



**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. In this regard, we have attended the personal hearing before your good self on 20.02.2023 wherein your good self 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.

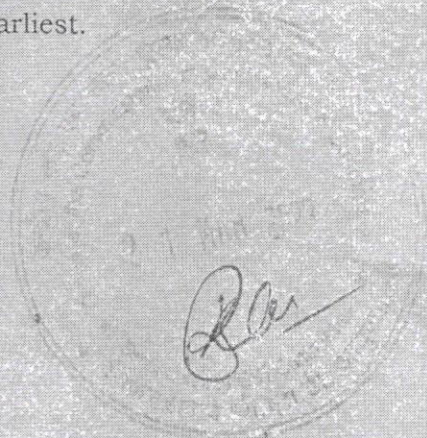
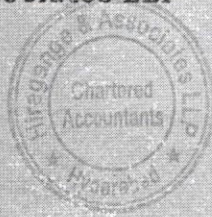
We shall be glad to provide any other information in this regard. Kindly acknowledge the receipt of the reply and post the hearing at the earliest.

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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K. Lakshman Kumar
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Partner- Designate



21 MAR 2023

[Signature]

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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 read with Misc. Order No. M/30226/2022 dated 11.03.2022

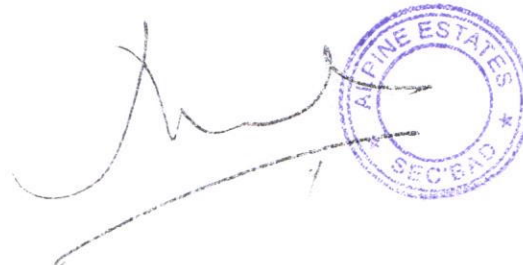
Brief facts:

- 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 31.03.2012 wherein vide Para 17 it was accepted that service tax would not be demanded on sale deed value

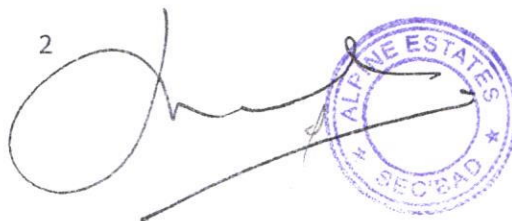


however OIO dated 31.08.2012 had included the amounts received towards Sale deeds also (Copy of Order-in-original is enclosed as Annexure **IV**) .

- 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

2



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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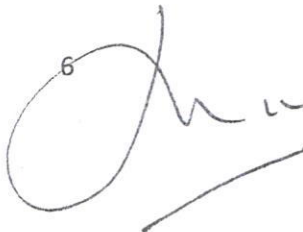
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"As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreement of construction to each of their customers to whom the 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




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.

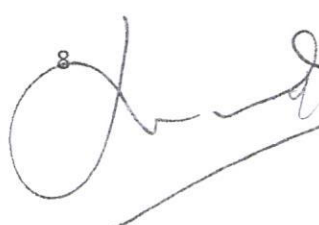
13. Noticee submits that once the apparent error in calculation is taken to its logical conclusion, the entire demand fails and therefore there is no cause of any grievance by the department on this ground.

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




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-



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

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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:

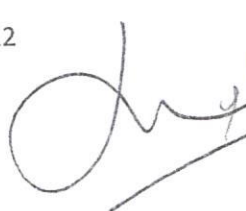
- a. Apex court judgment in Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.) wherein it was held that **“115. It may, however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract 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

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




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

Authorized Signatory

Date: 15.03.2023



**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

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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. Killa 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)

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26-7-19

सहायक पंजीकार / Asst. Registrar
सीमाशुल्क, उत्पादशुल्क और सेवा कर अपील अधिकरण
Customs Excise And Service Tax Appellate Tribunal
हैदराबाद / Hyderabad

FAX : 040-23312246
TEL : 040-23312247

OUTWARD NO:
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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH: HYDERABAD
1st Floor, HMWSSB Building, Rear Portion, Khairathabad, Hyderabad
Tele No: 040-23312247, Fax No: 040-23312246

