



H N A & Co LLP
Chartered Accountants

(Formerly known as Hiregange & Associates LLP)

Date: 21.10.2024

To

**The Commissioner of Central Tax (Appeals-II),
HQRS. Office, 7th Floor, L.B Stadium Road,
Basheerbagh, Hyderabad-500004.**

Dear Sir,

Sub: Filing of appeal against the Order dated 28.03.2024.

Ref: Order issued vide OR No. 113/2023-24-Sec-Adjn-ADC(ST) dated 28.03.2024
pertaining to **M/s. Kadakia & Modi Housing.**

1. We have been authorized by M/s. Kadakia & Modi Housing to submit an appeal against the above-referred Order dated 28.03.2024 but received on 23.07.2024 to represent before your good office to do necessary correspondence in the above-referred matter. A copy of the authorization along with the proof of receipt of Order is attached to the appeal.
2. In this regard, we are herewith submitting the appeal against the above-referred Order dated 28.03.2024 in Form APL-01 along with authorization and annexures. We shall be glad to provide any other information in this regard. Kindly acknowledge the receipt of the appeal and post the matter for hearing at the earliest.

Thanking You

Yours truly

For M/s. H N A & Co. LLP

(Formerly known as M/s. Hiregange & Associates)

Chartered Accountants

LAKSHMAN

KUMAR KADALI

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LAKSHMAN KUMAR
KADALI
Date: 2024.10.21 14:58:38
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CA Lakshman Kumar Kadali
Partner



Shakti

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Kadakia & Modi Housing

Date:10.10.2024

To,
The Commissioner of Central Tax (Appeals-II),
HQRS. Office, 7th Floor, L.B Stadium Road,
Basheer Bagh, Hyderabad-500004.

Dear Sir,

Sub: Application for condonation of delay in filing the Appeal

Ref: Appeal against Order vide OIO No.113/2023-24-Sec-Adjn-ADC(ST) dated 28.03.2024 pertaining to M/s Kadakia & Modi Housing.

1. As per Section 85 of the Finance Act, 1994, an appeal against the order of the adjudicating authority shall be filed within 2 months from the date of receipt of the order. In the instant case, the order was received through post on 23.07.2024, thereby, the due date for filing the appeal falls on 22.09.2024.
2. In this regard, we would like to submit that the delay is on account of gathering the information needed for preparing the Appeal as the order contains information relating to the multiple years i.e period from October 2010 to June 2017. The entire process took more time than expected and because of this, we have failed to respond on time.
3. The actual due date of filing the appeal is on 22.09.2024 whereas the present appeal is being filed on 10.10.2024. As explained in the above paragraphs, the delay is unintentional, and we have made sincere efforts to file the appeal within the time limit. Hence, we humbly request your good self to consider the same and allow the application for condonation of delay.

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

Thanking You,

Yours faithfully,

For M/s. Kadakia & Modi Housing

Authorized Signatory





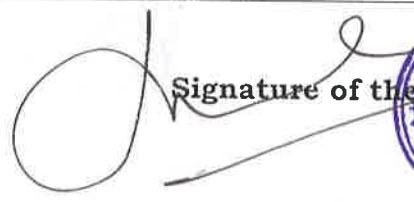
FORM ST-4

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

**BEFORE THE COMMISSIONER OF CENTRAL TAX (APPEALS-II), HQRS. OFFICE,
7TH FLOOR, L.B. STADIUM ROAD, BASHEERBAGH, HYDERABAD-500004**

(1) Appeal No. _____	_____ of 2024
(2) Name and address of the Appellant	M/s. Kadakia & Modi Housing.
(3) Designation and address of the officer Passing the decision or order appealed against and the date of the decision or order	Additional Commissioner of Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate, Hyderabad.
(4) Date of Communication to the Appellant of the decision or order appealed against	28.03.2024 But the date of communication is 23.07.2024.
(5) Address to which notices may be sent to the Appellant	M/s. H N A & Co LLP, (Formerly M/s. Hiregange & Associates LLP), Chartered Accountants, 4th Floor, West Block, Anushka Pride, Road Number 12, Banjara Hills, Hyderabad, Telangana 500034. Email: laxman@hnaindia.com Mob: 89781 14334 (And also copy to the Appellant)
(5A)(i) Period of dispute	October 2010 – June 2017.
(ii) Amount of service tax if any demanded for the period mentioned in the Col. (i)	Rs. 76,66,221/-
(iii) Amount of refund if any claimed for the period mentioned in Col. (i)	NA
(iv) Amount of Interest	Interest at applicable rates
(v) Amount of penalty	Rs. 63,72,629/-
(vi) Value of Taxable Service for the period mentioned in Col.(i)	As per the Order In Original
(6) Whether Service Tax or penalty or interest or all the three have been deposited.	Rs.5,74,967/- is paid towards pre-deposit required under Section 35F of Central Excise Act, 1944. (Tax Amount Appropriated in OIO of Rs. 19,00,736/- paid towards Service Tax)
(6A) Whether the appellant wishes to be heard in person?	Yes, at the earliest
(7) Reliefs claimed in appeal	To set aside the impugned order to the extent aggrieved and grant the relief claimed.

Signature of the Appellant





STATEMENT OF FACTS

A. M/s. Kadakia & Modi Housing (hereinafter referred to as 'Appellant'), located at 5-4-187/3 & 4, II Floor Soham Mansion, M.G Road, Secunderabad. The Appellant is engaged in the Construction of the Villas and registered with service tax vide STC No. AAHFK8714ASD001.

FOR THE PERIOD OCTOBER 2010 TO MARCH 2015.

B. Appellant submits that the intelligence team were indicated that the Appellant was not discharging the Service tax properly on Construction of Villas under the project titled "**Bloomsdale**". Therefore, Documents were called under summons for the period October 2010 to March 2015 and a statement was recorded from the Authorised Signatory of the Company on 16.11.2015 and 01.02.2016.

C. After Examination of the documents, it was observed that the Appellant has not filed ST-3 returns for the period October 2010 and March 2011 and has not paid any Service tax for the above period. Further, the Appellant has discharged service tax under Construction of Residential Complex service for the period 2011-2012 and under works contract services from October 2011 onwards.

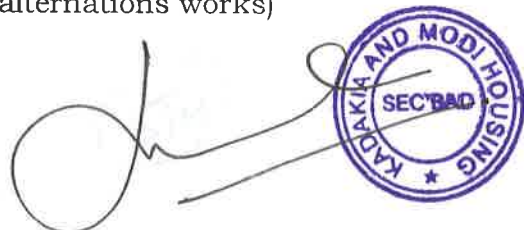
D. Appellant initially executes Agreement of Sale (AOS) for sale of residential villa and thereafter executes

i. Sale Deed, that gets registered and appropriate 'Stamp Duty' has been discharged on the same. Initially 'sale deed' was entered only for the portion of land value and separate agreement was entered in the name of 'land development charges' however from 2012 practice of entering separate agreement for 'land development charges' was dispensed with as the land was already developed by that time and started entering 'sale deed' for the semi-constructed villa along with land attached thereto.

ii. Construction agreement is being entered for the construction work to be undertaken for the said villa's. This agreement includes construction of common amenities like club house, CC roads, street lighting, landscaped gardens etc.,

E. Appellant collects amounts from their customers towards:

- i. Sale deed for sale of semi-finished villa along with land;
- ii. Construction agreement (includes for 'common amenities/facilities');
- iii. Other taxable receipts (additions/alternations works)

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- iv. Other non-taxable receipts (Corpus fund, electricity deposit, water deposit & service tax);
- v. Taxes/duties (VAT, stamp duty, service tax etc.);
- vi. Land development charges (only during 2010-11, 2011-12, nominally in 2012).

Service tax Compliance & correspondence with department:

- F. Appellant was given understanding that service tax is not liable and same was also clarified vide CBEC circular No. 108/02/2009-ST dated 29.01.2009. On this understanding, initially Appellant has not paid service tax and however with intent not to litigate and also in light of amendments took place in the year 2010, Appellant decided to pay service tax on the construction done from 01.07.2010 onwards.
- G. The above understanding on the taxability prior to 01.07.2010 and after 01.07.2010 and compliance thereof was duly intimated to the department vide letter dated 16.08.2010 with specific request to revenue department on their understanding so that appropriate decision can be taken at Appellant end and same was followed-up vide letter dated 13.09.2010. But there was no response from the department.
- H. Again vide letter dated 30.12.2011, Appellant intimated that service tax was paid under protest for the period 01.04.2011 to 30.09.2011 on the value attributable to the construction done after 01.07.2010 under the category of 'construction of complex service' (COCS) after adjusting the service tax payments previously made, if any (prior to 01.07.2010). And filed ST-3 return also. Here again there is no response from the revenue department.
The above was done only on their sole understanding of law and because of this, Appellant repeatedly requested the revenue department to confirm their understanding but Appellant at no point of time received any communication from department.
- I. As the department was not responding and Appellant has their own doubts, Appellant approached consultant for advised on the compliance to be made for service tax. As per the consultant advise, Appellant started paying service tax under protest on the amounts received towards 'construction agreements' & also on the Other taxable receipts (stated supra) under the category of 'Works contract service (WCS). Said fact of paying under protest & on the amounts received towards 'construction agreement' was intimated to department along with detailed statements showing the total receipts, amounts included in taxable value and excluded from it etc., was also submitted. For instance, for





the period January 2012 to March 2012, letter dated 22.07.2012 was filed and similarly for the subsequent period also. Here again it was specifically requested revenue department to confirm Appellant understanding and but no response again.

All these were done voluntarily and well before the intervention of revenue department.

J. And it was only after expiry of nearly 5 years from the date of filing letter asking for clarification/confirmation, officers of anti-evasion in the month of August 2015 sought various records, thereafter recorded statements and viewed that

- i. Land development charges collected are liable for service tax under the category of 'site formation and clearance, excavation and earthmoving and demolition ('site formation' for short)';
- ii. Service tax is liable to be paid at full rate on 'common amenities/facilities without any abatement;
- iii. Other charges collected are liable for service tax;

K. Later, the Appellant was in receipt of Show Cause Notice vide O.R.No. 99/2016/Adjn.(ST)(Commr) dated 22.04.2016 stating the above discrepancies and proposing to demand the following: (A copy of SCN is Enclosed **as Annexure_IX**)

- i. *An amount of Rs. 14,35,330/- (Rupees Fourteen Lakh Thirty-Five Thousand Three Hundred and Thirty Only) (including all cesses) being the service tax payable on Site Formation Service (as per enclosure WS-5 read with WS-3& WS-4 to the Notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73(1) of the Finance Act, 1994;*
- ii. *An amount of Rs.40,80,581/- (Rupees Forty Lakh Eighty Thousand Five Hundred Eighty One Only) (including all cesses) being the service tax payable on Works Contract Service (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;*
- iii. *An amount of Rs.7,01,874/- (Rupees Seven Lakh One Thousand Eight Hundred Seventy Four Only) (including all cesses) being the service tax payable on other taxable Services (as per Enclosure WS-5 read with WS-3*





& WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

- iv. An amount of Rs.19,00,736/- (Rupees Nineteen Lakh Seven Hundred Thirty-Six Only) paid towards service tax (as per Enclosure WS-5 to the notice) should not be appropriated towards the service tax demanded at Sl No (i) to (iii) above;
- v. Interest as applicable, on an amount at Sl.No (i) to (iii) above should not be paid by them under Section 75 of the Finance Act, 1994;
- vi. Penalty should not be imposed on the amount at Sl. No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;
- vii. Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for delayed Registration.

L. With respect to the above SCN, the Appellant has filed a detailed reply dated 28.12.2016 and attended the personal hearing on 28.12.2016.(A Copy of SCN reply and PH recording is Enclosed as **Annexure_VII and VIII**)

M. Subsequently, the Appellant was in receipt of Order-in-Original vide OIO no. 48/2016-ST-AE-VIII dated 30.12.2016 issued by the Joint Commissioner of Central Excise and Service Tax, erstwhile Hyderabad-I Commissionerate, Hyderabad and confirmed the following: (A Copy of OIO is Enclosed as **Annexure_VI**)

- i. I confirm the demand of Rs. 14,35,330/- (Rupees Fourteen lakhs thirty-five thousand three hundred thirty Only) (including all cesses) in the service tax payable on Site formation Service during the period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- ii. I confirm the demand of Rs.40,80,581/- (Rupees Forty lakhs eighty thousand five hundred and eighty-one Only) (including all cesses) being the service tax payable on Works Contract Service during the period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- iii. I confirm the demand of Rs.7,01,874/- (Rupees seven lakhs one thousand eight hundred and seventy-four Only) (including all cesses) being the service tax payable on other taxable Services during the period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;

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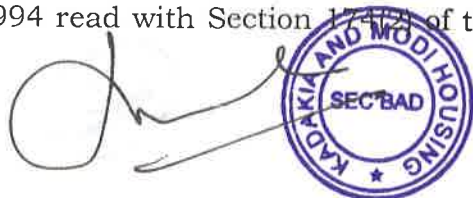
- iv. *I appropriate amount of Rs. 19,00,736/- (Rupees Nineteen lakhs seven hundred and thirty-six only) paid towards service tax towards the service tax demanded at SI No (i) to (iii) above;*
- v. *I confirm the demand of Interest as applicable, on the amounts at .No. (i) to (iii) above under Section 75 of the Finance Act, 1994;*
- vi. *I impose equivalent Penalty of Rs.62,17,785/- (Rupees Sixty two lakhs seventeen thousand seven hundred and eighty five only) on the amounts at SL No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;*
- vii. *I impose Penalty of Rs. 10,000/- (Rupees Ten thousand only) under Section 77(2) of the Finance Act, 1994 for delayed Registration.*

N. Against the above Order-In-Original, the Appellant has filed the detailed appeal in Form ST-4 Dated 12.07.2017 and attended the personal Hearing on 17.07.2017.

O. Subsequently, the Appellant was issued an Order-in-Appeal vide No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017 holding that (copy of Order in Appeal is Enclosed as **Annexure_V**)

- i. *'Land development charges' are not separately classifiable under the service category of "Site formation service" but liable as works contract service' at the composite rate. Accordingly, ordered for re-quantification of the demands made in OIO (Para 9 of OIA);*
- ii. *Amounts received towards 'sale deed' (attributable to the land cost and semi-finished villa/house) are not liable for service tax. and also, the amount received towards 'common amenities' liable at abated rate and not at full rate as demanded in the OIO. Accordingly, set aside the demands made vide Para 26(2) of OIO (Para 10 of OIA);*
- iii. *No service tax is liable on the amounts collected from the villa Vendees and deposited to the utilities/transferred to the association corpus fund without any retention. Accordingly, remanded to the lower authority for verification of the documents and the consequential re-quantification of the demands made in OIO in this regard (Para 11 of OIA);*
- iv. *Extended period of limitation is invoiceable;*
- v. *Reduced the penalty u/s. 78 of Finance Act, 1994 to 50% of the tax demand confirmed during the period 08.04.2011 to 31.03.2015;*
- vi. *Set aside the penalty imposed u/s 77(2) of Finance Act, 1994.*

P. Later, the Committee of Commissioners reviewed the above referred O-I-A under Section 86(2A) of the Finance Act, 1994 read with Section 174(2) of the





CGST Act, 2017 and passed the review order vide Order 03/2018-(0.1.A.) dated 30.01.2018 directing the Assisting Commission (Tribunal), Central Tax, Secunderabad GST Commissionerate, G Building, Basheerbagh, Hyderabad to file an appeal before Hon'ble CESTAT against the said OIA.

Q. Accordingly, the Assistant Commissioner (Tribunal) of Central Tax Secunderabad GST Commissionerate, GST Bhavan, L.B. Stadium Road Basheerbagh, Hyderabad 500 004 filed the present appeal to the Appellate Tribunal under Section 86(2A) of the Finance Act, 1994 read with Section 174(2) of the CGST Act, 2017 in Form ST-7 giving effect to the above review order of Committee of Commissioners.

- i. *Set aside the impugned Order in Appeal No. HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 and to confirm the demand proposed in Order in Original No. 48/2016-(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.*

Subsequently, the said Appeal is withdrawn by the department on monetary grounds and allowed by the Hon'ble CESTAT vide Final Order No. A/30981-30986/2019 dated 25.10.2019.

R. At present, the respected Additional Commissioner without considering the specific remand directions given by the Hon'ble Commissioner (Appeals) vide Order-in-Appeal vide No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017 passed the present Order In Original No.113/2023-24-Sec-Adjn-ADC(ST) dated 28.03.2024 treating it as a fresh adjudication against the Show Cause Notices issued for the period October 2010 To March 2015.

FOR THE PERIOD APRIL 2015 TO JUNE 2017

- S. The Appellant submits that the sale deed is executed for the entire sale consideration. However, in some cases, Sale deed is being executed for the semi-finished construction along with an agreement of construction. Sale deed is registered, and appropriate 'Stamp Duty' has been discharged on the same.
- T. Appellant collects amounts from their customers towards:
- a. Sale deed for sale of semi-finished villa along with land;
 - b. Construction agreement (includes for 'common amenities/facilities');
 - c. Other taxable receipts (additions/alternations works)
 - d. Other non-taxable receipts (Corpus fund, electricity deposit, water deposit & service tax);





e. Taxes/duties (VAT, stamp duty, service tax etc.,);

U. Further, the Appellant was in receipt of Show Cause Notice vide file No. V/24/15/03/2018-Adjn dated 16.04.2018 for the period April 2015 to June 2017 issued by the Assistant Commissioner, Secunderabad Commissionerate, as to why: (Copy of SCN Dated 16.04.2018 is enclosed as **Annexure_IV**)

- i. *An amount of Rs.14,48,436/- (Rupees Fourteen Lakh Forty-Eight Thousand Four Hundred Thirty-Six Only) (including cesses) should not be demanded as per para-4 of the notice towards "Works Contract Service" rendered by them during April 2015 to June 2017 in terms of Section 73(1) of the Finance Act, 1994;*
- ii. *Interest should not be demanded at (i) above under Section 75 of the Finance Act, 1994;*
- iii. *Penalty should not be imposed on them under Section 76 of the Finance Act, 1994 for the contravention of Rules and Provisions of the Finance Act, 1994;*
- iv. *(iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.*

V. Therefore, the Appellant has filed the detailed reply for the above SCN dated 13.06.2018 and also Appellant has attended the personal hearing on date:10.01.2024. (A copy of SCN Reply and PH Record is enclosed as **Annexure_II and III**).

W. Presently, the Appellant is in receipt of Order-in-Original vide O-I-O No. 113/2023-24-Sec-Adjn-ADC(ST) dated 28.03.2024 confirming the demand proposed in SCN (A Copy of Order-in-Original dated 28.03.2024 is enclosed as **Annexure_I**).

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

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GROUND OF APPEAL

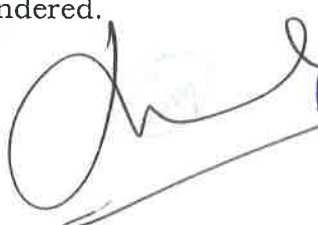
1. The appellant submits that the impugned order is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions and is violative to the principles of natural justice.
2. Appellant submits that the present proceedings and the issuance of the impugned order were without authority of the law as the provisions of the Finance Act, 1994 which authorizes the levy and collection of Service tax were repealed in terms of Section 19 of Constitution (one hundred and first amendment) Act, 2016 read with Section 173 of CGST Act, 2017. Further Section 174 of the CGST Act, 2017 as amended only saves the proceedings already instituted before the enactment of the CGST Act, 2017 (w.e.f. 01.07.2017) whereas the issuance of the impugned order was initiated after 01.07.2017. Therefore, the present impugned Order in original does not sustain.
3. In this regard, the Appellant submits Section 174(2) of the CGST Act, 2017 reads as follows:

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not—

(a) revive anything not in force or existing at the time of such amendment or repeal;
4. Therefore, the above-referred sub-section makes it very clear that repeal cannot revive anything that was not in existence. So, the present proceedings which were not in existence before the implementation of GST are against the law. Therefore, the present proceedings do not sustain.

In Re: Impugned order is in violation of remand directions given in Order-in-Appeal vide No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017 in first round of litigation:

5. The Appellant submits that the impugned order has confirmed an amount of Rs.43,17,049/- after appropriation of service tax amount paid during the disputed period stating that the Appellant has misclassified the amounts under the wrong heads and took exemption without paying tax amount as per applicable tax rates on the respective services rendered.





6. In this regard, the Appellant would like to submit that the Appellant as stated in the facts of the case is engaged in the business of construction of villas and the same is exempt from the payment of the service tax.
7. As mentioned in the facts of the case, the Appellant has filed an appeal against the original adjudication order No. 48/2016-ST-AE-VIII dated 22.04.2016 and the Commissioner (Appeals) vide OIA No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017 has been set aside the demand partially and remanded the matter for re-quantification. However, as stated in facts of the case, the department has filed an appeal against the Order-in-Appeal before Hon'ble CESTAT. Such appeal filed by the department was subsequently withdrawn by department on monetary grounds. Therefore, the issue with respect to taxability of the impugned transaction has attained finality.
8. Further, the powers of the department are restricted to the remand directions given by the Commissioner (Appeals) vide Order-in-Appeal vide No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017. The relevant extracts of OIA are as follows:

"Para-8. Insofar as element (i) is concerned, it is clear from Para 2.3.2 of the SCN that (in some Bases), the vendee is required to enter into separate land development contract in so the appellant, independent of the construction agreement for the house per se; which is relied upon by the department to conclude that it is a separate, identifiable service activity, meriting Independent classification and assessment; and the activity was viewed as 'site formation / clearance'. I have carefully considered the facts. The activities like leveling, completion of roads / street lights, storm-water drains etc., towards setting up of common amenities is usually covered under land development and formally certain charges are also collected by the local body towards land development under the extant building regulations, when according building permissions. The development is specific to the housing project and would form an intrinsic component of that project. For example, no individual who does not own a property would be entitled to shared ownership of the internal roads, utilities, garages etc. It is the villa construction that is the prime service, and the land development for access to that villa is clearly subsidiary to it. There is force in the appellant's contention [at Para 10 of the grounds/ Page 16 of appeal book] that the activities of sale of land parcel, fastening development charges, and **entering into construction agreement are mutually co-existing and inseparable**; and that the land development charges

are collected toward bouquet of charges for land parcel, development and construction of the villa.

Para-9. The ratio of the Tribunal ruling in the Vrindavan Engineers & Contractors case [2015(40)STR 765 (Tri-Mum)] squarely applies to the instant case, and the classification of the development activity separately under Site Formation is Sec 65A of the Finance Act 1994 (up to 30.06.2012) and Sec 66F ibidem (beyond 01.07.2012), the land development activity, part of major activity of villa construction with common amenities merits classification under WCS in the bundled service, and not under Site formation as an independent service. It automatically restricts the demand for short levy only where the charges merits are actually collected. Although the SCN admittedly sought to fasten the liability under Site Formation, the appellant fairly conceded at Para 26 of the grounds of appeal, that the demand would exist under WCS category, assessed under the composition scheme in as much as the Necessary conditions (non availment of credit etc.) are met. Para 26(1) of **the impugned order is therefore set aside and remanded to the lower authority for re-quantification of liability** under WCS, by extending composition scheme for the period upto 30.06.2012 and under Rule 2A of the Service Tax Valuations Rules with effect from 01.07.2012 by extended abatement. Since the tax incidence has been demanded on the transaction value which is deemed to consist of the tax element under Sec 67(2) inasmuch as the incidence has neither been discharged nor shown to be passed on downstream; the liability shall be assessed on cum-tax values. I rely on the rulings pronounced in COMMISSIONER OF C. EX., PANCHKULA Versus GOEL INTERNATIONAL PVT. LTD. [2015 (39) S.T.R. 330 (Tri. - Del.)]; and COMMISSIONER OF SERVICE TAX Versus ASSOCIATED HOTELS LTD. [2015 (37) S.T.R. 723 (Guj.)]. in ordering the remand."

9. From the above Para 8 & 9 of Order-in-Appeal vide No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017, it is evident that the Appellant has already submitted why the service tax should not be demanded under Site formation charges. The same has been considered by the Commissioner of Appeals-II and has set aside the demand partially and remanded back to the lower authority for re-quantification of liability with respect to the Site formation charges. However, the impugned order has again confirmed the demand at full rate without following the remand directions given in Order-in-Appeal vide No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017. This shows that the impugned order has confirmed the demand by going beyond the Order-in-Appeal vide No. HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017





10. Further, Appellant provides that the "Para-10. Insofar as the demand pertaining to element (ii) is concerned, I find that the notice, at Para 3.2 and 3.4, clearly arrived at the liability towards construction value of unfinished house, attempting to fasten liability on full value, without even extending any abatement towards goods/material components. I have carefully considered the facts. When the appellant possessed title to the land [outright purchase, as recorded at the third bullet under Para 2.1 of the SCN), any construction undertaken prior to sale of any land parcel is admittedly service to self there is no service involved since the fiscal statute prescribes the existence of independent service provider and receiver to fasten the levy; and the factual matrix shows on record that the part of C sale deed consisting of land-parcel along with unfinished house is registered for the composite consideration. **Therefore, the transaction covered by the sale deed, even when containing an unfinished villa, is-sale simplicitor, and cannot be considered to represent a divisible land- building transaction involving sale (of land) and construction (of building), for separately assessing the latter. The sale deed records the immovable property in totality (land parcel unfinished house) which is assessed to Stamp duty and thereby recognized as a sale transaction alone, which is placed out of ambit of service tax levy, both prior to and after 01.07.2012. As far as common amenities are concerned, the unit rate of the constructions is deemed to be adjusted to amortize the cost over the entire project villas and thereby included in the unit cost of the villas since the value of apportioned common amenities (villa-wise) have not been shown to be charged separately in any case. The tax demand in respect of element (ii) is therefore legally unsustainable. Accordingly, Para 26(2) of the impugned order is set aside."**

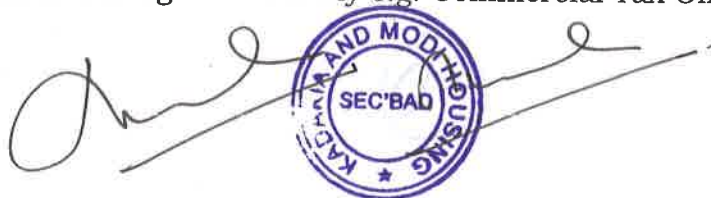
11. With respect to above para, the Appellant already submitted the detailed reply at the time of filing the reply against the notices or orders and as a result the respected Commissioner of Appeals-II has passed the final order in order in Appeal stating that the tax amount demand in respect of element (ii) is therefore legally unsustainable. The impugned order is set aside. Since the department has dropped the amount already in Order in original demanding of the same again is not correct and same needs to be dropped.

12. The Appellant submits the Extract related to "Para-11. Insofar as element (iii) is concerned, it is contended that the impugned amounts have been collected towards corpus fund, electricity deposit and water charges, all of which are statutorily



prescribed. The tax demand has been confirmed merely on the ground that the appellant failed to produce documentary evidences in support of their claim that these amounts were not received towards service consideration, but represented statutory dues collected from the customer and paid to the corresponding utility. The rebuttal on this count was that no specific evidences were sought by the lower authority, which could have been furnished had they been sought. Although this is a puerile ground, I find that this matter can also be examined by the lower authority afresh, along with the issue pertaining to element (i), remanded supra. **It is expressly clarified that if the impugned amounts are collected from the villa vendees and deposited to the utilities / transferred to the association corpus fund without any retention in appellant's account, the question of treating the same as consideration for construction of villa and assessment under WCS does not arise. Para 26(3) of the impugned order is therefore set aside and remanded to the lower authority to specify the evidences required from the appellant in this connection; ascertain the facts; arrive at a conclusion on the existence of liability; and then proceed to quantify it, if applicable. The appellant is directed to co-operate in the denovo proceedings and submit the evidences sought. On re-quantification of elements (i) and (ii) in the manner directed herein, the amount paid shall automatically stand appropriated; and Para 26(4) of the impugned order is upheld, for adjustment against the quantification in denovo proceedings.**"

13. Concerning Para-11, the Appellant has already submitted that it is expressly clarified that if the impugned amounts are collected from the villa vendees and deposited to the utilities / transferred to the association corpus fund without any retention in the appellant's account, the question of treating the same as consideration for construction of villa and assessment under WCS does not arise.
14. Further the Appellant would like to submit that the department has already set aside and remanded back to the lower authority for re-quantification of liability. Therefore, demanding the same again without any re-quantification is not correct and the same leads to a violation of judicial discipline which is not valid as per law.
15. The Appellant submits that judicial discipline requires that decision of higher authority should be followed by the lower authorities, therefore, a lower officer is bound to follow the decision of the higher authority e.g. Commercial Tax Officer is



bound to follow the decision of the High Court or Tribunal and the reliance is placed on following case laws:

- a. **Sonar Impex Vs CCE, Belgaum 2015 (40) STR 793 (Tri-bang)** wherein it was held that

"8. In that case also, the fresh round was started by the Revenue on the ground that question of unjust enrichment was not considered In the initial round and Hon'ble Supreme Court said that once the order attained finality, even on the ground of unjust enrichment, fresh proceedings could not have been initiated. This case stands on a worse ground. In this case the same ground on which Commissioner (Appeals) had got a verification report and allowed the appeals stands reopened. This could not have been done at all. Further a small amount has also been held to be beyond the limitation period prescribed under Section 11B which is of course a new ground but in the light of the decision of the Hon'ble Supreme Court, this ground also cannot be considered. In any case once all the refund claims and their fate had attained finality in the order of the Commissioner (Appeals), no further action could have been taken except the option of appealing against that decision and recover the lost ground which has been missed. I also agree with the submissions that this is a case where the decision of the Hon'ble Supreme Court in the case of Kamlakshi Finance Corporation Ltd. is applicable and therefore the order should have been simply implemented.

9. In view of the above discussion I find that the second round of litigation initiated itself was unwarranted and probably has to be held void. In any case allowing the appeal with consequential relief and holding the proceedings ab initio void have the same consequences. Therefore I prefer to allow the appeal with consequential relief to the appellants."

- b. **Sharad Chandra Agrahari Vs CCE, Patna 2001 (127) ELT 716 (Tri-Cal)**

- c. **Sree SVM Textile Mills Vs CCE, Coimbatore 2014 (301) ELT 499 (Tri-Chennai);**

16. The Hon'ble High Court of Delhi in the matter of **Alex Tour And Travel Pvt. Ltd. Versus Assistant Commissioner Of CGST, Division; (2023) 7 Centax 158 (Del.)** had held that-

"17. Undisputedly, the Revenue is entitled to file an appeal under Section 112 of the Central Goods and Services Tax Act, 2017, within a period of three months from the date of the order. We are informed that the said period has been extended



as the Appellate Tribunal has not been constituted as yet. However, the respondent cannot refuse to comply with the appellate orders on this ground.

18. We are unable to accept that the Revenue can ignore an order passed by the appellate authority on the ground that it proposes to appeal the said order.

19. Suffice it to note that there is no order passed by any competent Court, staying the implementation of the Orders-in-Appeal passed by the appellate authority. The Revenue has also taken no steps for securing orders to that effect.

20. We are also unable to appreciate the insistence on the part of the Revenue for the appellant to file fresh applications for the refund.

21. Mr. Singla fairly states that fresh applications for refund or response to Show Cause Notices are not necessary, considering that the proceedings emanated from the petitioner filing applications for refund, which culminated in Orders-in-Appeals passed by the appellate authority.

22. In view of the above, the refund applications filed by the petitioner to seek implementation of the Orders-in-Original and the deficiency memos shall be treated as non est.+

23. The appellate authority has not granted any interest on the amount of refund due. However, more than one year has elapsed in case of Order-in-Appeal dated 8-2-2022 and almost ten months have elapsed in respect of Orders-in-Appeal dated 28-7-2022. Plainly, the petitioner cannot be denied interest as payable for the period of delay in refunding the amount due to the petitioner.

24. In view of the aforesaid, we consider it apposite to hold that the petitioner is also be entitled to interest in accordance with law.

25. The present petition is allowed. The respondent is directed to forthwith disburse the petitioner's claim for refund along with interest as payable in accordance with law."

17. Appellant further provides that even decision of the Tribunal, not a jurisdictional Tribunal, is required to be followed by the lower authority as held by the Supreme Court in the case of **Union Of India Versus Kamlakshi Finance Corporation LTD, 1991 (55) E.L.T. 433 (S.C.)**.

18. Further, the lower authority cannot ignore the decision taken by the Appellate authority in favour of the taxpayer as well as the lower authority cannot refuse to follow the order passed by the Joint Commissioner (Appellate authority) etc. When an order is passed by a higher authority, the lower authority is bound thereby keeping in view the principles of judicial discipline.



19. The Appellant would like to place reliance on the following judicial pronouncements.

- a. **Singhal's Flexipack Versus The Additional Commissioner, CGST & CENTRAL EXCISE, JAIPUR, 2020 (10) TMI 998** where in it was held that the *"While passing the impugned order the releasing authority was required to follow the judgments of various courts under judicial discipline. The impugned order has been passed in utter violation of judicial discipline. In support of this argument the appellant has submitted various judgments and requested to consider the case laws cited by the appellant and modify the impugned order"*.
- b. **Galaxy Indo Fab. Limited V/s Union of India 2010 (252) E.L.T 3(All HC)** wherein it was held that *"In the present case it is admitted case that the order of the Tribunal has not been challenged by the revenue in any higher Court and the same holds good till date. The said order of the Tribunal was binding upon the revenue authority. Revenue authority cannot refuse to obey the order on any pretext. The refusal to obey the order amounts to violation of judicial discipline. In the present case, knowingly there is an order of Tribunal staying the demand till the disposal of appeal, the demand notice has been issued. Not only that in paragraph-6 of the counter affidavit, the authority of the Tribunal and this Court has been challenged by breaking all judicial norms and discipline. We are of the view that the language used in paragraph-6 of the counter affidavit is contemptuous in nature. However, having regard to the facts and circumstances, instead of taking a contempt proceeding against the officer concerned, we propose to impose an exemplary costs of Rupees one lac on the respondent-officer, which will be payable to the petitioner within two months by a account payee cheque or draft with a further warning to the officer not to act in haste and arbitrarily in future"*.
- c. **XL. Health Corporation Pvt. Ltd. V/s Union of India 2018 (10) TMI 1585 High Court of Karnataka** wherein it was held that *" In the impugned order, the first appellate authority throwing to the winds, the principles of judicial discipline and binding order passed by higher appellate forum, not only reiterated his own stand, which were set aside by the Tribunal but the same is sought to be defended by the Department with the aforesaid words quoted above. The total callous, negligent and disrespectful behaviour shown by the Departmental authorities in this Court should not be tolerated at all. It is this kind of lack of judicial discipline which if it goes unpunished, will lead to more litigation and chaos and such public servants are actually a threat to the*





society. The cost is quantified at ₹ 1 lakh (Rupees One Lakh only) to be deposited by Mr.Suresh Kumar, Commissioner of Service Tax (Appeals) from his personal funds with the Registrar General of this Court. The impugned order apparently flies in the face of the higher Tribunal's order dated 23.03.2017 and therefore cannot be sustained. The writ petition therefore clearly deserves to be allowed with exemplary costs".

From the above-stated submissions and relied on decisions, the Appellant submits that issuance of fresh demand for the same concluded matter is incorrect and the same needs to be set aside.

In Re: No Service tax to be payable on Works Contract services for the period April 2015 to June 2017:

20.As stated in the background facts, the Appellant started paying service tax on the value of "construction agreements" from July 2012 onwards. Thereafter, the said taxes have been regularly paid. On a perusal of the Order, it is evident that the issue in the order is therefore limited to the aspect of quantification of demand.

21.Appellant submitted detailed statements showing the breakup of the receipts into receipts towards "sale deeds", receipts towards "construction agreements", receipts towards other taxable receipts and receipts towards other non-taxable receipts was provided below:

Description	Receipts	Non-taxable	Taxable
Amount received towards sale deed	16,505,950	16,505,950	0
Amount received towards agreement of construction	4,887,647	0	4,887,647
Amount received towards other taxable receipts	28,822	0	28,822
Amount received towards other non-taxable receipts	3,749,346	3,749,346	0
Amount received towards VAT, Registration charges, etc	1,190,570	1,190,570	0
Total	26,362,335	21,445,866	4,916,469

22.However, ongoing through the impugned order, it can also be observed that though the allegation is to demand service tax on construction agreements, the quantification is based on gross amounts mentioned above for all the activities including amounts received towards the "sale deeds".

