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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
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Tele No: 040-23312247, Fax No: 040-23312246

Appeal No. (ST/30115/2018-ST[DB])

To

Kadakia And Modi Housing (Respondent)
No. 5-1-187/3 & 4, Second Floor,
Soham Mansion, M G Road,
Secunderabad,
Telangana-500003

MODI PROPERTIES PVT. LTD. INWARD No. 541 Date 04/10/18 SECTION

Enclosed: Appeal Folder
Subject - **ST/30115/2018 - ST[DB]** - Arising out of **HYD-SVTAX-000-AP2-0210-17-18-ST** Dt. **14/09/2017**
Commissioner of Central Tax--Secunderabad - G S T (Appellant)

VS

Kadakia And Modi Housing (Respondent)
Sir,

1. I am to forward herewith a copy / copy each of the memorandum of appeal(s) detailed above and to inform you that the appeal(s) will be heard by Regional bench of the tribunal in Hyderabad in due course.

2. Please treat this as a notice under Section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Encl: Copy(ies) of Memorandum of appeal(s).

Yours Faithfully

Dated: **20/02/2018**

Assistant Registrar
CESTAT, Hyderabad

Copy To:
1. S.D.R. (Copy of appeal enclosed)
2. Appellant

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

3. Advocate(s) / Consultant(s).

4. Office Copy.

PAPER BOOK			
DEPARTEMENTAL APPEAL AS PER REVIEW ORDER NO.03/2018-(OIA) DT.30.01.2018 PASSED BY THE COMMITTEE OF COMMISSIONERS AGAISNT O.I.A. NO. HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 PASSED BY THE COMMISSIONER (APPEALS-II), CENTRAL TAX, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD IN THE CASE OF M/s. KADAKIA & MODI HOUSING, No.5-4-187/3&4, SECOND FLOOR, SOHAM MANSION, M.G.ROAD, SECUNDERABAD SECUNDERABAD.			
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FORM ST-7

[See rules 9 (2) and 9 (2A)]

Form of Appeal to Appellate Tribunal under sub-Section (2) of Section 86 of the Finance Act, 1994

In the Customs, Central Excise and Service Tax Appellate Tribunal
South Zonal Bench at Hyderabad

ST APPEAL No. 30115 of 2018 (DB)

Commissioner, Central Tax, Central Excise & Service Tax, Secunderabad GST Commissionerate, Hyderabad — Applicant

Vs

M/s Kadakia & Modi Housing, No.5-4-187/3&4, Second Floor, Soham Mansion, M.G.Road, Secunderabad. — Respondent

1	Assessee Code*	Premises Code**	PAN***
	AAHFK8714ASD001	YO0102A001	AAHFK8714A
	E-Mail Address	Phone No.	Fax No.
	asr.agm@modiproperties.com	040-66335551	0040-27544058
2	The designation and address of the appellant Commissionerate (if the appeal is filed on the basis of the authorisation given by the Committee of Commissioners under sub-section (2A) of section 86 of the Act. A copy of the authorisation shall be enclosed)	The Assistant Commissioner (Tribunal), Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate, GST Bhavan, Basheerbagh, Hyderabad-500 028. (Review Order No.03/2018(OIA) dated 30.01.2018 issued by the Committee of Commissioners is enclosed.	
3	The designation and address of the appellant (if the appeal is filed on the basis of an order of the Committee of Chief Commissioners under sub-section (2) of section 86 of the Act. A copy of the order shall be enclosed).	NA	
4	Name and address of the respondent.	M/s Kadakia & Modi Housing, No.5-4-187/3&4, Second Floor, Soham Mansion, M.G.Road, Secunderabad.	
5	Number and date of the order against which the appeal is filed.	OIA No.HYD-SVTAX-OOO-AP2-0210-17-18-ST dated 14.09.2017 passed by the Commissioner (Appeals-II), Hyerabad	
6	Designation and address of the officer passing the decision or order in respect of which this appeal is being made.	The Commissioner (Appeals-II), Central Tax, Central Excise and Service Tax, GST Bhavan, Basheerbagh, Hyderabad	
7	State or Union territory and the Commissionerate in which the decision or order was made.	Telangana State. Secunderabad GST Commissionerate.	
8	Date of receipt of the Order referred to in (5) above by the Committee of Commissioners of Central Excise or by the Committee of Chief Commissioners of Central Excise,as the case may be	12.10.2017	
9	Whether the decision or order appealed against involves any question having a relation to the rate of service tax or to the value of service for the purpose of assessment.	NO	

10	Description of service and whether under 'negative list'.	Services under ; (1) Site formation and clearance, excavation and earth moving and demolition", (2) "Works Contract" and (3) "Taxable Services" -- Not in Negative List.
11	Period of dispute	October, 2010 to March, 2015
12 (i)	Amount of service tax demand dropped or reduced for the period of dispute	Service Tax of Rs.40,80,581/- under "Contract Service' was set aside and Rs.21,37,204/- under 'Site formation and clearance, excavation and earth moving and demolition" and "taxable services" was set aside and remanded.
(ii)	Amount of interest demand dropped or reduced for the period of dispute	Interest on the amount of Rs.40,80,581/- was set aside and on the amount of Rs. 21,37,204/- is upheld on the liablities quantified in the denovo proceedings.
(iii)	Amount of refund sanctioned or allowed for the period of dispute	NA
(iv)	Whether no or less penalty imposed?	Pealty of Rs.62,17,785/- imposed under Section 78 of the Finance Act, 1994 was modified and Rs.10,000/- imposed under Section 77 of the Finance Act, 1994 was set aside.
13	Whether any application for stay of the operation of the order appealed against has been made?	NO
14	Subject matter of dispute in order of priority (please choose two items from the list below) (i) Taxability (vii) CENVAT	
	[i) Taxability - Sl. No. of Negative List, ii) Classification of Services, iii) Applicability of Exemption Notification-Notification No., v) Export of services., v) Import of services., vi) Point of Taxation., vii) CENVAT., viii) Refund., ix) Valuation., x) Others.]	
	Priority 1	Priority 2
	Taxability (ii) Classification of services.	
15	If the application is against an Order-in-Appeal of Commissioner (Appeals), the number of Orders-in-Original covered by the said Order-in-Appeal.	Order-in-Original No.048/2016-(ST) dated 30.12.2016 passed by the Joint Commissioner of Central Excise & Service Tax, erstwhile Hyderabad I Commssionerate, Hyderabad.
16	Whether the respondent has also filed an appeal against the order against which this appeal is made?	NA
17	If answer to serial number 16 above is 'yes', furnish the details of the appeal.	NA
18	Whether the applicant wishes to be heard in person?	Yes. Through the Department's Authorised Representative.
19	Reliefs claimed in application.	-As prayed for in the Grounds of Appeal enclosed.-
20	Statement of Facts	Enclosed from page No. 3 to 11
21	Grounds of Appeal, Prayer	Enclosed from page No.12 to 23

05/02/18
(TARUN NEOGI)
ASST.COMMISSIONER(TRIBUNAL)
सहायक आयुक्त
Assistant Commissioner
केन्द्रीय कर एवं सीमा शुल्क
Central Tax & Customs
सिकंदराबाद जी एस टी आयुक्तालय
Secunderabad GST Commissionerate
हैदराबाद/Hyderabad

STATEMENT OF FACTS

M/s Kadakia & Modi Housing, Secunderabad are engaged in the construction of Villas and are registered with the Department vide STC AAHFK8714ASD001 under the categories of "Construction of Residential Complex Service" and "Works Contract Service".

2. During the course of investigation, it was observed that the assessee are not discharging Service Tax properly. Examination of the assessee's documents revealed that :

(i) they had not filed ST-3 returns and not paid Service Tax during the period October,2010 to March, 2011.

