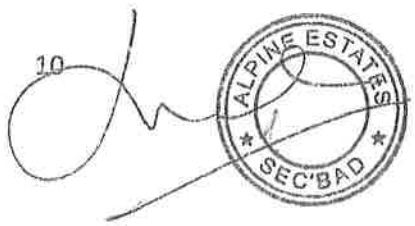
finished buildings were sold to the buyers under the sale agreement. Thereafter, a separate agreement was entered into with the individual home owners for completion of the building/structure as per the agreement. In other words, there is no agreement for completion of the entire complex but there are a number of agreements with each individual house owner for completion of their building. In other words, the individual house owner is engaging the Noticee for construction of the complex for his personal use as residence. The explanation to section 65(91a) categorically states that personal use includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, it does not matter whether the individual buyer uses the flat himself or rents it out. There is nothing on record to establish that the individual buyers do not fall under the aforesaid explanation. For this reason, we find no service tax is chargeable from the Noticee on the agreements entered into by them with individual buyers for completion of their buildings as has been alleged in the SCN. Consequently, the demand needs to be set aside and we do so. Accordingly, the demands for interest and imposition of penalties also need to be set aside."

b. Modi Ventures Vs Commissioner of Central Tax, Hyderabad 2015 (6) TMI 825 - CESTAT BANGALORE

18. Noticee submits that from the above referred decision, it is clear that there is no liability to pay service tax on the amounts received during the period July 2010 to December 2011. Thereby, the entire demand proposed in the impugned Show Cause Notices needs to be dropped.

19. Without prejudice to above, Noticee submits that sale deed is executed for semi-finished flat represents the construction work already done prior to booking of flat by the prospective buyer. The work undertaken till that time of booking flat is nothing, but work done for self as there is no service



provider and receiver. It is settled law that there is no levy of service tax on the self-service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be bought into the realm of works contract. In this regard, reliance is placed on the following:

a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.)wherein it was held that ***"115.*** *It may, however,* ***be clarified that 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****. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."*

b. CHD Developers Ltd vs State of Haryana and others, 2015 –TIOL-1521-HC – P&H-VAT wherein it was held that *"45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property."*

20. It is further submitted that to be covered under the definition of works contract, one of the vital conditions is that there should be transfer of property in goods leviable for sales tax/VAT. Undisputedly sale of undivided portion of land along with semi finished flat is not chargeable to VAT and it is mere sale of immovable property (same was supported by above cited judgments also). Therefore said sale cannot be considered as

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works contract and consequently no service tax is liable to be paid. All the goods till the prospective customer become owner have been self consumed and not transferred to anybody. Further goods, being used in the construction of semi-finished flat, have lost its identity and been converted into immovable property which cannot be considered as goods therefore the liability to pay service under 'works contract service' on the portion of semi-constructed villa represented by *'sale deed'* would not arise.

Interest and penalties are not imposable

21. Noticee submits that when service tax itself is not payable, the question of interest does not arise. 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)

22. Noticee submits that imposition of penalty cannot be merely an automatic consequence of failure to pay duty hence the penalty requires to be dropped.

23. Noticee submits that they are under bonafide belief that the amounts received towards sale deeds are not subjected to service tax. It settled position of the law that if the Noticee is under bonafide belief as regards to non taxability imposition of the penalties are not warranted. In this regards wishes to rely on the following judicial pronouncements.
    a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)
    b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

24. Without prejudice to the foregoing, Noticee submits that the SCN/OIO has not explained the reason for imposition of penalties under Section 76 and

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77 of the Finance Act, 1994. As the subject show cause notice has not considered these essential aspects, the proposition of levying penalty under section 76 and 77 is not sustainable and requires to be set aside.

25. Noticee submits that issue involves interpretation and the periodical notices has been issued to the Noticee, the imposition of penalties under Section 76 is not tenable and the same needs to be set aside. In this regard, Noticee relied on M/s. Phoenix IT Solutions Ltd Vs CCE 2017 (52) STR 182 (Tri-Hyd).

26. Further, there is bona fide litigation is going on and issue was also debatable which itself can be considered as reasonable cause for failure to pay service tax. Accordingly, waiver of penalty under section 80 of Finance Act, 1994 can be made. In this regard reliance is placed on C.C.E., &Cus., Daman v. PSL Corrosion Control Services Ltd 2011 (23) S.T.R. 116 (Guj.);

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

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

For Alpine Estates

ALPINE ESTATES SEC'BAD

Authorized Signatory
Date: 15.03.2021

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Annexure - IV

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH – COURT NO – I

Service Tax Appeal No. 27015 of 2013

(Arising out of Order-in-Appeal No. 38/2013 (H-II) ST dated 27.02.2013 passed by Commissioner of Customs Central Excise & Service Tax (Appeals-II) Hyderabad)

M/s Alpine Estates
5-4-187/3&4, 2nd Floor,
M.G. Road,
Secunderabad 500 003 — Appellant

VERSUS

Commissioner of Central Excise & Service Tax,
Hyderabad-II Commissionerate
Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheer Bagh, Hyderabad-500004 — Respondent

APPEARANCE

Shri V.S. Sudhir, C.A. for the Appellant.
Shri B. Natesh Authorised Representative for the Respondent.

CORAM: HON'BLE Ms SULEKHA BEEVI C.S. MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No./ 30699 /2019

DATE OF HEARING: 19.06.2019
DATE OF DECISION: 19.06.2019

[ORDER PER: SULEKHA BEEVI C.S.]

Brief facts are that appellants were issued show-cause notice proposing to demand short-paid service tax under works contract service.

2. Learned consultant Shri Sudhir V.S. appearing on behalf of the appellant submitted that the appellants were engaged in construction of residential complexes. During the disputed period, they had entered into

two separate agreements with the customers. Firstly, the appellant would execute the sale-deed for sale of undivided portion of land together with semi-finished portion of the flat. Thereafter an agreement for construction was entered for completion of construction of the flat. The appellant has discharged the entire service tax liability as per the agreement of construction. The present show-cause notice is issued including the value shown in the sale-deed and also other reimbursable charges in the nature of registration fee etc. It is submitted by him that though the jurisdictional authority has made a categorical finding in para 17 of the impugned order that no service tax has been demanded on the sale-deed value in the light of the Board Circular dated 29.01.2009, at the time of confirmation of demand the said value as per the sale-deed also has been included. He therefore requested that the matter may be remanded so as to requantify the amount after giving the deductions as per the show-cause notice in respect of value shown in sale-deed as well as other reimbursable expenses such as VAT, registration fee etc.