23.It is therefore apparent that the order represents an error in quantification of the demand. It may be noted that the Appellant have regularly and diligently discharged Service Tax on the value of "construction agreements" after June

17

2012 onwards. The above is explained through a comparative chart provided below:

Particulars	As per Appellant	As per order In Original
Gross Receipts	26,362,335	26,362,335
Less Deductions		
Sale Deed Value	16,505,950	0
VAT, Registration charges, stamp duty and other non-taxable receipts	4,939,916	1,190,570
Taxable amount	4,916,469	25,171,765
Abatement @ 40%	1,966,588	10,068,706
Service Tax as applicable	287,934	1,448,436
Actually Paid	287,934	0
Balance Demand	0	1,448,436

24. The Appellant submit 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.

25. Since the impugned order agree on the principle that service tax cannot be demanded on the value attributable to sale deeds, the Appellant is not making detailed grounds on the legal merits of the said claim and would like to submit the following broad lines of arguments:

- a. In many cases, the "sale deed" is entered into after the completion of the building and therefore the demand cannot be justified under the said entries.
- b. Till the stage of entering into a "sale deed", the transaction is essentially one of sale of immovable property and therefore excluded from the purview of Service Tax.
- c. In any case, the deeming fiction for construction services prior to completion cannot be classified under works contract services since doing the same would render Section 66E(b) of Finance Act, 1994 & Notification 26/2012 ST dated 20.06.2012 redundant.
- d. If at all a view is taken that the value of "sale deed" is liable to service tax, the benefit of the above notification should be granted after reclassification of the service.



26. Further, the Ld. Commissioner (Appeals) vide Order-In-Appeal: HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 agreed on the principle that sale deed value need not be includible in the taxable value while paying service tax. Hence, the service tax demand on the same does not sustain and requires to be dropped.
27. The Appellants also reserve their right to make additional arguments as felt necessary on this aspect of service tax on the value of "sale deeds" if it is ultimately held that this aspect could be taken up without an allegation in the Order.
28. Similar to the claim for exclusion of sale deed value, the value attributable to stamp duty, electricity etc., need to be reduced. It is submitted that once the above deductions are allowed, the demand would be reduced to NIL.
29. Appellant submits that as brought in background facts, an amount of Rs. 2,87,934/- has already paid towards service tax on the amounts received towards construction agreements. T
30. As the Appellant has not collected service tax from the buyer, the benefit of cum-tax u/s. 67(2) of Finance Act, 1994 requires to be given.
31. Without prejudice to the foregoing, Appellant submits that when service tax itself is not payable, the question of interest does not arise. Appellant further submits that it is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC). Similarly, the penalty also cannot be imposed in absence of the any short payment as alleged in the Order.

In Re: Extended period of limitation is not invokable:

32. Appellant submits that impugned order has alleged that they were registered with the department and were discharging tax liability and filing but for allegations made in the notice, ST-3 Returns regularly. In this regard, Appellant submits that they has never intention to evade the service tax or suppress the fact that is the reason for taking registration and filing the returns. If the intention were to be evade they would neither have taken service tax registration and nor they would have paid the taxes where the liability was attracted.
33. Appellant submits that suppression means not providing information which the person is legally required to state, but intentionally or deliberately not stated. As



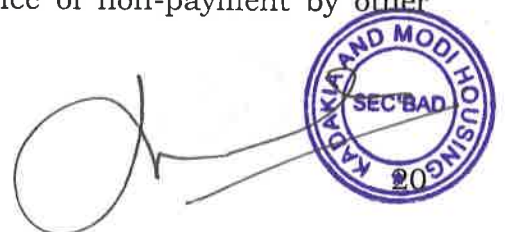
stated in factual matrix there was continuous intimation (from year 2010) regarding the compliance being made from time to time and repeated requests were made asking to confirm the understanding of Appellant. Letters were filed giving the detailed breakup of amounts collected, amounts offered to tax & not offered (excluded) to tax. At no point of time, department responded/rebutted to the above intimations/requests.

34. Appellant submits that what is believed to be not taxable/leviable as backed by their legal understanding was well put forth before the authorities in the year 2010 i.e. at the time of beginning their compliance itself and subsequently also. Thus **full facts of subject SCN were voluntarily disclosed by the Appellant without any enquiry/request from the departmental authorities and they had never hidden any fact from the officers of department** and subject matter of present order was known to the department before the beginning of SCN period itself as evident from the corresponded referred above.

35. Not objecting/responding at that time which gave vehement belief that understanding & compliance made is in accordance with the law and but now that is after expiry of nearly 5 years coming out with the present SCN with illusory & baseless allegation to invoke larger period of limitation and proposing to punish the Appellant for the failure of departmental authorities is not valid in the eyes of law. In this regard reliance is placed on Pushpam Pharmaceuticals Company Vs Collector Of C. Ex., Bombay 1995 (78) E.L.T 401 (S.C) it was held that *"suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression.*

36. Appellant submits that the extended period of limitation is not invokable in the instant case:

- a. Most of the builders/developers across the country are not at all paying service tax (especially on villas constructions) and there were serious doubts expressed on the applicability of service tax and customers are also very reluctant to reimburse citing the above practice of non-payment by other similar builders;



- b. Judicially also it was held that construction of villas are not subjected to service tax as submitted supra;
- c. There was lot of confusion on the liability of builders on the applicability of service tax and was challenged before various courts and courts also expressed different views and most of the cases in favour of tax payer. For instance, recently Hon'ble High court in case of Suresh Kumar Bansal v. UOI 2016-TIOL-1077-HC-DEL-ST held that construction contracts are not subjected to service tax.
- d. Further taxability of contracts involving immovable property was also subject matter of dispute during the subject period. There were contrary judgments of Supreme Court at such point of time and which was finally settled by larger bench of Supreme Court in the year 2014 as reported in Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.).
- e. The issue of classification of indivisible contracts under 'COCS'/'WCS' was in dispute. Courts expressed different views, referred to larger bench and finally settled by Supreme Court in the year 2015 in favour of tax payer as reported in Commissioner v. Larsen & Toubro Ltd. — 2015 (39) S.T.R. 913 (S.C.).
- f. Apart from the above difficulties, construction industry was in slump (especially in erstwhile state of Andhra Pradesh due to state bifurcation issue) and builders were facing huge financial problems/difficulties.

Despite of above challenges/doubts/confusion, Appellant voluntarily paid all service tax dues within the due date before the intervention of revenue department. There is no evasion of tax. Therefore, in the above background, intension to evade or delay the payment cannot be attributed. Further differentiation shall be made between the assessee (like Appellant) who is voluntarily complying with the law and paying all dues despite of doubts/confusion/challenges etc., and assessee who is not at all complying with the law despite knowing his liability. Giving equal punishment for errant assessee and non-errant assessee shall be best avoided. Hence in view of above factual & legal matrix, larger period of limitation is not invocable.

Interpretation is involved

37. The Appellant submits that present SCN and order arises due to difference of interpretation of provisions between Appellant & revenue. Further various letters were filed before department authorities, who never objected/responded on the compliance made by Appellant. Subject matter is plausible for different interpretations and involves in complexities in the determination of



taxability. Thus it is pure case of interpretational issue under which circumstances larger period of limitation cannot be invoked. In this regard reliance is placed on CCE v. Poonam Plastics Industries 2011 (271) E.L.T 12 (Guj);

38. Appellant submits that merely because Appellant chooses an interpretation beneficial to him, malafide intension to evade payment of service tax cannot be attributed on part of the assessee accordingly larger period of limitation is not invocable. In this regard reliance is placed on Rangsons Electronic Solutions (P) Ltd v. CCE 2014 (301) E.L.T. 696 (Tri. - Bang.) wherein it was held that *"It is a settled principle that merely because an assessee chooses an interpretation beneficial to him, there can be an allegation of suppression or misdeclaration. In view of the available facts and circumstances of the case and several decisions relied upon and cited by the learned counsel (we have not taken note of all of them since we do not feel the need), appellant cannot be found fault with for coming up with an interpretation and availing the benefit which was not available to them. Under these circumstances, we have to take a view that the order of the Commissioner limiting the demand to the normal period and not imposing the penalty was an order which rendered justice to the appellant/assessee without being unfair to the Revenue. Therefore we do not find any merit in the appeal filed by the Revenue and reject the same."*

Returns filed regularly

39. Appellant submits that they regularly paid service tax and duly filling ST-3 returns showing the all these particulars as required/permitted in the format prescribed in this behalf (Form ST-3 specified by CBEC). If the Appellant wants to suppress the fact with intent to evade the payment of taxes, they might not have disclosed the same in ST-3 returns. Further, finding of impugned order that Appellant has not disclosed the relevant details/information to the department is not factually correct and requires to be set aside. In this regard, Appellant wishes to rely on the following judgments wherein it has been held that if disclosure of amounts received/charged towards impugned activity are made in ST 3 Returns, extended period of limitation cannot be invoked:

- a. Shree Shree Telecom Pvt Ltd., Vs. CCE Hyderabad [2008 (232) E.L.T. 689 (Tri. - Bang.)
- b. Sopariwala exports pvt. Ltd v. CST 2014 (36) S.T.R. 802 (Tri. - Ahmd.)
- c. Bajaj Hindusthan Ltd v. CCE 2014 (33) S.T.R. 305 (Tri. - Del.)



40. When the issue was disputable and at one point of time, the view of the courts was in favour of the assessee, question of invocation of extended period of limitation does not arise. Relied on CCE v. Saurashtra Cement Ltd 2016-TIOL-365-HC-AHM-CX.
41. Appellant submits that long list of familiar judicial pronouncements holding impugned two grounds of non-payment of Service Tax and failure to file correct ST-3 returns by themselves totally inadequate to sustain allegation of wilful misstatement/suppression of facts. Relied on Punj Lloyd Ltd. V. CCE & ST 2015 (40) S.T.R. 1028 (Tri. - Del.)
42. Appellant submits that averment of SCN as well as order is that, lapse would not have come to light but for the investigation of department, standing alone cannot be accepted as a ground for confirming suppression, Mis-statement or mis-declaration of facts. More so considering the fact that the very objective of conducting the Audit of records of an assessee is to ascertain the correctness of payment of duty, availment of CENVAT credit, etc., any shortcomings noticed during the course of Audit, itself cannot be reasoned that the deficiency was due to mala fide intention on the part of assessee. In this regard relied on LANDIS + GYR LTD Vs CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata).
43. Appellant submits that they are under bonafide belief that compliance made by them not in accordance with the law and whatever believed to be paid was paid. It is well settled legal position that suppression of facts cannot be attributed to invoke longer period of limitation if there is bonafide belief. Same was flown from the following:
- 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.)

Other cases:

44. The Appellant submits that expression “suppression” has been used in the Section 73 of the Finance Act, 1994 accompanied by very strong words as ‘fraud’ or “collusion” and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. Relied on Continental Foundation Jt. Venture CCE, 2007 (216) E.L.T 177 (S.C)



45. Appellant submits that the show cause notice proposed demand by invocation of the extended period of limitation only on the ground that Appellant has suppressed the details to Central Excise department. In this regard it is submitted that **extended period of five years applicable only when something positive other than mere inaction or failure on the part of manufacturer/service provider is proved** - Conscious or deliberate withholding of information by manufacturer/service provider necessary to invoke larger limitation of five years. In this regard wishes to rely on **CCE, Chemphar Drugs & Liniments 1989 (40) E.L.T 276 (S.C)**. Therefore the allegation of SCN is not legal and proper.
46. Intention to evade payment of tax is not mere failure to pay tax. It must be something more i.e. that assessee must be aware that tax was leviable/credit was inadmissible and he must act deliberately avoid such payment of tax. Evade means defeating the provision of law of paying tax and it is made more stringent by the use of word 'intent'. Where there was scope for doubt whether tax is payable or not, it is not 'intention to evade payment of tax'. reliance is placed on **Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)**
47. Mere non-payment/short payment of tax per se does not mean that Appellant has willfully contravened the provisions with the intent to evade payment of tax. in this regard reliance is placed on **Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.)** wherein it was held that *"The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the Appellant as fit for the applicability of the proviso."*
48. The Appellant submits that all the entries are recorded in books of accounts and financial statements nothing is suppressed hence the extended period of limitation is not applicable. Wishes to place reliance on **LEDER FX Vs DCTO**



In Re: Benefit of cum-tax shall be given

49. Appellant submits that in case demand stands confirmed, same shall be re-quantified after allowing the benefit of cum-tax u/s. 67(2) of Act, *ibid* since Appellant has not collected service tax from the buyer to the extent of alleged short/non-payment of service tax.

50. Appellant submits that impugned order has alleged vide Para 22 that *"they are aware of the statutory provisions and are billing service tax separately where ever they collected towards taxable services. Hence in some cases separate collection of taxes and in some cases cum tax benefit cannot be in the practice."* In this regard Appellant submits that section 67(2), *ibid* allows to arrive once the tax is not collected which is undisputed in the instant case. Not considering the said vital requirement, impugned order simply rejected the request stating that same is not practicable as Appellant is being collected in other cases. It is submitted that undisputedly whatever collected has been duly remitted to the government and entire impugned demands raised wherein Appellant did not collect the same from customers. In such circumstances, averment of impugned order is arbitrary and deserved to be set aside.

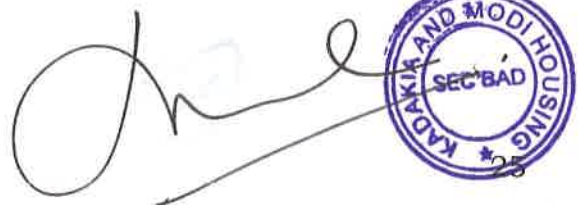
51. Appellant submits that in light of the statutory backup as mentioned above and cases where it was held that when no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis

- a. P. Jani & Co. vs. CST 2010 (020) STR 0701 (Tri.-Ahmd).
- b. Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del
- c. Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590
- d. BSNL Vs CCE, Jaipur 2011 (24) S.T.R 435 (Tri-Del).

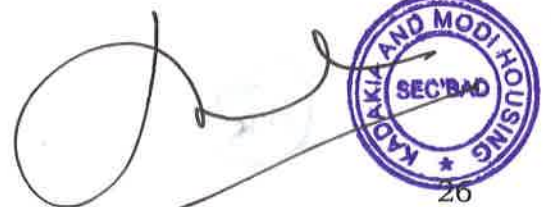
In Re: Interest and penalties are not payable/imposable:

52. Without prejudice to the foregoing, Appellant submits that when service tax is paid on time, the question of interest & also penalties does not arise.

53. Without prejudice to the foregoing, Appellant submits that all the grounds taken for ***"In Re: Extended period of limitation is not invokable"*** above is equally applicable for penalty as well.



54. As submitted supra, there is no intention to evasion of tax and what are all believed to be payable was paid (Rs.19,00,736/-) within time, which is undisputed. Hence no penalty shall be imposed to that extent.
55. The Appellant submits that the impugned show cause notice had not discharged the burden of proof regarding the imposition of the penalty under Section 78 of the Finance Act, 1994. In this regard wishes to rely on the judgment in the case of Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) it was held that **"It is unjustified in absence of discussion on fundamental conditions for imposition of penalty under Section 78 of Finance Act, 1994"**.
56. The Appellant submits that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner prescribed by the statute. Relied on Hindustan Steel Ltd. v. State of Orissa — 1978 (2) E.L.T. (J159) (S.C.).
57. The Appellant submits that as submitted supra there were favourable judgments holding that **service tax is not at all payable and there was confusion existed at such point of time and the issue involved interpretation of provisions and law is at nascent stages and courts expressed different views**. Therefore the penalties cannot be imposed. Relied on CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.L.T 661 (S.C.).
58. It is further submitted that when schemes of 'Extraordinary tax payer friendly' and VCES was introduced to waive the penalty when assessees who did not at all comply with service tax law can be given immunity provided they pay service tax along with appropriate rate of interest, no reason why law abiding assessee who had got himself registered more or less in time and started paying service tax, shall be denied benefit of waiver of penal provisions. In this regard relied on Commissioner v. R.K. Electronic Cable Network — 2006 (2) S.T.R. 153 (Tribunal).
59. Further Appellant is new to the service tax law and not much conversant with the provision of service tax and whatever believed to be taxable, same was assessed without any department intervention. In this background, no penalty shall be imposed. Relied on Sundeep Goyal and Company v. Commissioner — 2001 (133) E.L.T. 785 (Tribunal).



26

Benefit of Section 80:

60. Appellant submits that alleged short/non-payment of service tax was due to various reasons *inter alia*

- a. Given understanding that compliance made by Appellant is in accordance with the law;
- b. Whatever believed as taxable was duly paid voluntarily;
- c. Various letters/disclosures were made to the department informing their compliance and requested for confirmation also;
- d. There were divergent views of Courts over the classification of indivisible contracts, taxability of transaction involving immovable property etc.,;
- e. There was enough confusion prevalent on the applicability of the Service tax among the industry;
- f. Matters were referred to larger bench at various instances;

All the above can be considered as reasonable cause and waiver of penalty can be granted in terms of section 80 of Finance Act, 1994. Relied on **CST, Vs Motor World 2012 (27) S.T.R 225 (Kar)**.

61. Appellant submits that several grounds are urged in the subject appeal, in this regard, Appellant wishes to communicate that **all grounds are without prejudice to one another.** Reliance is placed on the decision in case of Bombay Chemicals Pvt Ltd Vs Union of India 1982 (10) E.L.T 171 (Bom)

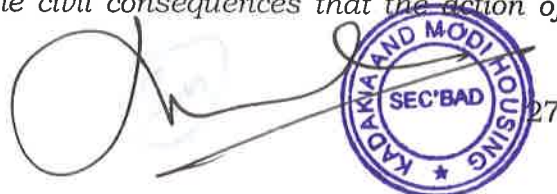
In Re: Impugned Order is not valid

Violation of principles of natural justice

62. Appellant submits that the submissions made by the Appellant is rejected without considering the same which is clearly a gross violation of principles of natural justice. In this regard, reliance is placed on Jindal Drugs Limited Vs UOI 2011 (263) ELT 536 (Bom) wherein it was held as follows

"11. Though various grounds have been urged to assail the impugned action of the respondents and for challenging the Circular dated 28-2-2006, in our view it is not necessary to deal with each of the said grounds as we are of the view that since the Petitioners have not been heard, the action of the Respondents suffers from an infirmity and the petitioners would succeed on the said ground.

12. As contended by the learned senior counsel for the Petitioners, the respondents were obliged considering the civil consequences that the action of



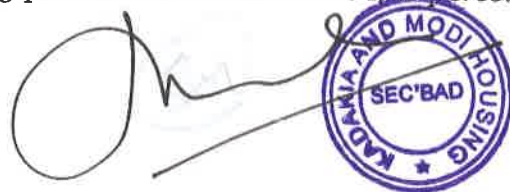
the respondents would have, to at least grant hearing to the Petitioners before passing the impugned orders. This submission of the learned senior counsel for the Petitioners commends to us. The action of the respondents undoubtedly has the effect of visiting the petitioners with civil consequences and therefore, in our view the least that was expected of the respondents was to follow a modicum of procedure and thereafter pass orders on their application seeking benefit of the said VKUY scheme. Having not done so, in our view, the said action of the respondents suffers from an infirmity and is therefore, vitiated and is accordingly required to be set aside. The learned counsel appearing for the Respondents fairly concedes to the said position."

From this decision, it is clear that the imposition of penalty is not correct and the same needs to be set aside.

63. Appellant submits that the impugned order has confirmed the demand without considering the various meritorious submissions made by the Appellant in their Show Cause Notice Reply which shows that the impugned order has been passed in violation of principles of natural justice, therefore, the same is not valid and needs to be set aside on this count alone. In this regard, Appellant submits that the Hon'ble Supreme Court in case of Dharampal Satyapal Limited Vs DC of Gauhati 2015 (320) ELT 3 (SC) held that

"18. Natural justice is an expression of English Common Law. Natural justice is not a single theory - it is a family of views. In one sense administering justice itself is treated as natural justice. It is also called 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism.' Moral naturalism captures the essence of common-sense morality - that good and evil, right, and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

"19. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi-judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must be given to each of the parties to adequately present the case made. It is perceived



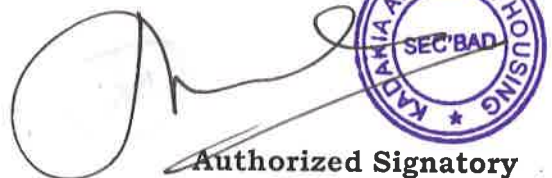
that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice.' The principles of natural justice developed over a period of time, and which is still in vogue and valid even today were: (i) rule against bias, i.e., nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e., audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order.'

64. Appellant submits that from the above referred decision of Hon'ble Supreme Court, it is quite clear that every quasi-judicial authority is required to give reasons while confirming the demands. However, in the instant case the impugned order has not given any reasons as to why the submissions made by the Appellant are not correct. Hence, the impugned order is not correct and the same needs to be set aside.

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

66. Appellant submits that they wish to be heard in person before passing any order in this regard.

For M/s. Kadakia and Modi Housing



A handwritten signature in black ink is written over a circular purple stamp. The stamp contains the text "KADAKIA AND MODI HOUSING" around the top edge, "SEC'Y" in the center, and a small star at the bottom. Below the signature, the text "Authorized Signatory" is printed.

Authorized Signatory

PRAYER

Therefore it is prayed that

- a. To set aside the impugned order to the extent aggrieved;
- b. To hold that no short payment of service tax under Site formation services;
- c. To hold that no tax to be demanded under works contract services;
- d. To hold that no tax to be payable under other taxable services;
- e. To hold that no interest is leviable;
- f. To hold that no penalty under section 78 of the Finance Act, 1944 is leviable;
- g. Any other consequential relief shall be granted;


Signature of the Appellant

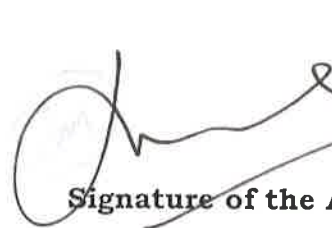


VERIFICATION

I, Beham Satish Modi, Partner, of M/s. Kadakia and Modi Housing, hereby affirm and declare that the information given herein above is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

Place: Hyderabad.

Date: 21.10.2024.


Signature of the Appellant



**BEFORE THE COMMISSIONER OF CENTRAL TAX (APPEALS-II), HQRS, OFFICE, 7TH
FLOOR, L.B. STADIUM ROAD, BASHEERBAGH, HYDERABAD-500004.**

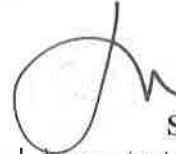
Sub: Appeal against the Order-In-Original No.113/2023-24-Sec-Adjn-ADC(ST) dated 28.03.2024 passed by Additional Commissioner of Central tax pertaining to M/s. Kadakia and Modi Housing.

I, Soham Satish Modi, Partner of M/s. Kadakia and Modi Housing. Appellant hereby authorize and appoint HNA & Co. LLP, Chartered Accountants, Bangalore or their partners and qualified staff who are authorized to act as authorized representative under the relevant provisions of the law, to do all or any of the following acts: -

- To act, appear and plead in the above noted proceedings before the above authorities or any other authorities before whom the same may be posted or heard and to file and take back documents.
- To sign, file verify and present pleadings, applications, appeals, cross-objections, revision, restoration, withdrawal and compromise applications, replies, objections and affidavits etc., as may be deemed necessary or proper in the above proceedings from time to time.
- To Sub-delegate all or any of the aforesaid powers to any other representative and I/We do hereby agree to ratify and confirm acts done by our above authorized representative or his substitute in the matter as my/our own acts, as if done by me/us for all intents and purposes.

This authorization will remain in force till it is duly revoked by me/us.

Executed on __ day of October 2024 at Hyderabad

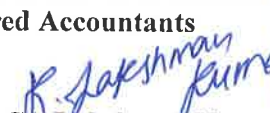

Signature 

I the undersigned partner of M/s Hiregange & Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings. I accept the above said appointment on behalf of M/s Hiregange & Associates. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated:

Address for service:

**H N A & Co. LLP
(Formerly Hiregange & Associates, LLP)
Chartered Accountants,
4th Floor, West Block,
Anushka Pride,
R. No.12, Banjara Hills,
Hyderabad, Telangana 500034**

**For H N A & Co. LLP
Chartered Accountants**

**CA Lakshman Kumar K
Partner (M.No. 241726)**



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

S.No	Name	Qualification	Mem./Roll No.	Signature
1	Sudhir V S	CA	219109	
2	Venkata Prasad P	LLB	AP/3511/2023	
3	Srimannarayana S	CA	261612	
4	Mohammad Shabaz	LLB	TS/22207/2016	
5	Akash Heda	CA	269711	
6	Manikanta	CA	277705	





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

OR No.39/2021-22-Sec-Adjn-ADC (ST)
DIN-20240356YO0000717817

Date:28.03.2024

मूल आदेश संख्या/ORDER-IN-ORIGINAL No.113/2023-24-Sec-Adjn-ADC(ST)

(Passed by Shri B. VIJAY, Additional Commissioner of Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate)

PREAMBLE

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

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

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

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

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

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

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

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

4. एस टी ४ फार्म में की गई अपील अनुलिपि में प्रस्तुत की जानी चाहिए और उसके साथ जिसने निर्णय या आदेश 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 और जिसने 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 their fee stamp of the appropriate amount.

Sub: Service Tax - Non -payment of Service Tax on Works Contract
Service by M/s. Kadakia & Modi Housing - Issuance of Order In
Original for the period from October 2010 to June, 2017 - Reg.

BRIEF FACTS OF THE CASE:

M/s. Kadakia & Modi Housing having their Registered office at 5-4-187/3 & 4, II Floor Soham Mansion, M.G. Road, Secunderabad (here-in-after referred to as M/s KMH or the "assessee") are engaged in the construction of Villas and are registered with Service Tax Department under STC No. AAHFK8714ASD001 for "Construction of Residential Complex service" and "Works Contract Service"

2. Intelligence received indicated that M/s KMH are Constructing Villas under the project titled "Bloomsdale", and are not discharging Service Tax properly. Documents were called from M/s KMH under Summons and a statement was recorded from the authorized signatory of the Company on 16/11/2015 and 01/02/2016.

2.1 Sri M. Jaya Prakash authorized signatory of the assessee in his Statement dated 16/11/2015 and 01/02/2016, (Enclosed as E.6) inter-alia submitted that

- M/s KMH are involved in the activity of Construction of Residential Villas;

- so far there is only one project of Residential Villas known as "Bloomsdale" located at Shamirpet Village;
- they acquired the land by outright purchase and the project consists of 72 Villas out of which 31 Villas were sold upto 2014-15;
- the mode of sale is that they enter into agreement of sale, then execute sale deed (for land Value) and agreement of Construction; that they are first appropriating the amounts received from the Customer towards the sale deed thereafter they appropriate the amounts towards agreement of construction. Amounts received from third parties like Registration Charges, VAT, Service Tax, Electricity deposit, maintenance charges are excluded for the purpose of estimating service tax liability;
- that they are paying Service Tax under the category of "Works Contract Service" against Agreement of Construction Value only;
- that because of ambiguity on applicability of service tax before the amendment to the act in 2012 they were given to understand that service tax is not applicable for the activity undertaken by them;
- that they are willing to pay the amounts collected under Works Contract Service.

2.2 Examination of the documents revealed that M/s KMH have not filed the Statutory ST-3 Returns and not paid any service tax for the period October 2010 to March 2011. For the year 2011-12 they have filed the ST-3 returns and self-assessed their service under Construction of Residential Complex service for the period upto September 2011; and from October 2011 onwards they changed the classification of the service and are discharging duty under Works Contract Service and they filed the returns for the period 2012-13 to 2014-15.

2.3 Examination of the Agreement of Sales indicated that M/s KMH are collecting the agreed value under the following three separate heads

A. Towards Sale of land

B. Towards development Charges of land for laying of roads, drains parks etc

C. Towards Cost of Construction, water and electricity connection and for other amenities.

2.4 The following consideration details in Condition number 1 of the agreement dated 12.11.2009 entered with Major Achyut Ranjan confirms the above mode of receipt of payments

SI. No.	Description	Amount
A.	Towards sale of land	Rs. 1,85,000/-
B.	Towards development charges of land for laying of roads, drains, parks, etc.	Rs.11,95,000/-
C.	Total towards land cost (A-B)	Rs.13,80,000/ -
D.	Towards cost of construction, water & electricity connection and for other amenities.	Rs.20,70,000/ -
E.	Total sale consideration (C+D)	Rs.34,50,000/ -

2.5. As per Para 13 of agreement of Sale dated 12.11.2009 entered with Major Achyut Ranjan reads as under

"13 The vendee shall enter into a separate agreement with the vendor for construction of the bungalow as per the specifications and other terms and conditions agreed upon. The vendee shall also enter into separate agreement with the Vendor for payment of development charges on land"

2.6. Identical conditions forms part of the all other agreement of Sales in respect of other customers. Accordingly M/s KMH are entering into separate agreement for development of land and for construction of Villas. M/s KMH vide their letter dated 09.02.2016 informed that in the Statement of receipts

submitted by them, under Column "Receipts towards agreement of Construction include the receipt towards the land development".

2.7. However examination of the receipts vis-à-vis the amounts indicated in the Agreement of sales showed that the cost of Land development is not included in the Agreement of Construction in some cases and partially included in some cases. The Cost of land development in some cases is included in the amount indicated in the Sale deed (Cost of land value) and exemption is claimed in this respect

2.8. The activity of land development involves preparing the site suitable for construction, laying of roads, laying of drainage lines water pipes etc. Thus it is a separate activity different from construction of Villas.

2.9. Upto the period 30.06.2012, as per Section 65 (97a) of the Finance Act 1994 Site formation and clearance excavation and earthmoving and demolition 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

2.10. Upto the period 30.06.2012 As per Section 65(105) (zzza) of 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 earthmoving and demolition and such other similar activities

2.11. Thus, it appeared that the activity of development of land fall under the definition of site formation as per Section 65(97a) ibid and the development charges collected are taxable to service tax as per Section 65

(105)(zzza) *ibid.* and with effect from 1.7.2012 it appeared to be a service under Section 65B (44) of the Act and taxable under the provisions of 65B (51) read with Section 66(B) of the Act. Further the activity does not fall under the negative list mentioned in Section 66 D of the Act. Thus the activity of land development appeared to be chargeable to service tax without any abatement.

2.12. Upto the period 30.06.2012 As per Section 65 (105) (zzzza) of 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, 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, ductwork and sheet metal work, thermal insulation, sound insulation, fire proofing or waterproofing, 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

(f) commissioning (EPC) projects;

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

2.13. After 01.07.2012, as per **Section 66B** of Finance Act 1994 as amended, *there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

2.14. As per Sec **65B(34)** of Finance Act 1994, *"negative list" means the services which are listed in **section 66D**;*

2.15 As per Sec 65B(51) of Finance Act 1994, *"taxable service" means any service on which service tax is leviable under section 66B;*

2.16. As per **Sec 65B (44)** of Finance Act 1994 *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*

(a) an activity which constitutes merely,-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (ii) a transaction in money or actionable claim;

(b) a provision of service by an Employee to the Employer in the course of or in relation to his Employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

2.17. As per Section 68 of the Finance Act 1994, every person providing taxable service to any person shall pay service tax at the rate specified in section 66 (upto 30.06.2012) and Section 66B (from 01.07.2012 onwards) in such manner and within such period as may be prescribed.

2.18. Section 66D specifies the Negative List of services & Exemption Notification No. 25/2012 dated 20.06.2012 lists the exempted taxable services. "Works Contract Service" does not figure in the negative list or in the said exemption Notification.

2.19. As detailed above the M/s KMH are entering into a Separate agreement of construction with his customers and the activity appears to be taxable under Works Contract Service even during the period from October 2010 to September 2011 during which M/s KMH appears to have erroneously classified the service under construction of Residential Complex Service. The fact that M/s KMH are discharging VAT under Works Contract and are assessing the service under Works Contract confirms the nature of the service that it is "Works Contract Service" Only.

2.20. As mentioned in above the cost of construction includes the cost of providing common amenities also. Sri Jaya Prakash in his Statement dated 01/02/2016 in response to Question No 3 submitted that the cost of providing common amenities is between one to one and half lakh rupees and the cost forms a part and parcel of Cost of Construction and they are discharging Service tax for the said amount under works contract providing common amenities is not a Works Contract as there is no transfer of property to the individual. Hence the abatement appears to be not available for the value of Rs.1,50,000/- per Villa (being the higher of the value admitted as M/s KMH failed to arrive at the correct value of common amenities) and appeared to be chargeable to full rate of Service Tax under other taxable services

2.21. In view of the foregoing it appeared that M/s KMH are liable to discharge charge service tax for Cost of land development shown in agreement of sales under "Site formation Service ". They appeared to be liable to service tax on the full value of Common amenities without any abatement at full rate. They appeared to be liable to Service Tax under "Works Contract Service" in respect of the value of construction shown in

agreement of sales excluding the value of Common amenities. The cost of land shown in agreement of sales only appears to be exempt from service tax.

2.22. Accordingly the service tax liability is arrived at villa wise.

3. Agreement of Sales indicates that the assessee is collecting the agreed value under the following two heads only.

A Towards Sale of land

B Towards Cost of Construction, water and electricity connection and for other amenities.

The consideration details in Condition Number 1 of the Agreement of Sale dated 20.07.2012 entered with Sri Abdul Rahim and another confirms the above mode of receipt of payment.

Sl. No.	Description	Amount
A.	Towards sale of land	Rs.18,00,000/-
B.	Towards cost of construction, water & electricity connection and for other amenities.	Rs.26,83,000/-
C.	Total sale consideration (A+B)	Rs.44,83,000/-

3.1. M/s KMH are not entering into any land development agreement in respect of these customers. In his Statement dated 01/02/2016, Sri M. Jaya Prakash authorized signatory of the Company in response to question number 4 why there is no separate agreement for development of land in respect of some customers, submitted that these booking were done after development of the land, that is why there is no separate agreements for land development charges in respect of them.

3.2. Condition No 1 of the sale deed dated 10.09.2012 entered with Sri Abdul Rahim and another indicates the following details

"The Vendor do hereby convey, transfer und sell the Plot No. 9, ad measuring 183 sq. yds., along with semi-finished construction having a total built-up area of 1849 sft., forming part of Sy. No.1139 situated at Shamirpet Village, Shamirpet Mandal, Ranga Reddy District which is hereinafter referred to as the Scheduled Property and more particularly described in the schedule and the plan annexed to this Sale Deed in favor of the Vendee for a consideration of Rs.18,00,000/- (Rupees Eighteen Lakhs Only) financed by HDFC Ltd., Hyderabad. The Vendor hereby admit and acknowledge the receipt of the said consideration in the following manner"

3.3. Further Annexure 1-A of the above cited sale deed dated 10.09.2012 indicates the following details

ANNEXURE-1-A

- Description of the Building: ALL THAT PIECE AND PARCEL OF SEMI-FINISHED HOUSE on bearing Plot No. 09 in the project known as "BLOOMDALE" forming part of Sy. No. 1139 of Shamirpet Village, Shamirpet Mandal, Ranga Reddy District.
 - (a) Nature of the roof : R. C. C.(G+1)
 - (b) Type of Structure : Framed Structure
- Age of the Building: Under Construction

3.4. Identical details are incorporated in all other Sale deeds in respect of other Customers.

3.5. In view of the above facts it appeared that what is transferred by way of sale deed is a semi-finished construction and not merely land. However it was observed that M/s KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi-finished houses is to be arrived by deducting from sale deed

value, the cost of land which is to be arrived at proportionately based on the values of identical lands.

3.6. As mentioned in Para 3 (detailed in annexures enclosed to the notice) above the cost of construction includes the cost of providing common amenities also. The cost of common amenities have to be arrived at as detailed in Para 2.20 (detailed in annexures enclosed to the notice) above and appeared to be chargeable to full rates of Service Tax.

3.7. In view of the foregoing, in respect of Customers mentioned in Enclosure WS-2 to the notice, it appeared that M/s KMH is liable to discharge service tax for Cost of construction in respect of value of semi finished houses shown in the "Sale deed" and value shown in agreement of Construction, under Works Contract Service. They appeared to be liable to service tax on the full value of Common amenities without any abatement at full rate. The cost of land arrived proportionately based on identical lands of customers appeared exempt from service tax.

3.8. Accordingly the service tax liability was arrived villa wise and detailed in Annexures enclosed to the notice. Further the villa wise Year wise and Service wise liability was detailed in Enclosure WS-3 & WS-4 to the notice.