(ii) They had filed ST-3 returns and self assessed their Service Tax under "Construction of Residential Complex Service" for the period from April,2011 to September, 2011. Later on they changed the classification of the services rendered to "Works Contract Service" with effect from October, 2011 and onwards.

3. On further examination of the Agreements entered with their Customers, it was observed that the assessees are collecting the agreed value, in connection with the construction of villas, under the following heads.

(i) Towards sale of Land.

(ii) Towards development charges of land for laying of roads, drains, parks etc.

(iii) Towards cost of construction, water & electricity connection and for other amenities.

If the documents are entered before the Development of Land, the assessee's are entering into separate contracts for sale of Land, for development of land and for construction of villas. If the documents are entered after the Development of Land, the assessee's are entering into contract for sale of land and for construction of Villas. Examination of the receipts vis-à-vis the amounts indicated in the agreement of sales showed that the Land Development charges are not included in the Agreement of construction in some cases, partially included in some

cases. The Cost of Land Development in some cases is included in the amount indicated in the Sale Deed and exemption is claimed exemption from payment of Service Tax on the Development charges.

4. As per Section 65(97a) of the erstwhile Finance Act, 1994, "Site formation and clearance, excavation and earth moving and demolition" service, for the period up to 30.06.2012, includes:

(i) Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes;
(ii) Soil Stabilization; or
(iii) Horizontal drilling for the passage of cables or drain pipes ; or
(iv) Land reclamation work; or
(v) Contaminated top soil stripping work; or
(vi) Demolition and wrecking of building structure or road.

For the period up to 30.06.2012, as per Section 105(zzza) of the erstwhile Finance Act, 1994, "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to "site formation and clearance, excavation and earth moving and demolition and such other similar activities".

5. W.e.f.01.07.2012, it appeared that "site formation and clearance, excavation and earth moving and demolition and such other similar activities to be a service under Section 65(44) of the erstwhile Finance Act, 1994 and taxable under the provisions of 65B(51) ibid.

Thus, the activity of land development rendered by the assessee appears to be chargeable to Service Tax under "Site formation and clearance, excavation and earth moving and demolition" service without any abatement.

6. As far as the construction of villas are concerned, 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 purpose of carrying out,-

(a).....
(b).....
(c) Construction of a new residential complex or a part thereof; or
(d).....
(e).....

From 01.07.2012 onwards, service portion of Works Contract Service is a "Declared Service" under Section 66E(h) of the Finance Act, 1994.

As per Section 65B(54) of the Finance Act, 1994, *works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance. renovation, alteration of any movable or immovable property or for carrying out any other* similar activity or a part thereof in relation to such property;

7. In the present case there involved transfer of property in goods in execution of construction agreements and hence, the service rendered by the assessee is taxable under "Works Contract Service". However, the assessee, in some cases, has transferred semi-finished construction by way of sale deed. Subsequently, the assessee entered into a construction agreement for completion of the semi-finished villa. Thus the assessee erroneously claimed exemption for the entire value indicated in the sale deed. Whereas, the cost of construction of these villas is to be arrived at by deducting the cost of land which is to be arrived proportionately basing on the values of identical lands from the sale deed value and to be included in the taxable value.

8. Further verification of the documents revealed that the assessee has included the cost of providing common amenities, which will be Rs.1,50,000/- per villa, in the cost of construction and assessed to Service Tax under "Works Contract Service" for payment of Service Tax. Whereas, providing common amenities is not a service rendered under "Works Contract' as there is no transfer of property to the individual.

Hence, the assessee are required to discharge full rate of Service Tax under "other taxable Services".

9. In view of the above, it appeared that the assessee are liable to discharge Service Tax on:

(i) Cost of Land Development shown in agreement of sales under the category of "Site Formation Services";

(ii) Common amenities without any abatement at full rate under "other Services";

(iii) The value of construction shown in the agreement of sales excluding the value of common amenities under "Works Contract Service";

10. Accordingly, the Service Tax liability was arrived at, villa wise and issued a Show Cause Notice in O.R.No.99/2016-Adjn(ST)(Commr) HQPOR No.10/2016-ST-AE-VIII dated 22.04.2016 to M/s Kadakia & Modi Housing demanding Service Tax of Rs.14,35,330/- under "Site Formation Service", Rs.40,80,581/- under "Works Contract Service" and Rs.7,01,874/- under "other Services" in terms of proviso to Section 73(1), interest on the above said amounts under Section 75 besides proposing penalties under Sections 77 and 78 of the Finance Act, 1994.

11. The above said Show Cause Notice was adjudicated vide Order-in-Original No.48/2016-(S.T) dated 30.12.2016 by the Joint Commissioner of Central Excise and Service Tax, erstwhile Hyderabad I Commissionerate, Hyderabad, wherein it was observed:

(a) The assessee, on one hand contested that the Land Development Service do not all under the category of "Site Formation & clearance, excavation and earth moving and demolition services" as none of the work specified in the definition were carried out by them; do not fall under "Works Contract Service" and hence there is no liability of Service Tax. On the other hand, the assessee in their reply to the Show Cause Notice contested that the "Land Development Service" shall be treated as species of "Works Contact Service" and relied upon various case laws.

(b) Further, the assessee submitted that there is a transfer of property in goods while providing common amenities; pay VAT on the charges collected under "Land Development Services" and hence it is a species of "Works Contract Services". However, in their written reply, it is again contested that "Land Development Services" are not at all covered under any of the "Works" defined under Works Contract Services and referred Apex Court case Law in the case of CCE Vs. Larson & Turbo Ltd.-2015(39)STR913(C).

(c) From the above, it is clear that the assessee lacks clarity as they say that the Land Development Service" do not fall under "Site Formation & clearance, excavation and earth moving and demolition services" and it forms species of "Works Contract Services; again they say it is not a "Works Contract Service" as non of the works specified in the works contract service was performed for Land Development Service.

(d) In terms of Section 65(A)2(a) of the Finance Act, 1994, "Land Development Service" gives more specific description under "Site Formation & clearance, excavation and earth moving and demolition services" as the work i.e. leveling of the land, making it suitable for construction of villa, horizontally drilling for laying of drainages lines, laying water pipes and Cables etc. apart from constructing common amenities such as park, current poles and club houses. Since majority works involved are related to "Site Formation" and the assessee have collected the charges under "Land Development Services" separately, they are rightly classifiable under "Site Formation & Clearance, Excavation and Earth Moving and Demolition Services".

(e) As per Section 66F of the Finance Act, 1994, the "Land Development Services" shall be treated as a single service due to its nomenclature and essential characteristics even though it contains many elements.

(f) As regards the demand under "Works Contract Service, there is no basis for the argument that "undivided portion of land along with semi finished villa/house is not chargeable to VAT

and it is mere sale of immovable property" is not acceptable and it is totally misconstrued in their favour to get exemption from payment of Service Tax. Hence, the tax demanded is liable for confirmation under "Works Contract Service".

(g) With regard to demand of Service Tax under "Other Services" it is observed that the assess could not produced any evidence that the amounts are received towards Corpus Fund, Electricity Deposit, Water Charges and towards Service Tax. Hence the Service Tax is payable on these charges under "Other Services".

(h) The assessee are well aware of the statutory provisions and are billing Service Tax liability wherever they collected. Since the assessee are claiming cum-tax benefit wherever they have not collected, such benefit cannot be given.

(i) The issue came light only after initiation of investigation by the Department and it was discovered that the assessee were misclassifying their services with intent to evade payment of Service Tax. Since the assessee are aware of statutory provisions and have been collecting Service Tax and not paying the same to the exchequer, they have suppressed these facts from the notice of the Department, they are liable for penal action under Section 78 of the Finance Act, 1994.