Dated: 15/03/2022

To

Alpine Estates Alpine Estates
(Appellant as per address in table below)

Commissioner of Central Tax and Central Excise, Secunderabad GST Commissionerate-Secunderabad - G
S T
(Respondent as per address in table below)

Stay/Misc Order No. M/30226/2022 dated 11/03/2022

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Deputy Registrar

Application Appeal Name and Address of Appellant

1 ST/ROM/30052/2020 ST/27015/2013 Alpine Estates,
5-4-187/3 & 4, 2nd Floor, M.g.road,
SEUNDERABAD
AP-500003

Name and Address of
Respondent

2

Commissioner of Central Tax and
Central Excise, GST Commissionerate-
Secunderabad - G S T
KENDRIYA SHULK BHAVAN,L.B
STADIUM ROAD, BASHEERBAGH
HYDERABAD
TELANGANA-500004

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Hiregange & Associates Chartered
Accountants (New)
4th Floor, West Block,
Anushka Pride, Opp. Ratnadeep
Supermarket, Road Number -12,
Banjara Hills,
Hyderabad,
Telangana-500034

Deputy Registrar

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH AT HYDERABAD**
Division Bench
Court - I

**Misc Application No. ST/ROM/30052/2020
in Service Tax Appeal No. 27015 of 2013**

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

Alpine Estates

5-4-187/3 & 4, 2nd Floor, MG Road,
Secunderabad, Hyderabad - 500 003

.....Appellant

VERSUS

**Commissioner of Central Tax,
Secunderabad - GST**

Kendriya Shulk Bhavan, LB Stadium Road,
Basheerbagh, Hyderabad - 500 004

.....Respondent

Appearance

Shri Venkata Prasad, CA for the Appellant.

Shri A. Rangadham, Authorized Representative for the Respondent.

Coram:

HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

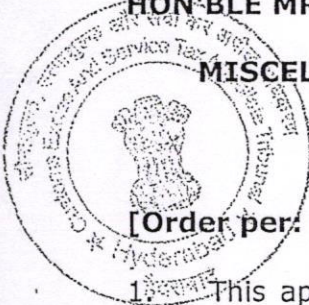
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

MISCELLANEOUS ORDER No. M/30226/2022

Date of Hearing: 28.02.2022

Date of Decision: 11-3-2022

[Order per: P. VENKATA SUBBA RAO.]



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."

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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

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(3)

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 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.

(Pronounced in the open court on 11-3-2022)

- Sd -

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

- Sd -

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Veda प्रमाणित प्रति / CERTIFIED COPY

उप प्रेसीडेंट / Dy. Registrar
सहायक, जमानत और सेवा कर अपील न्यायालय
Customs Excise and Service Tax Appellate Tribunal.

S. H. Seetharam



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.

ORDERAppeal 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, Secunderabad-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 Rs. 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 Section 75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, whichever 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 Section 75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, whichever 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. Relled 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

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/G/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 08.05.2010 and therefore the demand raised is bad in law. In the clarification issued by board TRU vide D.O.F No. 334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in tax treatment among different practices, the said explanation of the same being prospective and also clarifies that the transaction between the builder and buyer of the flat is not taxable until the assent was given to the bill. Hence this shows that the transaction in question is not liable to service tax for the period prior to 01.07.2010.
- (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 Mottisham 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.6,50,27,000/- 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 appellants 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 (108) 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 statutes 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

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) (zzza) 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 liable 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

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's 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 eligibility while demanding service 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 imposed on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure.