3. Learned A.R. Shri B. Natesh appeared on behalf of the department and argued the matter. He adverted to the amendment brought forth in the definition of residential complex service with effect from 01.07.2010 to argue that whenever an advance is received by the assessee prior to issuance of the completion certificate, the said amount would be taxable and therefore in the present case, the amount in the sale-deed for the period post 01.07.2010 would be taxable. The amount shown in the sale-deed has been rightly subjected to levy of service tax and confirmed by the original authority.

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4. Heard both sides. The finding of the Commissioner in para 17 is reproduced as under:-

> " various flats have been sold by them to various customers in two states. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customers. Appropriate stamp duty was paid on sale deed value. No service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement"

5. After hearing the submissions of learned A.R. we are of the view that the matter requires to be reconsidered as to whether the amounts included in the sale-deed value of immovable property would be subject to levy of service tax under construction services. The computation in the order-in-original has to be looked into on the basis of the sale-deed executed by the appellant with customer which includes the semi-finished flat. Other charges like registration fee, VAT, etc. needless to say, will not be subject to service tax as being reimbursable expenses.

6. For the period prior to 01.07.2010, the learned consultant submitted that in the appellant's own case for the earlier period, the Tribunal as reported in 2019 (2) TMI 772 (CESTAT-Hyd) had held as under:-

> "5. On careful consideration of the submissions made by both sides, we find that the facts are not much in dispute and the demand is further period January, 2009 to December, 2009 in some cases June, 2007 to December, 2009 in some cases and June, 2005 to February, 2007 in some cases and in some cases June, 2005 to March, 2008. All these demands are in respect of the service tax liability on the builders for the services provided before 01.07.2010. The self-same issue was considered by the Bench in detailed in the case of *M/s Mehta & Modi Homes* and as also in the case of *M/s Kalla Developers & Builders* and held that prior to 01.07.2010 service tax liability will not arise on the builders. We do not find any reason to deviate from such a view already taken on the issue. Accordingly, we hold that all the impugned orders are unsustainable and liable to be set aside and we do so. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any."

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7. From the above, we hold that the impugned order is modified to the extent of setting aside the demand prior to 01.07.2010 and remanding the matter after 01.07.2010 to the adjudicating authority for reconsideration. The adjudicating authority in such remand proceedings shall also reconsider the issue of penalty. Appeal is partly allowed and partly remanded in above terms, with consequential reliefs, if any.

(Dictated and pronounced in open court)

-sd-

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

-sd-

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Neela reddy

प्रमाणित प्रति / CERTIFIED COPY
26-7-19
सहायक पंजीकार / Asst. Registrar
सीमाशुल्क, उत्पादशुल्क और सेवा कर अपील अधिकरण
Customs Excise And Service Tax Appellate Tribunal
हैदराबाद / Hyderabad

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Annexure-V

C.H.Sudhir C.H

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. 200 / 2012 (H-II) S.TAX

Date: 27.02.2013.

ORDER-IN-APPEAL No. 38/ 2013 (H-II) S.TAX
(Passed By Dr.S.L.Meena, Commissioner (Appeals-II)

PREAMBLE

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

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.

****

ORDER

Appeal No : 200 / 2012 (H-II)S.Tax

The subject appeal along with stay petition has been filed by M/s.Alpine Estates, 5-4-187/3 & 4, 2nd Floor, MG Road, Secundeerabad-500003 (hereinafter referred to as Appellants) against Order-in-Original No.49/2012-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 their records revealed that they had undertaken a single venture by name M/s Flower Heights located at Mallapur Old village, Uppal Mandal and received amount from customers towards sale of land and agreement of construction of 102 houses for the period Jan., 2010 to Dec., 2010. It was also found that they had not filed ST.3 returns for the said period. The subject venture of M/s Alpine Estates 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 . It was also found that the appellant 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. The total amount received towards such service was Rs. 8,50,27,011/- during the period Jan., 2010 to Dec., 2010.

2.1. Therefore two show cause notices were issued to the appellants covering the period Jan., 2010 to Dec., 2010 vide O.R.No. 62/2011-Adj (ST) Gr.X dt. 23.4.2011 for Rs. 35,03,11/- under Section 73 of FA,1994 along with interest under Section 75 of FA,1994 and proposing penal action under Section 76 and 77 of FA,1994 and for the period Jan., 2011 to Dec., 2011 vide O.R.No. 51/2012-Adj(ST)Gr.X dt. 24.4.2012 for Rs. 48,33,495/- Section 73 of FA,1994 along with interest under Section 75 of FA,1994 and proposing penal action under Section 76 and 77 of FA,1994. The lower authority vide the impugned order had confirmed the demand of service tax of 35,03,133/- in respect of SCN O.R.No. 62/2011-Adjn.(ST) dt. 23.04.2011 under Section 73(2) of the Finance Act, 1994 along with interest under Section75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, for the period of default till the date of payment, 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. 51/2012-Adjn.(ST) dt. 24.4.2012, the lower authority had confirmed the demand of service tax of Rs. 48,33,495/- under Section 73(2) of the Finance Act, 1994 along with interest under Section75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, for the period of default till the date of payment, 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 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. Relied on various decisions rendered relying on the Circular 108 which is the crux of the entire issue are as under:

- Classic Promoters vs CCE Mangalore 2009-TIOL--1106-CESTAT--Bang,
- Virgo Properties Pvt Ltd Vs CST, Chen 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., Manga 2009 (016) STR 0448 Tri.-Bang
- Shri Sai Constructions vs CST, Bangalore 2009 (016) STR 0445 Tri.-Bang

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

(iii) The issue involved in the instant case is whether the appellants are out of service tax levy since the ultimate consumer has put the same for personal use and covered vide

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Circular 108 and other circular. However in the subject order the discussion is restricted only to the classification of the service provided which was not an issue relevant to the present case. Both the notice and the Appellant are in consensus that the service provided is 'works contract services'. Hence, in such a situation the reliance on Circular No. 128/10/2010-ST dated 24.08.2010 is undesirable and out of context.

(iv) The impugned order has relied on the decision of the authority on advance ruling in the case of Hare Krishna Developers 2008 (10) S.T.R. 357 (A.A.R). It is pertinent to note the facts of the case are entirely different from facts of the present case and does not support the contention of the adjudicating authority.

(v) They are rendering works contract service as defined in Section 65 (105) (zzzza) of the Finance Act, 1994, it was also accepted by the subject order. The works contract service is provided in relation to construction of a new residential complex.

(vi) Non-taxability of the construction provided for an individual customer intended for his personal 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.

(vii) 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.

(viii) 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.

(ix) 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.

(x) 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 06.05.2010 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.

(xi) 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).

(xii) 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.