12. From the above observations, the Adjudicating Authority vide Order-in-Original No.048/2016-(ST) dated 30.12.2016 has passed the following order.

(i) Confirmed the demand of Rs.14,35,330/- being the Service Tax payable on "Site Formation Service" under proviso to sub-section (1) of the Section 73 of the Finance Act, 1994;

(ii) Confirmed the demand of Rs.40,80,581/- being the Service Tax payable under "Works Contract Service" under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994;

(iii) Confirmed the demand of Rs.7,01,874/- being the Service Tax payable under "Other Services" under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994;

(iv) Appropriated the amount of Rs.19,00,736/- paid towards service tax against the demands mentioned at Sl.No.(1) to (3) above;

(v) Confirmed the interest as applicable on the amounts mentioned at (i) (ii) and (iii) in terms of Section 75 of the Finance Act, 1994;

(vi) Imposed a penalty of Rs.62,17,785/- under Section 78 of the Finance Act, 1994. However, the penalty is reduced to Rs.15,54,446/- provided the Service Tax amount, interest and the reduced penalty is paid within thirty days of receipt of the order.

(vii) Imposed a penalty of Rs.10,000/- under Section 77(2) of the Finance Act, 1994.

13. Aggrieved by the above said Order-in-Original, the assessee preferred an appeal before the Commissioner (Appeals), Hyderabad who vide Order-in-Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 observed that:

(i) the assessee have contested the demands mainly on limitation. However, the short discharge of the Service Tax by suppressing the values in ST-3 Returns has come to light only with the intervention of the Department by reconciliation of the receipts declared in the ST-3 returns with the actual receipts mentioned in their financial records. Since the assessee registered under both "Construction of Residential Complex Service" and "Works Contract Service", the Department cannot presume the identical activity undertaken by the assessee as the ST-3 provides no clues. It is only after investigation, the Department could conclude that the assessee was actually undertaking a singular activity classified both under Construction of Residential Complex Services and Works Contract Service. Hence, there

is reasonable cause and justification for the invocation of the proviso to Section 73(1) of the Finance Act, 1994.

(ii) The activities like leveling, completion of roads/street lights, storm-water drains etc. towards setting up of common amenities are ancillary to the main service of villa constructions. For example, no individual who does not own a property would be entitled to share ownership of the internal roads, utilities, garages etc. The prime service is only villa construction and the land development for access to that villa is clearly a subsidiary to it. Further, in terms of Section 65A and Section 66 F of the Finance Act, 1994, the land development, a part of major activity of villa construction with common amenities, merits classification under Works Contract Service in the bundled service and not under Site Formation as an independent service. Hence, the demand is only short levy if the charges are actually collected. **Hence the para 26(1) of the Order-in-Original is therefore set-aside and remanded** to the Original Adjudicating Authority for re-quantification of liability under Works Contract by extending composition scheme. Since the tax incidence has been demanded on the transaction value which includes the tax element, the liability shall be assessed on the cum-tax value in terms of Section 67(2) of the Finance Act, 1994.

(iii) As regards the liability on the construction of semi-finished villa, it is observed that the assessee possessed a title to the land and any construction undertaken prior to sale of any land parcel is admittedly service to self; there is no service provider and receiver to fasten the levy; and the sale deed consisting of land parcel along with the unfinished house is registered for the composite consideration; the sale deed records the immovable property in totality i.e. land parcel and the unfinished house which is assessed to Stamp duty and thereby recognized as a sale transaction alone; the transaction covered by a sale deed cannot be considered to represent a divisible land – building transaction involving sale of land and construction of building. **Hence, para 26(2) of the Order-in-Original is to be set aside.**

(iv) With regard to the "other services", it is observed that the assessee are collecting certain amounts towards corpus fund, electricity deposit and water charges, all of which are statutorily prescribed. If the impugned amounts collected from the villa vendees are not deposited to the utilities/transferred to the association's corpus fund without any retention in the assessee's account, the question of treating the same as consideration for construction of villa and the assessment under "Works Contract Service" does not arise. Hence, the matter is to be examined by the original Adjudicating Authority by ascertaining the fact; arrive at a conclusion on the existence of the liability and then proceed to quantify it, if applicable as was done in the case of the amounts collected for the land development discussed above. **Accordingly, para 26(3) of the Order-in-Original set aside and remanded.**

(v) On re-quantification of elements (i) and (iii) of the Order-in-Original, the amount paid shall automatically stand appropriated.

(vi) Interest under Section 75 is a quintessential liability, accompanying belated discharge of tax and cannot be waived under any provision of law. Hence, para 26(5) of the Order-in-Original is upheld.

(vii) The demand proposals have been upheld on limitation and the allegation of gross violations has been upheld; thereby a penalty under Section 78(1) of the Finance Act, 1994 is warranted. However the quantity of penalty shall be computed as aggregated of (a) 100% tax liability for the period prior to 08.04.2011 and (b) 50% of the tax liability for the period 08.04.2011 to 31.03.2015, quantified in de-novo proceedings in terms of proviso under Section 78(1) of the Finance Act, 1994. **Accordingly, the para 26(6) of the Order-in-Original was modified.**

(viii) As regards the penalty under Section 77 for the belated registration, it is observed that the demand is proposed from October,2010 and the assessee has had taken registration on 25.04.2010 and hence the penalty imposed under Section 77(2) is **legally unsustainable and accordingly set aside.**

GROUNDS OF APPEAL

The Order-in-Appeal No.HYD-SVTAX-000-0210-17-18-ST dated 14.09.2017 passed by the Commissioner (Appeals), Hyderabad appears to be not proper, correct and legal for the following reasons:

I. "LAND DEVELMENT SERVICE"

(a) The Commissioner (Appeals) in the impugned Order-in-Appeal opined that the prime service rendered by the assessee is only villa construction and the land development for access to that villa is clearly a subsidiary to it; the land development, a part of major activity of villa construction with common amenities, merits classification under Works Contract Service in the bundled service and not under Site Formation as an independent service. Whereas, the "Land Development Service" has nothing to do with the "Works Contract Services". The assessee, as per the agreement for sale entered with their Customers, charged separately for "Land Development Services" and "Works Contract Services for construction of villas". When the assessee himself has clearly bifurcated the "Land Development Service" from the "Works Contract Service" and as Section 65(A)2(a) of the erstwhile Finance Act, 1994, gives more specific description of "Land Development Service" under "Site formation and clearance, excavation and earth moving and demolition" Service, classification of "Land Development" under "Works Contract Service" in Bundled Services and extending the benefit of abatement in terms of Rule 2A of Service Tax (Determination of Value) Rules, 2012 is not legal, proper and correct.

(b) As per Section 65*(105)(zzzza) of the Finance Act, 1994, under Works Contract":*

" 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 purpose of carrying out,-

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

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

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

From 01.07.2012 onwards, service portion of Works Contract Service is a "Declared Service" under Section 66E(h) of the Finance Act, 1994.

As per Section 65B(54) of the Finance Act, 1994, *works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance. renovation, alteration of any movable or immovable property or for carrying out any other* similar activity or a part thereof in relation to such property.

From the above definition it clearly manifested that in order to classify "Land Development Service" under "Works Contract Service" two conditions are required to be satisfied i.e. first there should be a transfer of property in goods and to perform the activities from (a) to (e), mentioned above. Whereas, while performing the services under "Land Development", the assessee have not transferred any property in goods and no activities from (a) to (e) as above said have not been performed. Hence, it is not proper to classify the "Land Development" under "Works Contract" in Bundled Services.