3.9. The total service tax payable for both **Enclosure WS-1** and **Enclosure WS-2** customers together worked out to Rs.14,35,330/- in respect of site formation service, Rs.40,80,581/- in respect of works contract service, Rs.7,01,784/- in respect of other taxable services totaling to Rs.62,17,785/-. M/s KMH have paid an amount of Rs.19,00,736/- during the period from October 2010 to March 2015 and the differential amount payable worked out to Rs.43,17,049/- .

4. Service Tax under Works Contract Service has been arrived @ 4.12% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued vide Notification No.32/2007- ST dated 22.5.2007 for

the period 01.10.2010 to 31.03.2011 as the value of goods and materials consumed in the project could not be arrived as provided under Rule 2A and 3 of the Service Tax (Determination of Value) Rules, 2007.

4.1 Service Tax under Works Contract has been arrived @ 40% of the consideration received for rendering the services for the period from 01.04.2012 to 31.03.2015 as per the provisions of Section 2A [(ii)(A)] of the Service Tax (Determination of Value) Rules, 2007 as the value of the goods and materials consumed in the project could not be provided by the declarant.

5. By their acts of omission and commission as above, it thus appeared that M/s. KMH had contravened the various provisions of Finance Act, 1994 and the Service Tax Rules, 1994, with an intent to evade payment of Service Tax as follows:

- (i) Section 73A(1) of the Finance Act 1994 (hereinafter referred to as the Act) in as much as they have not paid the service tax collected from the customers completely.
- (ii) Section 65A(2)(a) of the Finance Act, 1994 inasmuch as they have not classified their services of construction of villas under "Works Contract service" during the period from October 2010 to September 2011" under Section 65 (105) (zzzza) and not classified the service of land development under Site formation Service under Section 65 (105)(zzza) from October 2010 to 30.06.2012.
- (iii) Section 67 of the Finance Act 1994 read with Rule 2A of the Service Tax (Determination of Value) Rules, 2006, inasmuch as they have not assessed correct values and not paid proper service tax on amounts received pertaining to the "Works Contract Service" during the period October 2010 to March 2015 and on site formation service from October 2010.
- (iv) Section 68 (1) of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994 inasmuch as they had not paid appropriate Service Tax under "Works Contract Service", "Site formation Service and Other taxable service on the considerations received for the services rendered.

(v) Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 inasmuch as they have not filed the statutory Returns under "Works Contract Service" during the period October 2010 to March 2012. And under Site formation Service from October 2010 and not assessing the taxable values correctly.

6. M/s Kadakia & Modi Housing have been rendering taxable services under the category of "Works Contract Services" and site formation service however they have not paid the of service tax charged and collected from the customers to the account of the Central Government properly during the period from October 2010 to March 2015. They had not discharged service tax on site formation service and they had not discharged service tax on works contract service by undervaluing the services they had not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation conducted. Therefore, it appeared that the assessee has intentionally suppressed the facts to evade the payment of service tax. Hence, it appeared that the period of limitation under proviso to Section 73 (1) is invokable to recover the short paid/not paid service tax along with interest under Section 75 of the Finance Act, 1994. The assessee appeared to be liable for penalty under Section 78 of the Finance Act, 1994 for suppression of facts, with an intent to evade payment of Service Tax

7. In view of the foregoing, a notice vide O.R. No.99/2016-Adjn.(ST) (Commr), HQPOR No.10/2016-ST-AE-VIII dated 22.04.2016 was issued to M/s. Kadakia & Modi Housing asking them to show cause to the to the Commissioner of Service Tax, Service Tax Commissionerate, as to why:

(i) An amount of Rs.14,35,330/- (Rupees Fourteen Lakh Thirty Five Thousand Three Hundred Thirty Only) (including all cesses) being the service tax payable on Site formation Service (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

- (ii) An amount of Rs.40,80,581/- (Rupees Forty Lakh Eighty Thousand Five Hundred Eighty One Only) (including all cesses) being the service tax payable on Works Contract Service (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- (iii) An amount of Rs.7,01,874/- (Rupees Seven Lakh One Thousand Eight Hundred Seventy Four Only) (including all cesses) being the service tax payable on other taxable Services (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- (iv) An amount of Rs.19,00,736/- (Rupees Nineteen Lakh Seven Hundred Thirty Six Only) paid towards service tax (as per Enclosure WS-5 to the notice) should not be appropriated towards the service tax demanded at Sl No (i) to (iii) above;
- (v) Interest as applicable, on an amount at Sl.No (i) to (iii) above should not be paid by them under Section 75 of the Finance Act, 1994;
- (vi) Penalty should not be imposed on the amount at Sl. No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;
- (vii) Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for delayed Registration.

8. Personal hearing was granted to the assessee on 28.12.2016. Shri Venkata Prasad, Chartered Accountant, on behalf of M/s. Kadakia & Modi Housing, appeared for the personal hearing and filed their written submissions dated 28.12.2016 and reiterated the same. He further submitted that an amount of Rs.19,00,736/- was paid by them before issue of the Show Cause Notice. Hence, he requested the same may be considered while imposing a penalty.

9. The Show Cause Notice O.R. No.99/2016-Adj.(ST)(Commr) HQPOR No. 10/2016-ST-AE-VIII dated 22.04.2016 was assigned for adjudication to

the Joint Commissioner, Hyderabad-I Commissionerate vide letter C.No. IV/16/156/2065-CC(HZ) Tech dated 07.12.2016 by the Chief Commissioner, Hyderabad Zone in terms of Notification No. 06/2009-ST dated 30.01.2009. Accordingly, corrigendum dated 20.10.2016 and 05.12.2016 were issued asking the assessee to show cause to the adjudicating authority for the subject notice.

10. The above said Show Cause Notice O.R. No.99/2016-Adj.(ST)(Commr) HQPOR No. 10/2016-ST-AE-VIII dated 22.04.2016 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 and passed the following orders:

- (i) I confirm the demand of Rs.14,35,330/- (Rupees Fourteen lakhs thirty five thousand three hundred thirty Only) (including all cesses) in the service tax payable on Site formation Service during the period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- (ii) I confirm the demand of Rs.40,80,581/- (Rupees Forty lakhs eighty thousand five hundred and eighty one Only) (including all cesses) being the service tax payable on Works Contract Service during the period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- (iii) I confirm the demand of Rs.7,01,874/- (Rupees seven lakhs one thousand eight hundred and seventy four Only) (including all cesses) being the service tax payable on other taxable Services during the period October, 2010 to March, 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- (iv) I appropriate amount of Rs.19,00,736/- (Rupees Nineteen lakhs seven hundred and thirty six only) paid towards service tax towards the service tax demanded at SI No (i) to (iii) above;
- (v) I confirm the demand of Interest as applicable, on the amounts at SI.No. (i) to (iii) above under Section 75 of the Finance Act, 1994;

(vi) I impose equivalent Penalty of Rs.62,17,785/- (Rupees Sixty two lakhs seventeen thousand seven hundred and eighty five only) on the amounts at SL No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;

(vii) I impose Penalty of Rs.10,000/- (Rupees Ten thousand only) under Section 77(2) of the Finance Act, 1994 for delayed Registration

11. Aggrieved by the above said Order-in-Original, the assessee preferred an appeal before the Commissioner (Appeals), Hyderabad. The Commissioner (Appeals) passed Order in Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 and the case was reminded back to the original authority.

12. The above said Order in Appeal was reviewed by the department and found that the Order in Appeal is not proper, correct and legal. Hence, the department filed an appeal before Hon'ble CESTAT, Hyderabad, vide Appcal No.ST/30115/2018, seeking to:

- (i) set aside the impugned Order in Appeal No. HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 and to confirm the demand proposed in the Order in Original No.48/2016-(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.

Subsequently the said appeal is withdrawn by the department on monetary grounds and allowed by the Hon'ble CESTAT vide Final Order No. A/30981-30986/2019 dated 25.10.2019.

13. For further period i.e. from April 2015 to June, 2017, a periodical Show Cause Notice was also issued by the Assistant Commissioner in file No. V/24/15/03/2018-Adjn dated 16.04.2018, wherein it was directed to the assessee to show cause to the Assistant Commissioner, Secunderabad Commissionerate, as to why:

- (i) an amount of Rs.14,48,436/- (Rupees Fourteen Lakh Forty Eight Thousand Four Hundred Thirty Six Only) (including cesses) should not be demanded as per para-4 of the notice towards "Works Contract Service" rendered by them during April, 2015 to June, 2017 in terms of Section 73(1) of the Finance Act, 1994;
- (ii) Interest should not be demanded at (i) above under Section 75 of the Finance Act, 1994;
- (iii) Penalty should not be imposed on them under Section 76 of the Finance Act, 1994 for the contravention of Rules and Provisions of the Finance Act, 1994;
- (iv) Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.

14. Personal Hearing: In the above said both cases, personal hearing was fixed on 08.12.2023, 18.12.2023 and 10.01.2024. Shri Mohammad Shabaz, Advocate, authorised representative of M/s. Kadakia & Modi Constructions had appeared for personal hearing on 10.01.2024. During the personal hearing he requested time till 16.01.2024 to submit proof. Further he had requested to expedite the order. The authorised representative vide his letter dated 16.01.2024 stated that due to Pongal holidays from 14.01.2024 to 16.01.2024, the appellant was not available to share the required supporting documents. Hence, he requested to provide 10 more days of time for filing the submission for which he requested time during personal hearing held on 10.01.2024. But he did not make any submission.

DISCUSSION AND FINDINGS:

15. I have gone through the Show Cause Notice dated 22.04.2016 passed by Commissioner, Show Cause Notice dated 16.04.2018 issued by Assistant Commissioner, Order In Original No.048/2016-(S.T) dated 30.12.2016, Order In Appeal No.HYD-SVTAX-000-AP2-0210-17-18-ST Dated 14.09.2017, Hon'ble CESTAT vide Final Order No. A/30981-30986/2019 dated 25.10.2019, their submission dated 28.12.2016, Oral/written submission made by the assessee and documents/information available on

records. I would like to draw attention towards the withdrawal of appeal filed before Hon'ble CESTAT by the department. The department had not accepted the Order In Appeal passed by Commissioner (Appeal) in this case and they preferred appeal before Hon'ble CESTAT. Later on the department had withdrawn the appeal on monetary ground. Thus, the department had not accepted the said Order in Appeal on merit basis. Further, on same ground, another Show Cause Notice for further period i.e. from April, 2015 to June, 2017 was issued to the assessee by Assistant Commissioner. Hence, I proceed to decide the both Show Cause Notices together. The main issue to be decided before me is that whether the demand of service tax on the services "Works Contract Services" and "Site Formation Services" is proper and the services are properly classified and the assessee are liable to pay the same or not.

16. It is alleged in the notice that the assessee failed to assess tax properly and misclassified the services under "Residential Complex Services" instead of classifying the same under "Works Contract Services" during the year 2011-12 and later they classified the same under "Works Contract Services" and paid tax liability accordingly. It was further alleged that they failed to file return for the period from October, 2010 to March, 2011 and thus not paid service tax liability during this period. It was alleged that the assessee entered into agreements with the buyers for sale of land, development charges for laying of roads, drains and parks etc., and towards cost of construction that include water and electricity connection and for other amenities. It was alleged in the impugned notices that the cost of "Land development charges" were not included in the cost of construction in some cases and partially included in some cases. It was alleged in the notice that the assessee failed to classify "Land Development Charges" under any of the category of services and hence the same are classified under "Site Formation Services". It was alleged in the notice that the cost of land development charges are not included in the cost of construction in respect of some of clients/customers and included in some cases. The activity involved, inter-alia, in the land development is preparation of site suitable

for construction, for laying of roads, drainage and for water pipes etc. Thus, it was alleged as a separate activity different from construction of villas. It was alleged in the notice that the activity was classified under "Site Formation Services" for the reason that the activity did not involve transfer of property and from the insertion of negative list in terms of Section 66B of the Finance Act, 1994 the services relating to land development charges were not listed in the negative list and thus taxable. It was further alleged that under the guise of sale of land, semi-finished villas were also sold by claiming exemption by treating these type of transactions as sale of land and underpaid the service tax on these transactions. The amount of service tax is alleged to be payable in this type of transactions and demand was made accordingly. It was further alleged that service tax on other services provided in connection with construction of villas was also not paid by the assessee. They contravened various sections of Finance Act, 1994 and each contravention is specified in the both notices. Hence, service tax liability of Rs.14,35,330/- under Site Formation Services, Rs.40,80,581/- under Works Contract Services and Rs.7,01,874/- under Other Taxable Services was arrived at and demanded in the Show Cause Notice OR No.99/2016-Adjn.(ST) (Commr) dated 22.04.2016. And for further period i.e. from April, 2015 to June, 2017, service tax liability of Rs.14,48,436/- under Works Contract Services was arrived at and demanded in the Show Cause Notice file C. No.V/24/15/03/2018-Adjn, dated 16.04.2018.

17. The assessee in their written reply submitted at the time of personal hearing held on 28.12.2016 contested that sale of land in the absence of proper mechanism for identification of service element is not taxable and relied on the case Suresh Kumar Bansal Vs. UOI 2016 43 S.T.R. 3 (Del.) and contested that construction of Villas cannot be subjected to Service tax at all as the construction of villas cannot be treated as residential complex as villa is not a building containing more than 12 units.

18. Further it was contested that the Villas constructed are being used for personal use and falls under the exclusion portion of the definition of the

"Residential complex" defined u/s 65(91a), *ibid.* hence no service tax. Relied on CBEC circular 108/2/2009-S.T., dated 29.01.2009 and M/s Virgo Properties Pvt Limited Vs CST, Chennai 2010-TIOL-1142-CESTAT-MAD; For period 01.07.2012 onwards, same is exempted under entry No. 14(b) of Notification No. 25/2012 ST dated 20.06.2012 as amended; and referred Macro Marvel Projects Ltd. v. Commissioner — 2008 (12) S.T.R. 603 (Tribunal) maintained by SC in 2012 (25) S.T.R. J154 (S.C.); and CBEC circular 108/2/2009-S.T dated 29.01.2009.

It is observed from the definition of "Residential complex" that M/s KMH misconstrued the definition in his favor and tried to overlook the definition for the benefit service tax. Extracts of the definition are reproduced here under

Section 65 (91a) "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;]

It is clear from the above definition that residential unit means a single house or a single apartment intended for use as a place of residence and as per the definition the project "Bloomsdale" met all the parameters of the

definition such it consisted more than 12 units with common areas and facilities such as parking places, parks and water supply etc. It is evident that M/s KMH are falsely contesting the issue for the sake of escaping the service tax liability on the construction activities undertaken by them in "Bloomsdale " project. The case laws relied upon by them are not factually applicable as the facts are different and distinguishable with the facts of the present issue before me. Hence the tax demanded under works contract services is correct and liability demanded in the notice is payable by them.

19. M/s KMH contested that "**Land development charges**" are not falling under "site formation and clearance, excavation and earthmoving and demolition" as none of the works specified in the definition were carried out by them in the Bloomsdale project. It was also contested that the services do not even fall under works contract service and stated that there is no liability of service tax on the services such as electrical cabling, laying roads, drainage lines, water lines etc. It was stated that both labour and material are involved in these activities. It was contested that the notice was issued with baseless allegation that the services provided such as electrical cabling, laying roads, drainage lines, water lines fall under "site formation and clearance, excavation and earthmoving and demolition". They contested that the notice is issued without any merit and needs to be quashed and relied upon the case Crystic Resins (India) Pvt. Ltd., Vs CCE, 1985 (019) ELT 0285 Tri.-Del and United Telecoms Limited vs. CCE, Hyderabad-2011 (21) S.T.R. 234 (Tri-Bang). I find that these case laws are delivered with different factual situations and hence are distinguishable with the facts of the present case.

20. Further to afore said contentions, M/s KMH further contested that taxability question arises only when site formation is done independently not as a part of composite contracts and relied on the Board's circular 123/5/2010-TRU, dated 24-5-2010. In this connection I observe that the contents of the circular are misconstrued by the assessee in their favour as the issue dealt in the circular dealt with laying of cable along the roadside. In the present case the services are not mere laying of cables alone and

hence the assessee's contention is not tenable. The assessee vehemently argued that the agreements such as "sale of land", "land development charges" and "construction charges" are mutually co-existing and inseparable and the activity of land development is not a "site formation service" if taken as a part of composite work and relied on few judgements *M. Ramakrishna Reddy v. CCE & Cus, Tirupathi 2009 (13) S.I.R. 661 (Tri-Bang)*; *Commissioner v. Vijay Leasing Company - 2011 (22) S.T.R. 553 (Tribunal)*.

21. Assessee further contested in their reply that the impugned "land development services" shall be treated as species of "works contract" and relied upon various case laws in support of their view. It was stated that common amenities were constructed with the material such as murram, concrete and electrical poles, electrical wiring etc., and used labour and transferred the property in goods to their customers and hence satisfies the definition of "works contract services". The definition of works contract is reproduced hereunder

(zzzza) 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) erection, commissioning or installation of plant, machinery, equipment or pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating or ventilation or air-conditioning including related pipe work, ductwork and sheet metal work, thermal insulation, sound insulation, fire proofing or waterproofing, lift, escalator, fire escape staircases or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

- (c) construction of a new residential complex or a part thereof; or
- (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
- (e) turnkey projects including engineering, procurement and construction or commissioning EPC projects;

22. From the above definition it clearly manifested that in order to classify "Land development charges" under "Works Contract services" two conditions are required to be satisfied 1st there should be transfer of property in goods and the activities to be performed under (a) to (e) listed in the definition. Hence the common area and amenities even though constructed with murram and concrete 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 individuals and hence the same cannot be treated as species of "Works contract services". In fact this is the allegation leveled against them in the notice. The assessee submitted that there is a transfer of property in goods in respect of common amenities provided and the amounts collected under "land development services" as they said that they paid VAT on these charges and hence it is a species of "Works Contract services". Again in their written reply it is again contested that (vide para 23 onwards) Land development services are not at all covered under any of the works defined under " Works contract services" and hence the land development services do not fall under works contract services and referred to Apex court case law Supreme court decision in CCE v. Larsen and Toubro Ltd 2015 (39) S.T.R. 913 (S.C.). It is noted that the assessee lacks clarity on his submissions as they say that the land development services do not fall under " site formation services" and they say that it forms species of "works contract service and again they say that it is not a works contract services as none of the works specified in the works contract service was performed for land development activities. Again vide para 34 of their reply they requested that if at all land development services are to be treated as taxable the same may be classified under Works contract and requested to extend the benefit of abatement or benefit of paying @ 4.8% in terms of Works Contract

(Composition Scheme for Payment of Service Tax) Rules, 2007 - as it is specie of works contract. Further they contested that the construction of common amenities involves the transfer of property and it is "works contract" service only and claimed that they correctly assessed at abated rates. They further argued that if land development charges are taxable, adopting the principles of Bundled service' u/s. 66F of Finance Act, 1994, same shall be construed as works contract and tax shall be levied only @40% on the amount received in terms of Rule 2A of Service tax (determination of value) Rules, 2012.

23. From the above submissions and contentions it is noticed that they lack clarity and trying to negotiate tax liability and circumvented the issue with divergent contentions and relying on irrelevant case laws. It is noticed that they wish to scheme on service tax liability as much as possible with illogical contentions. I find that in terms of Section 65 A, services are classified with more relevant descriptions of services. Extracts of Section 65A are reproduced here under

Section 65 A : Classification of taxable services. - (1) For the purposes 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- clauses of 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) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.]

[(3). The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.]

23.1 In terms of 65(A) 2(a) "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 and making it suitable for construction of villas and horizontal drilling for laying of drainage lines and water pipes and cables etc., apart from constructing common amenities such as park, current poles and club houses. Since majority works involved are relatable to "Site formation and clearance, excavation and earth moving and demolition" services, the land development services are rightly classified under the same. As requested by the assessee, land development services cannot be classified either under "residential complex services" or under "works contract services" (after 1/7/2007) as they collected charges under "land development services" separately and hence are rightly classifiable under "Site formation and clearance, excavation and earthmoving and demolition" services. In this context I rely upon the case Alokik Township Corporation Versus Comm. Of C. Ex. & S.T., Jaipur-I (Tri. - Del.) 2015 (37) S.T.R. 859 Demand - Land Development for housing project - Demand raised under Construction of Complex service upto 30-5-2007 and under Works Contract service category w.e.f. 1-6-2007 - HELD : Development of land for township not covered by definition of Construction of Commercial Complex service in Section 65(105)(zzzh) read with Sections 65(39a) and 65(91a) of Finance Act, 1994 or by definition of Works Contract service in Section 65(105)(zzzza) ibid - Service Tax demand not sustainable - Impugned order set aside - Sections 65(39a), 65(91a) and 65(105/zzzza) of Finance Act, 1994.

24. Hence in view of the above the land development services cannot be classified either under "Construction of Complex service" or under "Works Contract service". I also find that from the definition under Section 66F of the Finance act, 1994 the entire set of services under "land development

services" should be bundled under service that is "Site formation and clearance, excavation and earthmoving and demolition" services. Relevant extracts of Section 65 F are reproduced hereunder

SECTION [66F. Principles of interpretation of specified descriptions of services or bundled services. - (1) Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing the main service.

[Illustration

The services by the Reserve Bank of India, being the main service within the meaning of clause (b) of section 66D, does not include any agency service provided or agreed to be provided by any bank to the Reserve Bank of India. Such agency service, being input service, used by the Reserve Bank of India for providing the main service, for which the consideration by way of fee or commission or any other amount is received by the agent bank, does not get excluded from the levy of service tax by virtue of inclusion of the main service in clause (b) of the negative list in section 66D and hence, such service is liable to service tax.]

(2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

(3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely :

(a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;

(b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.

Explanation. - For the purpose of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.]

It is imperative from the above Section that "land developments services" shall be treated as single service due to its nomenclature and essential characteristics even though it contains various elements. Hence the demand under Site formation and clearance, excavation and earthmoving and demolition is correctly set in the notice and I confirm the tax liability under the same.

25. From the main demand under "works contract services", it is noticed that the assessee undervalued the services charges by not including cost of construction of semi-finished units by claiming the same as sale of land and thereby claimed ineligible exemption. The contentions of the assessee that (para 30) that "undivided portion of land along with semi-finished villa/house is not chargeable to VAT and it is mere sale of immovable property" and cited the judgment Larsen and Toubro Limited v. State of Karnataka - 2014 (34) S.T.R. 481 (S.C.). The assessee again scheming with irrelevant arguments that no service tax is payable on these transactions as it was not falling under "works contract services". I find that there is no basis in their argument and the definition is totally misconstrued in their favour to get benefit from paying service tax. I confirm the tax liability demanded in the notice under "works contract service".

26. The contention by M/s KMH that the demand of service tax in respect of "other services" is not tenable in the notice as it was claimed that the amounts were received towards Corpus fund, Electricity deposit, water charges and towards service tax. However it was observed that the assessee failed to submit documentary evidence in support of their claim and hence cannot be considered as non-taxable. After personal hearing held on 10.01.2024 also they did not submit the same. Hence, in the absence of any documentary backing the amounts collected for other services are taxable and I hold that tax is payable on these charges. In this connection I rely on the judgment of Delhi High Court in the case Gokaldas Images Ltd Vs Union Of India reported in 2007 (7) S.T.R. 347 (Del.) where in Delhi High Court held that:

WP (C) No. 5916/2003: The grievance of the petitioner is that the quota could not be utilized due to power cut and the appeal was heard on 5-11-1998 by the first appellate authority while the order was passed in January, 2000 and signed on 15-11-2000. There is undoubtedly delay on the part of the first appellate committee in passing the order but the matter has also been considered by the second appellate committee and the petitioner had failed to file necessary documentary evidence. Thus, I see no reason to interfere in this case.

(xv) WP (C) No. 16102/2004: The plea is frequent power failure in Okhla Industrial Area and the printing job at Jodhpur being affected due to cold weather and less sunshine. No documentary evidence was produced and the findings were, thus, correctly arrived at the first appellate committee and the second appellate committee rejecting the plea of the petitioner. Thus, the matter, in my considered view, calls for no interference.

(xvii) WP (C) No. 13154/2004: The petitioner has pleaded frequent court/customs strike and load shedding by the electricity authority. Documentary evidence was not produced and additional pleas were sought to be added before the second appellate committee, which has considered all the matters and rejected the same which, in my considered view, do not call for any interference.

27. M/s KMH contended that in case the demand is confirmed; they may be given the benefit of cum-tax under section 67(2) of Finance Act, 1994 and relied on various case laws in their favour. It is observed that the assessee have not collected values including service tax element in many cases. They collected service tax separately and are filing returns. They are aware of the statutory provisions and are billing service tax separately wherever they collected towards taxable services. Hence in some cases separate collection of taxes and in some cases cum tax benefit cannot be the practice. In fact the demand notice was issued against them as they suppressed the facts of receipt of taxable amounts with intent to evade payment of taxes and claiming ineligible exemptions. In this context I rely upon the following case law

The Settlement Commission in the case of M/s TIRUCHENGODE LORRY URIMAIYALARGAL SANGAM, reported in 2016 (41) S.T.R (343) (Settle Comn)(Chennai) held that *"The Commissioner conceded that the claim of exemption from Service Tax on the rent collected for the vacant land prior to 30-6-2010, was correct in law subject to production of documentary evidences. He further stated that threshold exemption of Rs. 8/10 lakhs in terms of Notification No. 6/2005-S.T., dated 1-3-2005 and Notification No. 33/2012-S.T., dated 20-6-2012 is applicable only for the aggregate value of all such taxable services. Since the aggregate turnover was more than 8/10 lakhs in the preceding Financial Years for all the services provided by the applicant, they are not eligible for exemption. In respect of claim for cum-tax benefit the Commissioner stated that the applicant did not initiate any effort to recover Service Tax element from their service receivers and in such scenario extending the benefit of cum- tax benefit does not arise and mere failure on the part of the applicant to collect Service Tax separately from their service receivers and later claiming cum-tax benefit would result in the deprival of legitimate revenue due to the Government"*

In view of the above case law I find that their request for cum-tax benefit can not be considered and extended.

28. M/s KMH contested that Interest and penalties ate not imposable as extended period is not invokable in theirs case and stated that they paid an amount of Rs.19,00,736/- and the same amount was only payable and paid the same with in the statutory time and burden to prove imposition of penalty was not discharged by the department and relied on a case law Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) and further stated that it involved interpretation of law and hence penalties are not imposable and relied on CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.LT 661 (S.C) in support of their contention. In this regard it was stated by them that they are new to service tax provisions and requested benefit under Section 80 of the Finance Act, 1994. I find that their contentions are not acceptable as they were registered

with the department and were discharging tax liability and filing, but for allegations made in the notice, ST-3 returns regularly.

ERECON Versus COMMISSIONER OF SERVICE TAX, AHMEDABAD reported in 2016 (41) S.T.R. 538 (Tri. - Ahmd.) "Heard both sides and perused the case records. Appellant was discharging tax liability up to September, 2004 and thereafter stopped making the payment of Service Tax No ST-3 returns was filed by the appellant after September, 2004. Once appellant was aware of the fact that service tax on the services provided was paid earlier, it cannot be considered that there was no intention to evade payment of tax by suppression when appellant was not even filing the statutory returns of the tax which he was paying earlier. Accordingly, it is held that penalties under Section 78 of the Finance Act, 1994 is imposable. The case laws relied upon by the appellant are distinguishable on facts and are not applicable to the facts and circumstances of this case".

FREE LOOK OUTDOOR ADVERTISING Versus COMMR OF CUS. & C. EX., GUNTUR 2007 (6) S.T.R. 153 (Tri.- Bang.)

Demand (Service tax) - Limitation - Failure to file return - It was sufficient for invocation of extended period when there was no time limit for recovery of dues as per Section 73 of Finance Act, 1994. [para 5.1]

BOX & CARTON INDIA PVT. LTD. Versus COMMISSIONER OF C. EX., DELHI-IV 2008 (228) E.I.T. 85 (Tri. - Del.) "Demand - Limitation - Extended period - Plea that Departmental officers visited the units on 27-3-2003 and SCN issued on 1-9-2004 for duty demand for short paid duty for period from 1-8-1999 to 31-3-2004 and duty demand for period from 27-3-2003 to 31-7-2003 time barred - Tribunal decision in 1999 (114) E.L.T: 429 (Tribunal) holding that knowledge of department in respect of suppression of facts not relevant for computing limitation period of five years - Demand sustainable - Section 11A of Central Excise Act, 1944."

29. In the light of the above judgments I reject the plea of the assessee that extended period is not invokable as the full facts were voluntarily disclosed by them without any inquiry from the departmental authorities

and claim that they had not hidden any fact from the officers of the department is not acceptable and tenable. They have provided the information 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 and they have hidden these facts to the department and they are liable to pay a penalty equal to the amount of service tax short paid/not paid by them. The information was provided only after initiation of investigation against them and hence I do not find that they have recorded the information in the specified records as the issue is intent to evade payment of tax by misclassifying the services and as well suppressing the facts. Hence extended period is rightly invoked in the case.

30. Assessee requested to consider the benefit under Section 80 of the Finance Act, 1994. It is observed that they have not shown any reasonable cause to consider their request for benefit under Section 80 of the Finance Act, 1994. Hence the request of the assessee for benefit under Section 80 is rejected for the aforesaid reasons. In this connection I rely on the following case law in support of my view.

Gitanjali Gems Ltd. Vs Commissioner of Service Tax, Mumbai-I reported in 2016 (43) S.T.R. 230 (Tri. - Mumbai) where in it was held that

"As regards the plea of the learned counsel for the appellant for setting aside the penalty imposed, on a specific query from the bench, it was stated that the appellant has not paid the entire amount of the service tax liability and the interest thereof. The appellant has only paid 50% of the amount of service tax liability. We find that the provisions of Section 80 cannot be invoked in this case as there being no discharge of service tax liability and interest thereof the penalty imposed on the appellant needs to be upheld as there is no justifiable reason or cause shown for setting aside the penalties"

COMMISSIONER OF SERVICE TAX, MUMBAI Versus LARK CHEMICALS P. LTD. 2016 (42) S.T.R 417 (S.C.) "Penalty - Quantum of - Reduction under Section 80 of Finance Act, 1994 - Scope of - In view of judgment of Apex Court

in Dharamendra Textile Processors at 2008 (231) E.L.T. 3 (S.C.), penalties imposed under Sections 76 and 78 ibid not reducible under Section 80 of Finance Act, 1994".

31. In view of the above discussions and findings I pass the following order:

ORDER

(A) Show Cause Notice OR No. 99/2016-Adjn.(ST) (Commr) dated 22.04.2016:

(i) I confirm the demand of **Rs.14,35,330 /-** (**Rupees Fourteen Lakh Thirty Five Thousand Three Hundred Thirty Only**) (including all cesses) in the service tax payable on Site formation Service during the period from October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(ii) I confirm the demand of **Rs.40,80,581/-** (**Rupees Forty Lakh Eighty Thousand Five Hundred Eighty One Only**) (including all cesses) being the service tax payable on Works Contract Services during the period from October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(iii) I confirm the demand of **Rs.7,01,874/-** (**Rupees Seven Lakh One Thousand Eight Hundred Seventy Four Only**) (including all cesses) being the service tax payable on other taxable Services during the period from October, 2010 to March, 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(iv) I appropriate an amount of **Rs.19,00,736/-** (**Rupees Nineteen Lakh Seven Hundred Thirty Six Only**) paid towards service tax demanded at SI No (i), (ii) and (iii) above;

(v) I confirm the demand of Interest as applicable on the amounts demanded at SI.No. (i), (ii) and (iii) above under Section 75 of the Finance Act, 1994;

(vi) I impose a penalty of **Rs.62,17,785/- (Rupees Sixty Two Lakh Seventeen Thousand Seven Hundred Eighty Five Only)** equivalent to the tax demanded at Sl. No. (i), (ii) and (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;

(vii) I impose a penalty of **Rs.10,000/- (Rupees Ten Thousand Only)** under Section 77(2) of the Finance Act, 1994 for delayed Registration.

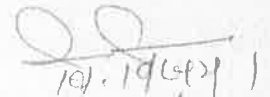
(B) Show Cause Notice C. No. V/24/15/03/2018-Adjn dated 16.04.2018 issued by Assistant Commissioner, Secunderabad Division, Secunderabad GST Division:

(a) I confirm the demand of **Rs.14,48,436/- (Rupees Fourteen Lakh Forty Eight Thousand Four Hundred Thirty Six Only)** (including cesses) being the service tax payable towards 'Works Contract Services' during the period from April, 2015 to June, 2017 from them, in terms of Section 73(1) of the Finance Act, 1994;

(b) I confirm the demand of Interest as applicable on the amount demanded at Sl. No. (a) above under Section 75 of the Finance Act, 1994;

(c) I impose a penalty of **Rs.1,44,844/- (Rupees One Lakh Forty Four Thousand Eight Hundred Forty Four Only)** being ten percent of the tax demanded at Sl. No.(a) above under Section 76 of the Finance Act, 1994 for contravention of Rules and Provisions of the Finance Act, 1994;

(d) I impose a penalty of **Rs.10,000/- (Rupees Ten Thousand Only)** under Section 77 of the Finance Act, 1994.


28/3/24
(B. VIJAY)

ADDITIONAL COMMISSIONER

To
M/s Kadakia & Modi Housing,
5-4-187/3 & 4, 2nd Floor,
Sohan Mansion, M.G. Road,
Secunderabad- 500003.

(Through Range Officer)

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

(Kind Attn.: Superintendent, Review)

Copy to:

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

Hiregange & Associates

Chartered Accountants



14.06.2018

To

The Deputy/Assistant Commissioner of Central Tax,
Secunderabad GST Division,
Secunderabad GST Commissionerate,
Salike Senate, D. No. 2-4-416 & 417,
Ramgopalpet, MG Road,
Secunderabad- 500 003.

Dear Sir,

Sub: Proceedings under SCN C. No. V/24/15/03/2018-Adjn dated 16.04.2018 issued to M/s. Kadakia & Modi Housing, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad- 500 003

We have been authorized to reply and represent M/s. Kadakia & Modi Housing. We are herewith to submit the Reply to SCN, Authorization letter and other annexure etc.

Kindly note that there is a change in our address of the office premises

From	To
"Basheer Villa", House No.8-2-268/1/16/B, II Floor, Sriniketan Colony, Road No.3, Banjara Hills, Hyderabad - 500034 Landline: 040-0062934/23606181	4th Floor, West Block, Anushka Pride, Opp. Ratnadeep Supermarket, Road Number 12, Banjara Hills, Hyderabad, Telangana 500034

Hence we request you to make future correspondence to the above mentioned new address

Kindly acknowledge the receipt of the above.

Thanking You,
Yours faithfully,
For Hiregange & Associates
Chartered Accountants

Venkata Prasad P

Head Office Bangalore

#1010, 2nd Floor (Above Corporation Bank) 26th Main, 4th "C" Block, Jayanagar, Bangalore-500 041 Tele. +91 80 4121 6703 Telefax. 080 2655 6404 / 05 E-mail: rajesh@hiregange.com

Branch Offices

Hyderabad "Basheer Villa", House No.8-2-268/1/16/B, II Floor, Sriniketan Colony, Road No.3, Banjara Hills, Hyderabad-500 034 Tele: +91 040 4006 2934, 2360 6181 E-mail: sudhir@hiregange.com

Visakhapatnam Flat No. 101, D.No. 9-19-18, Sai Sri Kesav Vihar, Behind Gethi Sons Show room, CBM Compound, Visakhapatnam-530 003 Tele. +91 891 600 9235 Email: anil@hiregange.com

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

Mumbai 409, Pillix, Opp. Asian Paints, LBS Marg, Bhandup (West), Mumbai-400078. Tele. +91 22 2595 5544, 22 2595 5533 Mobile: +91 98673 07715 Email: vasant.bhat@hiregange.com,

Website : www.hiregange.com



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7/11/18

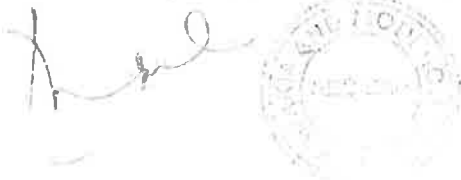
L-3

**BEFORE THE DEPUTY/ASSISTANT COMMISSIONER OF CENTRAL TAX
AND CUSTOMS, SECUNDERABAD GST DIVISION & SECUNDERABAD
COMMISSIONERATE, SALIKE SENATE, D. NO. 2-4-416 & 417,
RAMGOPALPET, MG ROAD, SECUNDERABAD-500003**

Sub: Proceedings under C. No. V/24/15/03/2018-Adjn dated 16.04.2018 issued to M/s Kadakia& Modi Housing, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003

FACTS OF THE CASE:

- A. M/s.Kadakia& Modi Housing (hereinafter referred as 'Noticee') *inter alia* engaged in sale of residential villas on their own land under the name & style of 'Bloomdale'. They are registered with department vide STC No. AAHFK8714ASD001 w.e.f. 25.04.2010
- B. In many cases, sale deed is executed for the entire sale consideration. However in some cases, Sale deed is being executed for the semi-finished construction along with an agreement of construction. Sale deed is registered and appropriate 'Stamp Duty' has been discharged on the same.
- C. Noticee collects amounts from their customers towards:
- i. Sale deed for sale of semi-finished villa along with land;
 - ii. Construction agreement (includes for 'common amenities/facilities');
 - iii. Other taxable receipts (additions/alternations works)
 - iv. Other non-taxable receipts (Corpus fund, electricity deposit, water deposit & service tax);
 - v. Taxes/duties (VAT, stamp duty, service tax etc.,);
- D. SCN vide O.R.No. 99/2016-Adjn. (ST) (Commr)dated 22.04.2016was served for the period October 2010 to March 2015. The demands



proposed in the above SCN was set aside by the Hon'ble Commissioner (Appeals) vide Order-In-Appeal: HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 (copy enclosed as annexure II). The revenue department filed the appeal before Hon'ble CESTAT, Hyderabad vide Appeal No. ST/30115/2018-ST [DB].