(xiii) For the period January 2010 to December 2010, the SCN had claimed that entire receipts of Rs.8,50,27,000/- are taxable. As per the statement submitted, the total receipts during the period are Rs. 11,70,98,426/-. Out of the said amount Rs.3,77,11,339/- is received towards value of sale deed and Rs.2,11,54,769/- is towards taxes and other charges which shall not be leviable to service tax. They had given breakup of such amounts along with the documentary proof for all such amounts which are Rs.2,00,000/- or above. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.5,82,32,318/- and not on the entire amount as envisaged in the order.

(xiv) For the period January 2011 to December 2011, the SCN had claimed that entire receipts of Rs.11,73,17,845/- are taxable without providing the permissible deductions. Out of the said amount Rs.5,66,66,170/- is received towards value of sale deed and Rs.66,11,038/- is towards taxes and other charges which shall not be leviable to service tax. They had given breakup of such amounts along with the documentary proof for all such amounts which are Rs.2, 00,000 or above. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.5, 40, 40,637 and not on the entire amount as envisaged in the order.

(xv) The service tax is to be levied on Rs.5,40,40,637 for the period January 2011-December 2011. Thus the service tax liability shall amount to Rs.22,26,474/-. Out of the said amount Rs.7, 45,524/- was paid on 4.6.2011 and disclosed in the ST-3 returns filed for the period and Rs.14,50,000/- was paid vide Challan dated 9.02.2012 and Rs.36, 958/- has been paid by utilization of Cenvat Credit.

(xvi) 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.)

(xvii) 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.)

(xviii) 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.

(xix) 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.63/2012 (H-II) ST dated 07.12.2012, wherein it was directed to pre-deposit 50% of the tax amount as confirmed vide the impugned order. However the pre-deposit of balance amounts, interest and penalties

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were waived. The appellants vide 17.01.2013 had submitted that they had made the pre-deposit as required.

5. When the main appeal was posted for personal hearing on 27.02.2013, Shri. VS Sudhir 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) Submitted that the appellants have complied with the conditions of stay order.

(iii) Construction of flats for individuals does not come under 'Works Contract Service' definition as construction of individual flat/unit would not come under meaning of construction of residential complex or a part thereof .

(iv) As per Board's Circular No. 108/02/2009-ST dt. 29.1.2009, it has been clarified that residential unit sold for a customer for his personal use is not liable to service tax. In the impugned order of the adjudicating authority has only considered the conclusion of the Board's Circular and the preamble or the arguments have not been taken into consideration while adjudicating the show cause notice.

(v) It is further submitted that builders became liable to service tax from 1.7.2010 as per Finance Act, 2010 as per Explanation added to the taxable service.

(vi) Since the matter was not free from confusion, the facts were intimated to the department and the issue involved is a matter of interpretation, penalty under Section 80 may be waived as the appellant had acted under bonafide belief.

(vii) The appellant is not clear with regard to quantification of service tax, demanded and confirmed. As per their view, for the period Jan., 2010 to Dec., 2010, the taxable value should be Rs. 5,82,32,000/- instead of Rs. 8,50,27,000/- as mentioned in the show cause notice.

6. 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 ?

7. 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
---

7.1. The impugned order has arisen out of the periodical demands issued for subsequent period from Jan,09 to Dec,2009 which was decided in favour of revenue in OIA No.8/2011(H-II) S.Tax dt 31.1.2011. As per the above statutory provisions, the appellants are liable to pay service tax on the construction 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 29.01.2009 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*

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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.

7.2. 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.

7.3. 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.

8. 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 Rules, the department is not obliged to determine their cenvat credit eligibleity while demanding servcel tax on the taxable services accordingly their contention does not have substance. I do agree with the finding of the lower authority.

9. 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.

9.1. 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 penalty is 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 them.

10. **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

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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 in as much as this is not the first instance but it is a case of repetition of default. 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.

11. With regard to the quantification of service tax, it is observed that 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.5,62,32,000/- but not Rs.8,50,27,000/- and similarly for the period Jan,11 to Dec,11, the service tax be quantified on the value of Rs. Rs.5,40,40,637. They also contested that an amount Rs.7,45,524/- was paid on 4.6.2011 and disclosed in the ST-3 returns filed for the period and Rs.14,50,000/- was paid vide Challan dated 9.02.2012. Therefore, the lower authority is directed to ascertain the factual position to re-quantify the service tax payable (after deducting the service tax paid if their claim is correct) 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 this limited matter is decided .

12. 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.

13. The appeal is disposed of in above terms.

3/2/2013

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

To,

1. M/s.Alpine Estates,
5-4-187/3 & 4, 2nd Floor,
MG Road, Secunderabad-500003.
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.V.S.Sudhir, 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.
3. Master Copy.

KPD

Annexure - VI

केन्द्रीय उत्पाद, सीमाशुल्क एवं सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX
हैदराबाद-II आयुक्तालय :: एल.बी. स्टेडियम रोड
HYDERABAD II COMMISSIONERATE :: L.B.STADIUM ROAD
बशीरबाग :: हैदराबाद & 500 004
BASHEERBAGH :: HYDERABAD-500 004
(PHONE NO: +91-40-2323 1198 & FAX NO: +91-40-2321 1655)

CNO.IV/16/35/2012-S.Tax(Gr.X)
OR No.62/2011-Adjn(ST)ADC.Gr.X &
OR No.51/2012-Adjn(ST)ADC

Date:31.08.2012

ORDER IN ORIGINAL NO.49/2012-Adjn(ST)ADC
(Passed by Shri R.S. Maheshwari, Additional Commissioner, Service Tax)

प्रस्तावना
PREAMBLE

1. निजी प्रयोग के लिए इसे जिस व्यक्ति को जारी किया गया यह प्रति बिना मूल्य के दी जाती है This copy is granted free of charge for the private use of the person to whom it is issued.

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

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

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

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

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

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

5. अपील पर और जिस निर्णय या आदेश के विरूद्ध अपील की जा रही हो उस आदेश की प्रति पर भी समुचित मूल्य के अदालती टिकट लगाए जाने चाहिए ।

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.

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Sub: Service Tax – Offence – Case against M/s. Alpine Estates – Non payment of Service Tax on taxable services rendered – OIO Passed – Regarding.

* * * * *

M/s. Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad - 500 003 (hereinafter referred as Paramount / assessee , in short) are engaged in providing works contract service. M/s Alpine Estates is a registered partnership firm and got themselves registered with the department for payment of service tax with STC No.AANFA5250FST001.

2. A Show Cause Notice vide HQPOR No. 82/2010-Adjn(ST) dt. 16.6.2010 was issued for the period from January 2009 to December 2009 involving an amount of Rs. 31,10,377/- including cess and the same has been adjudicated and confirmed vide Order-In-Original No:44/2010-ST dt. 15.10.2010. Further, the assessee has gone an appeal and the same has been dismissed vide OIA No.08/2011(H-II) dt. 31.1.2011 by the Commissioner (Appeal), Hyderabad. The present notice is issued in sequel to the same for the period from January 2010 to December 2010.