As per Section 80 of the Finance Act, 1994, there is provision for not imposing any penalty if the appellants proved that there was a reasonable cause for said failure. They merely stated that with a bonafide belief they had not paid service tax on the basis of clarification issued in the Board's Circular No. 108/02/2009-ST dt.29.01.2009, which is contrary to the statutory obligation cast upon the appellants under Works Contract Rules, 2007. Such a bald statement cannot be

acceptable. There should have cogent reasons as to what made to bonafidely believe that they were not liable to pay service tax on such, defrayed amounts. This reason is not reasonable cause for attracting waiver of penalty under Section 80 of the Finance Act, 1994. The scope and ambit of expression 'reasonable cause' has been well explained in a case under the Income Tax Act. 'Reasonable cause can be said to be cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bonafides' as held in the case of *Azadi Bachao Andolan Vs. Union of India* 2001 (116) Taxman 249/252 ITR 471 (Delhi). Further, it is evident from the record that the Appellants had not shown the taxable amounts in their ST 3 returns filed with the department during January 2009 to December 2009 even though they received taxable amounts from their customers and not paid service tax on such taxable amounts as required under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and this fact came to the knowledge of the department after conducting investigation into their activities. In this regard, it can be noticed from the records of this case that the appellants vide their letter dt. 08.7.2009 replied to the department's letter for non-filing of ST3 returns for Half Year ending 31.3.2009 that they were not required to pay service tax on the construction activity undertaken by them in the light of Hon'ble Gauhati High Court's decision in the case of *Magus Construction (P) Ltd - 2008 (11) STR 225 (Gau)* and Board's Circular No. 108/02/2009-ST dt. 29.01.2009, but the department had issued subject show cause notice not accepting their contention. Therefore, it is evident on record that their bonafide belief for non-payment of service tax is defeated. Further the case law cited in their letter is distinguished by the Hon'ble Punjab & Haryana High Court's decision in the case of *G.S. Promoters Vs. Union of India* reported in 2011 (21) STR 10 (P & H) as detailed in para 8.4 supra. Thus, they had not paid service tax on the taxable amounts received from their customers with an intention to avoid / evade payment of tax contrary to the statutory provisions. Adhering to the ratio of the above decision, there is nothing on record to show that the Appellants were prevented by reasonable cause for non-payment of service tax to entitle them for grant waiver of penalty under Section 80 of the Finance Act, 1994. It should be kept in mind that under Section 80 of the Finance Act, 1994, where the person / assessee succeeds in proving reasonable cause for failure to pay service tax, penalty may be waived altogether. But such is not the situation in the instant case. The Appellants had not proved reasonable cause for non-payment of service tax as required under Section 80 of the Finance Act, 1994 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. 5,82,32,000/- 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. 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.

4/2/13
(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, Secundeerabad-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.



केन्द्रीय उत्पाद, सीमाशुल्क एवं सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX

हैदराबाद-11 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 अंतर्गत आयुक्त (अपील) को की जानेवाली अपील फार्म एस.टी.-4 में हो और इसकी जांच 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 विरुद्ध 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 विरुद्ध 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.

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,

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.

6. Further it is made clear on 01.02.2010 by Sri A. Shanker Reddy, Deputy General Manager (Admin) 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 loans 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. 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 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

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 assessee 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. 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.

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 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.

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

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

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 1-7-2010, 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

- (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. 1159 (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 exists reasonable 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

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 Rs.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.

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 material 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 65A 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

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 by 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

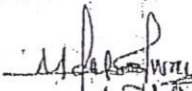
24. Accordingly, I hold that penalty under section 76 is imposable as they have contravened the provisions of law despite adverse order passed by Commissioner (Appeals).

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.

- (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.


(R S MAHESHWARI)
ADDITIONAL COMMISSIONER

To
M/s. Alpine Estates,
5-4-187/3 & 4, 1st 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.

-(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, Arrear's 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.



सीमाशुल्क, केन्द्रीय उत्पाद शुल्क व सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX
हैदराबाद II आयुक्तालय HYDERABAD II COMMISSIONERATE
11-3-4 E.M.F.A.: सीताराम प्रसाद टावर: रेड हिल्स: 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

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

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 AANFA5250FST001.

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

deed the right in a property got transferred to the customer, hence the construction service rendered by the assessee 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 22-5-2007, 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

(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, 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. 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

OR No. 51/2012-Adm-SI(ADC)
C.No. IV/16/62/2012-G.N

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. 74,52,400/-) 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.