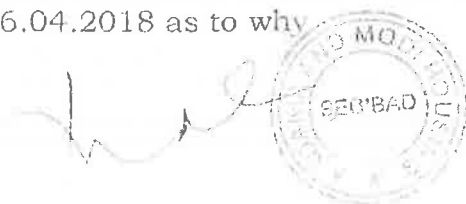
E. The detailed working of the receipts and the attribution of the said receipts was already provided to the Department authorities, identified receipt wise and flat wise. The summary of the same is provided hereunder:

Description	Receipts	Non taxable	Taxable
Amount received towards sale deed	16,505,950	16,505,950	0
Amount received towards agreement of construction	4,887,647		4,887,647
Amount received towards other taxable receipts	28,822	0	28,822
Amount received towards other non-taxable receipts	3,749,346	3,749,346	0
Amount received towards VAT, Registration charges, etc	1,190,570	1,190,570	0
Total	26,362,335	21,445,866	4,916,469

(Statement showing receipts towards various flats is enclosed as Annexure III)

F. Accordingly, the value of taxable services constituted 40% of Rs.49,16,469 i.e. Rs.19,66,588/- and the service tax thereon @ 12.36%/14%/14.5%/15% constituted Rs.2,87,934/-. It was also explained that the actual payment of service tax amounted to Rs.2,05,803.

G. Noticee received present SCN vide C.No. V/24/15/03/2018-Adjn dated 16.04.2018 as to why



- i. An amount of Rs.14,48,436/- should not be demanded as per Para-4 above towards "Works Contract Service" rendered by them during April, 2015 to June, 2017 in terms of Section 73(1) of the Finance Act, 1994; on the grounds discussed supra; and
- ii. Interest should not be demand at (i) above under Section 75 of the Finance Act, 1994; and
- iii. Penalty should not be imposed on them under Section 76 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 77 of the Finance Act, 1994

A handwritten signature in dark ink, appearing to be 'D. N. S.', with a long horizontal stroke extending to the right.

Submissions:

1. Noticee submits that undoubtedly they are discharging service tax on construction agreements thereby paying service tax on activity as proposed by impugned SCN (Para 2 of the SCN). SCN included the value of sale deeds only at the time of quantifying the demand. As seen from the operative part of SCN, it is clear that it is only sole allegation of SCN (Para 2) that construction agreements are subject to service tax under the category of "works contract", no allegation has been raised to demand service tax on the sale deed value.
2. As stated in the background facts, the Noticee started paying service tax on the value of "construction agreements" from July 2012 onwards. Thereafter, the said taxes have been regularly paid. On a perusal of the SCN, it is evident that the issue in the current SCNs is therefore limited to the aspect of quantification of demand.
3. Noticee submitted detailed statements showing the breakup of the receipts into receipts towards "sale deeds", receipts towards "construction agreements", receipts towards other taxable receipts and receipts towards other non-taxable receipts was provided (Copy of statement enclosed as Annexure III). Further, the details of amounts received towards taxable and non-taxable receipts flat-wise is given as Annexure IV.
4. However, on going through the SCN, it can also be observed that though the allegation is to demand service tax on construction agreements, the



A handwritten signature in dark ink is written over a circular official stamp. The stamp contains the text "DEPARTMENT OF REVENUE" and "GOVERNMENT OF INDIA" around the perimeter, with "SECRETARY" in the center.

quantification is based on gross amounts mentioned above for all the activities including amounts received towards the "sale deeds".

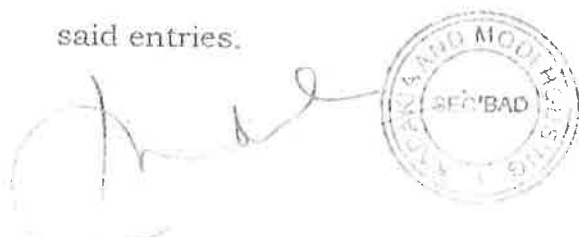
5. It is therefore apparent that the SCN represents an error in quantification of the demand. It may be noted that the Noticee have regularly and diligently discharged Service Tax on the value of "construction agreements" after June 2012 onwards. The above is explained through a comparative chart provided below:

Particulars	As per Noticee	As per SCN
Gross Receipts	26,362,335	26,362,335
Less Deductions		
Sale Deed Value	16,505,950	0
VAT, Registration charges, stamp duty and other non taxable receipts	4,939,916	1,190,570
Taxable amount	4,916,469	25,171,765
Abatement @ 40%	1,966,588	10,068,706
Service Tax as applicable	287,934	1,448,436
Actually Paid	287,934	0
Balance Demand	0	1,448,436

6. The Noticee submit 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.

7. Since the impugned SCN agree on the principle that service tax cannot be demanded on the value attributable to sale deeds, the Noticee is not making detailed grounds on the legal merits of the said claim and would like to submit the following broad lines of arguments:

a. In many cases, the "sale deed" is entered into after the completion of the building and therefore the demand cannot be justified under the said entries.



b. Till the stage of entering into a "sale deed", the transaction is essentially one of sale of immovable property and therefore excluded from the purview of Service Tax.

c. In any case, the deeming fiction for construction services prior to completion cannot be classified under works contract services since doing the same would render Section 66E(b) of Finance Act, 1994 & Notification 26/2012 ST dated 20.06.2012 redundant.

d. If at all a view is taken that the value of "sale deed" is liable to service tax, the benefit of the above notification should be granted after reclassification of the service.

8. Further, the Ld. Commissioner (Appeals) vide Order-In-Appeal: HYD-SVTAX-000-AP2-0210-17-18-ST dated 14.09.2017 agreed on the principle that sale deed value need not be includible in the taxable value while paying service tax. hence, the service tax demand on the same does not sustain and requires to be dropped.

9. The Appellants also reserve their right to make additional arguments as felt necessary on this aspect of service tax on value of "sale deeds" if it is ultimately held that this aspect could be taken up without an allegation in the SCN.

10. Similar to the claim for exclusion of sale deed value, the value attributable to stamp duty, electricity etc., need to be reduced. It is submitted that once the above deductions are allowed, the demand would be reduced to NIL



11. Noticee submits that as brought in background facts, an amount of Rs. 287,934/- has already paid towards service tax on the amounts received towards construction agreements. Noticee humbly request Ld. Adjudicating authority to consider the same while passing the order.
12. Noticee humbly request the adjudicating authority to exclude the value of land from determination of service tax liability.
13. As the Noticee has not collected service tax from the buyer, the benefit of cum-tax u/s. 67(2) of Finance Act, 1994 requires to be given.
14. Without prejudice to the foregoing, 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). Similarly, the penalty also cannot be imposed in absence of the any short payment as alleged in the SCN.
15. Without prejudice to the foregoing, Noticee submits that penalty is proposed under section 77. However, the subject show cause notice has not provided any reasons as to why how penalty is applicable under section 77 of the Finance Act, 1994. Further, the Noticee is already registered under service tax under works contract service and filing returns regularly to the department. Accordingly, penal provisions mentioned under section 77 is not applicable for the present case. As the subject show cause notice has not considered these essential aspects,




the proposition of levying penalty under section 77 is not sustainable and requires to be dropped.

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

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

For M/s Kadakia & Modi Housing



Authorized Representative



BEFORE THE ASSISTANT COMMISSIONER OF CENTRAL TAX, SECUNDERABAD
GST DIVISION, SECUNDERABAD GST COMMISSIONERATE, SALIKE SENATE, D.
NO. 2-4-416 & 417, RAMGOPALPET, MG ROAD, SECUNDERABAD-500 003

Sub: Proceedings under C. No. V/24/15/03/2018-Adjn dated 16.04.2018 issued to M/s Kadakia & Modi Housing, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad-500003

I, Soham Modi, partner of M/s Kadakia & Modi Housing, 5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad-500003 hereby authorizes and appoint Hiregange & Associates, Chartered Accountants, Hyderabad or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

- a. To act, appear and plead in the above noted proceedings before the above authorities or any other authorities before whom the same may be posted or heard and to file and take back documents.
- b. To sign, file verify and present pleadings, applications, appeals, cross-objections, revision, restoration, withdrawal and compromise applications, replies, objections and affidavits etc., as may be deemed necessary or proper in the above proceedings from time to time.
- c. To Sub-delegate all or any of the aforesaid powers to any other representative and I/We do hereby agree to ratify and confirm acts done by our above authorised representative or his substitute in the matter as my/our own acts, as if done by me/us for all intents and purposes.

This authorization will remain in force till it is duly revoked by me/us.

Executed this on 13th day of June 2018 at Secunderabad

SEC'BAD

Signature

I the undersigned partner of M/s Hiregange & Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 35Q of the Central Excises Act, 1944. I accept the above said appointment on behalf of M/s Hiregange & Associates. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated: 13.06.2018

Address for service:

Hiregange & Associates,
Chartered Accountants,
4th Floor, West Block,
Srida Anushka Pride,
Opp. Ratnadeep Supermarket,
Road Number 12, Banjara Hills,
Hyderabad 500 034

For Hiregange & Associates
Chartered Accountants

Venkata Prasad P
Partner (M. No. 236558)

I Partner/employee/associate of M/s Hiregange & Associates duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

Sl No.	Name	Qualification	Mem./Roll No.	Signature
01	Sudhir V S	CA	219109	
02	Lakshman Kumar K	CA	241726	

Chartered
Accountants



केन्द्रीय कर, केन्द्रीय उत्पाद शुल्क एवं सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CENTRAL TAX, CENTRAL EXCISE & SERVICE TAX
सिकंदराबाद जीएसटी आयुक्तालय, जीएसटी भवन, एल बी स्टेडियम रोड,
SECUNDERABAD COMMISSIONERATE
GST BHAWAN, L.B. STADIUM ROAD
बशीरबाग हैदराबाद
BASHEERBAGH, HYDERABAD - 500 004.
email: adjudication3@gmail.com

O.R.No: 39/2021-22-Sec-Adjn-ADC(ST)

Date: 10.01.2024

RECORD OF PERSONAL HEARING

Name of the Assesscc : M/s Kadakia & Modi Constructions

Represented by :

Signature :

Shri. Mohammad Shabaz, Advocate -
Authorized Representative of M/s Kadakia Modi
Constructions has appeared for the PH at 4pm
N.R.E. 2010 - 15 he had sought time till 16.12
to submit proof
They had requested to expedite the order

md. Shabaz
10/01/2024

9676512315.

10.1.24 1
10/01/24.

(B. VIJAY)
ADDITIONAL COMMISSIONER



सेंट्रल टैक्स एवम् कस्टम उप/सहायक आयुक्त का कार्यालय
OFFICE OF THE DEPUTY/ASSISTANT COMMISSIONER OF CENTRAL TAX AND CUSTOMS
सिकंदराबाद माल एवम् सेवा कर मंडल & सिकंदराबाद माल एवम् सेवा कर आयुक्तालय
SECUNDERABAD GST DIVISION & SECUNDERABAD COMMISSIONERATE
पता: "सलीक सीनेट", गेट. 2-4- 416 & 417, रामगोपालपेट, एम.जी.रोड सिकंदराबाद 500003
ADD: "SALIK SENATE", D. No. 2-4-416 & 417, RAMGOPALPET, MG ROAD, SECUNDERABAD 500003
Contact No. 7901243130 email- cgst.secdiv@gov.in

C. NO. V/24/15/03/2018-Adjn

Date: 16.04.2018

SHOW CAUSE NOTICE**(Notice under Section 73(1A) of the Finance Act, 1994)**

Sub: Service Tax – M/s Kadakia & Modi Housing, Hyderabad – Non-Payment of Service Tax during the period April 2015 to June 2017- Issue of Show Cause Notice – Regarding.

M/s Kadakia & Modi Housing, 5-4-187/3& 4, 2nd Floor, soham Mansion, M.G. Road, Secunderabad - 500 003 (hereinafter referred to as 'M/s. KMH' or "the Assessee" for short) have registered themselves with the service tax Department vide Registration No. AAHFK8714ASD 001, for payment of service Tax Under the categories of "Works contract service" and "construction of Residential complex service".

2. As seen from the records, the assessee entered into 1) Sale deed for sale of undivided portion of land together with semi-finished portion of the flat and 2) 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 transfer of property in goods in execution of the said construction agreements is involved, 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 are taxable services under "Works Contract Service".

3. Accordingly, the following Show Cause Notice had been issued to the Assessee:

SL.NO	SCN OR NO. & date	Period	Amount of Service Tax demanded (Rs.)	OIO NO. Date
1	OR.No.99/2016-Adjn (ST) (Commr) dated 22.04.2016	10/2010 to 03/2015	62,17,785/-	48/2016-ST Dt.30.12.2016 (Confirmed)

4. As per the information furnished by the Assessee vide their letter dated 15.02.2018 received by the jurisdictional Range Superintendent on 16.02.2018, it is seen that "the Assessee" have rendered taxable services under the category of "Works Contract Services" during the period April, 2015 to June, 2017. The Assessee had rendered services for a taxable value of Rs. 2,63,62,335/- (Rupees Two Crores Sixty Three Lakhs Sixty Two Thousand Three hundred and Thirty Five only). After deduction of VAT of Rs. 11,90,570/- the taxable value works out to Rs. 2,51,71,765/- (Rupees Two Crores Fifty One Lakhs Seventy One Thousand Seven hundred and

Sixty five only) on which service tax (including Cesses) works out to Rs. 14,48,436/- for services rendered during the said period, as detailed in the Annexure enclosed to this notice.

5. Vide Finance Act, 2012, sub section (1A) was inserted in Section 73 which read as under:

SECTION 73(1A) – Notwithstanding anything contained in sub-section (1), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

6. The section 65B, 66B, 66D as inserted in the Finance Act, 1994 by the Finance Act, 2012 w. e. f. 01.07.2012 are reproduced below:

6.1. Section 65 B (34): "negative list" means the services which are listed in section 66D;

6.2. SECTION 65B (44): "service" means any activity carried out by person for another for consideration, and includes a declared service, but shall not include – (a) an activity which constitutes merely, - (i) a transfer of title in goods or immovable property, by way of Sale, gift or in any other manner; or(ii) a transaction in money or actionable claim; (b) a provision of service by an employee to the employer in the course of or in relation to his employment; (c) fees taken in any Court or tribunal established under any law for the time being in force.

6.3. Section 65B (51): "taxable service" means any service on which service tax is leviable under section 66B;

6.4. SECTION 66B: There shall be levied a tax (hereinafter referred to as the service tax) at the rate of Fourteen per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person another and collected in such manner as may be prescribed.

6.5. SECTION 66D: Contains the negative list of services. It appears that services provided by the assessee are not covered under any of the services listed therein.

6.6. SECTION 66E: Contains declared service and work contract is covered under 66E(h) of the Finance Act, 1994.

6.7. SECTION 68. Payment of service tax. – (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section [66B] in such manner and within such period as may be prescribed.

6.5. Further, Notification No.25/2012-ST, dated 20.06.2012, as amended specified services which were exempt from payment of Service Tax. It appears that services provided by the Assessee are not covered under any of the services listed therein.

7. The grounds as explained in the Saw Cause cum demand notice issued above are also applicable to the present case; the legal position in so far as 'Works Contract Service' is concerned, the said service and its taxability as defined under Sub –clause(zzzza) of Clause 105 of Section 65 of the Finance Act, 1994 as existed before 01.07.2012 stands now covered by 65B (54) whereby the said Service being declared service under Section 66E(h) of Finance Act, 1994 and for not being in the Negative List prescribed under 66D, continues to be a taxable service. But for the said changes in legal provision, the status of Service and the corresponding tax liability remained same. Hence, this statement of demand / show because notice is issued in terms of Section 73(1A) of the Finance Act, 1994 for the period April, 2015 to June, 2017.

8. In view of the above, M/s. Kadakia & Modi Housing, Hyderabad are hereby required to show cause to the Assistant Commissioner of Central Tax & Central Excise, Office of the Assistant Commissioner of Central Tax, Secunderabad GST Division, Secunderabad GST:

Commissionerate, Door No. 2-4-416 & 417, 1st Floor, Salike Senate, M. G Road, Ramgopalpet, Hyderabad, within 30(thirty) days of receipt of this notice as to why: -

i). an amount of Rs. 14,48,436/- (Rupees Fourteen Lakh Forty Eight Thousand Four hundred and Thirty Six only) (including Cesses) should not be demanded as per Para-4 above towards "Works Contract Service" rendered by them during April, 2015 to June, 2017, in terms of Section 73 (1) of the Finance Act, 1994; on the grounds discussed supra; and

ii). Interest should not be demand at (i) above, under Section 75 of the finance Act, 1994; and

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

9. M/s Kadakia & Modi Constructions, are required to Produce all the evidence upon which they intend to rely in their defense while showing cause. They are also required to indicate in their written reply whether they wish to be heard in person before the case is adjudicated.

10. If no cause is shown against the action proposed to be taken within the stipulated time and if the noticee does not appear for the personal hearing on the appointed day, then it will be presumed that they do not have anything to state in their defense and the case will be decided on merits on the basis of evidence available on records.

11. This Notice is issued without prejudice to any other action that has been or may be taken against the noticee / others under this Act or under any other law for the time being in force in India.

12. The provisions of the Finance Act, 1994 as discussed above are validated under the provisions of Section 174 of the Central Goods and Services Tax Act, 2017.

13. Reliance for issue of this Notice is placed on the following:

(i) Assessee's letter dated 15.02.2018 received by the Jurisdictional Range Superintendent on 16.02.2018, in which Service Tax consolidated statement is provided.

(ii) ST3 Returns for the period 2015-16, 2016-17 and 2017-18 (up to June, 2017)

Place: Secunderabad

Date: 16.04.2018


(के गोपाल राव/K Gopala Rao)

सहायक आयुक्त/Assistant Commissioner
सिकंदराबाद मण्डल/Secunderabad Division

To

M/s. Kadakia & Modi Housing,
Address: 5-4-187/3 & 4, 2nd Floor,
Soham Mansion, M.G. Road,
Secunderabad- 500 003.

Copy to:

1. The Superintendent of Central Tax, Central Excise and Service Tax, Ramgopalpet Range-II, Secunderabad GST Division, Secunderabad Commissionerate, with a direction to serve the Notice on the assessee and submit dated Acknowledgment to this office.

ANNEXURE TO THE SHOW CAUSE NOTICE C.No. V/24/15/03/2018 -Adjn
DATED: 16.04.2018- M/S KADAKIA & MODI HOUSING: -

	Before Occupancy Certificate is obtained			Total (Rs)
	2015-16	2016-17	2017-18 (Up to June, 2017)	
Gross Receipts	16250938	10111397	0	26362335
Construction Agreement value	2579647	2308000	0	4887647
Gross Sale Deed Value	9586000	6919950	0	16505950
Less: VAT & Registration	556230	634340	0	1190570
Net Taxable Value (Net of VAT)	15694708	9477057	0	25171765
Tax Rate	1225000@4.944%	990907@5.80%	0	118037
	9003465@5.60%	8486150@6.00%	0	1013363
	5466143@5.80%	0	0	317036
Service Tax Payable	881794	566642	0	1448436

[Signature]
16.04.2018

अपील सं : Appeal No. 118/2017 (STC)ST



आयुक्त(अपील-II) जीएसटी, व केन्द्रीय उत्पाद शुल्क का कार्यालय

OFFICE OF THE COMMISSIONER (APPEALS-II), GST & CENTRAL EXCISE

7 वीं मंजिल, जीएसटी भवन, एल बी स्टेडियम रोड

7th FLOOR, GST BHAVAN, L B STADIUM ROAD

बशीर बाग, हैदराबाद, तेलंगाना राज्य-500004 :: BASHEER BAGH, HYDERABAD, TS-500004

TELEPHONE: 040-23234219/23231160

email: commrappl-sthyd@nic.in

Fax No.040-23237873

अपील सं : Appeal No: 118 / 2017 (STC) ST

अपील आदेश सं : ORDER-IN-APPEAL NO: HYD-SVTAX-000-AP2-0210-17-18-ST DATED 14.09.2017

पास करने वाले अधिकारी

: श्री. बी.वी.टी. प्रसाद नायक, आयुक्त (अपील-II), हैदराबाद

Passed by

: Sri. B.V.V.T PRASAD NAIK, COMMISSIONER (APPEALS-II) HYDERABAD

प्रस्तावना PREAMBLE

1. आदेश जिनके नाम जारी किया गया है उस व्यक्ति के निजी उपयोग के लिए यह प्रति मुफ्त में दी जाती है।
This copy is granted free of cost for the private use of the person to whom it is issued.
- 2.(a) कोई भी निर्धारित इस आदेश से असहमत हो तो वे वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत सीमाशुल्क, उत्पाद शुल्क व सेवाकर अपील अधिकरण, क्षेत्रीय बेंच, प्रथम तल, हैदराबाद मेट्रो जल आपूर्ति और सीवरेज बोर्ड इमारत (पीछे के हिस्से), खैराताबाद, हैदराबाद, तेलंगाना-500004 के समक्ष अपील दायर कर सकते हैं।
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, Regional Bench, 1st Floor, HMWSSB Building (Rear Portion), Khairatabad, Hyderabad, TS-500004.
- 2.(b) केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35 एफ के खंड (iii) के अनुसार, धारा 85 की उप-धारा (5) में संदर्भित आदेश या निर्णय के विरुद्ध अपील के लिए, अपीलकर्ता को निर्णय या जिस आदेश के विरुद्ध अपील की गई हो उसके अनुसरण के लिए कर का, ऐसे मामले में जहां कर या कर और दंड विवादित हो, या दंड का, जहां ऐसा दंड विवादित हो, दस प्रतिशत जमा करना होगा : सेवा कर के मामलों में, एफ ए, 1994 की धारा 83 के प्रभाव से अधिनियम की धारा 35 एफ लागू है।
As per clause (iii) of Section 35F of the CEA, 1944, the appeal against the decision or order referred to in sub-section (5) of section 85, the appellant has to deposit ten per cent of the tax, in case where tax or tax and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against: Section 35F of the Act is applicable to service tax case by virtue of Section 83 of FA, 1994.
3. उप धारा (1) [या उप धारा (2) या उप धारा (2ए)] के अंतर्गत प्रत्येक अपील जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारित द्वारा प्राप्त करने की तारीख से तीन महीने के भीतर (मुख्य आयुक्तों या आयुक्तों की सभिति) के समक्ष, जैसे भी मामला हो, दायर किया जाना चाहिए।
Every appeal under sub-section(1) [or sub-section(2) or sub-section(2A)] of Section 86 of FA, 1994 shall be filed within three months of the date on which the order sought to be appealed against was received by the assessee, the [Committee of the Commissioners], as the case may be.
4. पैरा 2 में उल्लिखित अपील एस टी 5/ एस टी 7 प्रोफार्मा में चार प्रतियों में जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारित के पास पहुँचने की तारीख से तीन महीने के भीतर किया जा सकता है। जिस आदेश के विरुद्ध अपील किया जाना चाहता हो और अपील करने के लिए लिखित मूल आदेश की उस आदेश की चार प्रतियाँ संलग्न होने चाहिए (जिसमें से एक प्रति प्रमाणित प्रति होने चाहिए)।
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 was 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. अपील के साथ ट्रिब्यूनल के दक्षिणी बेंच के सहायक रजिस्ट्रार के पक्ष में जहां ट्रिब्यूनल स्थित है वहाँ के किसी भी राष्ट्रीयकृत बैंक की शाखा से प्राप्त किए गए रेखांकित मांग ड्राफ्ट संलग्न होने चाहिए और अधिनियम की धारा 86 के अंतर्गत विनिर्दिष्ट शुल्क के भुगतान का प्रमाण भी संलग्न होने चाहिए। देय शुल्क निम्नलिखित है।
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:-

OIA # 210/17-18 dated 14.09.2017

Page 1 of 10

- (क) जिस मामले से अपील संबंधित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख या उससे कम हो तो, रुपये एक हजार;
- (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;
- (ख) जिस मामले से अपील संबंधित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख से अधिक, लेकिन रुपये पचास लाख से कम, हो तो, रुपये पाँच हजार;
- (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;
- (ग) जिस मामले से अपील संबंधित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड, रुपये पचास लाख से अधिक हो तो, रुपये दस हजार;
- (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;

5.(i) उसी की धारा 86 की उप धारा (4) के अंतर्गत बताए गए कुल आपत्तियों के ज्ञापन के संबंध में कोई शुल्क देय नहीं है।
No fee is payable in respect of the Memorandum of Cross Objections referred to in Sub-Section (4) of Section 86 ibid.

6. अपीलीय ट्रिब्यूनल के समक्ष प्रस्तुत किए गए सभी आवेदनपत्र के साथ: Every application made before the Appellate Tribunal:
(क) रोक की मंजूरी के लिए अपील या गलती को सुधारने के लिए अथवा किसी अन्य प्रयोजन के लिए आवेदन पत्र; या
(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose, or
(ख) किसी अपील या आवेदन को पुनः स्थापित करने के लिए इसके साथ 500 रुपये का शुल्क देने चाहिए।
(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees.

6.(i) इस उप धारा के अंतर्गत आयुक्त द्वारा दायर किए गए आवेदन के मामले में कोई शुल्क देय नहीं है।

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

7. केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 और केन्द्रीय उत्पाद शुल्क नियमावली, 2002 तथा सीमाशुल्क, केन्द्रीय उत्पाद शुल्क व सेवा कर अपीलीय ट्रिब्यूनल (प्रक्रिया) नियमावली, 1982 में शामिल इससे और अन्य संबंधित मामलों को नियंत्रित करने वाले प्रावधानों की गोर ध्यान आकर्षित किया जाता है।

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.

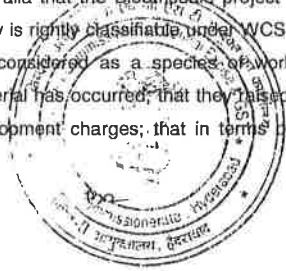
This appeal is filed by **M/s Kadakia & Modi Housing**, No.5-4-187/3 & 4, Second Floor, Soham Mansion, MG Road, Secunderabad, TS-500003 (hereinafter referred to as the "appellant"), against the **Order-in-Original No.048/2016-ST** dated 30.12.2016 in OR No.44/2016-Hyd-I.Adjn(ST) (hereinafter referred to as the "Impugned order"), passed by the Joint Commissioner of Customs, Central Excise & Service Tax, (erstwhile) Hyderabad-I Commissionerate, Kendriya Shulk Bhavan, LB Stadium Road, Basheerbagh, Hyderabad, TS-500004, presently falling under the jurisdiction of Secunderabad GST Commissionerate (hereinafter referred to as the "respondent / adjudicating / lower authority").

2. The brief facts of the case are that the appellant is engaged in constructing independent villas and holds registration for rendering services of Construction of Residential Complex (CRC) and Works Contract (W.C.) services; with STC No.AAHFK8714ASD001. Based on intelligence that the appellant was not discharging tax on consideration received toward taxable services involving construction of villas in a project named "Bloomsdale", the authorized



signatory of the appellant firm was summoned by officers and statements were recorded on 16.11.2015 and 01.02.2016, wherein he deposed inter alia that the sale deed is executed for land value and construction agreement is made separately; that they discharge tax under WCS on the amount agreed to in the construction contract; that there was flux in the legality of the levy, leading to possible short-payments which they are willing to discharge. The service was classified under CRC until Sep 2011 and then amended to WCS; and tax was discharged under WCS with effect from Oct 2011. However, no tax was discharged for the period Oct 2010-Mar 2011 and no ST3 was filed, although the returns for the period post Apr 2011 were filed. Examination of the agreements showed that the appellant was collecting the consideration as an aggregate of three elements, viz. (i) sale of land; (ii) Development charges of land for laying drains, pipelines, roads etc.; and (iii) cost of construction, including amenities and utilities (water / electricity connections). It was observed that element (ii) did not form part of value covered by construction agreement either fully or partially; and that the activity per se merited classification as "site formation / clearance" service up to 30.06.2012 under Sec 65(97a) read with Sec 65(105)(zza); and under Sections 65B(44) and 65B(51) of the Finance Act 1994 post 01.07.2012. It was also viewed that for the (material) period Oct 2010-Sep 2011, the construction activity itself was rightly classifiable under WCS and not CRS as classified by the appellant; that the entire consideration including that for common amenities is to be considered as the gross value for assessment to tax under WCS, even in cases where the sale deed covers the land parcel as well as semi-constructed building. Tax liabilities of Rs.14,45,330 under site formation service; Rs.40,80,581 under WCS; and Rs.7,01,784 (said to be collected towards corpus fund, electricity deposit, water charges etc.) under various other services were calculated in worksheets designated WS1-WS4. It was viewed that the appellant suppressed material facts and values in respect of Site formation and WCS, unearthed only with the departmental intervention; that gross violations were thus committed with intent to evade tax, meriting the invocation of the proviso to Sec 73(1) in proposing the demands for the extended period of limitation.

2.1. A show cause notice dated 22.04.2016 in OR No.99/2016-Adjn(ST)(Commnr) [HQPOR No.10/2016-ST-AE-III] was issued, raising the tax demand proposals quantified in the manner laid out in Para 4 and 4.1 of the SCN, along with interest and penalties under Sec 78 (gross violations) and 77(2) (delayed registration) for violations listed at Para 5.1-5.5 therein. The notice was adjudicated in the impugned order, culminating in the instant appeal; wherein the tax demands were confirmed to the extent proposed; an amount of Rs.19,00,736 paid by the appellant was appropriated; a penalty of Rs.62,17,785 was imposed under Sec 78 for gross violations with intent to evade tax; and a penalty of Rs.10,000 imposed under Sec 77(2) for delayed registration. He held inter alia that the Bloomsdale project met all the parameters of residential complex; that the activity is rightly classified under WCS and taxable; that the land development charges cannot be considered as a species of works contract since no title transfer of property in goods / material has occurred; that they raised contradictory contentions on the classification of land development charges; that in terms of Sec 65A(2)(a), the land



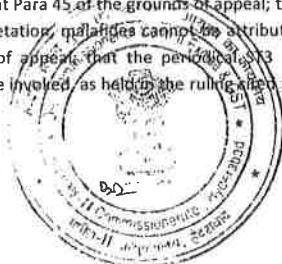
development activity is appropriately covered under the category, "site formation / clearance" particularly as it was charged separately; that the ratios of the rulings cited at Para 18.1 of the impugned order apply; that the demand under WCS was contested on irrelevant grounds; that they failed to submit evidences in support of the claim that the amount of Rs.7,01,784 was not consideration toward taxable service; that he relies on the rulings cited at Para 21 of the impugned order in support of this view; that cum-tax benefit cannot be extended in terms of the ruling cited at Para 22 of the impugned order; that the extended period is justified in terms of the rulings cited at Para 23 of the impugned order and the facts narrated at Para 24 ibidem; and that the plea for waiver of penalty under Sec 80 is rejected in terms of the rulings cited at Para 25 Ibidem.

3. The appellant, aggrieved by the impugned order, agitated the demands on the following grounds:

- The impugned order was passed in violation of the principles of natural justice inasmuch as their contentions were neither addressed nor considered; that specific pleas regarding classification of land development charges, service to self until time of booking, property in goods consumed in common amenities were also transferred with the villa hence merited treatment under works contract, statutory dues cannot be treated as consideration for service, and limitation aspect; were unaddressed by the lower authority; that thereby the impugned order is non-speaking; that the ratios of the rulings cited at Para 4 of the grounds of appeal [Pages 12-13 of appeal book] apply;
- Independent villas are not covered under the definition of "residential complex" at Sec 65(91a) of the Finance Act 1994; that it was not subject to the levy as held in the Macro Marvel case cited at Para 5 of the grounds of appeal; that the lower authority chose to confirm the demand despite the legislative intent to keep individual houses out of ambit of the levy;
- The activity of land development is not covered by any clause under Sec 65(97a); that taxability under site formation arises only when the specified activities are undertaken independently; that in the instant case, it was undertaken as part of a composite contract of villa construction as is clarified in the agreement for sale; that the impugned activity is not liable under the category of Site formation;
- The activities involved in land development is a species of works contract inasmuch as property in goods namely murrum, concrete, electrical poles, wiring etc., in the execution of land development is used with labor and title transferred to the property owners jointly as common amenity; that VAT is discharged on the land development charges collected, fortifying the view that it is a species of WCS; that even then, it does not fit into any clause under Sec 65(105)(zzzz) and hence does not attract service tax;
- Composite contracts can only be taxed under WCS post 01.06.2007, in terms of the Apex Court ruling cited at Para 13(i) [Page 20 of appeal book]; that since the activity of land development has not been specifically covered under the definition, it is out of ambit of the levy;
- Their contention that the activity of land development being part of composite contract, can only be classified under WCS, but the tax cannot be levied since it does not get covered under any clause of Sec 65(105)(zzzz) has been misconstrued as contradictory by the lower authority; that even under Sec 65A, the more specific description is WCS and not site formation service;
- Assuming without admission that land development attracted the levy, no liability can be fastened where no land development agreement was entered into; that the allegation at Para 3.2 of the SCN (cost of construction of semi finished house by deducting land cost) has been

rebutted in terms of Para 115 of the Apex Court ruling in the L&T case extracted at Para 21(a) of the grounds of appeal; that goods used in constructing semi-finished house lost the identity and got converted to immovable property which cannot be considered as goods;

- There is transfer of ownership for a price in the instant case, by way of sale deed validly registered; that there is no element of service involved; that the amounts received under agreement to sale cannot be subject to tax;
- Where there is clear vivisection identifying transaction value for service of construction, further subjecting the associated transactions to separate assessment is unwarranted;
- Without prejudice to the above, even if land development attracts the levy, it merits being fastened only under WCS, at the rate under composition scheme; that for the period beyond 01.07.2012, the tax shall be levied only on 40% of the value under Rule 2A of the Service Tax Valuation Rules, 2012;
- Construction of common amenities involves the transfer property, hence is classifiable under WCS, eligible for abatement; that the cost of construction of common amenities is factored into the cost of each individual dwelling unit; that the common areas are transferred to the body of individuals, i.e., RWA; that appellant does not own the common areas;
- The definition of works contract both prior to and after 01.07.2012 does not prescribe that transfer of common areas should be to individuals or association; that the common areas was transferred to the association and VAT was discharged;
- Assuming without admitting that common areas is a service, it has been provided to the association and not to individual house-owners; that the definition of residential complex included common amenities; that the corresponding demand is untenable;
- Corpus fund for the association, electricity deposit, water charges etc., do not form consideration towards rendering taxable service; that these elements are not includible for assessment to tax; that they rely on the ratio of the ruling cited at Para 38 of the grounds of appeal, in support of this contention;
- The demand in respect of other services has been baldly confirmed on the ground that no evidences were submitted; however, no documents were explicitly sought for verification; that the lower authority was empowered to verify facts; that it was not exercised; that hence the demand is untenable in terms of the ruling cited at Para 39 of the grounds of appeal;
- Full facts were voluntarily disclosed by the appellant and no material facts were suppressed at any point of time; that the issue was in the department's knowledge well before issuance of SCN; that no positive act of malafide was established; that they rely on the ratio of the ruling cited at Para 43, 53, 55 of the grounds of appeal, in support of this contention; that mere short payment / non-payment when all transactions are recorded in financials, cannot lead to conclusion of gross violations, in terms of the rulings cited at Para 56 & 57 of the grounds of appeal;
- There was legal flux in understanding / interpretation of legal provisions during the material period; that the taxability is not free from doubt even in the recent ruling pronounced in the Suresh Kumar Bansal case [2016-TIOL-1077-HC-DEL-ST]; that contrary rulings were pronounced even by the Apex Court; that in spite of all difficulties including a slump in demand, the appellant discharged the dues voluntarily; that since malafide cannot be attributed, larger period of limitation cannot be invoked; that they rely on the ratios of the rulings cited at Para 48 and 49 of the grounds of appeal, in support of this contention;
- Extended period cannot be invoked when the dispute pertains to diverse interpretation of law, as held in the ruling cited at Para 45 of the grounds of appeal; that merely because the appellant chose a beneficial interpretation, malafides cannot be attributed, as held in the ruling cited at Para 46 of the grounds of appeal; that the periodical return was admittedly filed and hence extended period cannot be invoked, as held in the ruling cited at Para 47 & 50 of the grounds of



appeal; that demands based on audit observation alone is unsustainable, as held in the ruling cited at Para 51 of the grounds of appeal;

- They entertained bonafide belief on the non-levy of tax on the disputed elements; that in such cases, extended period cannot be invoked, as held in the rulings cited at Para 52 of the grounds of appeal;
- Without prejudice to the above contentions, the liability ought to be computed on cum-tax values inasmuch as the incidence is not passed on downstream, as held in the rulings cited at Para 60 of the grounds of appeal; that since the primary tax liability is itself questionable, the demand for interest and penalty do not sustain; that the penalty imposed under Sec 78 is unwarranted in terms of the rulings cited at Para 64-68 of the grounds of appeal; that since the impugned activity was held not taxable for the period prior to 01.07.2010, the allegation of belated registration does not have merit;
- Without prejudice to the above submissions, reasonable cause (listed at Para 70 of the grounds of appeal) existed for non discharge of tax, meriting waiver of penalty under Sec 80, as held in the ruling cited ibidem.