3. As per Section 65 (105)(zzzza) of the Finance Act, 1994 defines that 'taxable service 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;...*

(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 (a); or*

(e) *turnkey projects including engineering, procurement and construction or commissioning (EPC) projects."*

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.

5. M/s Alpine Estates registered with the service tax department and not discharging the service tax liability properly and also not filing the ST-3 returns, which are mandatory as per Service Tax Rules made there under. On verification of the records, it is found that M/s Alpine Estate have undertaken a single venture by name M/s Flower Heights located at Plot No:3-3-27/1,

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Mallapur Old Vilage, Uppal Mandal, RR District and received amount from customers towards sale of land and agreement of construction of 102 houses for the said period. Further, it is found that they have not filed ST-3 returns for the said period.

6. Further it is made clear on 01.02.2010 by Sri A. Shanker Reddy, Deputy General Manager (Admn) authorized representative of the assessee , that the activities undertaken by the company are providing services of construction of residential complexes and also stated that initially, they collected the amounts against booking form/ agreement of sale. At the time of registration of the property, the amounts received till then will be allocated towards Sale Deed and Agreement of Construction. Therefore, service tax on amount received against Agreement of Construction portion of the amounts towards agreement of construction is aid on receipt basis. The Agreement of Sale constitutes the total amount of the land/semi finished flat with undivided share of land and value of construction. The sale deed constitutes a condition to go for construction with the builder. 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 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 loads from the banks".

7. As per the exclusion provided in Section 65(91a) of the Service Tax Act, 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. Here" personal use" includes permitting the complex for use as residence by another person on rent or without consideration. If is further clarified in para 3 of the Circular No.108/02/2009-ST dt. 29.01.2009 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, 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 construction entire complex for one person for personal use as residence by such person would not be subjected to service tax. Further, the builder/promoter/developer normally enters into construction/completion agreement after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore, there is no levy of service tax on the services rendered till sale deed, i.e on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements/contract against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements of construction are invariably attracts service tax under Section 65(105(zzzza) of the Finance Act 1994.

8. As per the definition of " Residential Complex" provided under Section 65(91 a) of the Finance Act 1994, it constitutes any one more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s Alpine Estates qualifies to be a residential complex as it contains more than 12 residential

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units with common area and common facilities like park, common water supply etc., and the layout was approved by HUD A vide permit No. 14014/P4/PLG/H/2006 dt. 23.3.2007. As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) 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 assesses thereafter to their customers under agreement of construction are taxable under Service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under works contract service.

9. M/s Alpine Estates, Hyderabad vide- their statement received in this office on 22.4.2011 has submitted the Flat-wise amounts received for the period from January 2010 to December 2010. The total amount received is Rs. 85027011/- against agreements of construction during the period and are liable to pay service tax including cess works out to Rs. 3503113/- and the interest at appropriate rates under Works Contract Service respectively.

10. M/s Alpine Estates, Hyderabad are well aware of the provisions and of liability of service tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly with an intention to evade payment of Service Tax. The' have intentionally not filed the ST-3 returns for the said period. Hence, the service tax payable by M/s Alpine Estates, ' appears to be recovered under Sub-Section (1) of Section 73 of the Finance Act 1994.

11. From the foregoing, it appears that M/s Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad-3 have contravened the provisions of Section 68 of the Finance Act: 1994 read with Rule 6 of the Service I ax Rules, 1994 in as much as they have not paid the appropriate amount of service tax on the value of the taxable services and Section 70 of the Finance Act 1994 read v/ith Rule 7 of the Service Tax Rules 1994 in as much as they have not filed statutory returns for the taxable services rendered 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 provisions to the Section 73(1) of the Finance Act 1994 and thereby they have rendered themselves liable for penal action under Section 77 &76 of the Finance Act 1994.

12. Therefore, M/s Alpine Estates, Hyderabad , were required to show cause to the Additional Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad, as to why:-

(i) an amount of Rs.3503113/- (Rupees Thirty five lakhs three thousand one hundred thirteen only) including cess should not be demanded on the works contract service under the Sub-Section (1) of Section 73 of the Finance Act 1994 for the period from January 2010 to December 2010; and

(ii) Interest is not payable by them on the amount demanded at (i) above under Section 75 of the Finance Act 1994; and

(iii) Penalty should not be imposed on them under Section 77 of the

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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 76 of the Finance Act 1994.

13. A Personal Hearing was held on 16.08.2012. Shri Jaya Prakash, Manager (Accounts) along with Shri Sudhir V. S. and Sri Harsha, Chartered Accountants, appeared for the personal hearing. While reiterating the earlier submissions made in their reply to show cause notices, they have made following submissions. In addition, the assessee has stated that one more periodical show cause notice with O.R.No.51/2012-ST dated 24.04.2012 covering the period January, 2011 to December, 2011 under similar issue is pending adjudication and requested to adjudicate the same with this order.

(i) that the Finance Act, 1994 was amended by the Finance Act, 2010 to introduce an explanation to Section 65(105)(zzq) and Section 65(105)(zzzh). Clause (zzq) relates to a service provided or to be provided to any person by any other person in relation to commercial or industrial construction and clause (zzzh), a service in relation to the construction of a complex. Both bear the following explanation:

Explanation — For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorized 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 the person authorized by the builder before 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.

(ii) Noticee further submits that reliance is place on Mohtisham Complex (P) Ltd. v. CCE 2011 (021) S.T.R.551 (Tri-Bang) wherein it was held as under- *"The deeming provision would be applicable only from 1-7-2010.*Our attention, has also been taken to the texts of certain other Explanations figuring under Section 65(105). In some of these Explanations, there is an express mention of retrospective effect. Therefore, there appears to be substance in the learned counsel's argument that the deeming provision contained in the explanation added to Section 65(105)(zzq) and (zzzh) of the Finance Act, 1994 will have only prospective effect from 1-7-2010. *Apparently, prior to this date, a builder cannot be deemed to be service provider providing any service in relation to*industrial/commercial or residential complex to the ultimate buyers of the property."

(iii) Noticee further submits that Circular 1/2011- S.T. 15.2.2011 issued by Pune Commissionerate it has been clarified as under: "Representations have been received from trade requesting clarification particularly for advance payments for services of Construction of Residential Complex rendered after 1-7-2010 and also for service tax collected by builders even where no liability exists. It is hereby clarified that where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of Para 3 of Boards Circular number

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108/02/2009-S.T., dated 29-1-2009. The Service of Construction of Residential Complex would attract service tax from 1-7-2010. *Despite no service tax liability, if any amount has been collected by the builder as "Service Tax" for Services rendered prior to 1-72010, the same is required to be deposited by the builder to the Service tax department. Builder cannot retain the amount collected as Service Tax.*

(iv) Without prejudice to the foregoing, Noticee submits that taxable value under the work contract service is that part of value of the works contract which is relatable to services provided in the execution of a works contract. For this purpose, valuation mechanism has been provided under Rule 2A of the valuation rules. However, an option is given to assessee to opt for a composition scheme. that composition scheme is not mandatory and if he chooses not to opt for the said scheme, service tax can be paid under Rule 2A, ibid. Therefore, the said notice is invalid in as much as it imposes the composition scheme on the assessee.