(c) In the instant case the assessee, under "Land Development Services", rendered the work pertaining to preparation of site suitable for construction, laying of roads, laying of drainage lines, water pipes etc. Hence the common area and amenities even though constructed with murram and usage of labour it is not transferred in goods to any individual and the common area and amenities are used by the group of individual and hence the same cannot be treated as species of "Works Contract".

(d) As per As per Section 65(97a) of the erstwhile Finance Act, 1994, "Site formation and clearance, excavation and earth moving and demolition" service, for the period up to 30.06.2012, includes:

(i) Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes;
(ii) Soil Stabilization; or
(iii) Horizontal drilling for the passage of cables or drain pipes ; or
(iv) Land reclamation work; or
(v) Contaminated top soil stripping work; or
(vi) Demolition and wrecking of building structure or road.

For the period up to 30.06.2012, as per Section 105(zzza) of the erstwhile Finance Act, 1994, "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to "site formation and clearance, excavation and earth moving and demolition and such other similar activities".

W.e.f. 01.07.2012, it appeared that "site formation and clearance, excavation and earth moving and demolition and such other similar activities to be a "service" under Section 65(44) of the erstwhile Finance Act, 1994 and taxable under the provisions of 65B(51) ibid.

Further, as per Section 65A of the erstwhile Finance Act, 1994, Classification of taxable service:-

(1) For the purpose of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of Section 65:

(2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clause(105) of Section 65, classification shall be effected as follows:

(a) The sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) .....

(c) .....

(3).....

In terms of Section 65(97a) read with Section 65(A)2(a) of the erstwhile Finance Act, 1994, "Land Development Services" gives more specific description under "Site formation and clearance, excavation and earth moving and demolition" Service and the works involved are leveling the land, making suitable for construction of villas and horizontal drilling for laying of drainage lines and water pipes and cables etc.

(e) As per Section 66F of the erstwhile Finance Act, 1994, "Land Development Services" shall be treated as single service due to its nomenclature and essential characteristics even though it contains various elements. However, the Commissioner (Appeals) has not drawn a logical conclusion from Section 65A of the erstwhile Finance Act, 1994 and Section 66F ibid and held that the activity of Land Development rendered by the assessee falls under "Works Contract Service" in the bundled service which appears to be not correct, legal.

Further, the assessee are well aware of the statutory provisions and are collecting Service Tax on the agreements entered for constructions. The assessee intentionally evaded the service tax on "Land Development Services" and "Other Taxable Services". Hence, extending the cum-tax benefit appears to be not proper.

II. "WORKS CONTRACT SERVICE"

(f) The assessee have entered into agreements with their Customers for sale land together with bungalow to be constructed thereon as per the specifications and other terms and condition for a total consideration. For example, the assessee have entered into an Agreement dated 09.11.2011 with Ms. Sabiha Hussain for sale of Plot No.1 at Shamirpet Village, R.R.District together with a deluxe bungalow to be constructed thereon for consideration as detailed below.

Sl.No.	Description	Amount
A	Towards Sale of and	Rs.1,78,000
B	Towards Development Charges of Land for laying of Roads, Drains Parks etc.	Rs.18,22,000
C	Total towards Land Cost (A+B)	Rs.20,00,000
D	Towards cost of construction, water & electricity connection and for other amenities	Rs.30,00,000
E	Total Sale Consideration (C+D)	Rs.50,00,000

Verification of the sale deed reveals that the assessee has registered the above said plot along with the semi-finished construction for a consideration of Rs.12,00,000/-. The assessee have entered this type of agreements with their other Customers who booked their plots before "Land Development".

Further the assessee have also entered into another type of sale agreements with their Customers who booked their plots after "Land Development". For example, the assessee have entered into a sale agreement dated 13.12.2014 with Mr. Giri Ramachander Patwar and Ms. Roopa Patwari for sale of Plot No.8 at Shamirpet Village of R.R.Dist. together with a semi-deluxe bungalow to be constructed thereon for a consideration as detailed below.

Sl.No.	Description	Amount
A	Towards Sale of and	Rs.34,38,000
B	Towards cost of construction, water & electricity connection and for other amenities	Rs.11,40,000
C	Total towards Land Cost (A+B)	Rs.45,78,000

Verification of the Sale Deed dated 18.03.2015 revealed that the assessee has registered the plot along with semi-finished construction for a total consideration of Rs. 34,38,000/-. The assessee have entered this type of agreements with their other Customers who booked their plots after "Land Development".

As per Section 65(91a) of the erstwhile 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 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 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.

From the above definition, residential unit means a single house or a single apartment intended for use as a place of residence. As per above said definition, the project 'Bloomsdale", where assessee have constructed the villas, met all the parameters.

Board in their circular No.151/2/2013-ST dated 10.02.2012 vide para 2.1(A) has clarified construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner. From above, it is clear that the construction service under "Works Contract Service" rendered before issuance of completion certificate is a taxable service. Hence, the assessee is required to discharge their service tax obligation even on the semi-finished villas registered before issuance of Completion Certificate by the Competent Authority.

Whereas, the Commissioner (Appeals), Hyderabad in the impugned Order-in-Appeal, without considering the evidence on record, observed that the assessee possessed a title to the land and any construction undertaken prior to sale of any land parcel is admittedly service to self; there is no service provider and receiver to fasten the levy and accordingly set aside the demand. The observations of the Commissioner (Appeals) appears to be not proper, correct an legal.

(g) From the above, it is amply clear that the assessee have intentionally included the cost of semi-finished construction in the land cost so as to evade Service Tax resulting in short payment under "Works Contract Service". Though the assessee have rendered the Services under the category of "Works Contract" they have not paid 'Service Tax' nor filed ST-3 returns during the period from October, 2010 to March, 2011. They have classified their services under the category of "Residential Complex Services" during the period from April, 2011 to September, 2011, paid Service Tax and filed ST-3 Returns. Later on they changed their classification to "Works Contract Services" during the period from October, 2011 and onwards and paid Service Tax. During the period from October, 2010 to March, 2015, the assessee paid Service Tax to the tune of Rs.19,00,736/- on the contracts entered for constructions availing exemption on semi-finished villages registered along with Land.

The demand in the Show Cause Notice dated 22.04.2016, which was confirmed vide Order-in-Original No.048/2016-(S.T) dated 30.12.2016, was arrived at Rs.40,80,581/- by calculating villa wise taking together the values of semi-finished villas and the value for completion of the said semi-finished villas. The Service Tax already paid by the assessee under "Works Contract" during the period from October, 2011 to March, 2015 has been appropriated against the said demand. However, the Commissioner (Appeals) without considering the material facts, set aside the entire demand observing that the same pertains only to semi-finished villas; sale deed consisting of land parcel along with the unfinished house is assessed to Stamp duty and thereby recognized as a sale transaction alone. Further, the Commissioner (Appeals) vide the said impugned order has upheld that the Service Tax of Rs.19,00,736/- already paid by the assessee stands appropriated against the re-quantified demands under "Land Development Services" and "other Services". Since the above said Service Tax of Rs.19,00,736/- has been paid by the assessee under "Works Contract Services" on the values of the agreements entered

for construction, appropriating the same against the "Land Development Services and "Other Taxable Services" is absolutely not correct and legal.

III. "OTHER TAXABLE SERVICES"

(h) The assessee has also collected certain amounts over and above the agreed amount in connection with rendering the construction of villas. The assessee have claimed that the same are in connection with Corpus Fund, Electricity Deposit, water charges and towards service tax. However, the assessee has not submitted any documentary evidence to this effect. The assessee have also not submitted the said documentary evidence even before the Commissioner (Appeals). However, the Commissioner (Appeals) without considering the same remanded the matter to the Original Adjudicating Authority for re-quantification which is not correct.