4. I heard the appellant, represented by Sri P. Venkata Prasad, Chartered Accountant, on 17.07.2017. He reiterated the submissions made in the grounds of appeal; and prayed for relief. Nono appeared for the respondent despite notice.

FINDINGS

5. I have carefully considered the documents and the submissions. The short point to be addressed is the sustainability of demands confirmed in the impugned order, under the facts and law in vogue.

6. The demands have been contested on limitation, with the appellant devoting a significant portion [Para 40-57 of the grounds of appeal] to it. I have carefully considered the contentions on limitation. The dispute arises from a departmental investigation and recording of statements on 16.11.2015 and 01.02.2016. The notice actually relied upon the ST3 filed for the material period, as admitted at Para 10(iii) therein. It is only on reconciliation of the receipts declared in the ST3 against the actual receipts booked in their financial record and the various agreements examined, that the department concluded that there existed a variance between the receipts declared in ST3 and assessed to tax, and the actual receipts detected from other sources; that the investigation uncovered facts leading to allegation of short discharge of tax by suppressing values in the ST3. The natural presumption in demands arising from a departmental intervention is that of gross violations with intent to evade tax. However, in all fairness, I do find that the appellant issued communications to the jurisdictional Commissioner, seeking confirmation of the correctness of their understanding of the levy, post the period 01.07.2010 [Pages 147-152 of appeal book]; and there was admittedly no response shown to have been issued. Be that as it may, the appellant had registered for both CMC and WCS service categories as recorded in the ST2 (Registration Certificate) dated 08.12.2014 [Page 146 of appeal book], and it was only the former which was clarified exempt up to 01.07.2010. The Department cannot presume that the

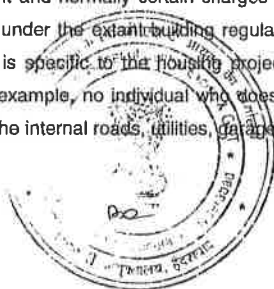
U/A # 210/17-18 dated 14.09.2017



identical activity is undertaken by the appellant both as CRC simplicitor and WCS composite as the ST3 provides no clue in this direction; and requires an intervention to ascertain the factual matrix. Hence the plea that ST3 was filed, in contest of limitation, is rejected. It was only after the investigation was initiated and transactions examined, that the department could conclude that the appellant was actually undertaking a singular activity, classified both under CRC and WCS. The appellant's communication dated 16.08.2010 to the department adverts at Para 11, to the initial classification under WCS, and their intent to discharge tax under CRCS, subject to the reimbursement by the customer. Such conditional discharge of tax liability is not provided for in the fiscal statute, and the appellant made no assertion on the service classification at their end, nor the basis of the assessment made. Be that as it may, there is no dispute at any stage that the primary activity of villa construction under composite works contract has been classified by the appellant under WCS and accepted by the department; since even the demands in the impugned order toward the construction element is under WCS category. Moreover, the reconciliation between the ST3 figures and actual receipts unearthed undeclared receipts towards services, irrespective of classification. The material period in the instant case is Oct 2010-Mar 2015, well after the retrospective legislation set to rest any doubts lingering in respect of the levy on the specific activity. The reliance on case laws pertaining to legal flux is therefore of no help to the appellant. Considering the facts and circumstances in totality, I have no hesitation in concluding that there existed reasonable cause and justification for the invocation of the proviso under Sec 73(1) for the extended period; and the appellant's contentions on limitation are rejected.

7. On merit, there appear to be three elements of primary demand in dispute: (i) classification of land development charges under 'Site Formation' service and corresponding tax demand of Rs.14,35,330; (ii) demand of Rs.40,80,581 under WCS in respect of unfinished house and common amenities; and (iii) Rs.7,01,784 in respect of elements like corpus fund, electricity deposit and water charges collected from the customers.

8. Insofar as element (i) is concerned, it is clear from Para 2.3.2 of the SCN that (in some cases), the vendee is required to enter into separate land development contract with the appellant, independent of the construction agreement for the house per se; which is relied upon by the department to conclude that it is a separate, identifiable service activity, meriting independent classification and assessment; and the activity was viewed as 'site formation / clearance'. I have carefully considered the facts. The activities like leveling, completion of roads / street lights, storm-water drains etc., toward setting up of common amenities is usually covered under land development and normally certain charges are also collected by the local body toward land development under the extant building regulations, when according building permissions. The development is specific to the housing project and would form an intrinsic component of that project. For example, no individual who does not own a property would be entitled to shared ownership of the internal roads, utilities, garages etc. It is the villa construction



that is the prime service, and the land development for access to that villa is clearly subsidiary to it. There is force in the appellant's contention [at Para 10 of the grounds /Page 16 of appeal book] that the activities of sale of land parcel, fastening development charges, and entering into construction agreement are mutually co-existing and inseparable; and that the land development charges are collected toward bouquet of charges for land parcel, development and construction of the villa.

9. The ratio of the Tribunal ruling in the Vrindavan Engineers & Contractors case [2015(40)STR 765(Tri-Mum)] squarely applies to the instant case, and the classification of the land development activity separately under Site Formation is legally unsustainable. In terms of Sec 65A of the Finance Act 1994 (up to 30.06.2012) and Sec 66F ibidem (beyond 01.07.2012), the land development activity, part of major activity of villa construction with common amenities merits classification under WCS in the bundled service, and not under Site formation as an independent service. It automatically restricts the demand for short levy only where the charges are actually collected. Although the SCN admittedly sought to fasten the liability under Site Formation, the appellant fairly conceded at Para 26 of the grounds of appeal, that the demand would exist under WCS category, assessed under the composition scheme inasmuch as the necessary conditions (non availment of credit etc.) are met. **Para 26(1) of the impugned order is therefore set aside and remanded** to the lower authority for re-quantification of liability under WCS, by extending composition scheme for the period up to 30.06.2012 and under Rule 2A of the Service Tax Valuations Rules with effect from 01.07.2012 by extending abatement. Since the tax incidence has been demanded on the transaction value which is deemed to consist of the tax element under Sec 67(2) inasmuch as the incidence has neither been discharged nor shown to be passed on downstream; the liability shall be assessed on cum-tax values. I rely on the rulings pronounced in COMMISSIONER OF C. EX., PANCHKULA Versus GOEL INTERNATIONAL PVT. LTD. [2015 (39) S.T.R. 330 (Tri. - Del.)]; and COMMISSIONER OF SERVICE TAX Versus ASSOCIATED HOTELS LTD. [2015 (37) S.T.R. 723 (Guj.)], in ordering the remand.

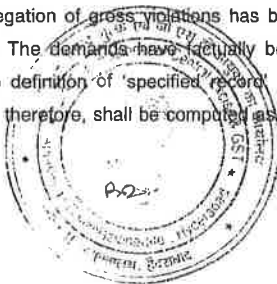
10. Insofar as the demand pertaining to element (ii) is concerned, I find that the notice, at Para 3.2 and 3.4, clearly arrived at the liability toward construction value of unfinished house, attempting to fasten liability on full value, without even extending any abatement toward goods/material components. I have carefully considered the facts. When the appellant possessed title to the land [outright purchase, as recorded at the third bullet under Para 2.1 of the SCN], any construction undertaken prior to sale of any land parcel is admittedly service to self; there is no service involved since the fiscal statute prescribes the existence of independent service provider and receiver to fasten the levy; and the factual matrix shows on record that the sale deed consisting of land parcel along with unfinished house is registered for the composite consideration. Therefore, the transaction covered by the sale deed, even when containing an unfinished villa, is sale simpliciter, and cannot be considered to represent a divisible land-



building transaction involving sale (of land) and construction (of building), for separately assessing the latter. The sale deed records the immovable property in totality (land parcel + unfinished house) which is assessed to Stamp duty and thereby recognized as a sale transaction alone, which is placed out of ambit of service tax levy, both prior to and after 01.07.2012. As far as common amenities are concerned, the unit rate of the constructions is deemed to be adjusted to amortize the cost over the entire project villas and thereby included in the unit cost of the villas since the value of apportioned common amenities (villa-wise) have not been shown to be charged separately in any case. The tax demand in respect of element (ii) is therefore legally unsustainable. Accordingly, **Para 26(2) of the impugned order is set aside.**

11. Insofar as element (iii) is concerned, it is contended that the impugned amounts have been collected toward corpus fund, electricity deposit and water charges, all of which are statutorily prescribed. The tax demand has been confirmed merely on the ground that the appellant failed to produce documentary evidences in support of their claim that these amounts were not received toward service consideration, but represented statutory dues collected from the customer and paid to the corresponding utility. The rebuttal on this count was that no specific evidences were sought by the lower authority, which could have been furnished had they been sought. Although this is a puerile ground, I find that this matter can also be examined by the lower authority afresh, along with the issue pertaining to element (i), remanded supra. It is expressly clarified that if the impugned amounts are collected from the villa vendees and deposited to the utilities / transferred to the association corpus fund without any retention in appellant's account, the question of treating the same as consideration for construction of villa and assessment under WCS does not arise. **Para 26(3) of the impugned order is therefore set aside and remanded** to the lower authority to specify the evidences required from the appellant in this connection; ascertain the facts; arrive at a conclusion on the existence of liability; and then proceed to quantify it, if applicable. The appellant is directed to co-operate in the denovo proceedings and submit the evidences sought. On re-quantification of elements (i) and (iii) in the manner directed herein, the amount paid shall automatically stand appropriated; and **Para 26(4) of the impugned order is upheld**, for adjustment against the quantification in denovo proceedings.

12. Interest under Sec 75 is a quintessential liability, accompanying belated discharge of tax; and cannot be waived under any provision of law. The liabilities quantified in denovo proceedings shall attract interest at applicable rates, which shall be paid by the appellant in addition to the primary tax liability. **Para 26(5) of the impugned order is upheld**, in respect of the tax quantification arising in denovo proceedings. The demand proposals have been upheld on limitation supra and the allegation of gross violations has been upheld; thereby a penalty under Sec 78(1) is warranted. The demands have actually been proposed on the basis of documents consistent with the definition of 'specified records' under the Explanation to Sec 78(1). The quantum of penalty, therefore, shall be computed as the aggregate of (a) 100% tax



liability arising for the period prior to 08.04.2011; and (b) 50% of the tax liability for the period 08.04.2011-31.03.2015, quantified In denovo proceedings; in terms of the first proviso under Sec 78(1). **Para 26(6) of the Impugned order stands modified** accordingly. The plea for waiver under Sec 80 cannot be considered at his juncture since the provision has been omitted from the statute with effect from 14.05.2015 by Sec 116 of the Finance Act 2015, without any saving / repeal in respect of existing Impositions.

13. A penalty has been proposed and imposed under Sec 77(2) for belated registration. The factual matrix shows that the demand is proposed from Oct 2010 whereas the original registration has been issued on 25.04.2010 and the amendment registration has actually been issued on 08.12.2010. Considering that no demands are proposed for the previous period under any classification, the date of original registration contradicts the allegation of belated registration; and the penalty imposed under Sec 77(2) is legally unsustainable. **Para 26(7) of the Impugned order is therefore set aside;** and the appeal is partly allowed in the terms laid out supra.

ORDER

The impugned order stands modified to the extent discussed supra.



By SPEEDPOST To

1. M/s Kadakia & Modi Housing, No.5-4-187/3 & 4, Second Floor, Soham Mansion, MG Road, Secunderabad, TS-500003. [Appellant]

2. Sri P. Venkata Prasad, Chartered Accountant, M/s Hiregange & Associates, "Basheer Villa", H.No.8-2-268/1/16/B, Second Floor, Sriniketan Colony, Road No.3, Banjara Hills, Hyderabad, TS-500034. [Advocate / Consultant]

Copy Submitted to The Chief Commissioner, Central Tax & Customs, Hyderabad Zone, Hyderabad.

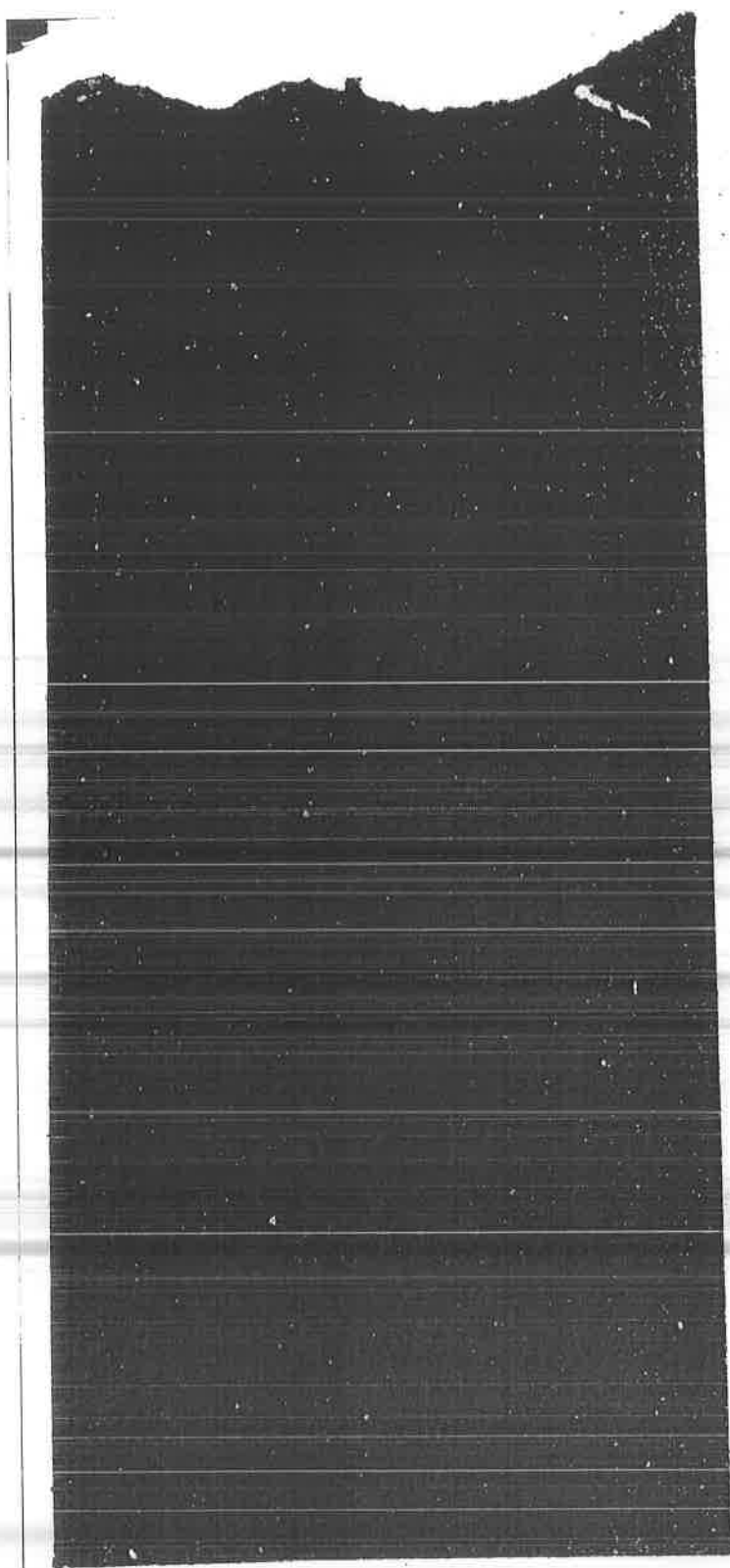
Copy to

1. The Commissioner of Central Tax, Secunderabad GST Commissionerate [erstwhile Hyderabad Service Tax Commissionerate], GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad, TS-500004. [jurisdictional Commissioner]

2. The Additional / Joint Commissioner of Central Tax, Secunderabad GST Commissionerate [erstwhile Hyderabad Service Tax Commissionerate], GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad, TS-500004. [Respondent]

3. Master copy.







सीमा शुल्क, वान्द्रीय उत्पाद शुल्क व सेवा कर के प्रधान आयुक्त का कार्यालय
OFFICE OF THE
PRINCIPAL COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
हैदराबाद: 1 आयुक्तलाय, बशीरबाग, हैदराबाद - 500 004
HYDERABAD - I COMMISSIONERATE, BASHEERBAGH:: HYDERABAD 500 004

आ.सं/O.R.No. 44/2016-Hyd-I Adjn(S.T)/106 दिनांक /Date: 30.12.2016.

मूल आदेश संख्या 048/2016-(S.T)

(श्री वी। वसुधा प्रसादा राव, संयुक्त आयुक्त द्वारा पारित)

ORDER-IN-ORIGINAL No. 048 /2016-(S.T)

(Passed by Shri V. Vasudha Prasada Rao, Joint Commissioner)

क्र.सं.	प्रस्तावना	PREAMBLE
1	किन्ही प्रयोग के लिए इसे निम्न व्यक्ति को जारी किया गया वह प्रति निम्न रूप के हो जानी है।	This copy is granted free of charge for the private use of the person to whom it is issued.
2	जो भी व्यक्ति केन्द्रिय उत्पाद शुल्क अधिनियम, 1944 के अंतर्गत धारा 35 (1) संशोधित से दुषप्रभावित हो, इस प्रकार प्रत्येक आदेश निम्न के विस्तार आदेश की प्राप्ति के 60 दिनों के भीतर आयुक्त (अपील), मुद्रासूचक कार्यालय, 7 वें तल, एल.बी. स्टाडियम रोड, बशीरबाग, हैदराबाद 500 004 को अपनी अपील प्रस्तुत कर सकता है।	Under Section 35 (1) of the Central Excise Act, 1944, as amended, any person aggrieved by this order can prefer an appeal within 60 days from the date of communication of such order/decision to the Commissioner (Appeals), Hqrs., Office, 7 th floor, L.B.Stadium Road, Basheerbagh, Hyderabad - 500 004.
3	धारा 35 के उप खण्ड (1) के अंतर्गत आयुक्त (अपील) को की-जायनाली अपील फॉर्म ई.प. 1 में जो और इसकी जांच निर्धारित पद्धति के अनुसार की जानी चाहिए।	An appeal under sub-section (1) of Sec.35 to the Commissioner (Appeals) shall be made in form S.T-4 and shall be verified in the prescribed manner.
4	धारा 35 के उप खण्ड (1) में निर्दिष्ट अपील के आधार और उपर्युक्त जांच के फॉर्म पर निम्न के बहास करने चाहिए: (क) व्यक्तिगत मामलों में स्वयं व्यक्ति द्वारा या उसके भारत में बाहर रहने पर संबंधित व्यक्ति द्वारा या उसकी ओर से उसके द्वारा अधिकृत व्यक्ति द्वारा और व्यक्ति के अवयवक या मानदिए गए वे विकर्ताग ऐसे व्यक्ति जो अपने काम स्वयं द्वारा या किप जाने की विधि में हो, अपने संरक्षक द्वारा या उसकी ओर से काम करने के लिए किसी सम व्यक्ति द्वारा; (ख) अधिकांगित निम्न परिवार के मामले में फॉर्म द्वारा और जब फॉर्म भारत में उपस्थित न हो या अपने स्वयं के मामले स्वयं द्वारा निपटाने में भागदिक रूप में विकर्ताग हो तो अपने परिवार के किसी अन्य व्यक्त सदस्य द्वारा; (ग) कंपनी या स्थानीय प्राधिकरण के मामले में संबंधित प्रधान अधिकारी द्वारा; (घ) फॉर्म के मामले में किसी भागीदार के द्वारा जो अवयवक न हो; (ङ) कपी अन्य रूप के मामले में रूप के किसी भाग्य द्वारा या प्रधान अधिकारी द्वारा; (च) किसी अन्य व्यक्ति के मामले में उसी व्यक्ति द्वारा या उसकी ओर से कार्य करने के लिए किसी अन्य सम व्यक्ति द्वारा बहासदित होना चाहिए।	The grounds of appeal and the form of verification as contained in form No. S.T-4 shall be signed:- a) In the case of individual, by the individual himself or where the individual is absent from India, by the individual concerned or by some person duly authorized by him on his behalf and where the individual is a minor or is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf; (b) In the case of a HUF, by the KARTHA, and where the KARTHA is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family; (c) In the case of a company or local authority, by the principal officer thereof; (d) In the case of a firm, by any partner thereof, not being a minor; (e) In the case of any other association, by any member of the association or the principal officer thereon; (f) In the case of any other person, by that person or some person competent to act on his behalf;
5	ई.प. 1 फॉर्म में जो गई अपील अनुविधि में प्रस्तुत की जानी चाहिए और उसकी छाप निम्न 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. EA-1 shall be filed in duplicate and shall be accompanied by a copy of the decision or the order appealed against;
6	अपील पर और निम्न निर्णय या आदेश के विरुद्ध अपील की जा रही हो उस अपील की प्रति पर भी मुद्रासूचक शुल्क के अस्थायी 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.

BRIEF FACTS

M/s. Kadakda & Modi Housing having their Registered office at 5-4- 187/3 & 4, II Floor Soham Mansion, M.G.Road, Secunderabad (hereinafter referred to as "M/s KMH" or "the assessee") are engaged in the construction of Villas and are registered with Service Tax Department under STC NO AAHFKB714ASD001 for "Construction of Residential Complex service" and "Works Contract Service"

2. Intelligence received indicated that M/s KMH are Constructing Villas under the project titled "Bloomsdale", and are not discharging Service Tax properly. Documents were called from M/s KMH under Summons and a statement was recorded from the authorized signatory of the Company on 16.11.2015 and 01.02.2016.

2.1 Sri M.Jaya Prakash authorized signatory of the assessee in his statement dated 16.11.2015 and 01.02.2016, inter-alia, submitted that:

- M / s KMH are involved in the activity of Construction of Residential Villas;
- so far there is only one project of Residential Villas known as "Bloomsdale" located at Shamirpet Village;
- they acquired the land by outright purchase and the project consists of 72 Villas out of which 31 Villas were sold upto 2014-15;
- the mode of sale is that they enter into agreement of sale , then execute sale deed (for land Value) and agreement of Construction; that they are first appropriating the amounts received from the Customer towards the sale deed thereafter they appropriate the amounts towards agreement of construction. Amounts received for third parties like Registration Charges, VAT, Service Tax, Electricity deposit ,maintenance charges are excluded for the purpose of estimating service tax liability;
- that they are paying Service Tax under the category of "Works Contract Service" against Agreement of Construction Value only;
- that because of ambiguity on applicability of service tax before the amendment to the act in 2012 they were given to understand that service tax is not applicable for the activity undertaken by them;
- that they are willing to pay the amounts collected under Works Contract Service

2.2 Examination of the documents revealed that M/s KMH had not filed the Statutory ST-3 Returns and not paid any service tax for the period October, 2010 to March, 2011. For the year 2011-12, they had filed the ST-3 returns and self-assessed their service under Construction of Residential Complex service for

the period upto September 2011; and from October 2011 onwards they changed the classification of the service and are discharging duty under Works Contract Service and they filed the returns for the period 2012-13 to 2014-15.

2.3 Examination of the Agreement of Sales indicated that M/s KMH are collecting the agreed value under the following three separate heads

A. Towards Sale of land

B. Towards development Charges of land for laying of roads, drains parks etc

C. Towards Cost of Construction , water and electricity connection and for other amenities.

2.4 The following consideration details in Condition number 1 of the agreement dated 12.11.2009 entered with Major Achyut Ranjan confirms the above mode of receipt of payments:

Sl. No.	Description	Amount (Rs.)
A	Towards sale of land	1,85,000/-
B	Towards development charges of land for laying of roads, drains, Darks, etc.	11,95,000/-
C	Total towards land cost (A+B)	13,80,000/-
D	Towards cost of construction, water & electricity, connection and for other amenities	20,70,000/-
E	Total sale consideration (C+D)	34,50,000/-

2.5 As per Para 13 of agreement of Sale date 12.11.2009 entered with Major Achyut Ranjan reads as under

"13 The vendee shall enter into a separate agreement with the vendor for construction of the bungalow as per the specifications and other terms and conditions agreed upon. The vendee shall also enter into separate agreement with the Vendor for payment of development charges on land"

2.6 Identical conditions forms part of the all other agreements of Sales in respect of other Customers. Accordingly, M/s KMH are entering into separate agreement for development of land and for construction of Villas. M/s KMH vide their letter dated 09.02.2016 informed that in the statement of receipts submitted by them, under Column "Receipts towards agreement of Construction include the receipt towards the land development.

2.7 However, examination of the receipts vis-a-vis the amounts indicated in the Agreement of sales showed that the cost of Land development is not included in the Agreement of Construction in some cases and partially included in some cases. The Cost of land development in some cases is included in the amount indicated in the Sale deed (Cost of land value) and exemption is claimed in this respect

2.8 The activity of land development involves preparing the site suitable for construction, laying of roads, laying of drainage lines water pipes etc. thus it is a separate activity different from construction of Villas

2.9 Upto the period 30.06.2012 As per Section 65 (97a) of the Finance Act 1994 Site formation and clearance, excavation and earth moving and demolition 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

2.10 Upto the period 30.06.2012 As per Section 65(105) (zzza) of 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 earthmoving and demolition and such other similar activities.

2.11 Thus, it appeared that the activity of development of land fall under the definition of site formation as per Section 65(97a) ibid and the development charges collected are taxable to service tax as per Section 65(105)(zzza) ibid. and with effect from 1.7.2012 it appeared to be a service under Section 65B (44) of the Act and taxable under the provisions of 65B(51) read with Section 66(B) of the Act . Further, the activity does not fall under the negative list mentioned in Section 66D of the Act. Thus, the activity of land development appears to be chargeable to service tax without any abatement.

2.12 Upto the period 30.06.2012, as per Section 65(105)(zzzza) of 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 prefabricated or otherwise, installation of electrical and

... and 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
- (f) commissioning (EPC) projects; .

From 01.07.2012 onwards, Service portion of Works Contract service is a "declared service" under Section 66E(h) of Finance Act as amended.

2.13 After 01.07.2012, as per Section 66B of Finance Act, 1994 as amended, there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

2.13 As per Section 65B(34) of Finance Act 1994, "negative list" means the services which are listed in section 66D;

2.14 As per Section 65B(51) of Finance Act, 1994, "taxable service" means any service on which service tax is leviable under section 66B;

2.15 As per Section 65B (44) of Finance Act 1994 "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

- (a) an activity which constitutes merely,—
 - (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
 - (ii) a transaction in money or actionable claim;
- (b) a provision of service by an Employee to the Employer in the course of or in relation to his Employment;
- (c) fees taken in any Court or tribunal established under any law for the time being in force.

2.16 As per Section 68 of the Finance Act 1994, every person providing taxable service to any person shall pay service tax at the rate specified in section

66 (upto 30.06.2012) and Section 66B (from 01.07.2012 onwards) in such manner and within such period as may be prescribed.

2.17 Section 66D specifies the Negative List of services & Exemption Notification No. 25/2012 dated 20.06.2012 lists the exempted taxable services. "Works Contract Service" does not figure in the negative list or in the said exemption Notification.

2.18 As detailed above, M/s KMH are entering into a Separate agreement of construction with his customers and the activity appears to be taxable under Works Contract service even during the period from October 2010 to September 2011 during which M/s KMH appeared to have erroneously classified the service under construction of Residential Complex Service. The fact that M/s KMH are discharging VAT under Works Contract and are assessing the service under Works Contract confirms the nature of the service that it is "Works Contract Service" Only.

2.19 As mentioned in above the cost of construction includes the cost providing common amenities also. Sri Jaya Prakash in his Statement dated 01.02.2016 in response to Question No 3 submitted that the cost of providing common amenities is between one to one and half lakh rupees and the cost forms a part and parcel of Cost of Construction and they are discharging Service tax for the said amount under works contract providing common amenities is not a Works Contract as there is no transfer of property to the individual. Hence, it appeared that the abatement is not available for the value of Rs 1,50,000/- per Villa (being the higher of the values admitted as M/s KMH failed to arrive at the correct value of common amenities) and chargeable to full rate of Service Tax under other taxable services

2.20 In view of the foregoing, It appeared that M/s KMH are liable to discharge charge service tax for Cost of land development shown in agreement of sales under "Site formation Service". They appeared liable to service tax on the full value of Common amenities without any abatement at full rate. They appeared liable to Service Tax under "Works Contract Service" in respect of the value of construction shown in agreement of sales excluding the value of Common amenities. The cost of land of shown in agreement of sales only appeared exempt from service tax.

2.21 Accordingly, the service tax liability is arrived villa wise.

3. Agreement of Sales indicates that the assessee is collecting the agreed value under the following two heads only.

A. Towards Sale of land

B. Towards Cost of Construction, water and electricity connection and for other amenities.

The consideration details in Condition Number 1 of the Agreement of Sale dated 20.07.2012 entered with Sri Abdul Rahim and another confirms the above mode of receipt of payment.

Sl. No.	Description	Amount (Rs.)
A	Towards sale of land	18,00,000/-
B	Towards cost of construction, water & electricity connection and for other amenities.	26,83,000/-
C	Total sale consideration (A+B)	44,83,000/-

3.1 M/s KMH are not entering into any land development agreement in respect of these customers. In his Statement dated 01.02.2016, Sri M.Jaya Prakash authorized signatory of the Company in response to question number 4 why there is no separate agreement for development of land in respect of some customers, submitted that these booking were done after development of the land, that is why there is no separate agreements for land development charges in respect of them.

3.2 Condition No 1 of the sale deed dated 10.09.2012 entered with Sri Abdul Rahim and another indicates the following details:

"The Vendor do hereby convey, transfer and sell the Plot No. 9, admeasuring 183 sq. yds., along with semi-finished construction having a total built-up area of 1849 sqft, forming part of Sy. No. 1139 situated at Shamirpet Village, Shamirpet Mandal, Ranga Reddy District, which is herein after referred to as the Scheduled Property and more particularly described in the schedule and the plan annexed to this Sale Deed in favour of the Vendee for a consideration of Rs. 18,00,000/- (Rupees Eighteen Lakhs Only) financed by HDFC Ltd., Hyderabad. The Vendor hereby admit and acknowledge the receipt of the said consideration in the following manner"

3.3 Further, Annexure 1-A of the above cited sale deed dated 10.09.2012 indicated the following details

ANNEXURE-1-A

1. Description of the : ALL THAT PIECE AND PARCEL OF SEMI-FINISHED HOUSE on bearing Plot No. 09 in the project known as "BLOOMDALE" forming part of Sy. No. 1139 OF Shamirpet Village, Shamirpet Mandal, Ranga Reddy District
- (a) Nature of : R.C.C (G+1)
- roof
- (b) Type of : Framed Structure
- Structure
2. Age of the Building : Under Construction

3.3 Identical details are incorporated in all other Sale deeds in respect of other Customers.

3.4 In view of the above facts, it appeared that what is transferred by way of sale deed is a semi-finished construction and not merely land. However, it was observed that M/s KMH had erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi-finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands.

3.5 As mentioned in Para 3(detailed in annexures enclosed to the notice) above, the cost of construction includes the cost of providing common amenities also. The cost of common amenities had to be arrived at as detailed in Para 2.19(detailed in annexures enclosed to the notice) above and appeared chargeable to full rates of Service Tax.

3.6 In view of the foregoing, in respect of Customers mentioned in Enclosure WS-2 to the notice, it appeared that M/s KMH were liable to discharge service tax for Cost of construction in respect of value of semi-finished houses shown in the "Sale deed" and value shown in agreement of Construction, under Works Contract Service. They appeared liable to service tax on the full value of Common amenities without any abatement at full rate. The cost of land arrived proportionately based on identical lands of customers appeared exempt from service tax.

3.7 Accordingly, the service tax liability was arrived villa wise and detailed in Annexures enclosed to the notice. Further the villa wise Year wise and Service wise liability was detailed in Enclosure WS-3 & WS-4 to the notice.

3.8 The total service tax payable for both Enclosure WS-1 and Enclosure WS-2 customers together worked out to Rs 14,35,330/- in respect of site formation service Rs 40,80,581/- in respect of works contract service Rs 7,01,784/- in respect of other taxable services totalling to Rs 62,17,785/-M/s KMH had paid an amount of Rs 19,00,736/- during the period from October, 2010 to March, 2015 and the differential amount payable worked out to Rs 43,17,049/-.

4. Service Tax under Works Contract Service has been arrived @4.12% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued vide Notification No.32/2007-ST dated 22.5.2007 for the period 01.10.2010 to 31.03.2011 as the value of goods and materials consumed in the

project could not be arrived as provided under Rule 2A and 3 of the Service Tax (Determination of Value) Rules, 2007.

4.1 Service Tax under Works Contract was arrived @40% of the consideration received for rendering the services for the period from 01.04.2012 to 31.03.2015 as per the provisions of Section 2A[(ii)(A)] of the Service Tax (Determination of Value) Rules, 2007 as the value of the goods and materials consumed in the project could not be provided by the declarant.

5. By their acts of omission and commission as above, it appeared that M/s. KMH had contravened the various provisions of Finance Act, 1994 and the Service Tax Rules, 1994, with an intent to evade payment of Service Tax as follows

➤ Section 73A(1) of the Finance Act 1994 (hereinafter referred to as the Act) inasmuch as they had not paid the service tax collected from the customers completely.

➤ Section 65A(2)(a) of the Finance Act, 1994 inasmuch as they had not classified their services of construction of villas under "Works Contract service" during the period from October, 2010 to September, 2011 under Section 65(105)(zzzza) and not classified the service of land development under Site formation Service under Section 65(105)(zzza) from October, 2010 to 30.06.2012.

➤ Section 67 of the Finance Act, 1994 read with Rule 2A of the Service Tax (Determination of Value) Rules, 2006, inasmuch as they had not assessed correct values and not paid proper service tax on amounts received pertaining to the "Works Contract Service" during the period October, 2010 to March, 2015 and on site formation service from October 2010.

➤ Section 68 (1) of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994 inasmuch as they had not paid appropriate Service Tax under "Works Contract Service", "Site formation Service and Other taxable service on the considerations received for the services rendered.

➤ Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 inasmuch as they had not filed the statutory Returns under "Works Contract Service" during the period October, 2010 to March, 2012. And under Site formation Service from October, 2010 and not assessing the taxable values correctly.

6 The assessee have been rendering taxable services under the category of "Works Contract Services" and site formation service however they

have not paid the service tax charged and collected from the customers to the account of the Central Government properly during the period from October, 2010 to March, 2015. They had not discharged service tax on site formation service and they had not discharged service tax on works contract service by undervaluing the services they had not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation conducted. Therefore, it appeared that the assessee had intentionally suppressed the facts to evade the payment of service tax. Hence, it appeared that the period of limitation under proviso to Section 73(1) was invokable to recover the short paid/not paid service tax along with interest under Section 75 of the Finance Act, 1994. The assessee appeared liable for penalty under Section 78 of the Finance Act, 1994 for suppression of facts, with an intent to evade payment of Service Tax.