(v) Noticee submits assuming but not admitting Service Tax, if any is payable under the head Works Contract, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006. Noticee submits that the impugned SCN has been passed with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. It is unreasonable to hold that material value is nil in any construction activity merely on the ground that material value has not been furnished by noticee in his correspondence dated 22.04.2011, the same was not furnished as it was not asked for by the department, therefore it does not lead to a conclusion that the same is nil without being given an opportunity of being heard. Noticee shall submit the material Consumption for the period January 2010 to December 2010.

(vi) Noticee further submits that where the Value of Work Contract Service shall is determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, he shall also be entitled to utilize Cenvat Credit on Input services and Capital goods.

(vii) Noticee submits that assuming but not admitting service tax if any is payable and the benefit of Rule 2A, ibid is not available for any reason, service tax payable under composition scheme at 4.12% can be paid by utilizing the Cenvat Credit in respect of Input services and Capital goods. However, impugned notice has not considered the same before arriving at the tax liability and such notices issued mechanically with revenue bias should be set-aside.

(viii) Without prejudice to the foregoing, assuming but not admitting Noticee submits for the period January 2010 to December 2010, the SCN has claimed amount of Rs.850.27 Lakhs are taxable. However, noticee fails to understand how the said amount has been arrived at. Out of the total receipts of Rs. 1170.98 Lakhs during the period January 2010 to December 2010, Rs.377.11 Lakhs is received towards value of sale deed, and

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(ix) Rs.211.55 Lakhs taxes and other charges which shall not be leviable to service tax. An amount of Rs.582.32 Lakhs 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.582.32 and not on the entire amount as envisaged in the notice.

(x) Noticee submits that penalty under Section 77 for failure to submit the returns is not right in law as they have filed their half-yearly returns in form ST-3 for the said period. (Copy of the ST-3 returns enclosed). Hence, penalty on this count should be set-aside.

(xi) Noticee further submits that *mensrea* is an essential ingredient to attract penalty. The Supreme Court in the case of *Hindustan Steel v. State of Orissa [1978 (2) E.L.T. J159 (S.C.)* held that an order imposing penalty for failure to carry out the statutory obligation is the result of quasi - criminal proceedings and *penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contentious or dishonest or acted in conscious disregard of its obligation.* Penalty will not also be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, when there is a technical or judicial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

(xii) Noticee further no evidence has been brought on record by the lower authority to prove contravention of various provisions of Finance Act, 1994 by the noticee only with intent to evade the payment of service tax. In this scenario, imposition of penalties upon them is not justified. In this regard Appellant places reliance on the decisions in the case of In *Eta Engineering Ltd.* v. *Commissioner of Central Excise, Chennai* - 2006 (3) S.T.R. 429 (Tri.-LB) = 2004 (174) E.L.T. 19 (Tri.-LB). CESTAT, Northern Bench, New Delhi (Larger Bench) held - Appellants *being under bona fide doubt regarding their activity whether covered by Service tax or not, there existsreasonable cause on their part in not depositing Service tax in time-* penalty not imposable in terms of Section 80 of Finance Act, 1994.

(xiii) In the case of *Ramakrishna Travels Pvt Ltd- 2007(6) STR 37(Tri-Mum)* wherein it was held that in the absence of any records as to suppression of facts, then bona fide belief is a reasonable cause under section 80 of the Finance Act, 1994.

(xiv) Noticee further submits that where the interpretation of law is required, penal provisions cannot be invoked. Also in the case of *CCE vs. Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (New Delhi - CESTAT)* it was held that: *"It is settled position that when there is a dispute of interpretation of provision of law, the penal provisions cannot be invoked. Therefore, the Commissioner (Appeals) rightly set aside the penalty."* Hence penalty is not

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applicable in the instant case where there have been confusions as to applicability of service tax, classification of service etc. and law has very much been unsettled.

(xv) Without prejudice to the foregoing, assuming but not admitting that service tax on said service is payable, Noticee further submits that Penalty under Section 77 and Section 76 of the Finance Act, 1994 should not be imposed as there was a reasonable cause for the said failure.

Similarly, with regard to show cause notice O.R.No.51/2012-Adjn.(ST), dated 24.04.2012, covering the period January 2011 to December 2011, they have stated as follows:-

(i) Noticee submits that for the period January 2011 to December, 2011, the show cause notice has claimed that entire receipts of Rs.11,73,17,845/- are taxable. Out of the said amount, Rs.5,66,66,170/- is received towards value of sale deed and Rs.66,11,038/- is towards taxes and other charges which shall not be leviable to service tax. An amount of Rs.5,40,40,637/- 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.5,40,40,637/- and not on the entire amount as envisaged in the notice.

(ii) Noticee further submits that service tax is to be levied on Rs.5,40,40,637/ . Thus, the service tax liability shall amount to Rs.22,26,474/-. Out of the said amount, Rs.7,45,524/- was paid earlier to the issuance of notice and acknowledged the same in the subject notice and jRs.36,958/- was paid by utilization of Cenvat Credit and the balance of Rs.14,50,000/- was paid vide Challan dated 09.02.2012. Therefore, the entire liability has been discharged by the Noticee and hence, the notice is required to be set aside.

DISCUSSION & FINDINGS:

14. I have carefully gone through the records of the case, the documents relied upon for issue of show cause notice and written & oral submissions made by the assessee. There are two show cause notices on the same issue covering different period. As the issue involved is same, both the show cause notices are proposed to be adjudicated by a common order, the details of which are as under:-

S.No.	SCN No. & date	Period covered	Service Tax Demanded
1.	O.R.No.62/2011-Adj (ST) Gr.X dtd.23.04.2011	January, 2010 to December, 2010	Rs.35,03,113/-
2.	O.R.No.51/2012-Adj (ST) Gr.X dtd 24.04.2012	January, 2011 to December, 2011	Rs.48,33,495/-

15. I find that these are periodical show cause notices. The demand for the past period was confirmed vide OIO No.44/2010-ST dated 15.10.2010 and the same was also upheld by Commissioner (Appeals) vide OIA No.08/2011 H-II dated 31.01.2011. Respectfully following the decision of the Commissioner (A), I hold that demand of Service Tax is sustainable.