19. Further, it appears that M/s Kadakia & Modi Housing, 5-4-187/3 & 4, II Floor, Soham Mansion, M.G.Road, Secunderabad are liable to pay Service Tax under the category of "Site Formation & Clearance, Excavation and Earth Moving and Demolition Services" "Works Contract Services" and "Other Taxable Services" along with interest and consequential penalties as confirmed in the Order-in-Original No.048/2016-(S.T) dated 30.12.2016. Hence, setting aside of the demands at para 26(2), 26(7) and modifying and remand of the demands at para 26(1), 26(3) and 26(6) of the Order-in-Original 048/2016-(S.T) dated 30.12.2016 passed by the Joint Commissioner of Central Excise & Service Tax, Erstwhile Hyderabad I Commissionerate, Hyderabad by the Commissioner (Appeals), Hyderabad vide Order-in-Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 is not proper, correct and legal.

PRAYER

The Committee of the Commissioners, therefore, under the provisions of Section 86(2) of the Finance Act, 1994, read with Section 174(2) of the CGST Act,2017, has directed the Assistant Commissioner (Tribunal), Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate, Hyderabad to appeal to the Customs, Excise & Service Tax Appellate Tribunal, Hyderabad, against the Order-in-Appeal, for determination of the following points arising out of the said order.

(i) set aside the impugned Order-In-Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 passed by the Commissioner (Appeals-II), GST and Central Excise, Hyderabad, in the case of M/s Kadakia & Modi Housing, 5-4-187/3 & 4, II Floor, Soham Mansion, M.G.Road, Secunderabad and to confirm the demand proposed in the Order-in-Original No.048/2016-(S.T) dated 30.12.2016 along with interest and penalties as per the provisions of law; or

(ii) pass any suitable orders, as deemed fit.

15/02/18

(TARUN NEOGI)
ASSISTAT COMISSIONER (TRIBUNAL)
सहायक आयुक्त
Assistant Commissioner
केन्द्रीय कर एवं सीमा शुल्क
Central Tax & Customs
सिकंदराबाद जी एस टी आयुक्तालय
Secunderabad GST Commissionerate
हैदराबाद/Hyderabad

VERIFICATION

I, TARUN NEOGI, Assistant Commissioner (Tribunal), Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate, Hyderabad, the Officer authorized by the Committee of Commissionerates i.e. the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified to-day the 5th of February,2018.

05/02/18

(TARUN NEOGI)
ASSISTAT COMISSIONER (TRIBUNAL)

सहायक आयुक्त
Assistant Commissioner
केन्द्रीय कर एवं सीमा शुल्क
Central Tax & Customs
सिकंदराबाद जी एस टी आयुक्तालय
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OFFICE OF THE COMMISSIONER
OF CENTRAL TAX, CENTRAL EXCISE & SERVICE TAX
SECUNDERABAD GST COMMISSIONERATE : GST BHAVAN
L.B.STADIUM ROAD : BASHEERBAGH : HYDERABAD – 500 004

C.No.V/R/OIA/123/2017-Review Dated 30.01.2018

Review Order No. 03/ 2018-(O.I.A.)

(Issued by the Committee of Commissioners consisting of the Commissioner of Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate and the Commissioner of Central Tax, Central Excise and Service Tax, Medchal GST Commissionerate, Hyderabad)

OOO

WHEREAS, we have called for and examined the records relating to the Order-In-Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 in Appeal No.118/2017(STC)S.T (**Enclosed**) passed by the Commissioner (Appeals-II), GST and Central Excise, Hyderabad, in the case of M/s Kadakia & Modi Housing, No.5-4-187/3 & 4, Second Floor, Soham Mansion, MG Road, Secunderabad (hereinafter also referred to as "the assessee") for the purpose of satisfying ourselves as to legality and propriety of the said Order-in-Appeal.

2. The impugned Order-in-Appeal set aside the demands under para 26(2) and 26(7) and modified and remanded the demands under para 26(1), 26(3) and 26(6) of the Order-in-Original No.048/2016-(S.T) dated 30.12.2016 passed by the Joint Commissioner of Central Excise and Service Tax, erstwhile Hyderabad I Commissionerate, Hyderabad as detailed in the Statement of Facts below.

3. AND WHEREAS on examination, it is found that the said Order-in-Appeal is not proper and legal on the grounds specified in the "Grounds of Appeal".

4. Now, therefore, in exercise of the powers vested on us under sub-section (2A) of Section 86 of the Finance Act, 1994 read with Section 174(2) of the CGST Act, 2017, we hereby authorize the Assistant Commissioner (Tribunal), Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate, GST Building, Basheerbagh, Hyderbad and direct him to appeal on our behalf to the Hon'ble CESTAT, Regional Bench, Hyderabad, against the said order.

STATEMENT OF FACTS

5. M/s Kadakia & Modi Housing, Secunderabad are engaged in the construction of Villas and are registered with the Department vide STC AAHFK8714ASD001 under the categories of "Construction of Residential Complex Service" and "Works Contract Service".

6. During the course of investigation, it was observed that the assessee are not discharging Service Tax properly. Examination of the assessee's documents revealed that :

(i) they had not filed ST-3 returns and not paid Service Tax during the period October,2010 to March, 2011.

(ii) They had filed ST-3 returns and self assessed their Service Tax under "Construction of Residential Complex Service" for the period from April,2011 to September, 2011. Later on they changed the classification of the services rendered to "Works Contract Service" with effect from October, 2011 and onwards.

7. On further examination of the Agreements entered with their Customers, it was observed that the assessees are collecting the agreed value, in connection with the construction of villas, under the following heads.

(i) Towards sale of Land.

(ii) Towards development charges of land for laying of roads, drains, parks etc.

(iii) Towards cost of construction, water & electricity connection and for other amenities.

If the documents are entered before the Development of Land, the assessee's are entering into separate contracts for sale of Land, for development of land and for construction of villas. If the documents are entered after the Development of Land, the assessee's are entering into contract for sale of land and for construction of Villas. Examination of the receipts vis-à-vis the amounts indicated in the agreement of sales showed that the Land Development charges are not included in the Agreement of construction in some cases, partially included in some cases. The Cost of Land Development in some cases is included in the amount indicated in the Sale Deed and exemption is claimed exemption from payment of Service Tax on the Development charges.

8. As per Section 65(97a) of the erstwhile Finance Act, 1994, "Site formation and clearance, excavation and earth moving and demolition" service, for the period up to 30.06.2012, includes:

(i) Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes;
(ii) Soil Stabilization; or
(iii) Horizontal drilling for the passage of cables or drain pipes ; or
(iv) Land reclamation work; or
(v) Contaminated top soil stripping work; or
(vi) Demolition and wrecking of building structure or road.

For the period up to 30.06.2012, as per Section 105(zzza) of the erstwhile Finance Act, 1994, "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to "site formation and clearance, excavation and earth moving and demolition and such other similar activities".

9. W.e.f.01.07.2012, it appeared that "site formation and clearance, excavation and earth moving and demolition and such other similar activities to be a service under Section 65(44) of the erstwhile Finance Act, 1994 and taxable under the provisions of 65B(51) ibid.

Thus, the activity of land development rendered by the assessee appears to be chargeable to Service Tax under "Site formation and clearance, excavation and earth moving and demolition" service without any abatement.

10. As far as the construction of villas are concerned, 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 purpose of carrying out,-

(a).....
(b).....
(c) Construction of a new residential complex or a part thereof; or
(d).....
(e).....

From 01.07.2012 onwards, service portion of Works Contract Service is a "Declared Service" under Section 66E(h) of the Finance Act, 1994.