7. In view of the above, a Show Cause Notice in O.R.No. 99/2016-Adjn.(ST)(Commr) HQPOR No. 10/2016-ST-AE-VIII dated 22.04.2016 was issued to M/ s. Kadakia & Modi Housing, asking them to show cause to the Commissioner of Service Tax, Hyderabad Service Tax Commissionerate, as to why:

- (i) An amount of Rs. 14,35,330 /- (Rupees Fourteen lakhs thirty five thousand three hundred thirty Only) (including all cesses) being the service tax payable on Site formation Service (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- (ii) An amount of Rs. 40,80,581 /-(Rupees Forty lakhs eighty thousand five hundred and eighty one Only) (including all cesses) being the service tax payable on Works Contract Service (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- (iii) An amount of Rs. 7,01,874/-(Rupees seven lakhs one thousand eight hundred and seventy four Only) (including all cesses) being the service tax payable on other taxable Services (as per Enclosure WS-5 read with WS-3 & WS-4 to the notice) during the period October, 2010 to March, 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(iv) an amount of Rs 19,00,736/- (Nineteen lakhs seven hundred and thirty six only) paid towards service tax (as per Enclosure WS-5 to the notice) should not be appropriated towards the service tax demanded at SI No (i) to (iii) above;

(v) Interest as applicable, on an amount at SI.No. (i) to (iii) above should not be paid by them under Section 75 of the Finance Act, 1994;

(vi) Penalty should not be imposed on the amount at SI No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;

(vii) Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for delayed Registration.

8. The Show Cause Notice O.R.No. 99/2016-Adjn.(ST)(Commr) HQPOR No. 10/2016-ST-AE-VIII dated 22.04.2016 was assigned for adjudication to the Joint Commissioner, Hyderabad-I Commissionerate vide letter C.No. IV/16/156/2065-CC(HZ) Tech dated 07.12.2016 by the Chief Commissioner, Hyderabad Zone in terms of Notification No. 06/2009-ST dated 30.01.2009. Accordingly, corrigenda dated 20.10.2016 and 05.12.2016 were issued asking the assessee to show cause to the adjudicating authority for the subject notice.

PERSONAL HEARING

9. Personal hearing was granted to the assessee on 28.12.2016. Shri Venkata Prasad, Chartered Accountant, on behalf of M/s. Kadakia & Modi Housing, appeared for the personal hearing and filed their written submissions dated 28.12.2016 and reiterated the same. He further submitted that an amount of Rs.19,00,736/- was paid by them before issue of the Show Cause Notice. Hence, he requested the same may be considered while imposing penalty.

10. In their written submissions dated 28.12.2016, the assessee, interalia, submitted as under:-

① They denied all the allegations made in Show Cause Notice (SCN) as they were not factually/legally correct;

② Service Tax is not at all payable by builder on the contracts entered with individual buyer involving the sale of land component in absence of proper mechanism for identification of service component therein and placed reliance on the decision of the Hon'ble High Court of Delhi in the case of Suresh Kumar Bansal Vs. UOI 2016 43 S.T.R. 3 (Del.);

(iii) Construction of villas cannot be subjected to service tax, *inter alia* due to:

- Villas cannot be treated as residential complex defined under Section 65(91a) of Finance Act, 1994 since villa is not a building containing more than 12 units. Consequently same does not fall under the category of 'Works contract service (WCS)' qua Section 65(105)(zzzza) of Finance Act, 1994;
- Further, judicially also it was held that construction of villas cannot be treated as 'construction of complex' and placed reliance on the decision of the Hon'ble Tribunal in the case of Macro Marvel Projects Ltd. v. Commissioner - 2008 (12) S.T.R. 603 (Tribunal) maintained by the Hon'ble Supreme Court as reported in 2012 (25) S.T.R. J154 (S.C.);
- Further, Villas constructed are being used for his personal use and falls under exclusion portion of the definition of the "Residential complex" defined under Section 65(91a), *ibid.* hence no service tax and relied on the CBEC circular 108/2/2009-S.T., dated 29.01.2009 and the decision of the Hon'ble Tribunal in the case of M/s Virgo Properties Pvt Limited Vs CST, Chennai 2010-TIOL-1142-CESTAT-MAD;
- For period 01.07.2012 onwards, same is exempted under entry No. 14(b) of Notification No. 25/2012 ST dated 20.06.2012 as amended;

(iv) Mere paying service tax or filing of ST-3 returns under self-assessment system does not alter the taxability of the impugned activity as self-assessment cannot be considered as final/decisive and further there is no restriction for claim of the refund of the duty so self-assessed. In this regard reliance was placed on the following case laws:

- Central Office Mewar Palaces Org. v. UOI 2008 (12) S.T.R. 545 (Raj.)
- Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553 (Tri. - Bang.)

(v) Therefore, notwithstanding payment of service tax by them during the subject period, there is no service tax liability at all on the entire transaction of villa sale that being a position there is no question of any short payment and entire demand falls on this count itself;

(vi) Charges for 'land development' were collected towards development of the layout into plots by laying roads, drainage lines, electrical lines,

water lines etc., as per the rules of HUDA. Both materials, labour are involved in laying of said roads, drainages etc. For instance, murrum, concrete were being incorporated in the laying of roads apart from exerting the labour therein. Similarly while laying of electrical lines, they incorporate goods namely electrical poles, wire etc;

(vi) The impugned proposes to tax the 'land development' charges collected after alleging (vide Para 2.3.8) that same is classifiable under the category of 'site formation' under Section 65(105)(zzza) of Finance Act, 1994;

(vii) The definition of the "*Site Formation and Clearance, Excavation and Earthmoving and Demolition Services*" on one hand and reference to description of on another hand, concluded the liability of the service tax on the same activities without proving how the particular activity is covered under the provisions of Finance Act, 1994. Notice had not recorded any reasons for concluding the liability of service tax on the impugned activities. Authority has not discharged its onus on proving the liability without any doubt and hence the Notice is not valid. The Notice has been just issued in air and without proper examination and hence the same has to be set aside. In this regard, reliance was placed on the decision of the Hon'ble Tribunal (The Special Bench of Tribunal consisting of three members) *Crystic Resins (India) Pvt. Ltd., Vs CCE*, 1985 (019) ELT 0285 Tri-Del;

(viii) The impugned SCN has merely extracted the entire provision under Section 65(97a) of Finance Act, 1994 and alleges that service tax is liable to be paid on the 'land development charges' under the category of 'site formation' under Section 65(105)(zzza) of Finance Act, 1994 but fails to specify under which clause of 'Site formation' is taxable more specifically when 'Site formation' contains several clauses covering different activities. Therefore, such SCN is invalid and infirmity incurable therefore requires to be quashed. Reliance in this regard was placed on *United Telecoms Limited v. CCE, Hyderabad-2011 (21) S.T.R. 234 (Tri-Bang)*;

(ix) First sub-clause covers drilling, boring and core extraction services and in the instant case of 'land development' there was no such activities were undertaken and therefore same is not covered under this sub-clause;

- (xi) Second sub-clause covers the cases of soil stabilization and the instant case of 'land development' does not require any such type of 'soil stabilization' i.e. improving or changing the soil of surface. Therefore the not covered under second sub-clause too;
- (xii) Third sub-clause covers the cases of 'horizontal drilling' whereas 'land development' does not require such kind of drilling works hence not covered here also;
- (xiii) Similarly, further sub-clause covers requires 'Land reclamation' works which involves the converting unusable/disturbed land into usable form whereas in the instant case of 'land development' land is in very well usable form before Noticee carried the development work and development work only for laying of infrastructure as required by M/s.HUDA. Resultantly same is not covered under this sub-clause also;
- (xiv) Fifth sub-clause covers the cases of '*contaminated top soil stripping work*' involving the carrying out measures for preventing/correcting the soil contamination. Whereas in the instant case of 'land development' there is neither 'soil contamination' nor measures for prevention/correction. Therefore, not covered under this sub-clause also;
- (xv) Last sub-clause covers the cases of 'demolition and wracking services' and the instant case of 'land development' does not require any such kind of 'demolition/wrecking' resultantly not covered under this sub-clause also;
- (xvi) In view of the above, it is clear that impugned case of 'land development' would not fit into any sub-clauses of 'site formation' category *qua* Section 65(105)(zzza), *ibid*. Hence, demand is not sustainable;
- (xvii) Taxability under 'site formation' attracts only when those specified activities were undertaken independently and not as part of any other composite work. This is because if such works are held to be taxable under the site formation service irrespective of whether carried out independently or part of composite work, then every such construction work would involve the activity of site formation, which is separately taxed in other category. Same position was clarified by CBEC vide its Circular No. 123/5/2010-TRU, dated 24.5.2010;
- (xviii) In the instant case, 'land development' activity was not carried out independently and part of composite contract for carrying out the villa

construction/sale. This fact was fortified from the fact of agreement of sale (AOS). Therefore, 'land development' is not taxable under the category of 'site formation';

(vii) Judicially also it was held that carrying out the activities that may cover under the category of 'site formation' if taken as part of any composite work then same cannot be taxed under the category of 'site formation' *qua* Section 65(105)(zzza), *ibid.* few of judgments are as follows:

- M. Ramakrishna Reddy v. CCE & Cus, Tirupathi 2009 (13) S.T.R. 661 (Tri.-Bang.)
- Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553 (Tribunal)

(viii) Before going into the discussion as to whether impugned activity is works contract or not, it is worthwhile to keep in the mind the fundamental principle of works contract is that it is an composite agreement for transfer of property in goods by accretion together with rendition of labour/service. And further it is well recognised naturally, lawfully and explicitly so in Central and State legislation as well that Works contract is a composite, indivisible, distinct and insular contractual arrangement, a specie distinct from a contract for mere sale of goods or one exclusively for rendition of services. And the above principles are flown from unvarying series of Apex court rulings *inter alia* the following:-

- State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd — (1958) 9 STC 353 (SC);
- Gannon Dunkerley & Co. and others v. State of Rajasthan and others (1993) 088 STC 0204;
- Builders Association of India v. Union of India — (1989) 2 SCC 645;
- Bharat Sanchar Nigam Ltd. v. Union of India — 2006 (2) S.T.R. 161 (S.C.);
- Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.);
- Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu — 2014 (34) S.T.R. 641 (S.C.)
- CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.);

(ix) In view of the above principles laid down by the Apex court and invariable factual position that they are incorporating the various goods namely murum, concrete, electrical poles, electrical wiring etc., in the execution of impugned activity of 'land development' apart from exertion of labour, the impugned activity shall be treated as species of works contract;

(xxii) It is settled law that in case of execution of works contract property in goods involved therein would get transferred through accretion. And in the instant case Noticee incorporated the goods namely murrum, concrete, electrical poles, electrical wiring etc., therefore it is clear case that Noticee transferred the property in goods to their customer while undertaking the impugned activity and undisputedly exerted the labour for execution of impugned activity thereby satisfying the species of works contract viz., supply of goods and services/labour;

(xxiii) Value assessed for VAT also includes the 'land development charges' collected which further fortifies that 'land development' is species of works contract;

(xxiv) From the provisions of 'Works Contract Service' in the Finance Act, 1994 it is clear that only specified activities of 'works contract' are intended to tax and not every contract of 'works contract' like therein VAT provisions. Hence in order to tax under the category of 'works contract', activity shall fall in the list of works specified therein. And the instant case of 'land development' is not falling under any of such specific works since:-

- It does not involve any work of 'erection, commissioning or installation' etc., accordingly sub-clause (a) fails;
- 'Land development' does not involve any construction of building/civil structure accordingly sub-clauses (b), (c) & (d) fails on this count;
- Similarly sub-clause (e) also fails in the instant case as there is no execution of any turnkey projects/EPC contracts;

(xxv) Therefore, the impugned activity is not liable under the category of 'WCS';

(xxvi) Composite contracts can be taxed only under the category of 'Works contract service' qua Section 65(105)(zzzza), ibid and not under any other categories including 'site formation'. Reliance in this regard was placed on Hon'ble Supreme court decision in CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.). That means service element in the works contracts other than those covered under the specified category of 'Works Contract Services (WCS)' is not taxable;

(xxvii) Since there is a specific category for 'works contract' but Parliament has in its wisdom not covered the works contract in relation to 'land development', the same cannot be taxed under any other category of services. In this regard, reliance was placed on the decision of the Hon'ble Tribunal in the case of Dr. Lal Path Lab Pvt. Ltd. Vs Commissioner of C. Ex., Ludhiana 2006 (004) STR 0527 Tri.-Del and

same was Affirmed in 2007 (8) STR 337 (P&H.) wherein it was held that "What is specifically kept out of a levy by the legislature cannot be subjected to tax by the revenue administration under another entry". Therefore, demand of service tax on 'land development charges' is not sustainable;

(xxviii) As stated in background facts, from 2012, they stopped entering separate agreement for 'land development' since land was already developed by that time and villas are in semi-constructed/finished stage (including villas not booked at that time). Accordingly, sale deed was being entered covering the both portion of land & semi-constructed villa/house and stamp duty was paid;

(xxix) The impugned SCN does not dispute the above fact that sale deed was entered conveying the title of semi-finished villa/house along with land but proposes to tax component of semi-constructed component after alleging that (vide Para 3.2) *"It appears what is transferred by way of sale deed is a semi-finished construction and not merely land. However it is observed that M/s. KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi-finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands."*;

(xxx) Semi-finished villa/house represents the construction work already done prior to booking of villa/house by the prospective buyer. The work undertaken till that time of booking villa/house is nothing but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self-service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be brought into the realm of works contract. In this regard, reliance is placed on the following:

- Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.)
- CHD Developers Ltd vs State of Haryana and others, 2015 - TIOI-1521-HC - P&H-VAT

(xxxi) 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 villa/house 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 villa/house, 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;

(iii) Without prejudice to the foregoing, there is no service tax levy on sale of semi-finished villa/house as the same was excluded from the definition of 'service' itself;

(iv) To be covered under the above ~~exclusion~~ the following ingredients shall be satisfied:

a. There should be transfer of title:

Transfer of title means "change in ownership". And in the instant case there is change in ownership from Noticee to their customer since after execution of 'sale deed' customer is the owner of "said immovable property" thereby this condition is satisfied.

b. Such transfer should be in goods or immovable property:

What constitutes immovable property was nowhere defined in the provisions of Finance Act, 1994 or rules made thereunder. It is pertinent to refer the definition given in section 3 of Transfer of property act 1882 which reads as follows:

"Immovable property" does not include standing timber, growing crops or grass"

Further section 3 of General clauses act, 1897 which reads as follows:

"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Reading of the above, undisputedly "land along with semi-finished villa/house" is immovable property thereby this condition was also met.

c. It is by way of sale, gift or other manner

In the instant case execution of 'sale deed' & payment of applicable stamp duty itself evidences that there is sale. Further it is pertinent to consider the definition given under section 54 of Transfer of property Act, 1882. In absence of definition of "sale" in the provisions of Finance Act, 1994 and relevant extract reads as follows:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. Sale how made — Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the instant case also there is transfer of ownership and price was also paid (part of the price is promised to pay) and transfer was made by executing 'sale deed' which is validity registered with stamp authorities. Therefore, undoubtedly there is sale thereby this condition was also met.

d. Merely

Undoubtedly 'sale deed' was executed to transfer the title in immovable property only and such transaction (sale of immovable property) does not involve any other activity namely construction activity as the same done entering separate agreement Mis-constructed by the impugned SCN.

(xxiv) Therefore, all the above conditions were satisfied in the instant case thereby making the transaction falling under said exclusion and hence amounts received towards 'agreement of sale' are not subjected to service tax;

(xxv) If two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words, the discernible portion of the transaction, which constitutes a transfer of title in immovable property would be excluded from the definition of service by operation of the said exclusion clause while the service portion would be included in the definition of service. In the instant case, it was well discriminated the activity involved & amounts received towards Sale of "land along with semi-finished villa" ('sale deed' separately) and Construction activity (by executing construction agreement);

(xxvi) Whatever the activity involved & amounts received towards construction agreement was suffered service tax and again taxing the associated transaction alleging that construction was involved is not warranted under the Finance Act, 1994 more so in case when there is clear separation/bifurcation/vivisection of activity involved & amounts received towards such associated transactions from the activity of construction;

(xxvii) Without prejudice to the foregoing, even assuming 'land development' activity is liable for service tax, it humbly request to allow the benefit of paying tax @4.8% in terms of 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 - as it is specie of works contract;

(xxviii) Even assuming 'land development charges' taxable, it is submitted that for the period 01.07.2012, adopting the principles of 'Bundled service' u/s. 66F of Finance Act, 1994, same shall be construed as 'works

contract' and tax shall be levied only @40% on the amount received in terms of Rule 2A of Service tax (determination of value) Rules, 2012;

(a) Construction agreement is being entered for the construction work to be undertaken including construction of common amenities/facilities like club house, CC roads, street lighting, landscaped gardens etc., and there is no bifurcation on the amounts towards common amenities/facilities. And Noticee is paying service tax on the amounts received towards this agreement adopting the taxable value as per Rule 2A of Service tax (determination of value) Rules, 2006. All these facts are undisputed in SCN also;

(a) Construction of common amenities like club house, CC roads, street lighting, landscaped gardens etc., requires both materials/goods (Murrum/clay, cement, concrete, rocks etc.,) and also the labour exertion in executing the said construction. The Common amenities/ facilities constructed would be transferred to society/ association that is being formed by all owners of villa in the impugned project. As the society/association (which is in turn owned by all customers) is owner of the same, the cost incurred for the construction is being recovered from each & every customer;

(b) The impugned SCN propose to deny the abatement citing that transfer of property is not to individual and hence not a 'works contract'. In this regard, it is submitted that common amenities/facilities constructed are being transferred to society/association which is in turn owned by customers/individuals only and they does not have any ownership over it. Further, it is well settled principle that society/association formed by group of people are not different and both are one & same. That being a case, whatever the transfers made to society/association is nothing but transferred to individual customers. Hence SCN averment that property in goods is not transferred to individual customers is not correct;

(c) The entire definition of 'works contract' (either before 01.07.2012 or thereafter) does not provide that transfer should to individual/ customer/contractee and what all it requires only the transfer of property that may be to customer/contractee or any third person and such transfer should be leviable to VAT, all these ingredients are satisfied in the instant case inter alia property in goods incorporated was transferred

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to society/association and VAT was levied & paid also. Hence SCN averment is not correct;

(iii) Further, 'residential complex' construction falls within the realm of 'WCS' and the expression 'residential complex' was defined under Section 65(91a), ibid to include 'common amenities/facilities'. On conjoint reading of this, it is clear that construction of 'common amenities/facilities' also specie of 'works contract'. Therefore, averment of SCN goes contrary to this and hence not valid;

(iv) Other non-taxable receipts (Corpus fund, Electricity deposit, water charges, service tax etc.,) are not liable - hence shall not be included in 'taxable value'. These receipts consists of:

a. Corpus fund which is collected & totally kept in separate bank account and transferred to society/association once it is formed; collection of corpus fund & keeping in separate bank account and subsequent transfer to association/society is statutory requirement;

b. Electricity deposit collected & totally remitted/deposited with the 'electricity board' before applying electricity connection to the villa and Noticee does not retain any amount out of it; this deposit is collected & remitted as per the statutory provisions of AP Electricity Reform Act 1998 read with rules/regulations made thereunder;

c. Water deposit collected & totally remitted to 'Hyderabad Metropolitan Water Supply & Sewerage Board (HMWSS)' before taking the water connection. This Deposit amount also includes water consumption charges for first two months along with sewerage cess. All these deposits are collected & paid in terms of HMWSS Act, 1989 r/w rules/regulations made thereunder;
Service tax collected & remitted to the Central government as per the provisions of Finance Act, 1994;

(vi) As seen from the above, all these charges collected 'other non-taxable receipts' are statutory charges/deposit and received as mere reimbursements of expenses/charges incurred/paid on behalf of customers and does not involve any provision of service. Hence same shall be excluded from the taxable value *inter alia* in terms of Rule 5(2) of Service tax (determination of value) Rules, 2006;

(vii) Judicially also it was held that above charges are not to be included in taxable value and placed reliance on ICC Reality & Others Vs CCE 2013 (32) S.T.R. 427 (Tri.-Mumbai); Karnataka Trade Promotion Organisation v. CST 2016-TIOL-1783-CESTAT-BANG; hence demand does not sustain to this extent;

(xivii) With regard to invocation of larger period of limitation, they submitted that suppression means not providing information which the person is legally required to state, but intentionally or deliberately not stated. As stated in factual matrix there was continuous intimation (from year 2010) regarding the compliance being made from time to time and repeated requests were made asking to confirm their understanding. Letters were filed giving the detailed breakup of amounts collected, amounts offered to tax & not offered (excluded) to tax. At no point of time, Department responded/rebutted to the above intimations/ requests;

(xiviii) What is believed to be not taxable/leviable as backed by their legal understanding was well put forth before the authorities in the year 2010 i.e. at the time of beginning their compliance itself and subsequently also. Thus, full facts of subject SCN were voluntarily disclosed by them without any enquiry/request from the Departmental authorities and they had never hidden any fact from the officers of Department and subject matter of present SCN was known to the Department before the beginning of SCN period itself as evident from the corresponded referred above;

(xv) Not objecting/responding at that time which gave vehement belief that understanding & compliance made is in accordance with the law and but now that is after expiry of nearly 5 years coming out with the present SCN with illusory & baseless allegation to invoke larger period of limitation and proposing to punish them for the failure of Departmental authorities is not valid in the eyes of law. In this regard reliance was placed on the decision of the Hon'ble Supreme Court in the case of Pushpam Pharmaceuticals Company Vs Collector Of C. Ex., Bombay 1995 (78) E.L.T 401 (S.C);

(vi) Most of the builders/developers across the country are not at all paying service tax (especially on villas constructions) and there were serious doubts expressed on the applicability of service tax and customers are also very reluctant to reimburse citing the above practice of non-payment by other similar builders. Judicially also it was held that construction of villas are not subjected to service tax as submitted supra;

(vii) There was lot of confusion on the liability of builders on the applicability of service tax and was challenged before various courts and courts also expressed different views and most of the cases in favour of tax payer. For instance, recently the Hon'ble High court in case of Suresh

Kumar Bansal v. UOI 2016-TIOL-1077-HC-DEL-ST held that construction contracts are not subjected to service tax;

(iii) Further, taxability of contracts involving immovable property was also subject matter of dispute during the subject period. There were contrary judgments of the Supreme Court at such point of time and which was finally settled by larger bench of Supreme Court in the year 2014 as reported in Larsen & Toubro Ltd. v. State of Karnataka -2014 (34) S.T.R. 481 (S.C.). The issue of classification of indivisible contracts under 'COCS'/'WCS' was in dispute. Courts expressed different views, referred to larger bench and finally settled by Supreme Court in the year 2015 in favour of tax payer as reported in Commissioner v. Larsen & Toubro Ltd. — 2015 (39) S.T.R. 913 (S.C.). Apart from the above difficulties, construction industry was in slump (especially in erstwhile state of Andhra Pradesh due to state bifurcation issue) and builders were facing huge financial problems/difficulties;

(iii) Despite above challenges/doubts/confusion, they voluntarily paid all service tax dues within the due date before the intervention of revenue department. There is no evasion of tax. Therefore, in the above background, intension to evade or delay the payment cannot be attributed. Further differentiation shall be made between the assessee who is voluntarily complying with the law and paying all dues despite of doubts/confusion/challenges etc., and assessee who is not at all complying with the law despite knowing his liability. Giving equal punishment for errant assessee and non-errant assessee shall be best avoided. Hence in view of above factual & legal matrix, larger period of limitation is not invokable;

(iv) The present SCN arises due to difference of interpretation of provisions between them & revenue. Further, various letters were filed before Department authorities, who never objected/responded on the compliance made by them. Not objecting the compliance made & taking nearly 6 months time after investigation to arrive their view/conclusion fortifies that subject matter is plausible for different interpretations and involves in complexities in the determination of taxability. Thus it is pure case of interpretational issue under which circumstances larger period of limitation cannot be invoked. In this regard reliance was placed on the decision of the Hon'ble High Court of Gujarat in the case of CCE v. Poonam Plastics Industries 2011 (271) E.L.T 12 (Guj);

(iv) Merely because they chooses an interpretation beneficial to him, mala fide intension to evade payment of service tax cannot be attributed to them. Accordingly, larger period of limitation is not invocable. In this regard reliance was placed on the decision of the Hon'ble Tribunal in the case of Rangsons Electronic Solutions (P) Ltd v. CCE 2014 (301) E.L.T. 696 (Tri. - Bang.);

(v) They regularly paid service tax and duly filling ST-3 returns showing the all these particulars as required/permitted in the format prescribed in this behalf (Form ST-3 specified by CBEC). If they wants to suppress the fact with intent to evade the payment of taxes, they might not have disclosed the same in ST-3 returns. Further, allegation of impugned SCN that they had not disclosed the relevant details/information to the department was not factually correct and requires to be set aside. In this regard, they placed reliance on the following case laws:

- Shree Shree Telecom Pvt Ltd., Vs. CCE Hyderabad [2008 (232) E.L.T. 689 (Tri. - Bang.)
- Separiwala exports pvt. Ltd v. CST 2014 (36) S.T.R. 802 (Tri. - Ahmd.)
- Bajaj Hindusthan Ltd v. CCE 2014 (33) S.T.R. 305 (Tri. - Del.)

(vi) As stated supra various matters involved in the issue were referred to larger bench. When the matter(s) were referred to larger bench, extender period of limitation cannot be invoked. Reliance was placed on the following case:-

- Continental Foundation Jt. Venture v. CCE, Chandigarh-I [2007 (216) E.L.T. 177 (S.C.)
- J.R. Construction CO. v. CCE & ST 2016 (41) S.T.R. 642 (Tri. - Del.)
- Megafine Pharma Pvt Ltd Vs CCE & ST 2014-TIOL-1312-CESTAT-AHM
- CCE v. Mapro India Ltd 2015-TIOL-2554-CESTAT-MUM

(vii) When the issue was disputable and at one point of time, the view of the courts was in favour of the assessee, question of invocation of extended period of limitation does not arise. Reliance in this regard was placed on the decision of the Hon'ble High Court of Ahmedabad in the case of CCE v. Saurashtra Cement Ltd 2016-TIOL-365-HC-AHM-CX;

(viii) Long list of familiar judicial pronouncements holding impugned two grounds of non-payment of Service Tax and failure to file correct ST-3 returns by themselves totally inadequate to sustain allegation of wilful

misstatement/suppression of facts and placed reliance on the decision of the Hon'ble Tribunal in the case of Punj Lloyd Ltd. V. CCE & ST 2015 (40) S.T.R. 1028 (Tri. - Del.);

(iv) The averment of SCN that, lapse would not have come to light but for the investigation of department, standing alone cannot be accepted as a ground for confirming suppression, Mis-statement or mis-declaration of facts. More so considering the fact that the very objective of conducting the Audit of records of an assessee is to ascertain the correctness of payment of duty, availment of CENVAT credit, etc., any shortcomings noticed during the course of Audit, itself cannot be reasoned that the deficiency was due to mala fide intention on the part of assessee. In this regard, reliance was placed on the decision of the Hon'ble Tribunal in the case of Landis + GYR Ltd. v. CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata);

(v) They are under bonafide belief that compliance made by them not in accordance with the law and whatever believed to be paid was paid. It is well settled legal position that suppression of facts cannot be attributed to invoke longer period of limitation if there is bonafide belief. Same was flown from the following case laws:-

- Padmini Products v. Collector — 1989 (43) E.L.T. 195 (S.C.)
- Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

(vi) Further, they placed reliance on the following case laws:

- Continental Foundation Jt. Venture CCE, 2007 (216) E.L.T. 177 (S.C)
- CCE, Chemphar Drugs & Liniments 1989 (40) E.L.T. 276 (S.C)
- Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)
- Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.)

(vii) All the entries are recorded in books of accounts and financial statements nothing is suppressed hence the extended period of limitation is not applicable and placed reliance on the following case laws:

- LEDER FX Vs DCTO 2015-TIOL-2727-HC-MAD-CT
- Jindal Vijayanagar Steel Ltd. v. Commissioner — 2005 (192) E.L.T. 415 (Tri-bang)

(viii) In case demand stands confirmed, same shall be re-quantified after allowing the benefit of cum-tax under Section 67(2) of Act, ibid since they

had not collected service tax from the buyer to the extent of alleged short/non-payment of service tax. In light of the statutory backup as mentioned above and cases where it was held that when no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis. Reliance in this regard was placed on the following case laws:-

- P. Jani & Co. vs. CST 2010 (020) STR 0701 (Tri.-Ahmd).
- Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654 Tri.-Del
- Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590
- BSNL Vs CCE, Jaipur 2011 (24) S.T.R 435 (Tri-Del)

(bvi) Without prejudice to the foregoing, Noticee submits that all the grounds taken for extended period of limitation above is equally applicable for penalty as well;

(bvi) There is no intention to evasion of tax and what are all believed to be payable was paid (Rs.19,00,735/-) within time, which is undisputed. Hence, no penalty shall be imposed to that extent;

(bvi) The impugned show cause notice had not discharged burden of proof regarding the imposition of the penalty under Section 78 of the Finance Act, 1994. No penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner prescribed by the statute. Reliance in this regard was placed on the following case laws:-

- Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All)
- Hindustan Steel Ltd. v. State of Orissa —1978 (2) E.L.T. (J159) (S.C.)
- CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.L.T 661 (S.C)
- Commissioner v. R.K. Electronic Cable Network — 2006 (2) S.T.R. 153 (Tribunal)
- Sundeeep Goyal and Company v. Commissioner — 2001 (133) E.L.T. 785 (Tribunal)

(lxviii) With regard to proposal to impose penalty under Section 77 of Finance Act, 1994, they submitted that they had registered with Department vide STC No. AAHTK8714ASD001 w.e.f. 25.04.2010 and submitted copy of the same and now it is settled law that builders/developers are not liable for service tax upto 30.06.2010 and same position was clarified by CBEC in its circulars & confirmed judicially also. That being a case, they registered well within the time

limit as per Section 69 of Finance Act, 1994 in fact before they become liable. Therefore, no penalty can be imposed under Section 77, *ibid*;
(lxix) The alleged short/non-payment of service tax was due to various reasons *inter alia*:

- a. Given understanding that compliance made by Noticee is in accordance with the law;
- b. Whatever believed as taxable was duly paid voluntarily;
- c. Various letters/disclosures were made to the department informing their compliance and requested for confirmation also;
- d. There were divergent views of Courts over the classification of indivisible contracts, taxability of transaction involving immovable property etc.,;
- e. There was enough confusion prevalent on the applicability of the Service tax among the industry;
- f. Matters were referred to larger bench at various instances;

(lxx) All the above can be considered as reasonable cause and waiver of penalty can be granted in terms of section 80 of Finance Act, 1994 and placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of CST, Vs Motor World 2012 (27) S.T.R 225 (Kar);

(lxxi) All grounds are without prejudice to one another and reliance in this regard was placed on the decision of the Hon'ble High Court of Bombay in the case of Bombay Chemicals Pvt Ltd Vs Union of India 1982 (10) E.L.T 171 (Bom);

(lxxii) In view of the above, they requested to drop the proceedings initiated in the Show Cause Notice.

DISCUSSIONS & FINDINGS

11. I have examined the notice issued under O.R.No.99/2016 dated 22-4-2016, relied upon documents, case records and also the written submissions made by the assessee at the time of personal hearing. The issues to be decided before me are that whether

- The demand of service tax on the services "works contract services" and "site formation services" is proper and the services are properly classified and the assessee is liable to pay the same or not
- The extended period is invocable or not
- The interest and penalties are payable by the assessee or not
- The cum tax benefit can be extended or not

12. It is alleged in the notice that the assessee failed to assess tax properly and misclassified the services under "residential complex services" instead of

classifying the same under "works contract services" during the year 2011-12 and later they classified the same under " Works Contract services" and paid tax liability accordingly. It was further alleged that they failed to file return for the period Oct,2010 to Mar,2011 and thus not paid service tax liability during this period. It was alleged that the assessee entered into agreements with the buyers for sale of land, development charges for laying of roads, drains, and parks etc., and towards cost of construction that include water and electricity connection and for other amenities. It was alleged in the notice that the cost of "Land development charges" were not included in the cost of construction in some cases and partially included in some cases. It was alleged in the notice that the assessee failed to classify " Land development charges" under any of the category of services and hence the same are classified under " site formation services". It was alleged in the notice that the cost of land development charges are not included in the cost of construction in respect of some of clients/customers and included in some cases. The activity involved, inter-alia, in the land development is preparation of site suitable for construction , for laying of roads, drainage and for water pipes etc.. Thus it was alleged as a separate activity different from construction of villas. It was alleged in the notice the activity was classified under " site formation" services for the reason that the activity did not involve transfer of property and from the insertion of negative list in terms of Section 66B of the Finance Act,1994 the services relating to Land development charges were not listed in the negative list and thus taxable. It was further alleged that under the guise of sale of land , semi-finished villas were also sold by claiming exemption by treating these type of transactions as sale of land and underpaid the service tax on these transactions. The amount of service tax is alleged to be payable in this type of transactions and demand was made accordingly. It was further alleged that service tax on other services provided in connection with construction of villas was also not paid by the assessee. They contravened various sections of Finance Act,1994 and each contravention is specified in the notice. Hence service tax liability of Rs 14,35,330/- under site formation services, 40,80,581/- under works contract services and 7,01,874/- under other taxable services was arrived at and demanded in the notice.

13. Assessee/M/s KMH in their written reply submitted at the time of personal hearing made the following submissions:

13.1 They contested that sale of land in the absence of proper mechanism for identification of service element is not taxable and relied on the case Suresh Kumar Bansal Vs. UOI 2016 43 S.T.R. 3 (Del.) and contested that construction of villas can not be subjected to Service tax at all as the construction of villas can not be treated as residential complex as villa is not a building containing more than 12 units.

13.2 Further it was contested that the Villas constructed are being used for personal use and falls under exclusion portion of the definition of the "Residential complex" defined u/s 65(91a), *ibid.* hence no service tax. Relied on CBEC circular 108/2/2009-S.T., dated 29.01.2009 and M/s Virgo Properties Pvt Limited Vs CST, Chennai 2010-TIOL-1142-CESTAT-MAD; For period 01.07.2012 onwards, same is exempted under entry No. 14(b) of Notification No. 25/2012 ST dated 20.06.2012 as amended; and referred Macro Marvel Projects Ltd. v. Commissioner — 2008 (12) S.T.R. 603 (Tribunal) maintained by SC in 2012 (25) S.T.R. J154 (S.C.); and CBEC circular 108/2/2009-S.T dated 29.01.2009. It is observed from the definition of "Residential complex" that M/s KMH misconstrued the definition in his favour and trying to overlook the definition for the benefit service tax. Extracts of the definition are reproduced here under

Section 65 [(91a) "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;]

It is clear from the above definition that residential unit means a single house or a single apartment intended for use as a place of residence and as per the

definition the project "Bloomsdale" met all the parameters of the definition such it consisted more than 12 units with common areas and facilities such as parking places, parks and water supply etc... It is evident that M/s KMH are falsely contesting the issue for the sake of escaping the service tax liability on the construction activities undertaken by them in "Bloomsdale" project. The case laws relied upon by them are not factually applicable as the facts are different and distinguishable with the facts of the present issue before me. Hence the tax demanded under works contract services is correct and liability demanded in the notice is payable by them.

14. M/s KMH contested that "Land development charges" are not falling under "site formation and clearance, excavation and earthmoving and demolition" as none of the works specified in the definition were carried out by them in the Bloomsdale project. It was also contested that the services do not even fall under works contract service and stated that there is no liability of service tax on the services such as electrical cabling, laying roads, drainage lines water lines etc.,. It was stated that both labour and material are involved in these activities. It was contested that the notice was issued with baseless allegation that the services provided such as electrical cabling, laying roads, ~~drainage lines water lines~~ fall under "site formation and clearance, excavation and earthmoving and demolition". They contested that the notice is issued without any merit and needs to be quashed and relied upon the case Crystic Resins (India) Pvt. Ltd., Vs CCE, 1985 (019) EIT 0285 Tri-Del and United Telecoms Limited vs. CCE, Hyderabad-2011 (21) S.T.R. 234 (Tri-Bang). I find that these case laws are delivered with different factual situations and hence are distinguishable with the facts of the present case.