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16. Admittedly, the assessee has executed a residential complex project having more than 12 flats and layout of the project was approved by the civic authorities. Therefore, the project satisfies the definition of 'residential complex' as defined in the statute.

17. Various flats have been sold by them to various customers in two states. First, they have executed a 'sale deed' at semi-finished stage by which the ownership of the semi-finished flats was transferred to the customer. Appropriate stamp duty was paid on sale deed value. No service tax been demanded on the sale deed value in the light of Board's Circular dated 29.01.2009. After execution of sale deed, they have entered into another agreement with the customer for completion of the said flats and the service tax demand is confined to this agreement.

18. The second agreement, (written or oral) and by whatever name is called, involve supply of materia and labour to bring the semi-finished flat to a stage of completion. As it is a composite contract involving labour and material, it clearly satisfies the definition of 'Works Contract Service'. Therefore, the classification under work contract service and the same shall be preferred in view of the Section 65 A of the Act. The Board vide Circular No.128/10/2010-ST dated 24.08.2010, at para 2 has also clarified as under,

> *"2. The matter has been examined. As regards the classification, 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."*

19. Reliance is also placed on the decision of the Authority on Advance Ruling in the case of HAREKRISHNA DEVELOPERS-2008 (10) S.T.R. 357 (A.A.R.) wherein it has been held as under:-

> *Advance Ruling (Service tax) - Works Contract service - Sale of plots to prospective buyers and construction of residential units under works contract - Applicant contesting liability on the ground that impugned works contract is for construction of individual residential unit and not for residential complex - Condition on transfer of property in goods leviable to sales tax satisfied - Records indicating construction of at least 12 residential units with common facilities and same covered under 'residential complex' as per provisions - Works contract not for construction of isolated house but for common facilities also - Impugned activity covered under Works Contract service - Sections 65(91a), 65(105)(zzzza) and 96D of Finance Act, 1994. - Individual houses built through works contract have to be viewed as parts of a residential complex rather than as stand alone house. [paras 1, 6, 7, 8*

In view of the above, I hold that the impugned activity is classifiable under 'Work Contract Service'.

20. The have further submitted that composite scheme is not mandatory and service tax can be paid under Rule 2A. It is accepted that composite scheme is optional. They have not furnished the details of material cost supported by documentary evidence. In the absence of which, the demand of Service Tax on the full amount without any permissible deduction of material cost would have been very harsh on them. In this backdrop, the calculation of service tax

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liability in the show cause notice at composite rate is a beneficial act which does not make the show cause notice invalid. They have not submitted the details of materials cost for the relevant period supported by documentary evidences even now.

21. They have further submitted that they are entitled to utilize cenvat credit on export services and capital goods and the same has not been considered before arriving at the tax liability. Eligibility to cenvat credit is governed Cenvat Credit Rules, 2004. Credit can be taken on the strength of valid documents on eligible capital goods and input services. The assessee has to take this credit in accordance with the rules. The department is not obliged to determine their cenvat credit eligibility while demanding service tax on the taxable services. Accordingly, their contention does not have any substance.

22. They have also contested the qualification of demand. They have submitted that taxes and other charges need to be deducted. I find that the demand of service tax has been made after excluding the sale deed value. The total amount collected from a customer minus sale deed value has been taken as gross amount charged for the works contract. No other deduction of any amount collected under any head, "Whether land development charges or any other charge" is permissible except VAT. It is neither their submission that VAT amount has also been included in the gross amount, nor they have furnished before me any evidence that they have paid VAT. Accordingly, their contention is rejected.

23. 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 wilful breach. Of course, just because penalty is prescribed that should not mechanically be levied following Apex Court's decision in the case of *Hindusthan Steel Ltd.* v. *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. The submission of the assessee does not constitute reasonable cause so as to exonerate them from the penalties by invoking section 80 of the Act. Reliance is placed on the following case laws:-

(I) 2007 (6) S.T.R. 32 (Tri. - Kolkata) -CCE., KOLKATA-I Versus GURDIAN LEISURE PLANNERS PVT. LTD.

(II) 2005 (188) E.L.T. 445 (Tri. - Chennai) -TRANS (INDIA) SHIPPING PVT. LTD. Versus CCE., CHENNAI-I.

(III) 2006 (1) S.T.R. 320 (Tri. - Del.)- SPIC & SPAN SECURITY & ALLIED SERVICE (I) P. LTD. Versus C.C.E., NEW DELHI

24. Accordingly, I hold that penalty under section 76 is imposable as they have contravened the provisions of law despite adverse order passed by Commissioner (Appeals).

25. Accordingly, I pass the following order:-

ORDER

(a) In respect of show cause notice O.R.No.62/2011-Adjn.(ST) dated 23.04.2011.

(i) Demand of service tax (including Cess) of Rs.35,03,113/- for the period January 2010 to December, 2010 is hereby confirmed under sub section (2) of Section 73 of Finance Act, 1994 against M/s.Alpine Estates, Secunderabad.

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(ii) I demand interest on the service tax demanded at (i) above, under section 75 of Finance Act, 1994, at the appropriate rate, from M/s.Alpine Estates, Secunderabad.

(iii) I impose a penalty @ Rs.200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of Service Tax under Section 76 of Finance Act, 1994, on M/s.Alpine Estates, Secunderabad. However, the total amount of penalty payable in terms of section 76 shall not exceed the service tax payable.

(iv) I impose a penalty of Rs.1,000/- under Section 77 of the Finance Act, 1994.

(v) The show cause notice issued vide O.R.No.62/2011 dated 23.04.2011 is accordingly disposed off.

(b) In respect of show cause notice O.R.No.51/2012-Adjn.(ST) dated 24.04.2012.

(vi) Demand of service tax (i/c Cess) of Rs.48,33,495/- for the period Jan. 2011 to Dec.2011 is hereby confirmed under sub section (2) of Section 73 of Finance Act, 1994 against M/s. M/s.Alpine Estates, Secunderabad.

(vii) I demand interest on the service tax demanded at (i) above, under section 75 of Finance Act, 1994, at the appropriate rate, from M/s.Alpine Estates, Secunderabad.

(viii) I impose a penalty @ Rs. 200/- per day or 2% of such service tax per month whichever is higher, for the period of default till the date of payment of Service Tax under Section 76 of Finance Act, 1994, on M/s.Alpine Estates, Secunderabad. However, the total amount of penalty payable in terms of section 76 shall not exceed the service tax payable.

(ix) I impose a penalty of Rs.1,000/- under Section 77 of the Finance Act, 1994.

(x) The show cause notices issued vide C.No.IV/16/62/2012-S.Tax Gr X (OR NO 51/2012-ST) dated 24.04.2012 is accordingly disposed off.