As per Section 65B(54) of the Finance Act, 1994, *works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance. renovation, alteration of any movable or immovable property or for carrying out any other* similar activity or a part thereof in relation to such property;

11. In the present case there involved transfer of property in goods in execution of construction agreements and hence, the service rendered by the assessee is taxable under "Works Contract Service". However, the assessee, in some cases, has transferred semi-finished construction by way of sale deed. Subsequently, the assessee entered into a construction agreement for completion of the semi-finished villa. Thus the assessee erroneously claimed exemption for the entire value indicated in the sale deed. Whereas, the cost of construction of these villas is to be arrived at by deducting the cost of land which is to be arrived proportionately basing on the values of identical lands from the sale deed value and to be included in the taxable value.

12. Further verification of the documents revealed that the assessee has included the cost of providing common amenities, which will be Rs.1,50,000/- per villa, in the cost of construction and assessed to Service Tax under "Works Contract Service" for payment of Service Tax. Whereas, providing common amenities is not a service rendered under "Works Contract' as there is no transfer of property to the individual. Hence, the assessee are required to discharge full rate of Service Tax under "other taxable Services".

13. In view of the above, it appeared that the assessee are liable to discharge Service Tax on:

(i) Cost of Land Development shown in agreement of sales under the category of "Site Formation Services";

(ii) Common amenities without any abatement at full rate under "other Services";

(iii) The value of construction shown in the agreement of sales excluding the value of common amenities under "Works Contract Service";

14. Accordingly, the Service Tax liability was arrived at, villa wise and issued a Show Cause Notice in O.R.No.99/2016-Adjn(ST)(Commr) HQPOR No.10/2016-ST-AE-VIII dated 22.04.2016 to M/s Kadakia & Modi Housing demanding Service Tax of Rs.14,35,330/- under "Site Formation Service", Rs.40,80,581/- under "Works Contract Service" and Rs.7,01,874/- under "other Services" in terms of proviso to Section 73(1), interest on the above said amounts under Section 75 besides proposing penalties under Sections 77 and 78 of the Finance Act, 1994.

15. The above said Show Cause Notice was adjudicated vide Order-in-Original No.48/2016-(S.T) dated 30.12.2016 by the Joint Commissioner of Central Excise and Service Tax, erstwhile Hyderabad I Commissionerate, Hyderabad, wherein it was observed:

(a) The assessee, on one hand contested that the Land Development Service do not all under the category of "Site Formation & clearance, excavation and earth moving and demolition services" as none of the work specified in the definition were carried out by them; do not fall under "Works Contract Service" and hence there is no liability of Service Tax. On the other hand, the assessee in their reply to the Show Cause Notice contested that the "Land Development Service" shall be treated as species of "Works Contact Service" and relied upon various case laws.

(b) Further, the assessee submitted that there is a transfer of property in goods while providing common amenities; pay VAT on the charges collected under "Land Development Services" and hence it is a species of "Works Contract Services". However, in their written reply, it is again contested that "Land Development Services" are not at all covered under any of the "Works" defined under Works Contract Services and referred Apex Court case Law in the case of CCE Vs. Larson & Turbo Ltd.-2015(39)STR913(C).

(c) From the above, it is clear that the assessee lacks clarity as they say that the Land Development Service" do not fall under "Site Formation & clearance, excavation and earth moving and demolition services" and it forms species of "Works Contract Services; again they say it is not a "Works Contract Service" as non of the works specified in the works contract service was performed for Land Development Service.

(d) In terms of Section 65(A)2(a) of the Finance Act, 1994, "Land Development Service" gives more specific description under "Site Formation & clearance, excavation and earth moving and demolition services" as the work i.e. leveling of the land, making it suitable for construction of villa, horizontally drilling for laying of drainages lines, laying water pipes and Cables etc. apart from constructing common amenities such as park, current poles and club houses. Since majority works involved are related to "Site Formation" and the assessee have collected the charges under "Land Development Services" separately, they are rightly classifiable under "Site Formation & Clearance, Excavation and Earth Moving and Demolition Services".

(e) As per Section 66F of the Finance Act, 1994, the "Land Development Services" shall be treated as a single service due to its nomenclature and essential characteristics even though it contains many elements.

(f) As regards the demand under "Works Contract Service, there is no basis for the argument that "undivided portion of land along with semi finished villa/house is not chargeable to VAT and it is mere sale of immovable property" is not acceptable and it is totally misconstrued in their favour to get exemption from payment of Service Tax. Hence, the tax demanded is liable for confirmation under " Works Contract Service".

(g) With regard to demand of Service Tax under "Other Services" it is observed that the assess could not produced any evidence that the amounts are received towards Corpus Fund, Electricity Deposit, Water Charges and towards Service Tax. Hence the Service Tax is payable on these charges under "Other Services".

(h) The assessee are well aware of the statutory provisions and are billing Service Tax liability wherever they collected. Since the assessee are claiming cum-tax benefit wherever they have not collected, such benefit cannot be given.

(i) The issue came light only after initiation of investigation by the Department and it was discovered that the assessee were misclassifying their services with an intent to evade payment of Service Tax. Since the assessee are aware of statutory provisions and have been collecting Service Tax and not paying the same to

the exchequer, they have suppressed these facts from the notice of the Department, they are liable for penal action under Section 78 of the Finance Act, 1994.

16. From the above observations, the Adjudicating Authority vide Order-in-Original No.048/2016-(ST) dated 30.12.2016 has passed the following order.

(i) Confirmed the demand of Rs.14,35,330/- being the Service Tax payable on "Site Formation Service" under proviso to sub-section (1) of the Section 73 of the Finance Act, 1994;

(ii) Confirmed the demand of Rs.40,80,581/- being the Service Tax payable under "Works Contract Service" under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994;

(iii) Confirmed the demand of Rs.7,01,874/- being the Service Tax payable under "Other Services" under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994;

(iv) Appropriated the amount of Rs.19,00,736/- paid towards service tax against the demands mentioned at Sl.No.(1) to (3) above;

(v) Confirmed the interest as applicable on the amounts mentioned at (i) (ii) and (iii) in terms of Section 75 of the Finance Act, 1994;

(vi) Imposed a penalty of Rs.62,17,785/- under Section 78 of the Finance Act, 1994. However, the penalty is reduced to Rs.15,54,446/- provided the Service Tax amount, interest and the reduced penalty is paid within thirty days of receipt of the order.

(vii) Imposed a penalty of Rs.10,000/- under Section 77(2) of the Finance Act, 1994.

17. Aggrieved by the above said Order-in-Original, the assessee preferred an appeal before the Commissioner (Appeals), Hyderabad who vide Order-in-Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 observed that:

(i) the assessee have contested the demands mainly on limitation. However, the short discharge of the Service Tax by suppressing the values in ST-3 Returns has come to light only with the intervention of the Department by reconciliation of the receipts declared in the ST-3 returns with the actual receipts mentioned in their financial records. Since the assessee registered under both "Construction of Residential Complex Service" and "Works Contract Service", the Department cannot presume the identical activity undertaken by the assessee as the ST-3 provides no clues. It is only after investigation, the Department could conclude that the assessee was actually undertaking a singular activity classified both under Construction of Residential Complex Services and Works Contract

Service. Hence, there is reasonable cause and justification for the invocation of the proviso to Section 73(1) of the Finance Act, 1994.