15. Further to afore said contentions , M/s KMH further contested that taxability question arises only when site formation is done independently not as a part of composite contracts and relied on the Board's circular 123/5/2010-TRU, dated 24-5-2010. In this connection I observe that the contents of the circular are misconstrued by the assesses in their favour as the issue dealt in the circular dealt laying of cable along the road side. In the present case the services are not mere laying of cables alone and hence the assessee's contention is not tenable. The assessee's vehemently argued that the agreements such as "sale of land", "land development charges" and " construction charges" are mutually co-existing and inseparable and the activity of land development is not

a "site formation service" if taken as a part of composite work and relied on few judgements M. Ramakrishna Reddy v. CCE & Cus, Tirupathi 2009 (13) S.T.R. 661 (Tri.-Bang.); Commissioner v. Vijay Leasing Company - 2011 (22) S.T.R. 553 (Tribunal);

16. Assessces further contested in their reply that the impugned "land development services" shall be treated as species of "works contract" and relied upon various case laws in support of theirs view. It was stated that common amenities were constructed with the material such as murram, concrete and electrical poles, electrical wiring etc., and used labour and transferred the property in goods to their customers and hence satisfies the definition of "works contract" services. The definition of works contract is reproduced hereunder

(zzzzz) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

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

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

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

- (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
- (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
- (c) construction of a new residential complex or a part thereof; or
- (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
- (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

17. From the above definition it clearly manifested that in order to classify "Land development charges" under "Works Contract services" two conditions are required to be satisfied 1st there should be transfer of property in goods and the activities to be performed under (a) to (e) listed in

the definition. Hence the common area and amenities even though constructed with murrum and concrete 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 individuals and hence the same can not be treated as species of "Works contract services". In fact this is the allegation leveled against them in the notice. The assessee submitted that there is a transfer of property in goods in respect of common amenities provided and the amounts collected under "land development services" as they said that they paid VAT on these charges and hence it is a species of "Works Contract services". Again in their written reply it is again contested that (vide para 23 onwards) Land development services are not at all covered under any of the works defined under "Works contract services" and hence the land development services do not fall under works contract services and referred to Apex court case law Supreme court decision in CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.). It is noted that the assessee lacks clarity on his submissions as they say that the land development services do not fall under "site formation services" and they say that it forms species of "works contract service" and again they say that its not a works contract services as none of the works specified in the works contract service was performed for land development activities (reference to para 24 to 27). Again vide para 34 of their reply they requested that if at all land development services are to be treated as taxable the same may be classified under Works contract and requested to extend the benefit of abatement or benefit of paying @ 4.8% in terms of 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 - as it is specie of works contract. Further they contested that the construction of common amenities involves the transfer of property and it is "works contract" service only and claimed that they correctly assessed at abated rates. They further argued that if 'land development charges' are taxable, adopting the principles of 'Bundled service' u/s. 66F of Finance Act, 1994, same shall be construed as 'works contract' and tax shall be levied only @40% on the amount received in terms of Rule 2A of Service tax (determination of value) Rules, 2012.

18. From the above submissions and contentions it is noticed that they lack clarity and **trying** to negotiate tax liability and circumvented the issue with divergent contentions and relying on irrelevant case laws. It is noticed that they wish to scheme on service tax liability as much as possible with

logical contentions. I find that in terms of Section 65 A, services are classified with more relevant description of services. Extracts of Section 65 A are reproduced here under

Section 65 A : Classification of taxable services. — (1) For the purposes 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-clauses of 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) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.]

[(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.]

18.1 In terms of 65(A) 2(a) "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 and making it suitable for construction of villas and horizontal drilling for laying of drainage pipes and water pipes and cables etc., apart from constructing common amenities such as park, current poles and club houses. Since majority works involved are relatable to "Site formation and clearance, excavation and earth moving and demolition" services, the land development services are rightly classified under the same. As requested by the assesses, land development services can not be classified either under "residential complex services" or under "works contract services" (after 1/7/2007) as they collected charges under "land development services" separately and hence are rightly classifiable under "Site formation and clearance, excavation and earth moving and demolition" services. In this context I rely upon the case *Alokik Township Corporation Versus Commr. Of C. Ex. & S.T., Jaipur-I* (Tri. - Del.) 2015 (37) S.T.R. 859 *Demand - Land Development for housing project - Demand raised under Construction of Complex service upto 30-5-2007 and under Works Contract service category w.e.f. 1-6-2007 - HELD : Development of land for township not covered by definition of Construction of Commercial Complex*

service in Section 65(105)(zzzh) read with Sections 65(39a) and 65(91a) of Finance Act, 1994 or by definition of Works Contract service in Section 65(105)(zzzza) *ibid* - Service Tax demand not sustainable - Impugned order set aside - Sections 65(39a), 65(91a) and 65(105)(zzzza) of Finance Act, 1994.

19. Hence in view of the above the land development services can not be classified either under "Construction of Complex service" or under "Works Contract service". I also find that from the definition under Section 66F the entire set of services under "land development services" should be bundled under service that is "Site formation and clearance, excavation and earth moving and demolition" services. Relevant extracts of Section 65 F are reproduced hereunder

SECTION [66F. Principles of interpretation of specified descriptions of services or bundled services. — (1) Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.

[Illustration

The services by the Reserve Bank of India, being the main service within the meaning of clause (b) of section 66D, does not include any agency service provided or agreed to be provided by any bank to the Reserve Bank of India. Such agency service, being input service, used by the Reserve Bank of India for providing the main service, for which the consideration by way of fee or commission or any other amount is received by the agent bank, does not get excluded from the levy of service tax by virtue of inclusion of the main service in clause (b) of the negative list in section 66D and hence, such service is leviable to service tax.]

(2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

(3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely :—

(a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;

(b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.

Explanation. — For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.]

It is imperative from the above section that "land developments services" shall be treated as single service due to its nomenclature and essential characteristics even though it contains various elements. Hence the demand under Site

formation and clearance, excavation and earth moving and demolition is correctly set in the notice and I confirm the tax liability under the same.

20. The main demand under "works contract services", it is noticed that the assessee undervalued the services charges by not including cost of construction of semi finished units by claiming the same as sale of land and there by claimed ineligible exemption. The contentions of the assessee that (para 30) that *"undivided portion of land along with semi finished villa/ house is not chargeable to VAT and it is mere sale of immovable property"* and cited the judgement *Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.)* The assessee again scheming with irrelevant arguments that no service tax is payable on these transactions as it was not falling under "works contract services". I find that there is no basis in their argument and the definition is totally misconstrued in their favour to get benefit from paying service tax. I confirm the tax liability demanded in the notice under "works contract service".

21. The contention by M/s KMH that the demand of service tax in respect of "other services" is not tenable in the notice as it was claimed that the amounts were received towards Corpus fund, Electricity deposit, water charges and towards service tax. However it was observed that the assessee failed to submit documentary evidence in support of their claim and hence cannot be considered as non-taxable. Hence, in the absence of any documentary backing the amounts collected for other services are taxable and I hold that that tax is payable on these charges. In this connection I rely on the judgment of Delhi High Court in the case *Gokaldas Images Ltd Vs Union Of India* reported in 2007 (7) S.T.R. 347 (Del.) where in Delhi High Court held that

WP (C) No. 5916/2003 : The grievance of the petitioner is that the quota could not be utilised due to power cut and the appeal was heard on 5-11-1998 by the first appellate authority while the order was passed in January, 2000 and signed on 15-11-2000. There is undoubtedly delay on the part of the first appellate committee in passing the order but the matter has also been considered by the second appellate committee and the petitioner had failed to file necessary documentary evidence. Thus, I see no reason to interfere in this case.

(xv) *WP (C) No. 16102/2004* : The plea is frequent power failure in Okhla Industrial Area and the printing job at Jodhpur being affected due to cold weather and less sunshine. No documentary evidence was produced and the findings were, thus, correctly arrived at by the first appellate committee and the second appellate committee rejecting the plea of the petitioner. Thus, the matter, in my considered view, calls for no interference.

(xvii) WP (C) No. 13154/2004 : The petitioner has pleaded frequent court/ customs strike and load shedding by the electricity authority. *Documentary evidence was not produced* and additional pleas were sought to be added before the second appellate committee, which has considered all the matters and rejected the same which, in my considered view, do not call for any interference.

22. M/s KMH contended that in case the demand is confirmed, they may be given the benefit of cum-tax under section 67(2) of Finance Act, 1994 and relied on various case laws in their favour. It is observed that the assessees have not collected values including service tax element in many cases. They collected service tax separately and are filing returns. They are aware of the statutory provisions and are billing service tax separately where ever they collected towards taxable services. Hence in some cases separate collection of taxes and in some cases cum tax benefit can not be the practice. In fact the demand notice was issued against them as they suppressed the facts of receipt of taxable amounts with intent evade payment of taxes and claiming ineligible exemptions. In this context I rely upon the following case law

The Settlement Commission in the case of M/s TIRUCHENGODE LORRY URIMAIYALARGAL SANGAM, reported in 2016 (41) S.T.R (343) (Settle Comm)(Chennai) held that "The Commissioner conceded that the claim of exemption from Service Tax on the rent collected for the vacant land prior to 30-6-2010, was correct in law subject to production of documentary evidences. He further stated that threshold exemption of Rs. 8/10 lakhs in terms of Notification No. 6/2005-S.T., dated 1-3-2005 and Notification No. 33/2012-S.T., dated 20-6-2012 is applicable only for the aggregate value of all such taxable services. Since the aggregate turnover was more than 8/10 lakhs in the preceding Financial Years for all the services provided by the applicant, they are not eligible for exemption. In respect of claim for cum-tax benefit the Commissioner stated that the applicant did not initiate any effort to recover Service Tax element from their service receivers and in such scenario extending the benefit of cum-tax benefit does not arise and mere failure on the part of the applicant to collect Service Tax separately from their service receivers and later claiming cum-tax benefit would result in the deprivation of legitimate revenue due to the Government"

In view of the above case law I find that their request for cum-tax benefit can not be considered and extended.

23. M/s KMH contested that Interest and penalties are not imposable as extended period is not invokable in theirs case and stated that they paid an amount of Rs 19,00,736/- and the same amount was only payable and paid the same with in the statutory time and burden to prove imposition of penalty was not discharged by the department and relied on a case law Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) and further stated that it involved interpretation of law and hence penalties are not imposable and relied on CCE Vs Gujarat Narmada Fertilizers Co. Ltd 2009 (240) E.L.T 661 (S.C) in support of their contention. In this regard it was stated by them that they are new to service tax provisions and requested benefit under Section 80 of the Finance Act, 1994. I find that their contentions are not acceptable as they were registered with the department and were discharging tax liability and filing, but for allegations made in the notice, ST-3 returns regularly.

ERECON Versus COMMISSIONER OF SERVICE TAX, AHMEDABAD reported in 2016 (41) S.T.R. 538 (Tri. - Ahmd.) "Heard both sides and perused the case records. Appellant was discharging tax liability up to September, 2004 and thereafter stopped making the payment of Service Tax No ST-3 returns was filed by the appellant after September, 2004. Once appellant was aware of the fact that service tax on the services provided was paid earlier, it can not be considered that there was no intention to evade payment of tax by suppression when appellant was not even filing the statutory returns of the tax which he was paying earlier. Accordingly, it is held that penalties under Section 78 of the Finance Act, 1994 is imposable. The case laws relied upon by the appellant are distinguishable on facts and are not applicable to the facts and circumstances of this case".

FREE LOOK OUTDOOR ADVERTISING Versus COMM. OF CUS. & C. EX., GUNTUR 2007 (6) S.T.R. 153 (Tri. - Bang.)

Demand (Service tax) - Limitation - Failure to file return - It was sufficient for invocation of extended period when there was no time limit for recovery of dues as per Section 73 of Finance Act, 1994. [para 5.1]

BOX & CARTON INDIA PVT. LTD. Versus COMMISSIONER OF C. EX., DELHI-IV 2008 (228) E.L.T. 85 (Tri. - Del.) "Demand - Limitation - Extended period - Plea that Departmental officers visited the units on 27-3-2003 and SCN issued on 1-9-2004 for duty demand for short paid duty for period from 1-8-1999 to 31-3-2004 and duty demand for period from 27-3-2003 to 31-7-2003 time barred - Tribunal decision in 1999 (114) E.L.T. 429 (Tribunal) holding that knowledge of Department in respect of suppression of facts not relevant for computing limitation period of five years - Demand sustainable - Section 11A of Central Excise Act, 1944."

24. In the light of the above judgments I reject the plea of the assessee that extended period is not invokable as the full facts were voluntarily disclosed by them without any inquiry from the departmental authorities and claim that they

had not hidden any fact from the officers of the department is not acceptable and tenable. They have provided the information only after initiation of investigation by the department and it was discovered that the assesses were misclassifying their services with intent to evade payment of service tax. Since the assesses are aware of statutory provisions and have been collecting service tax and not paying the same to the exchequer and they have hidden these facts to the department and they are liable to pay penalty equal to amount of service tax short paid/not paid by them. The information was provided only after initiation of investigation against them and hence I do not find that they have recorded the information in the specified records as the issue is intent to evade payment of tax by misclassifying the services and as well suppressing the facts. Hence extended period is rightly invoked in their case.

25. Assesses requested to consider the benefit under Section 80 of the Finance Act, 1994. It is observed that they have not shown any reasonable cause to consider their request for benefit under Section 80 of the Finance Act, 1994. Hence the request of the assesses for benefit under Section 80 is rejected for the afore said reasons. In this connection I rely on the following case law in support of my view.

Gitanjali Gems Ltd. Vs Commissioner Of Service Tax, Mumbai-I reported in 2016 (43) S.T.R. 230 (Tri. - Mumbai) where in it was held that "As regards the plea of the learned counsel for the appellant for setting aside the penalty imposed, on a specific query from the bench, it was stated that the appellant has not paid the entire amount of the service tax liability and the interest thereof. The appellant has only paid 50% of the amount of service tax liability. We find that the provisions of Section 80 cannot be invoked in this case as there being no discharge of service tax liability and interest thereof the penalty imposed on the appellant needs to be upheld as there is no justifiable reason or cause shown for setting aside the penalties"

COMMISSIONER OF SERVICE TAX, MUMBAI Versus LARK CHEMICALS P. LTD. 2016 (42) S.T.R. 417 (S.C.). "Penalty - Quantum of - Reduction under Section 80 of Finance Act, 1994 - Scope of - In view of judgment of Apex Court in *Dharamendra Textile Processors* at 2008 (231) E.L.T. 3 (S.C.), penalties imposed under Sections 76 and 78 *ibid* not reducible under Section 80 of Finance Act, 1994".

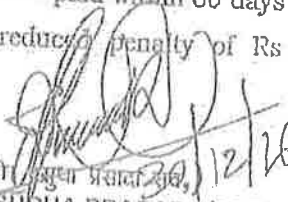
26. In view of the above discussions and findings I pass the following order

ORDER

1. I confirm the demand of Rs. 14,35,330 /- (Rupees Fourteen lakhs thirty five thousand three hundred thirty Only) (including all cesses) being the service tax payable on Site formation Service during the

- period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
2. I confirm the demand of Rs. 40,80,581 /-(Rupees Forty lakhs eighty thousand five hundred and eighty one Only) (including all cesses) being the service tax payable on Works Contract Service during the period October 2010 to March 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
 3. I confirm the demand of Rs. 7,01,874/-(Rupees seven lakhs one thousand eight hundred and seventy four Only) (including all cesses) being the service tax payable on other taxable Services during the period October, 2010 to March, 2015 from them, under proviso to Section 73 (1) of the Finance Act, 1994;
 4. I appropriate amount of Rs 19,00,736/- (Nineteen lakhs seven hundred and thirty six only) paid towards service tax towards the service tax demanded at SI No (1) to (3) above;
 5. I confirm the demand of Interest as applicable, on the amounts at SL.No. (1) to (3) above under Section 75 of the Finance Act, 1994;
 6. I impose equivalent Penalty of Rs 62,17,785/- (Rs Sixty two lakhs seventeen thousand seven hundred and eighty five only) on the amounts at SL No. (1) to (3) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;
 7. I impose Penalty of Rs 10,000/- (Rs Ten thousand only) under Section 77(2) of the Finance Act, 1994 for delayed Registration

I extend the benefit of reduced penalty of Rs15,54,446/- in terms of Section 78 of the Finance Act,1994 to the assessee equal to 25% of the Service tax confirmed at (1) to (3) above if the service tax and interest confirmed are paid within 30 days of receipt of this order along with the amount of reduced penalty of Rs 15,54,446/-


(श्री श्री वसुधा प्रसाद राव)
(V. VASUDHA PRASADA RAO)
संयुक्त आयुक्त
JOINT COMMISSIONER

To

M/s. Kadakia & Modi Housing,
5-4- 187/3 & 4, II Floor,
Soham Mansion, M.G.Road,
Secunderabad-500003

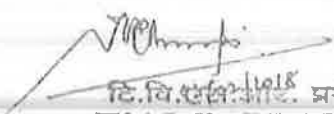
O.R.No. 44/2016-Hyd-I Adin (S.T.)
(SCN O.R.No. 99/2016-Adjn. (ST))(Commr)

Copy submitted to the Principal Commissioner of Hyderabad Service Tax Commissionerate.

Copy to:

1. The Assistant Commissioner of Service Tax, Division-III, Service Tax Commissionerate, Hyderabad
2. The Superintendent of Service tax, Range-III A, Hyderabad Service Commissionerate, Hyderabad (He is directed to serve the order and obtain dated acknowledgement for record)
3. The Superintendent of Service tax, Anti-Evasion Gr-VIII, Hyderabad Service Commissionerate, Hyderabad
4. Master Copy / Office Copy.

Attested


T.V.S.R. PRASAD
Superintendent
केन्द्रीय कर एवं सीमा शुल्क
Central Tax & Customs
विभाग/प्रादेशिक आय विभाग
Secunderabad GST Commissionerate
Secunderabad/Hyderabad

BEFORE THE JOINT COMMISSIONER OF SERVICE TAX,
HYDERABAD I COMMISSIONERATE, L.B.STADIUM ROAD,
BASHEERBHAG, HYDERABAD-500 004

Sub: Proceedings under O.R.No. 99/2016-Adjn. (ST) (Commr.) [HQPOR No: 10/2016-ST AE-VIII] dated 22.04.2016 issued to M/s. Kadakia & Modi Housing, #5-4-187/3 & 4, II Floor, Soham Mansion, MG Road, Secunderabad - 500003.

FACTS OF THE CASE:

A. M/s. Kadakia & Modi Housing (hereinafter referred as 'Noticee') *inter alia* engaged in sale of residential villas on their own land under the name & style of '**Bloomdale**'. They are registered with department vide STC No. AAHFK8714ASD001 w.e.f. 25.04.2010 (copy of ST-2 enclosed as annexure II).

B. Noticee initially executes Agreement Of Sale (AOS) for sale of residential villa and thereafter executes

- i. Sale Deed (sample copies sale deed is enclosed as annexure VI & VII), that gets registered and appropriate 'Stamp Duty' has been discharged on the same. Initially 'sale deed' was entered only for the portion of land value and separate agreement was entered in the name of 'land development charges' however from 2012 practice of entering separate agreement for 'land development charges' was dispensed with as the land was already developed by that time and started entering 'sale deed' for the semi-constructed villa along with land attached thereto.
- ii. Construction agreement is being entered for the construction work to be undertaken for the said villa's (sample copies of construction agreements are enclosed as annexure VIII & IX). This agreement includes



F. Again vide letter dated 30.12.2011, Noticee intimated that service tax was paid under protest for the period 01.04.2011 to 30.09.2011 on the value attributable to the construction done after 01.07.2010 under the category of 'construction of complex service' (COCS) after adjusting the service tax payments previously made, if any (prior to 01.07.2010). And filed ST-3 return also (copy of ST-3 return for the period April 2011 to September 2011 is enclosed as annexure VI). Here again there is no response from the revenue department.

The above was done only on their sole understanding of law and because of this, Noticee repeatedly requested the revenue department to confirm their understanding but Noticee at no point of time received any communication from department.

G. As the department was not responding and Noticee has their own doubts, Noticee approached consultant for advised on the compliance to be made for service tax. As per the consultant advise, Noticee started paying service tax under protest on the amounts received towards 'construction agreements' & also on the Other taxable receipts (stated supra) under the category of 'Works contract service (WCS)'. Said fact of paying under protest & on the amounts received towards 'construction agreement' was intimated to department along with detailed statements showing the total receipts, amounts included in taxable value and excluded from it etc., was also submitted. For instance, for the period January 2012 to March 2012, letter dated 22.07.2012 was filed and similarly for the subsequent period also (copies of letter filed are enclosed as annexure VII). Here again it was specifically requested

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revenue department to confirm Noticee understanding and but no response again.

All these were done voluntarily and well before the intervention of revenue department.

H. And it was only after expiry of nearly 5 years from the date of filing letter asking for clarification/confirmation, officers of anti-evasion in the month of August 2015 sought various records, thereafter recorded statements and viewed that

- i. Land development charges collected are liable for service tax under the category of *'site formation and clearance, excavation and earthmoving and demolition ('site formation' for short);*
- ii. Service tax is liable to be paid at full rate on *'common amenities/facilities* without any abatement;
- iii. Other charges collected are liable for service tax;

I. Subsequently, Present SCN vide O.R.No. 99/2016-Adjn. (ST) (Commr)

dated 22.04.2016 was served asking to show cause as to why: **[ANNEXURE-**

- i. An amount of Rs. 14,35,330 /- (including all cesses) being the service tax payable on Site formation Service (as per Enclosure WS-5 read with WS-3 & WS-4 to this notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73(1) of the Finance Act, 1994;
- ii. An amount of Rs.40,80,581/- (including all cesses) being the service tax payable on Works Contract Service (as per Enclosure WS-5 read with WS-3 & WS-4 to this notice) during the period October 2010 to

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March 2015 should not be demanded from them, under proviso to Section 73(1) of the Finance Act, 1994;

- iii. An amount of Rs.7,01,874/- (including all cesses) being the service tax payable on other taxable Services (as per Enclosure WS-5 read with Ws-3 & WS-4 to this notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;
- iv. An amount of Rs. 19,00,736/- paid towards service tax (as per Enclosure WS-5) should not be appropriated towards the service tax demanded at Sl No. (i) to (iii) above
- v. Interest as applicable, on an amount at Sl.No. (i) to (iii) above should not be paid by them under Section 75 of the Finance Act, 1994.
- vi. Penalty should not be imposed on the amount at Sl.No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;
- vii. Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for delayed Registration;

In as much as;

- a. Examination of the documents revealed that M/s.KMH have not filed the Statutory ST-3 Returns and not paid any service tax for the period October 2010 to March 2011. For the year 2011-12 they have filed the ST - 3 returns and self assessed their service under Construction of Residential Complex service for the period upto September 2011; and from October 2011 onwards they changed the classification of the

service and are discharging duty under Works Contract Service and they filed the returns for the period 2012-13 to 2014-15

- b. Examination of the receipts vis-à-vis the amounts indicated in the Agreement of Sales showed that the cost of Land Development is not indicated in the Sale deed (Cost of land Value) and exemption is claimed in this respect.
- c. The activity of land development involves preparing the site suitable for construction, laying of roads, laying of drainage lines water pipes etc thus it is a separate activity different from construction of Villas.
- d. The activity of development of land appears to fall under the definition of site formation as per Section 65(97a) ibid and the development charges collected appear to be taxable to service tax as per Section 65 (105) (zza) ibid. and with effect from 1.7.2012 it appears to be a service under Section 66(B) of the Act. Further the activity does not fall under the negative list mentioned in Section 66D of the Act. Thus the activity of land development appears to be chargeable to Service Tax without any abatement.
- e. M/s. KMH are entering into a Separate agreement of construction with his customers and the activity appears to be taxable under Works Contract service even during the period from October 2010 to September 2011 during which M/s. KMH appears to have erroneously classified the service under construction of Residential Complex Service. The fact that M/s. KMH are discharging VAT under Works Contract and are assessing the Service under Works Contract

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confirms the nature of the service that it is "Works Contract Service" Only.

- f. Providing common amenities is not a Works Contract as there is no transfer of property to the individual. Hence the abatement appears to be not available for the value of Rs.1,50,000/- per Villa (being the higher of the values admitted as M/s. KMH failed to arrive at the correct value of common amenities) and appears to be chargeable to full rate of Service Tax under other taxable services.
- g. M/s. KMH appears to be liable to discharge charge service tax for Cost of land development shown in agreement of sales under "Site formation Service". They appear to be liable to service tax on the full value of Common amenities without any abatement at full rate. They appear to be liable to Service Tax under "Works Contract Service" in respect of the value of construction shown in agreement of sales excluding the value of Common amenities. The cost of land of shown in agreement of sales only appears to be exempt from service tax.
- h. It appears what is transferred by way of sale deed is a semi-finished construction and not merely land. However it is observed that M/s. KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands.
- i. M/s. Kadakia & Modi Housing have been rendering taxable services under the category of "Works Contract Services" and site formation

service however they have not paid the of service tax charged and collected from the customers to the account of the Central Government properly during the period from October 2010 to March 2015. They have not discharged service tax on site formation service and they have not discharged service tax on works contract service by under valuing the services they have not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation conducted. Therefore, it appears that the assessee has intentionally suppressed the facts to evade the payment of service tax.

Submissions:

1. The Noticee submits that they emphatically deny all the allegations made in Show Cause Notice (SCN) as they are not factually/legally correct.
2. Noticee submits that service tax is not at all payable by builder on the contracts entered with individual buyer involving the sale of land component in absence of proper mechanism for identification of service component therein. **Relled on Suresh Kumar Bansal Vs. UOI 2016 43 S.T.R. 3 (Del.)** wherein it was held that

"Whilst Rule 2A of the Rules provides for mechanism to ascertain the value of services in a composite works contract involving services and goods, the said Rule does not cater to determination of value of services in case of a composite contract which also involves sale of land. The gross consideration charged by a builder/promoter of a project from a buyer would not only include an element of goods and services but also the value of undivided share of land which would be acquired by the buyer. (Para 45)"

"In absence of Rule 2A of the Rules there was no machinery for excluding the non-service element from such composite works contracts involving an element of services and transfer of property in goods. Whilst the impugned explanation expands the scope of Section 65(105)(zzzh) of the Act, it does not provide any machinery for excluding the non-service components from the taxable services covered therein. The Rules also do not contain any provisions relating to determination of the value of services involved in the service covered under Section 65(105)(zzzh) of the

Act. Thus the said clause cannot cover composite contracts such as the one entered into by the Petitioners with the builder. (Para 49)

"in the present case, neither the Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract. (Para 53)"

3. Further Noticee submits that construction of villas cannot be subjected to service tax *inter alia* due to

- a. Villas cannot be treated as residential complex defined u/s. 65(91a) of Finance Act, 1994 since villa is not a building containing more than 12 units. Consequently same does not fall under the category of 'Works contract service (WCS)' qua Section 65(105)(zzzza) of Finance Act, 1994;
- b. Further judicially also it was held that construction of villas cannot be treated as 'construction of complex' Relied on Macro Marvel Projects Ltd. v. Commissioner — 2008 (12) S.T.R. 603 (Tribunal) maintained by SC in 2012 (25) S.T.R. J154 (S.C.);
- c. Further Villas constructed are being used for his personal use and falls under exclusion portion of the definition of the "Residential complex" defined u/s 65(91a), *ibid.* hence no service tax. Relied on CBEC circular 108/2/2009-S.T., dated

29.01.2009 and M/s Virgo Properties Pvt Limited Vs CST,
Chennai 2010-TIOL-1142-CESTAT-MAD;

d. For period 01.07.2012 onwards, same is exempted under entry
No. 14(b) of Notification No. 25/2012 ST dated 20.06.2012 as
amended;

4. Mere paying service tax or filing of ST-3 returns under self assessment
system does not alter the taxability of the impugned activity as Self
assessment cannot be considered as final/decisive and further there
is no restriction for claim of the refund of the duty so self-assessed. In
this regard reliance is placed on

a. Central Office Mewar Palaces Org. v. UOI 2008 (12) S.T.R. 545

(Raj.)

b. Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553

(Tri. - Bang.)

Therefore notwithstanding payment of service tax by Noticee during
the subject period, there is no service tax liability at all on the
entire transaction of villa sale that being a position there is no
question of any short payment and entire demand fails on this
count itself.

5. Without prejudice to the foregoing, For the ease of comprehension, the
subsequent submissions in this reply are made under different heads
covering different aspects involved in the subject SCN as listed below:

A. Land development charges are not liable for service tax;

- a. It does not fall under the category of 'site formation';
- b. species of 'works contract' but not 'works contract' taxable under section 65(105)(zzzza), *ibid*;
- c. even assuming taxable, not liable for the cases wherein land development agreement was not entered;
- B. Construction of common amenities involves the transfer of property and hence it is 'works contract' and correctly assessed at abated rate – there is no short payment to this extent;
- C. Other charges (electricity, water etc.,) are not liable – hence shall not be included in 'taxable value'
- D. Taxes/duties collected (VAT, service tax, stamp duty) are not liable – hence shall not be included in 'taxable value'
- E. Extended period of limitation is not invokable;
- F. Benefit of cum-tax shall be given;
- G. Interest and penalties are not payable/imposable;

In Re: Land development charges are not liable for service tax:

- 6. Noticee submits that charges for 'land development' were collected towards development of the layout into plots by laying roads, drainage lines, electrical lines, water lines etc., as per the rules of HUDA. Both materials, labour are involved in laying of said roads, drainages etc., For instance, murrum, concrete were being incorporated in the laying of roads apart from exerting the labour therein. Similarly while laying of electrical lines, Noticee incorporates goods namely electrical poles, wire etc.,

7. Noticee submits that impugned proposes to tax the 'land development' charges collected after alleging (vide Para 2.3.8) that same is classifiable under the category of 'site formation' u/s. section 65(105)(zzza) of Finance Act, 1994.

8. The Noticee submits that the definition of the "Site Formation and Clearance, Excavation and Earthmoving and Demolition Services" on one hand and reference to description of on another hand, concluded the liability of the service tax on the same activities without proving how the particular activity is covered under the provisions of Finance Act, 1994. Notice had not recorded any reasons for concluding the liability of service tax on the impugned activities. Authority has not discharged its onus on proving the liability without any doubt and hence the Notice is not valid. The Notice has been just issued in air and without proper examination and hence the same has to be set aside. In this regard Noticee wishes to rely on the case law – (The Special Bench of Tribunal consisting of three members) Crystic Resins (India) Pvt. Ltd., Vs CCE, 1985 (019) ELT 0285 Tri.-Del, which has made the following observations on uncertainty in the SCN and said the SCN is not valid.

"If show cause notice is not properly worded inasmuch as it does not disclose essential particulars of the charge any action based upon it should be held to be null and void."

"The utmost accuracy and certainty must be the aim of a notice of this kind, and not a shot in the dark"

9. Noticee submits that the impugned SCN has merely extracted the entire provision under Section 65(97a) of Finance Act, 1994 and alleges that service tax is liable to be paid on the 'land development charges' under the category of 'site formation' u/s. section 65(105)(zzza) of Finance Act, 1994 but fails to specify under which clause of 'Site formation' is taxable more specifically when 'Site formation' contains several clauses covering different activities. Therefore such SCN is invalid and infirmity incurable therefore requires to be quashed. Reliance is placed on United Telecoms Limited vs. CCE, Hyderabad-2011 (21) S.T.R. 234 (Tri-Bang) wherein it was held that *"Commissioner does not give a finding as to the sub-clause (i) to (vi) of 65(19) to which maintenance of accounts related if the services fell under clause (vii). Moreover, there were no such proposals in the show cause notice. We find that no tax liability can be confirmed against any person unless the same is specifically alleged in the show cause notice. We hold that the impugned demand, therefore is not legally sustainable"*

10. Noticee submits that the definition of 'taxable service' & also the 'site formation' was reproduced for easy reference:

Section 65(105)(zzza) of Finance Act, 1994: *"to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities;*

Section 65(97a) of Finance Act, 1994: *"site formation and clearance, excavation and earthmoving and demolition" includes,—*

- (i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or*
- (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,
but does not include such services provided in relation to agriculture,
irrigation, watershed development and drilling, digging, repairing,
renovating or restoring of water sources or water bodies;

Not falling under any sub-clauses of 'site formation' service:

11. The Noticee submits first sub-clause covers drilling, boring and core extraction services and in the instant case of 'land development' there was no such activities were undertaken and therefore same is not covered under this sub-clause.
12. The Noticee submits that second sub-clause covers the cases of soil stabilization and the instant case of 'land development' does not require any such type of 'soil stabilization' i.e. improving or changing the soil of surface. Therefore the not covered under second sub-clause too.
13. The Noticee submits that third sub-clause covers the cases of 'horizontal drilling' whereas 'land development' does not require such kind of drilling works hence not covered here also.
14. Similarly further sub-clause covers requires 'Land reclamation' works which involves the converting unusable/disturbed land into usable form whereas in the instant case of 'land development' land is in very well usable form before Noticee carried the development work and

development work only for laying of infrastructure as required by M/s. HUDA. Resultantly same is not covered under this sub-clause also.

15. The Noticee submits fifth sub-clause covers the cases of '*contaminated top soil stripping work*' involving the carrying out measures for preventing/correcting the soil contamination. Whereas in the instant case of 'land development' there is neither 'soil contamination' nor measures for prevention/correction. Therefore not covered under this sub-clause also.

16. The Noticee submits that last sub-clause covers the cases of 'demolition and wracking services' and the instant case of 'land development' does not require any such kind of 'demolition/wrecking' resultantly not covered under this sub-clause also.

In view of the above, it is clear that impugned case of 'land development' would not fit into any sub-clauses of 'site formation' category *qua* Section 65(105)(zzza), *ibid*. Hence demand is not sustainable.

Part of composite contract of villa construction/sale – hence not covered under the category of 'site formation':

17. Noticee further submits that taxability under 'site formation' attracts only when those specified activities were undertaken independently and not as part of any other composite work. This is because if such works are held to be taxable under the site formation service irrespective of whether carried out independently or part of composite work, then every

such construction work would involve the activity of site formation, which is separately taxed in other category. Same position was clarified by CBEC vide its Circular No. 123/5/2010-TRU, dated 24-5-2010. The relevant extract is as under:

"iv) 'site formation and clearance, excavation, earthmoving and demolition services' are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road."

In the instant case, 'land development' activity was not carried out independently and part of composite contract for carrying out the villa construction/sale. This fact was fortified from the Para 'E' of Agreement of sale (AOS). The relevant extract reads as

"the vendor in the scheme of the development of Bloomdale has planned that the prospective buyers shall eventually become the absolute owners of the identifiable land (i.e. plot of land) together with independent bungalow constructed thereon. For this purpose the vendor and the vendee are required to enter into three separate agreements, one with respect to the sale of land, second with respect to development charges on land and the third with respect to the construction of the bungalow. These agreements will be interdependent, mutually co-existing and inseparable though in the scheme of the project the vendor may execute a sale deed in favour of the vendee before commencing the construction of the bungalow." (sample copies of 'AOS' are enclosed as annexure ____).

Therefore 'land development is not taxable under the category of 'site formation'

18. Noticee further submits that judicially also it was held that carrying out the activities that may cover under the category of 'site formation' if taken as part of any composite work then same cannot be taxed under the category of 'site formation' *qua* Section 65(105)(zzza), *ibid.* few of judgments are as follows:

- a. M. Ramakrishna Reddy v. CCE & Cus, Tirupathi 2009 (13) S.T.R. 661 (Tri.-Bang.);
- b. Commissioner v. Vijay Leasing Company — 2011 (22) S.T.R. 553 (Tribunal);

Species of 'works contract' as it involves supply of materials also and not liable for service tax as it was not specified under the category of 'works contract service' *qua* Section 65(105)(zzzza) of Finance Act, 1994:

19. Noticee submits that before going into the discussion as to whether impugned activity is works contract or not, it is worthwhile to keep in the mind the fundamental principle of works contract is that it is an composite agreement for transfer of property in goods by accretion together with rendition of labour/service. And further it is well recognised naturally, lawfully and explicitly so in Central and State legislation as well that Works contract is a composite, indivisible, distinct and insular contractual arrangement, a specie distinct from a contract for mere sale of goods or one exclusively for rendition of services. And the above principles are flown from unvarying series of Apex court rulings *inter alia* the following:

- a. State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd — (1958) 9 STC 353 (SC);

- b. Gannon Dunkerley & Co. and others vs. State of Rajasthan and others (1993) 088 STC 0204;
- c. Builders Association of India v. Union of India — (1989) 2 SCC 645;
- d. Bharat Sanchar Nigam Ltd. v. Union of India — 2006 (2) S.T.R. 161 (S.C.);
- e. Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.);
- f. Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu — 2014 (34) S.T.R. 641 (S.C.)
- g. CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.);

20. Noticee submits that in view of the above principles laid down by the Apex court and invariable factual position that Noticee is incorporating the various goods namely murrum, concrete, electrical poles, electrical wiring etc., in the execution of impugned activity of 'land development' apart from exertion of labour, the impugned activity shall be treated as species of works contract.