31.08.12

(R S MAHESHWARI)
ADDITIONAL COMMISSIONER

To
M/s. Alpine Estates,
5-4-187/3 & 4, 2nd Floor,
MG Road, Secunderabad – 500 003 (By REGD POST ACK DUE)

Copy submitted to

(i) the Commissioner, Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad.

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-(Through the Superintendent, Review & Tribunal, Service Tax)

Copy to

(ii) the Additional Commissioner of Service Tax, Hyderabad-II Commissionerate, Hyderabad.

(iii) the Assistant Commissioner of Service Tax, Hyderabad-II Commissionerate, Hyderabad.

(iv) the Superintendent of Customs, Central Excise & Service Tax, Arrears Recovery Cell, Hqrs Office, Hyderabad-II Commissionerate, Hyderabad.

(v) the Superintendent of Service Tax, Service Tax Group-X, Hyderabad-II Commissionerate, Hyderabad.

(vi) Office copy/ Master copy/ Spare copy.

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Annexure-VII

OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX HYDERABAD -II COMMISSIONERATE, L.B. STADIUM ROAD, BASHEERBAGH, HYDERABAD - 500 004

O.R.No. 62/2011-Adjn (S.T.) Gr.X Dated: 23.4.2011

SHOW CAUSE NOTICE

Subject: Service Tax – Offence – Case against M/s. Alpine Estates – Non-payment of Service Tax on taxable services rendered – Show Cause Notice – Regarding.

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M/s. Alpine Estates, 5-4-187/3 & 4, IInd Floor, MG Road, Secunderabad – 500 003 (hereinafter referred as Paramount / assessee, in short) are engaged in providing works contract service. M/s Alpine Estates, is a registered partnership firm and got themselves registered with the department for payment of service tax with STC No. AANFA5250FST001.

2. A Show Cause Notice vide HQPOR No. 82/2010-Adjn(ST) dt. 16.6.2010 was issued for the period from January 2009 to December 2009 involving an amount of Rs. 31,10,377/- including cess and the same has been adjudicated and confirmed vide Order-In-Original No:44/2010-ST dt. 15.10.2010. Further, the assessee has gone an appeal and the same has been dismissed vide OIA No.08/2011(H-II) dt. 31.1.2011 by the Commissioner (Appeal), Hyderabad. The present notice is issued in sequel to the same for the period from January 2010 to December 2010.

3. As per Section 65 (105) (zzzza) of the Finance Act, 1994 defines that 'taxable service 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 ;....,

(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."

execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore, there is no levy of service tax on the services rendered till sale deed. i.e on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements/contract against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements of construction are invariably attracts service tax under Section 65(105(zzzza) of the Finance Act 1994.

7. As per the definition of " Residential Complex" provided under Section 65(91a) of the Finance Act 1994, it constitutes any one ore more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s Alpine Estates qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like park, common water supply etc., and the layout was approved by HUDA vide permit No. 14014/P4/PLG/H/2006 dt. 23.3.2007. As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) 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 assesses thereafter to their customers under agreement of construction are taxable under Service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under works contract service.

8. M/s Alpine Estates, Hyderabad vide their statement received in this office on 22.4.2011 has submitted the Flat-wise amounts received for the period from January 2010 to December 2010. The total amount received is Rs. 85027011/- against agreements of construction during the period and are liable to pay service tax including cess works out to Rs. 3503113/- and the interest at appropriate rates under Works Contract Service respectively.

9. M/s Alpine Estates, Hyderabad are well aware of the provisions and of liability of service tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly with an intention to evade payment of Service Tax. They have intentionally not filed the ST-3 returns for the said period. Hence, the service tax payable by M/s Alpine Estates, appears to be recovered under Sub-Section (1) of Section 73 of the Finance Act 1994.

10. From the foregoing, it appears that M/s Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad-3 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 the 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 filed statutory returns for the taxable services rendered 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 provisons to the Section 73(1) of the Finance Act 1994 and thereby they have rendered themselves liable for penal action under Section 77 & 76 of the Finance Act 1994.

3. 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.

4. M/s Alpine Estates registered with the service tax department and not discharging the service tax liability properly and also not filing the ST-3 returns, which are mandatory as per Service Tax Rules made there under. On verification of the records, it is found that M/s Alpine Estate have undertaken a single venture by name M/s Flower Heights located at Plot No:3-3-27/1, Mallapur Old Vilage, Uppal Mandal, RR District and received amount from customers towards sale of land and agreement of construction of 102 houses for the said period. Further, it is found that they have not filed ST-3 returns for the said period.

5. Further it is made clear on 01.02.2010 by Sri A. Shanker Reddy, Deputy General Manager(Admn) authorized representative of the assessee , that the activities undertaken by the company are providing services of construction of residential complexes and also stated that initially, they collected the amounts against booking form/agreement of sale. At the time of registration of the property, the amounts received till then will be allocated towards Sale Deed and Agreement of Construction. Therefore, service tax on amount received against Agreement of Construction portion of the amounts towards agreement of construction is aid on receipt basis. The Agreement of Sale constitutes the total amount of the land/semi finished flat with undivided share of land and value of construction. The sale deed constitutes a condition to go for construction with the builder. 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 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 loads from the banks".

6. As per the exclusion provided in Section 65(91a) of the Service Tax Act, 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. Here" personal use" includes permitting the complex for use as residence by another person on rent or without consideration. If is further clarified in para 3 of the Circular No.108/02/2009-ST dt. 29.01.2009 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, 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 construction entire complex for one person for personal use as residence by such person would not be subjected to service tax. Further, the builder/promoter/developer normally enters into construction/completion agreement after execution of sale deed, till the

11. Therefore, M/s Alpine Estates, Hyderabad , are hereby required to show cause to the Additional Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad, within 30 days of receipt of this Notice as to why:-

(i) an amount of Rs.3503113/-(Rupees Thirty five lakhs three thousand one hundred thirteen only) including cess should not be demanded on the works contract service under the Sub-Section (1) of Section 73 of the Finance Act 1994 for the period from January 2010 to December 2010; and

(ii) Interest is not payable by them on the amount demanded at (i) above under Section 75 of the Finance Act 1994; and

(iii) Penalty should not be imposed on them under Section 77 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 76 of the Finance Act 1994 .

12. M/s Alpine Estates, Hyderabad at the time of showing cause, as above, are required to produce all the evidence upon which they intend to rely in their defence. They are also required to indicate in their written reply whether they wish to be heard in person before the case is adjudicated. If no cause is shown against the action proposed to be taken within the stipulated time or having desired a hearing if they do not appear for the personal hearing on the appointed day & time, the case will be decided on merits, basing on the material/evidence available on record.

13. This notice is issued without prejudice to any other action that may be taken against the noticees / others under the Finance Act, 1994 or under any other law for the time being in force in India.