(ii) The activities like leveling, completion of roads/street lights, storm-water drains etc. towards setting up of common amenities are ancillary to the main service of villa constructions. For example, no individual who does not own a property would be entitled to share ownership of the internal roads, utilities, garages etc. The prime service is only villa construction and the land development for access to that villa is clearly a subsidiary to it. Further, in terms of Section 65A and Section 66 F of the Finance Act, 1994, the land development, a part of major activity of villa construction with common amenities, merits classification under Works Contract Service in the bundled service and not under Site Formation as an independent service. Hence, the demand is only short levy if the charges are actually collected. **Hence the para 26(1) of the Order-in-Original is therefore set-aside and remanded** to the Original Adjudicating Authority for re-quantification of liability under Works Contract by extending composition scheme. Since the tax incidence has been demanded on the transaction value which includes the tax element, the liability shall be assessed on the cum-tax value in terms of Section 67(2) of the Finance Act, 1994.

(iii) As regards the liability on the construction of semi-finished villa, it is observed that the assessee possessed a title to the land and any construction undertaken prior to sale of any land parcel is admittedly service to self; there is no service provider and receiver to fasten the levy; and the sale deed consisting of land parcel along with the unfinished house is registered for the composite consideration; the sale deed records the immovable property in totality i.e. land parcel and the unfinished house which is assessed to Stamp duty and thereby recognized as a sale transaction alone; the transaction covered by a sale deed cannot be considered to represent a divisible land – building transaction involving sale of land and construction of building. **Hence, para 26(2) of the Order-in-Original is to be set aside.**

(iv) With regard to the "other services", it is observed that the assessee are collecting certain amounts towards corpus fund, electricity deposit and water charges, all of which are statutorily prescribed. If the impugned amounts collected from the villa vendees are not

deposited to the utilities/transferred to the association's corpus fund without any retention in the assessee's account, the question of treating the same as consideration for construction of villa and the assessment under "Works Contract Service" does not arise. Hence, the matter is to be examined by the original Adjudicating Authority by ascertaining the fact; arrive at a conclusion on the existence of the liability and then proceed to quantify it, if applicable as was done in the case of the amounts collected for the land development discussed above. **Accordingly, para 26(3) of the Order-in-Original set aside and remanded.**

(v) On re-quantification of elements (i) and (iii) of the Order-in-Original, the amount paid shall automatically stand appropriated.

(vi) Interest under Section 75 is a quintessential liability, accompanying belated discharge of tax and cannot be waived under any provision of law. Hence, para 26(5) of the Order-in-Original is upheld.

(vii) The demand proposals have been upheld on limitation and the allegation of gross violations has been upheld; thereby a penalty under Section 78(1) of the Finance Act, 1994 is warranted. However the quantity of penalty shall be computed as aggregated of (a) 100% tax liability for the period prior to 08.04.2011 and (b) 50% of the tax liability for the period 08.04.2011 to 31.03.2015, quantified in de-novo proceedings in terms of proviso under Section 78(1) of the Finance Act, 1994. **Accordingly, the para 26(6) of the Order-in-Original was modified.**

(viii) As regards the penalty under Section 77 for the belated registration, it is observed that the demand is proposed from October,2010 and the assessee has had taken registration on 25.04.2010 and hence the penalty imposed under Section 77(2) is **legally unsustainable and accordingly set aside.**

GROUNDS OF APPEAL

18. The Order-in-Appeal No.HYD-SVTAX-000-0210-17-18-ST dated 14.09.2017 passed by the Commissioner (Appeals), Hyderabad appears to be not proper, correct and legal for the following reasons:

I. "LAND DEVELMENT SERVICE"

(a) The Commissioner (Appeals) in the impugned Order-in-Appeal opined that the prime service rendered by the assessee is only villa construction and the land development for access to that villa is clearly a subsidiary to it; the land development, a part of major activity of villa construction with common amenities, merits classification under Works Contract Service in the bundled service and not under Site Formation as an independent service. Whereas, the "Land Development Service" has nothing to do with the "Works Contract Services". The assessee, as per the agreement for sale entered with their Customers, charged separately for "Land Development Services" and "Works Contract Services for construction of villas". When the assessee himself has clearly bifurcated the "Land Development Service" from the "Works Contract Service" and as Section 65(A)2(a) of the erstwhile Finance Act, 1994, gives more specific description of "Land Development Service" under "Site formation and clearance, excavation and earth moving and demolition" Service, classification of "Land Development" under "Works Contract Service" in Bundled Services and extending the benefit of abatement in terms of Rule 2A of Service Tax (Determination of Value) Rules, 2012 is not legal, proper and correct.

(b) As per Section 65*(105)(zzzza) of the Finance Act, 1994, under Works Contract":*

" 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 purpose of carrying out,-

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

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

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

From 01.07.2012 onwards, service portion of Works Contract Service is a "Declared Service" under Section 66E(h) of the Finance Act, 1994.

As per Section 65B(54) of the Finance Act, 1994, *works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other* similar activity or a part thereof in relation to such property.

From the above definition it clearly manifested that in order to classify "Land Development Service" under "Works Contract Service" two conditions are required to be satisfied i.e. first there should be a transfer of property in goods and to perform the activities from (a) to (e), mentioned above. Whereas, while performing the services under "Land Development", the assessee have not transferred any property in goods and no activities from (a) to (e) as above said have not been performed. Hence, it is not proper to classify the "Land Development" under "Works Contract" in Bundled Services.

(c) In the instant case the assessee, under "Land Development Services", rendered the work pertaining to preparation of site suitable for construction, laying of roads, laying of drainage lines, water pipes etc. Hence the common area and amenities even though constructed with murram and usage of labour it is not transferred in goods to any individual and the common area and amenities are used by the group of individual and hence the same cannot be treated as species of "Works Contract".

(d) As per As per Section 65(97a) of the erstwhile Finance Act, 1994, "Site formation and clearance, excavation and earth moving and demolition" service, for the period up to 30.06.2012, includes:

(i) Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes;
(ii) Soil Stabilization; or
(iii) Horizontal drilling for the passage of cables or drain pipes ; or
(iv) Land reclamation work; or
(v) Contaminated top soil stripping work; or
(vi) Demolition and wrecking of building structure or road.

For the period up to 30.06.2012, as per Section 105(zzza) of the erstwhile Finance Act, 1994, "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to "site formation and clearance, excavation and earth moving and demolition and such other similar activities".

W.e.f. 01.07.2012, it appeared that "site formation and clearance, excavation and earth moving and demolition and such other similar activities to be a "service" under Section 65(44) of the erstwhile Finance Act, 1994 and taxable under the provisions of 65B(51) ibid.

Further, as per Section 65A of the erstwhile Finance Act, 1994, Classification of taxable service:-

(1) For the purpose of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of Section 65:

(2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clause(105) of Section 65, classification shall be effected as follows:

(a) The sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) .....

(c) .....

(3).....

In terms of Section 65(97a) read with Section 65(A)2(a) of the erstwhile Finance Act, 1994, "Land Development Services" gives more specific description under "Site formation and clearance, excavation and earth moving and demolition" Service and the works involved are leveling the land, making suitable for construction of villas and horizontal drilling for laying of drainage lines and water pipes and cables etc.

(e) As per Section 66F of the erstwhile Finance Act, 1994, "Land Development Services" shall be treated as single service due to its nomenclature and essential characteristics even though it contains various elements. However, the Commissioner (Appeals) has not

drawn a logical conclusion from Section 65A of the erstwhile Finance Act, 1994 and Section 66F ibid and held that the activity of Land Development rendered by the assessee falls under "Works Contract Service" in the bundled service which appears to be not correct, legal.

Further, the assessee are well aware of the statutory provisions and are collecting Service Tax on the agreements entered for constructions. The assessee intentionally evaded the service tax on "Land Development Services" and "Other Taxable Services". Hence, extending the cum-tax benefit appears to be not proper.