14. Reliance for issue of this notice is placed on the following:

(1) Statement submitted by M/s Alpine Estates and received on 22.4.2011.

22/4/2011

(G.SREEHARSHA)
ADDITIONAL COMMISSIONER

Place: Hyderabad
Date: 23.04.2011

To:
M/s Alpine Estates
5-4-187/3 & 4, IInd Floor, MG Road, Secunderabad – 500 003

Copy to the Superintendent , Group – X, Hyd-II Comnr'ate, Hyd.
Spare copy.

सीमाशुल्क, केंद्रीय उत्पाद शुल्क व सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX
हैदराबाद II आयुक्तालय HYDERABAAD II COMMISSIONERATE
11-3-433/A:: सीताराम प्रसाद टावर:: रेड हिलस:: हैदराबाद – 4
SITARAM PRASAD TOWERS:: RED HILLS:: HYDERABAD-4

OR No: 51/2012 – Adjn (Addl. Commr.)
C.No: IV/16/ 35 /2012-S.Tax.Gr.X

Dt. 24.04.2012

SHOW CAUSE NOTICE

Sub:: Service Tax – Non payment of Service tax on taxable services rendered by M/s Alpine Estates – Issue of Show Cause Notice - Regarding.

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M/s. Alpine Estates, #5-4-187/3&4, II Floor, Soham Mansion, MG Road, Secunderabad-500 003 (here-in-after referred as " Alpine " or the assessee(s)"). The said assessee is registered partnership firm and got themselves registered with the department vide Service Tax Registration Number AANFA6250FST001.

2. Show Cause Notice vide HQPOR No. 82/2010-Adjn(ST) dt: 16.6.2010 was issued for the period from January 2009 to December 2009 for an amount of Rs 31,10,377/- including cesses and the same has been adjudicated and confirmed vide Order-In-Original No:44/2010-ST dt. 15.10.2010. Further, the assessee has gone an appeal and the same has been dismissed vide OIA No.08/2011(H-II) dt. 31.1.2011 by the Commissioner (Appeal), Hyderabad. Another show cause was issued vide OR No.62/201-Adjn (ST) dt. 23.4.2011 for the period from January 2010 to December 2010. The present notice is issued in sequel to the same for the period from January 2011 to December 2011.

3. As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale

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deed the right in a property got transferred to the customer, hence the construction service rendered by the assesses thereafter to their customers under agreement of construction are taxable under Service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under "Works Contract Service".

4. As per Section 65 (105) (zzzza) 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 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 ....,

(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."

4.1 An optional Composition Scheme for payment of Service Tax in relation to Works Contract Service is provided by the **Notification No.32/2007-ST** dated 22-8-2007, effective from 01-6-2007, under the **'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

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(VAT) or Sales Tax paid on transfer of property of goods involved in the execution of Works Contract. W.e.f. 1-3-2008 onwards, the said rate of 2 % is changed to 4% vide Notification No.7/2008-S.T. dated 1-3-2008.

5. M/s Alpine, Hyderabad vide their statement received in this office on 07.02.2012 has informed that they have received an amount of Rs. 11,73,17,845/- for the period from January 2011 to December 2011. The total consideration received by them for the period is Rs.11,73,17,845/- during the period and are liable to pay service tax including cess on the same works out to Rs. 48,33,495/-. The assessee further submitted that they have paid service tax of Rs.21,95,524/- (Rs.745524 Dt. 7.6.2011 and Rs.14,50,000/ Dt. 09.02.2012) under protest.

6. M/s Alpine registered with the service tax department and not discharging the service tax liability properly and also not filing the ST-3 returns, which are mandatory as per Service Tax Rules made there under. On verification of the records, it is found that M/s Alpine Estate have undertaken a single venture by name M/s Flower Heights located at Plot No:3-3-27/1, Mallapur Old Village, Uppal Mandal, RR District and received amount from customers towards sale of land and agreement of construction of 102 houses.

7: M/s Alpine, are well aware of the provisions and of liability of service tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly. They have not filed the ST-3 returns for the period upto 03/2011. Hence, the service tax payable by M/s Alpine, appears to be recovered under Sub-Section (1) of Section 73 of the Finance Act 1994.

8. From the foregoing, it appears that M/s Alpine Estates, 6-4-187/3 & 4, II Floor, MG Road, Secunderabad-3 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 the 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 filed statutory returns for the taxable services rendered 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. Hence, the service is liable for recovery under provisons of Section 73(1) of the Finance Act 1994 and they have rendered themselves liable for penal action under Section 76 of the

Finance Act, 1994 and Section 77 of the Finance Act 1994. They are also liable for interest under Section 75 of the Finance Act, 1994.

9. Therefore, M/s Alpine Estates, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad, Hyderabad . are hereby required to show cause to the Additional Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, 11-5-423/1/A, Sitaram Prasad Towers, Red Hills, Bazarghat Road, Hyderabad, within 30 (thirty) days of receipt of this Notice as to why:-

(I) an amount of Rs. 48,33,495/- (Rupees Forty eight lakhs thirty three thousand four hundred ninety five only) including cess should not be demanded on the "Works Contract Service" under the Sub-Section (1) of Section 73 of the Finance Act 1994 for the period from January 2011 to December 2011. An amount of Rs.21,95,524/- (Rs.745524 Dt. 7.6.2011 and Rs.14,50,000/ Dt. 09.02.2012) by them should not be adjusted against the demand discussed supra; and

(II) Interest is not payable by them on the amount demanded at (I) above under Section 75 of the Finance Act 1994; and

(III) Penalty should not be imposed on them under Section 77 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 76 of the Finance Act 1994.

10. M/s Alpine Estates, Hyderabad at the time of showing cause, as above, are required to produce all the evidence upon which they intend to rely in their defence. They are also required to indicate in their written reply whether they wish to be heard in person before the case is adjudicated. If no cause is shown against the action proposed to be taken within the stipulated time or having desired a hearing if they do not appear for the personal hearing on the appointed day & time, the case will be decided on merits, basing on the material/evidence available on record.

11. This notice is issued without prejudice to any other action that may be taken against the noticees / others under the Finance Act, 1994 or under any other law for the time being in force in India.

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12. Reliance for issue of this notice is placed on the following:

(i) Statement submitted by M/s Alpine Estates and received on 07.02.2012 and 22.4.2011.

24/4/2012

(G. SREEHARSHA)
ADDITIONAL COMMISSIONER

Place: Hyderabad
Date: 24.04.2012

To:
M/s Alpine Estates
5-4-187/3 & 4, IInd Floor, MG Road, Secunderabad – 500 003
Copy to the Superintendent, Group – X, Hyd-II Commr'ate, Hyd.
Spare copy.

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