II. "WORKS CONTRACT SERVICE"

(f) The assessee have entered into agreements with their Customers for sale land together with bungalow to be constructed thereon as per the specifications and other terms and condition for a total consideration. For example, the assessee have entered into an Agreement dated 09.11.2011 with Ms. Sabiha Hussain for sale of Plot No.1 at Shamirpet Village, R.R.District together with a deluxe bungalow to be constructed thereon for consideration as detailed below.

Sl.No.	Description	Amount
A	Towards Sale of and	Rs.1,78,000
B	Towards Development Charges of Land for laying of Roads, Drains Parks etc.	Rs.18,22,000
C	Total towards Land Cost (A+B)	Rs.20,00,000
D	Towards cost of construction, water & electricity connection and for other amenities	Rs.30,00,000
E	Total Sale Consideration (C+D)	Rs.50,00,000

Verification of the sale deed reveals that the assessee has registered the above said plot along with the semi-finished construction for a consideration of Rs.12,00,000/-. The assessee have entered this type of agreements with their other Customers who booked their plots before "Land Development".

Further the assessee have also entered into another type of sale agreements with their Customers who booked their plots after "Land Development". For example, the assessee have entered into a

sale agreement dated 13.12.2014 with Mr. Giri Ramachander Patwar and Ms. Roopa Patwari for sale of Plot No.8 at Shamirpet Village of R.R.Dist. together with a semi-deluxe bungalow to be constructed thereon for a consideration as detailed below.

Sl.No.	Description	Amount
A	Towards Sale of and	Rs.34,38,000
B	Towards cost of construction, water & electricity connection and for other amenities	Rs.11,40,000
C	Total towards Land Cost (A+B)	Rs.45,78,000

Verification of the Sale Deed dated 18.03.2015 revealed that the assessee has registered the plot along with semi-finished construction for a total consideration of Rs. 34,38,000/-. The assessee have entered this type of agreements with their other Customers who booked their plots after "Land Development".

As per Section 65(91a) of the erstwhile 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 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 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.

From the above definition, residential unit means a single house or a single apartment intended for use as a place of residence. As per above said definition, the project 'Bloomsdale", where assessee have constructed the villas, met all the parameters.

Board in their circular No.151/2/2013-ST dated 10.02.2012 vide para 2.1(A) has clarified construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner. From above, it is clear that the construction service under "Works Contract Service" rendered before issuance of completion certificate is a taxable service. Hence, the assessee is required to discharge their service tax obligation even on the semi-finished villas registered before issuance of Completion Certificate by the Competent Authority.

Whereas, the Commissioner (Appeals), Hyderabad in the impugned Order-in-Appeal, without considering the evidence on record, observed that the assessee possessed a title to the land and any construction undertaken prior to sale of any land parcel is admittedly service to self; there is no service provider and receiver to fasten the levy and accordingly set aside the demand. The observations of the Commissioner (Appeals) appears to be not proper, correct an legal.

(g) From the above, it is amply clear that the assessee have intentionally included the cost of semi-finished construction in the land cost so as to evade Service Tax resulting in short payment under "Works Contract Service". Though the assessee have rendered the Services under the category of "Works Contract" they have not paid 'Service Tax' nor filed ST-3 returns during the period from October, 2010 to March, 2011. They have classified their services under the category of "Residential Complex Services" during the period from April, 2011 to September, 2011, paid Service Tax and filed ST-3 Returns. Later on they changed their classification to "Works Contract Services" during the period from October, 2011 and onwards and paid Service Tax. During the period from October, 2010 to March, 2015, the assessee paid

Service Tax to the tune of Rs.19,00,736/- on the contracts entered for constructions availing exemption on semi-finished villages registered along with Land.

The demand in the Show Cause Notice dated 22.04.2016, which was confirmed vide Order-in-Original No.048/2016-(S.T) dated 30.12.2016, was arrived at Rs.40,80,581/- by calculating villa wise taking together the values of semi-finished villas and the value for completion of the said semi-finished villas. The Service Tax already paid by the assessee under "Works Contract" during the period from October, 2011 to March, 2015 has been appropriated against the said demand. However, the Commissioner (Appeals) without considering the material facts, set aside the entire demand observing that the same pertains only to semi-finished villas; sale deed consisting of land parcel along with the unfinished house is assessed to Stamp duty and thereby recognized as a sale transaction alone. Further, the Commissioner (Appeals) vide the said impugned order has upheld that the Service Tax of Rs.19,00,736/- already paid by the assessee stands appropriated against the re-quantified demands under "Land Development Services" and "other Services". Since the above said Service Tax of Rs.19,00,736/- has been paid by the assessee under "Works Contract Services" on the values of the agreements entered for construction, appropriating the same against the "Land Development Services and "Other Taxable Services" is absolutely not correct and legal.

III. "OTHER TAXABLE SERVICES"

(h) The assessee has also collected certain amounts over and above the agreed amount in connection with rendering the construction of villas. The assessee have claimed that the same are in connection with Corpus Fund, Electricity Deposit, water charges and towards service tax. However, the assessee has not submitted any documentary evidence to this effect. The assessee have also not submitted the said documentary evidence even before the Commissioner (Appeals). However, the Commissioner (Appeals) without considering the same remanded the matter to the Original Adjudicating Authority for re-quantification which is not correct.

19. Further, it appears that M/s Kadakia & Modi Housing, 5-4-187/3 & 4, II Floor, Soham Mansion, M.G.Road, Secunderabad are liable to pay Service Tax under the category of "Site Formation & Clearance, Excavation and Earth Moving and Demolition Services" "Works Contract Services" and "Other Taxable Services" along with interest and consequential penalties as confirmed in the Order-in-Original No.048/2016-(S.T) dated 30.12.2016. Hence, setting aside of the demands at para 26(2), 26(7) and modifying and remand of the demands at para 26(1), 26(3) and 26(6) of the Order-in-Original 048/2016-(S.T) dated 30.12.2016 passed by the Joint Commissioner of Central Excise & Service Tax, Erstwhile Hyderabad I Commissionerate, Hyderabad by the Commissioner (Appeals), Hyderabad vide Order-in-Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 is not proper, correct and legal. Hence, an appeal against the above said Order-in-Appeal is required to be preferred with the Hon'ble CESTAT, Hyderabad for the reasons detailed in the Grounds of Appeal.

ORDER

20. In view of the above, the Assistant Commissioner (Tribunal), Central Tax, Central Excise & Service Tax, Secunderabad Commissionerate, Hyderabad is directed to make a prayer before Hon'ble CESTAT seeking to:

(i) set aside the impugned Order-In-Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 passed by the Commissioner (Appeals-II), GST and Central Excise, Hyderabad, in the case of M/s Kadakia & Modi Housing, 5-4-187/3 & 4, II Floor, Soham Mansion, M.G.Road, Secunderabad and to confirm the demand proposed in the Order-in-Original No.048/2016-(S.T) dated 30.12.2016 along with interest and penalties as per the provisions of law; or

(ii) pass any suitable orders, as deemed fit.

30/1/2018

(SUNIL JAIN)
COMMISSIONER
SECUNDERABAD COMMISSIONERATE

30/01/18

(M.SRINIVAS)
COMMISSIONER
MEDCHAL COMMISSIONERATE

To

The Asst. Commissioner (Tribunal),
Central Tax, Central Excise & Service Tax,
Secunderabad GST Commissionerate,
GST Bhavan, Basheerbagh,
Hyderabad.

Attested

05/02/2018

टि.वि.एस.प्रसाद
T.V.S.R. PRASAD
अधीक्षक/Superintendent
केंद्रीय कर एवं सीमा शुल्क
Central Tax & Customs
सिकंदराबाद जी एस टी आयुक्तालय
Secunderabad GST Commissionerate
हैदराबाद/Hyderabad