21. Noticee further submits that it is settled law that in case of execution of works contract property in goods involved therein would get transferred through accretion. And in the instant case Noticee incorporated the goods namely murrum, concrete, electrical poles, electrical wiring etc., therefore it is clear case that Noticee transferred the property in goods to their customer while undertaking the impugned activity and

undisputedly exerted the labour for execution of impugned activity thereby satisfying the species of works contract viz., supply of goods and services/labour.

22. Noticee submits that value assessed for VAT also includes the '*land development charges*' collected which further fortifies that '*land development*' is species of works contract.

23. In continuation to the above, Noticee submits that the provisions of '*Works Contract Service*' in the Finance Act, 1994 are as follows:

a. Taxable service was defined in section 65(105)(zzzza) as "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".

b. The term Works contract is defined to explanation to the above provision as - "works contract" means a contract wherein, —

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

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

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including

related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

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

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

24. From the above it is clear that only specified activities of 'works contract' are intended to tax and not every contract of 'works contract' like therein VAT provisions. Hence in order to tax under the category of 'works contract', activity shall fall in the list of works specified therein. And the instant case of 'land development' is not falling under any of such specific works since

a. It does not involve any work of 'erection, commissioning or installation' etc., accordingly sub-clause (a) fails;

b. 'Land development' does not involve any construction of building/civil structure accordingly sub-clauses (b), (c) & (d) fails on this count;

c. Similarly sub-clause (e) also fails in the instant case as there is no execution of any turnkey projects/EPC contracts;

Therefore impugned activity is not liable under the category of 'WCS'.

25. The Noticee further submits that composite contracts can be taxed only under the category of 'Works contract service' *qua* Section 65(105)(zzzza), *ibid* and not under any other categories including 'site formation'. Reliance is placed on Hon'ble Supreme court decision in CCE v. Larsen and Turbo Ltd 2015 (39) S.T.R. 913 (S.C.). That means service element in the works contracts other than those covered under the specified category of 'Works Contract Services (WCS)' is not taxable.

26. Noticee further submits that since there is a specific category for 'works contract' but Parliament has in its wisdom not covered the works contract in relation to 'land development', the same cannot be taxed under any other category of services. In this regard Relied on Dr. Lal Path Lab Pvt. Ltd. Vs Commissioner of C. Ex., Ludhiana 2006 (004) STR 0527 Tri.-Del and same was Affirmed in 2007 (8) STR 337 (P&H.) wherein it was held that "*What is specifically kept out of a levy by the legislature cannot be subjected to tax by the revenue administration under another entry*". Therefore demand of service tax on 'land development charges' is not sustainable.

Even assuming taxable, not liable in the cases wherein land development agreement was not entered;

27. Noticee further submits that as stated in background facts, from 2012, Noticee stopped entering separate agreement for 'land development' since

land was already developed by that time and villas are in semi-constructed/finished stage (including villas not booked at that time). Accordingly, sale deed was being entered covering the both portion of land & semi-constructed villa/house and stamp duty was paid.

28. Noticee submits that impugned SCN does not dispute the above fact that sale deed was entered conveying the title of semi-finished villa/house along with land but proposes to tax component of semi-constructed component after alleging that (vide Para 3.2) *"It appears what is transferred by way of sale deed is a semi-finished construction and not merely land. However it is observed that M/s. KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi finished houses is to be arrived by deducting from sale deed value, the cost of land which is to be arrived proportionately basing on the values of identical lands."*

29. In this regard, it is submitted that semi-finished villa/house represents the construction work already done prior to booking of villa/house by the prospective buyer. The work undertaken till that time of booking villa/house is nothing but work done for self as there is no service provider and receiver. It is settled law that there is no levy of service tax on the self service and further to be a works contract, there should be a contract and any work done prior to entering of such contracts cannot be brought 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."*

30. Noticee further submits 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 villa/house 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 villa/house, 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.

31. Without prejudice to the foregoing, Noticee submits that there is no service tax levy on sale of semi-finished villa/house as the same was excluded from the definition of 'service' itself. The relevant portion of definition *qua* section 65B(44) reads as follows:

a) *an activity which constitutes merely,—*

(i) *a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*

32. Noticee submits that to be covered under the above exclusion the following ingredients shall be satisfied:

a. There should be transfer of title:

Transfer of title means "change in ownership". And in the instant case there is change in ownership from Noticee to their customer since after execution of 'sale deed' customer is the owner of "said immovable property" thereby this condition is satisfied.

b. Such transfer should be in goods or immovable property:

What constitutes immovable property was nowhere defined in the provisions of Finance Act, 1994 or rules made thereunder. It is pertinent to refer the definition given in section 3 of Transfer of property act 1882 which reads as follows:

"Immovable property" does not include standing timber, growing crops or grass"

Further section 3 of General clauses act, 1897 which reads as follows:

"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Reading of the above, undisputedly "land along with semi-finished villa/house" is immovable property thereby this condition was also met.

c. It is by way of sale, gift or other manner

In the instant case execution of 'sale deed' & payment of applicable stamp duty itself evidences that there is sale. Further it is pertinent to consider the definition given under section 54 of Transfer of property Act, 1882. In absence of definition of "sale" in the provisions of Finance Act, 1994 and relevant extract reads as follows:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. Sale how made — Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or

other intangible thing, can be made only by a registered instrument.

In the instant case also there is transfer of ownership and price was also paid (part of the price is promised to pay) and transfer was made by executing 'sale deed' which is validity registered with stamp authorities. Therefore, undoubtedly there is sale thereby this condition was also met.

d. Merely

Undoubtedly 'sale deed' was executed to transfer the title in immovable property only and such transaction (sale of immovable property) does not involve any other activity namely construction activity as the same done entering separate agreement Mis-constructed by the impugned SCN.

Therefore all the above conditions were satisfied in the instant case thereby making the transaction falling under said exclusion and hence amounts received towards 'agreement of sale' are not subjected to service tax.

33. Noticee further submits that if two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words, the discernible portion of the transaction, which constitutes a transfer of title in immovable property would be excluded from the definition of service by operation of the said exclusion clause while the service portion

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would be included in the definition of service. In the instant case, it was well discriminated the activity involved & amounts received towards

- a. Sale of "land along with semi-finished villa" ('sale deed' separately)
- b. Construction activity (by executing construction agreement)

Noticee submits that whatever the activity involved & amounts received towards construction agreement was suffered service tax and again taxing the associated transaction alleging that construction was involved is not warranted under the Finance Act, 1994 more so in case when there is clear separation/bifurcation/vivisection of activity involved & amounts received towards such associated transactions from the activity of construction.

34. Without prejudice to the foregoing, Noticee further submits even assuming 'land development' activity is liable for service tax, it humbly request to allow the benefit of paying tax @4.8% in terms of 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 - as it is specie of works contract.

35. Even assuming 'land development charges' taxable, it is submitted that for the period 01.07.2012, adopting the principles of 'Bundled service' u/s. 66F of Finance Act, 1994, same shall be construed as 'works contract' and tax shall be levied only @40% on the amount received in terms of Rule 2A of Service tax (determination of value) Rules, 2012.



In Re: Construction of common amenities involves the transfer of property and hence it is 'works contract' and correctly assessed at abated rate – there is no short payment to this extent;

36. Noticee submits that as stated in background facts, Construction agreement is being entered for the construction work to be undertaken including construction of common amenities/facilities like club house, CC roads, street lighting, landscaped gardens etc., and there is no bifurcation on the amounts towards common amenities/facilities. And Noticee is paying service tax on the amounts received towards this agreement adopting the taxable value as per Rule 2A of Service tax (determination of value) Rules, 2006. All these facts are undisputed in SCN also.

37. Construction of common amenities like club house, CC roads, street lighting, landscaped gardens etc., requires both materials/goods (Murrum/clay, cement, concrete, rocks etc.,) and also the labour exertion in executing the said construction. The Common amenities/facilities constructed would be transferred to society/association that is being formed by all owners of villa in the impugned project. As the society/association (which is in turn owned by all customers) is owner of the same, the cost incurred for the construction is being recovered from each & every customer.

38. Noticee submits that impugned SCN propose to tax 'Common amenities' at full rate on the full value alleging that (vide Para 2.5) *"Providing common amenities is not a Works Contract as there is no*

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transfer of property to the individual. Hence the abatement appears to be not available for the value of Rs.1,50,000/- per Villa (being the higher of the values admitted as M/s. KMH failed to arrive at the correct value of common amenities) and appears to be chargeable to full rate of Service Tax under other taxable services."

As seen from the above, impugned SCN propose to deny the abatement citing that transfer of property is not to individual and hence not a 'works contract'. In this regard, it is submitted that common amenities/faculties constructed are being transferred to society/association which is in turn owned by customers/individuals only and Noticee does not have any ownership over it. Further it is well settled principle that society/association formed by group of people are not different and both are one & same. That being a case, whatever the transfers made to society/association is nothing but transferred to individual customers. Hence SCN averment that property in goods is not transferred to individual customers is not correct.

39. Noticee further submits that the entire definition of 'works contract' (either before 01.07.2012 or thereafter) does not provide that transfer should to individual/customer/contractee and what all it requires only the transfer of property that may be to customer/contractee or any third person and such transfer should be leviable to VAT, all these ingredients are satisfied in the instant case *inter alia* property in goods incorporated was transferred to society/association and VAT was levied & paid also. Hence SCN averment is not correct.

40. Further 'residential complex' construction falls within the realm of 'WCS' and the expression 'residential complex' was defined u/s. 65(91a), ibid to include 'common amenities/facilities'. On conjoint reading of this, it is clear that construction of 'common amenities/facilities' also specie of 'works contract'. Therefore averment of SCN goes contrary to this and hence not valid.

In Re: Other non-taxable receipts (Corpus fund, Electricity deposit, water charges, service tax etc.) are not liable - hence shall not be included in 'taxable value':

41. Noticee submits that these receipts consists of

- a. ~~Corpus fund which is collected & totally kept in separate bank account and transferred to society/association once it s formed;~~
collection of corpus fund & keeping in separate bank account and subsequent transfer to association/society is statutory requirement;
- b. Electricity deposit collected & totally remitted/deposited with the 'electricity board' before applying electricity connection to the villa and Noticee does not retain any amount out of it; this deposit is collected & remitted as per the statutory provisions of AP Electricity Reform Act 1998 r/w rules/regulations made thereunder;
- c. Water deposit collected & totally remitted to 'Hyderabad Metropolitan Water Supply & Sewerage Board (HMWSS)' before taking the water connection. This Deposit amount also includes water consumption charges for first two months along with sewerage cess. All these

deposits are collected & paid in terms of HMWSS Act, 1989 r/w rules/regulations made thereunder;

d. Service tax collected & remitted to the Central government as per the provisions of Finance Act, 1994;

As seen from the above, all these charges collected 'other non-taxable receipts' are statutory charges/deposit and received as mere reimbursements of expenses/charges incurred/paid on behalf of customers and does not involve any provision of service. Hence same shall be excluded from the taxable value *inter alia* in terms of Rule 5(2) of Service tax (determination of value) Rules, 2006.

42. Judicially also it was held that above charges are not to be included in taxable value. Relied on ICC Reality & Others Vs CCE 2013 (32) S.T.R. 427 (Tri. - Mumbai); Karnataka Trade Promotion Organisation v. CST 2016-TIOL-1783-CESTAT-BANG; hence demand does not sustain to this extent.

In Re: Extended period of limitation is not invokable:

43. Noticee submits that impugned SCN proposed to demand service tax invoking larger period of limitation of 5 years after alleging that (Para 6) *"They have not discharged service tax on site formation service and they have not discharged service tax on works contract service by under valuing the services they have not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation*

conducted. Therefore, it appears that the assessee has intentionally suppressed the facts to evade the payment of service tax."

44. Noticee submits that suppression means not providing information which the person is legally required to state, but intentionally or deliberately not stated. As stated in factual matrix there was continuous intimation (from year 2010) regarding the compliance being made from time to time and repeated requests were made asking to confirm the understanding of Noticee. Letters were filed giving the detailed breakup of amounts collected, amounts offered to tax & not offered (excluded) to tax. At no point of time, department responded/rebutted to the above intimations/requests.

45. Noticee submits that what is believed to be not taxable/leviable as backed by their legal understanding was well put forth before the authorities in the year 2010 i.e. at the time of beginning their compliance itself and subsequently also. Thus full facts of subject SCN were voluntarily disclosed by the Noticee without any enquiry/request from the departmental authorities and they had never hidden any fact from the officers of department and subject matter of present SCN was known to the department before the beginning of SCN period itself as evident from the corresponded referred above.

46. Not objecting/responding at that time which gave vehement belief that understanding & compliance made is in accordance with the law and but now that is after expiry of nearly 5 years coming out with the present SCN with illusory & baseless allegation to invoke larger period of limitation and proposing to punish the Noticee for the failure of departmental authorities is not valid in the eyes of law. In this regard reliance is placed on Pushpam Pharmaceuticals Company Vs Collector Of C. Ex., Bombay 1995 (78) E.L.T 401 (S.C) it was held that *"suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression.*

47. Noticee submits that the extended period of limitation is not invokable in the instant case:

- a. Most of the builders/developers across the country are not at all paying service tax (especially on villas constructions) and there were serious doubts expressed on the applicability of service tax and customers are also very reluctant to reimburse citing the above practice of non-payment by other similar builders;
- b. Judicially also it was held that construction of villas are not subjected to service tax as submitted supra;

- c. There was lot of confusion on the liability of builders on the applicability of service tax and was challenged before various courts and courts also expressed different views and most of the cases in favour of tax payer. For instance, recently Hon'ble High court in case of Suresh Kumar Bansal v. UOI 2016-TIOL-1077-HC-DEL-ST held that construction contracts are not subjected to service tax.
- d. Further taxability of contracts involving immovable property was also subject matter of dispute during the subject period. There were contrary judgments of Supreme Court at such point of time and which was finally settled by larger bench of Supreme Court in the year 2014 as reported in Larsen & Toubro Ltd. v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.).
- e. The issue of classification of indivisible contracts under 'COCS'/ 'WCS' was in dispute. Courts expressed different views, referred to larger bench and finally settled by Supreme Court in the year 2015 in favour of tax payer as reported in Commissioner v. Larsen & Toubro Ltd. — 2015 (39) S.T.R. 913 (S.C.).
- f. Apart from the above difficulties, construction industry was in slump (especially in erstwhile state of Andhra Pradesh due to state bifurcation issue) and builders were facing huge financial problems/difficulties.

Despite of above challenges/doubts/confusion, Noticee voluntarily paid all service tax dues within the due date before the intervention of revenue department. There is no evasion of tax. Therefore in the above background, intension to evade or delay the payment cannot be

attributed. Further differentiation shall be made between the assessee (like Noticee) who is voluntarily complying with the law and paying all dues despite of doubts/confusion/challenges etc., and assessee who is not at all complying with the law despite knowing his liability. Giving equal punishment for errant assessee and non-errant assessee shall be best avoided. Hence in view of above factual & legal matrix, larger period of limitation is not invokable.

Interpretation is involved

48. The Noticee submits that present SCN arises due to difference of interpretation of provisions between Noticee & revenue. Further various letters were filed before department authorities, who never objected/responded on the compliance made by Noticee. In this regard it is submitted that not objecting the compliance made & taking nearly 6 months time after investigation to arrive their view/conclusion fortifies that subject matter is plausible for different interpretations and involves in complexities in the determination of taxability. Thus it is pure case of interpretational issue under which circumstances larger period of limitation cannot be invoked. In this regard reliance is placed on CCE v. Poonam Plastics Industries 2011 (271) E.L.T 12 (Guj);

49. Noticee submits that merely because Noticee chooses an interpretation beneficial to him, mala fide intension to evade payment of service tax cannot be attributed on part of the assessee accordingly larger period of

limitation is not invokable. In this regard reliance is placed on Rangsons Electronic Solutions (P) Ltd v. CCE 2014 (301) E.L.T. 696 (Tri. - Bang.) wherein it was held that *"It is a settled principle that merely because an assessee chooses an interpretation beneficial to him, there can be an allegation of suppression or misdeclaration. In view of the available facts and circumstances of the case and several decisions relied upon and cited by the learned counsel (we have not taken note of all of them since we do not feel the need), appellant cannot be found fault with for coming up with an interpretation and availing the benefit which was not available to them. Under these circumstances, we have to take a view that the order of the Commissioner limiting the demand to the normal period and not imposing the penalty was an order which rendered justice to the appellant/assessee without being unfair to the Revenue. Therefore we do not find any merit in the appeal filed by the Revenue and reject the same."*

Returns filed regularly

50. Noticee submits that they regularly paid service tax and duly filling ST-3 returns showing the all these particulars as required/permitted in the format prescribed in this behalf (Form ST-3 specified by CBEC). If the Noticee wants to suppress the fact with intent to evade the payment of taxes, they might not have disclosed the same in ST-3 returns. Further allegation of impugned SCN that Noticee has not disclosed the relevant details/information to the department is not factually correct and requires to be set aside. In this regard, Noticee wishes to rely on the following judgments wherein it has been held that if disclosure of

amounts received/charged towards impugned activity are made in ST 3 Returns, extended period of limitation cannot be invoked:

- a. Shree Shree Telecom Pvt Ltd., Vs. CCE Hyderabad [2008 (232) E.L.T. 689 (Tri. - Bang.)
- b. Sopariwala exports pvt. Ltd v. CST 2014 (36) S.T.R. 802 (Tri. - Ahmd.)
- c. Bajaj Hindusthan Ltd v. CCE 2014 (33) S.T.R. 305 (Tri. - Del.)

Matters referred to larger bench and view supported by court decisions:

51. Noticee submits that as state supra various matters involved in the issue were referred to larger bench. When the matter(s) were referred to larger bench, extender period of limitation cannot be invoked. Relied on the following:

- a. Continental Foundation Jt. Venture v. CCE, Chandigarh-I [2007 (216) E.L.T. 177 (S.C.)
- b. J.R. Construction CO. v. CCE & ST 2016 (41) S.T.R. 642 (Tri. - Del.)
- c. Megafine Pharma Pvt Ltd Vs CCE & ST 2014-TIOL-1312-CESTAT-AHM
- d. CCE v. Mapro India Ltd 2015-TIOL-2554-CESTAT-MUM

52. When the issue was disputable and at one point of time, the view of the courts was in favour of the assessee, question of invocation of extended period of limitation does not arise. Relied on CCE v. Saurashtra Cement Ltd 2016-TIOL-365-HC-AHM-CX

53. Noticee submits that long list of familiar judicial pronouncements holding impugned two grounds of non-payment of Service Tax and failure to file correct ST-3 returns by themselves totally inadequate to sustain allegation of wilful misstatement/suppression of facts. Relied on *Punj Lloyd Ltd. V. CCE & ST 2015 (40) S.T.R. 1028 (Tri. - Del.)*
54. Noticee submits that averment of SCN that, lapse would not have come to light but for the investigation of department, standing alone cannot be accepted as a ground for confirming suppression, Mis-statement or mis-declaration of facts. More so considering the fact that the very objective of conducting the Audit of records of an assessee is to ascertain the correctness of payment of duty, availment of CENVAT credit, etc., any shortcomings noticed during the course of Audit, itself cannot be reasoned that the deficiency was due to mala fide intention on the part of assessee. In this regard relied on *LANDIS + GYR LTD Vs CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata)*.
55. Noticee submits that they are under bonafide belief that compliance made by them not in accordance with the law and whatever believed to be paid was paid. It is well settled legal position that suppression of facts cannot be attributed to invoke longer period of limitation if there is bonafide belief. Same was flown from the following:
- 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.)

Other cases:

56. The Noticee submits that expression "suppression" has been used in the Section 73 of the Finance Act, 1994 accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. Relied on Continental Foundation Jt. Venture CCE, 2007 (216) E.L.T 177 (S.C)

57. Noticee submits that the show cause notice proposed demand by invocation of the extended period of limitation only on the ground that Noticee has suppressed the details to Central Excise department. In this regard it is submitted that **extended period of five years applicable only when something positive other than mere inaction or failure on the part of manufacturer/service provider is proved** - Conscious or deliberate withholding of information by manufacturer/service provider necessary to invoke larger limitation of five years. In this regard wishes to rely on CCE, Chemphar Drugs & Liniments 1989 (40) E.L.T 276 (S.C). Therefore the allegation of SCN is not legal and proper.

58. Intention to evade payment of tax is not mere failure to pay tax. It must be something more i.e. that assessee must be aware that tax was leviable/credit was inadmissible and he must act deliberately avoid such payment of tax. Evade means defeating the provision of law of paying tax and it is made more stringent by the use of word 'intent'. Where there was scope for doubt whether tax is payable or not, it is not 'intention to evade payment of tax'. reliance is placed on *Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)*

59. Mere non-payment/short payment of tax per se does not mean that Noticee has willfully contravened the provisions with the intent to evade payment of tax. in this regard reliance is placed on **Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.)** wherein it was held that *"The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the Appellant as fit for the applicability of the proviso."*

60. The Noticee submits that all the entries are recorded in books of accounts and financial statements nothing is suppressed hence the extended period of limitation is not applicable. Wishes to place reliance on LEDER FX Vs DCTO 2015-TIOL-2727-HC-MAD-CT; Jindal Vijayanagar Steel Ltd. v. Commissioner — 2005 (192) E.L.T. 415 (Tri-bang);

In Re: Benefit of cum-tax shall be given

61. Noticee submits that in case demand stands confirmed, same shall be re-quantified after allowing the benefit of cum-tax u/s. 67(2) of Act, ibid since Noticee has not collected service tax from the buyer to the extent of alleged short/non-payment of service tax.

62. The Noticee submits that in light of the statutory backup as mentioned above and cases where it was held that when no service tax is collected from the customers the assessee shall be given the benefit of paying service tax on cum-tax basis

- a. P. Jani & Co. vs. CST 2010 (020) STR 0701 (Tri.-Ahmd).
- b. Municipal Corporation of Delhi vs CST, Delhi 2009 (016) STR 0654
Tri.-Del
- c. Omega Financial Services Vs CCE, Cochin 2011 (24) S.T.R 590
- d. BSNL Vs CCE, Jaipur 2011 (24) S.T.R 435 (Tri-Del).



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

63. Without prejudice to the foregoing, Noticee submits that when service tax is paid on time, the question of interest & also penalties does not arise.
64. Without prejudice to the foregoing, Noticee submits that all the grounds taken for *"In Re: Extended period of limitation is not invokable"* above is equally applicable for penalty as well.
65. As submitted supra, there is no intention to evasion of tax and what are all believed to be payable was paid (Rs.19,00,736/-) within time, which is undisputed. Hence no penalty shall be imposed to that extent.
66. The Noticee submits that the impugned show cause notice had not discharged burden of proof regarding the imposition of the penalty under Section 78 of the Finance Act, 1994. In this regard wishes to rely on the judgment in the case of Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) it was held that "It is unjustified in absence of discussion on fundamental conditions for imposition of penalty under Section 78 of Finance Act, 1994".
67. Noticee submits that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner

OFFICE OF THE PRINCIPAL COMMISSIONER OF
CUSTOMS AND CENTRAL EXCISE
HYDERABAD-I COMMISSIONERATE
L.B. STADIUM ROAD :: BASHEERBAGH :: HYDERABAD 500 004

O.R.No. 44/2016 -Hyd-I Adjn (S.T.)

DATE : 28.12.2016

TIME : Hours

NAME OF THE PARTY : M/s. Kadakia & Modi Housing

SIGNATURE

REPRESENTED BY : (1) Venkata Prasad, CA
(8978114241)
(2)

(1) *[Signature]* 28/12/16
(2)

RECORD OF PERSONAL HEARING

representative
Sri Venkata prasad, CA, of the Company
has appeared for PH. He has submitted the
authorisation along with their written submissions
dt: 28.12.2016. CA Sri Venkata prasad
re-iterated the submissions made in the
above said letter. He further submitted that
amount Rs 1900736/- has been paid by them
before issue of the notice, hence he requests
the same may be considered while imposing
the penalty.

[Signature]
28/12/16

Before me
[Signature]
28/12/16

Supdt (IPR)
For n/a



O.R.No.99/2016-Adjn.(ST) (Commr.)
HQPOR No. 10/2016-ST-AE-VIII

ANNEXURE-IX

सेवा कर प्रधान आयुक्त का कार्यालय
OFFICE OF THE PRINCIPAL COMMISSIONER OF SERVICE TAX
सेवा कर आयुक्तालय :: SERVICE TAX COMMISSIONERATE
11-5-423/1/A:: सीताराम प्रसाद टावर:: रेड हिलस:: हैदराबाद - 500004
11-5-423/1/A::SITARAM PRASAD TOWER::RED HILLS::
HYDERABAD-500004

O.R.No.99/2016-Adjn.(ST) (Commr.)
HQPOR No. 10/2016-ST-AE-VIII

Date:22.04.2016

SHOW CAUSE NOTICE

Sub: Service Tax - Non -payment of Service Tax on Works Contract
Service by M/s. Kadakia & Modi Housing - Issue of Show Cause
Notice for the period from October 2010 to March 2015 - Reg.

M/s. Kadakia & Modi Housing having their Registered office at 5-4-187/3 & 4, II Floor Soham Mansion, M.G.Road, Secunderabad (here-in-after referred to as M/s KMH or the "assessee") are engaged in the construction of Villas and are registered with Service Tax Department under STC NO AAHFK8714ASD001 for "Construction of Residential Complex service" and "Works Contract Service"

2. Intelligence received indicated that M/s KMH are Constructing Villas under the project titled "Bloomsdale", and are not discharging Service Tax properly. Documents were called from M/s KMH under Summons and a statement was recorded from the authorized signatory of the Company on 16/11/2015 and 01/02/2016.

2.1 Sri M.Jaya Prakash authorized signatory of the assessee in his Statement dated 16/11/2015 and 01/02/2016, (Enclosed as E.6) inter-alia submitted that

- M/s KMH are involved in the activity of Construction of Residential Villas
- so far there is only one project of Residential Villas known as "Bloomsdale" located at Shamirpet Village;
- they acquired the land by outright purchase and the project consists of 72 Villas out of which 31 Villas were sold upto 2014-15;
- the mode of sale is that they enter into agreement of sale, then execute sale deed (for land Value) and agreement of Construction; that they are first appropriating the amounts received from the Customer towards the sale deed thereafter they appropriate the amounts towards agreement of construction. Amounts received from third parties like Registration

Charges, VAT, Service Tax, Electricity deposit, maintenance charges & excluded for the purpose of estimating service tax liability;

- that they are paying Service Tax under the category of "Works Contract Service" against Agreement of Construction Value only.
- That because of ambiguity on applicability of service tax before the amendment to the act in 2012 they were given to understand that service tax is not applicable for the activity undertaken by them.
- that they are willing to pay the amounts collected under Works Contract Service

2.2 Examination of the documents revealed that M/s KMH have not filed the Statutory ST-3 Returns and not paid any service tax for the period October 2010 to March 2011. For the year 2011-12 they have filed the ST-3 returns and self assessed their service under Construction of Residential Complex service for the period upto September 2011; and from October 2011 onwards they changed the classification of the service and are discharging duty under Works Contract Service and they filed the returns for the period 2012-13 to 2014-15. (**Enclosed as E.3**)

2.3 Examination of the Agreement of Sales in respect of customers mentioned in **Enclosure WS-1** to this notice indicates that M/s KMH are collecting the agreed value under the following three separate heads

A Towards Sale of land

B Towards development Charges of land for laying of roads, drains parks etc

C Towards Cost of Construction , water and electricity connection and for other amenities.

2.3.1 The following consideration details in Condition number 1 of the agreement dated 12.11.2009 (**Enclosure E.1**) entered with Major Achyut Ranjan confirms the above mode of receipt of payments

Sl. No.	Description	Amount
A.	Towards sale of land	Rs. 1,85,000/-
B.	Towards development charges of land for laying of roads, drains, parks, etc.	Rs. 11,95,000/-
C.	Total towards land cost (A+B)	Rs. 13,80,000/-
D.	Towards cost of construction, water & electricity connection and for other amenities.	Rs. 20,70,000/-
E.	Total sale consideration (C+D)	Rs. 34,50,000/-

2.3.2 As per Para 13 of agreement of Sale date 12.11.2009 entered with Major Achyut Ranjan reads as under

"13 The vendee shall enter into a separate agreement with the vendor for

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construction of the bungalow as per the specifications and other terms and conditions agreed upon. The vendee shall also enter into separate agreement with the Vendor for payment of development charges on land"

2.3.3 Identical conditions forms part of the all other agreement of Sales in respect of Customers mentioned in Enclosure WS-1. Accordingly M/s KMH are entering into separate agreement for development of land and for construction of Villas. M/s KMH vide their letter dated 09.02.2016 informed that in the Statement of receipts submitted by them, under Column: "Receipts towards agreement of Construction include the receipt towards the land development.

2.3.4 However examination of the receipts vis-à-vis the amounts indicated in the Agreement of sales showed that the cost of Land development is not included in the Agreement of Construction in some cases and partially included in some cases. The Cost of land development in some cases is included in the amount indicated in the Sale deed (Cost of land value) and exemption is claimed in this respect

2.3.5 The activity of land development involves preparing the site suitable for construction, laying of roads, laying of drainage lines water pipes etc thus it is a separate activity different from construction of Villas

2.3.6 Upto the period 30.06.2012 As per Section 65 (97a) of the Finance Act 1994 Site formation and clearance ,excavation and earth moving and demolition 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

2.3.7 Upto the period 30.06.2012 As per Section 65(105) (zzza) of 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 earthmoving and demolition and such other similar activities

2.3.8 Thus the activity of development of land appears to fall under the definition of site formation as per Section 65(97a) ibid and the development

charges collected appear to be taxable to service tax as per Section 65 (105) (zzza)ibid. and with effect from 1.7.2012 it appears to be a service under Section 65B (44) of the Act and taxable under the provisions of 65B (51) read with Section 66(B) of the Act. Further the activity does not fall under the negative list mentioned in Section 66 D of the Act. Thus the activity of land development appears to be chargeable to service tax without any abatement.

2.4 Upto the period 30.06.2012 As per Section 65 (105) (zzzza) of 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, 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
 - (f) commissioning (EPC) projects; .

From 01.07.2012 onwards, Service portion of Works Contract service is a "**declared service**" under Section 66E(h) of Finance Act as amended.

2.4.1 After 01.07.2012, as per Section 66B of Finance Act 1994 as amended, there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

2.4.2 As per Sec 65B(34) of Finance Act 1994, "negative list" means the services which are listed in section 66D;

2.4.3 As per Sec 65B(51) of Finance Act 1994, "taxable service" means any service on which service tax is leviable under section 66B;

2.4.4 As per Sec 65B (44) of Finance Act 1994 "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) a transaction in money or actionable claim;

(b) a provision of service by an Employee to the Employer in the course of or in relation to his Employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

2.4.5 As per Section 68 of the Finance Act 1994, every person providing taxable service to any person shall pay service tax at the rate specified in section 66 (upto 30.06.2012) and Section 66B (from 01.07.2012 onwards) in such manner and within such period as may be prescribed.

2.4.6 Section 66D specifies the Negative List of services & Exemption Notification No. 28/2012 dated 20.06.2012 lists the exempted taxable services. "Works Contract Service" does not figure in the negative list or in the said exemption Notification.

2.4.7 As detailed above the M/s KMH are entering into a Separate agreement of construction with his customers and the activity appears to be taxable under Works Contract service even during the period from October 2010 to September 2011 during which M/s KMH appears to have erroneously classified the service under construction of Residential Complex Service. The fact that M/s KMH are discharging VAT under Works Contract and are assessing the service under Works Contract confirms the nature of the service that it is "Works Contract Service" Only.

2.5 As mentioned in Para 2.3 above the cost of construction includes the cost providing common amenities also. Sri Jaya Prakash in his Statement dated 01/02/2016 (Enclosure E.6) in response to Question No 3 submitted that the cost of providing common amenities is between one to one and half lakh rupees and the cost forms a part and parcel of Cost of Construction and they are discharging Service tax for the said amount under works contract providing common amenities is not a Works Contract as there is no transfer of property to the individual. Hence the abatement appears to be not available

for the value of Rs 1,50,000/- per Villa (being the higher of the value admitted as M/s KMH failed to arrive at the correct value of common amenities) and appears to be chargeable to full rate of Service Tax under other taxable services

2.6 In view of the foregoing M/s KMH appears to be liable to discharge charge service tax for Cost of land development shown in agreement of sales under "Site formation Service". They appear to be liable to service tax on the full value of Common amenities with out any abatement at full rate. They appear to be liable to Service Tax under "Works Contract Service" in respect of the value of construction shown in agreement of sales excluding the value of Common amenities. The cost of land of shown in agreement of sales only appears to be exempt from service tax.

2.7 Accordingly the service tax liability is arrived villa wise and detailed in **Enclosure WS-3** enclosed to this notice. Further the villa wise Year wise and Service wise liability is detailed in **Enclosure WS-4** to this notice

3 Agreement of Sales in respect of customers mentioned in **Enclosure WS-2** to this notice indicates that the assessee is collecting the agreed value under the following two heads only.

A Towards Sale of land

B Towards Cost of Construction , water and electricity connection and for other amenities.

The consideration details in Condition Number 1 of the Agreement of Sale dated 20.07.2012 entered with Sri Abdul Rahim and another confirms the above mode of receipt of payment.

Sl. No.	Description	Amount
A.	Towards sale of land	Rs. 18,00,000/-
B.	Towards cost of construction, water & electricity connection and for other amenities.	Rs. 26,83,000/-
C.	Total sale consideration (A+B)	Rs. 44,83,000/-

M/s KMH are not entering into any land development agreement in respect of these customers. In his Statement dated 01/02/2016, Sri M.Jaya Prakash authorized signatory of the Company in response to question number 4 why there is no separate agreement for development of land in respect of some customers , submitted that these booking were done after development of the land, that is why there is no separate agreements for land development charges in respect of them.

3.1 Condition No 1 of the sale deed dated 10.09.2012 entered with Sri

A179

Abdul Rahim and another (Enclosure E.2) indicates the following details

1. The Vendor do hereby convey, transfer and sell the Plot No. 9, admeasuring 183 sq. yds., along with semi-finished construction having a total built-up area of 1349 sq. ft., forming part of Sy. No.1139 situated at Shamirpet Village, Shamirpet Mandal, Ranga Reddy District, which is herein after referred to as the Scheduled Property and more particularly described in the schedule and the plan annexed to this Sale Deed in favour of the Vendee for a consideration of Rs.18,00,000/- (Rupees Eighteen Lakhs Only) financed by HDFC Ltd., Hyderabad. The Vendor hereby admit and acknowledge the receipt of the said consideration in the following manner: 3.1.1

Further Annexure 1-A of the above cited sale deed dated 10.09.2012 indicates the following details

ANNEXURE-1-A

1. Description of the Building : ALL THAT PIECE AND PARCEL OF SEMI-FINISHED HOUSE on bearing Plot No. 09 in the project known as "BLOOMDALE" forming part of Sy. No. 1139 of Shamirpet Village, Shamirpet Mandal, Ranga Reddy District.
 - (a) Nature of the roof : R. C. C. (G+1)
 - (b) Type of Structure : Framed Structure
2. Age of the Building : Under Construction

3.1.2 Identical details are incorporated in all other Sale deeds in respect of Customers mentioned in Enclosure WS-2 to this notice.

3.2 In view of the above facts it appears what is transferred by way of sale deed is a semi- finished construction and not merely land. However it is observed that M/s KMH have erroneously claimed exemption for the entire value indicated in the sale deed. The value cost of construction of these semi finished houses is to be arrived by deducting from sale deed value , the cost of land which is to be arrived proportionately basing on the values of identical lands indicated in Enclosure WS-1.

3.3 As mentioned in Para 3 above the cost of construction includes the cost providing common amenities also. The cost of common amenities have to be arrived at as detailed in Para 2.5 above and appears to be chargeable to full rates of Service Tax.

3.4 In view of the foregoing, In respect of Customers mentioned in Enclosure WS-2, M/s KMH appears to be liable to discharge service tax for Cost of construction in respect of value of semi finished houses shown in the Sale deed " and value shown in agreement of Construction, under Works Contract Service. They appear to be liable to service tax on the full value of Common amenities with out any abatement at full rate. The cost of land arrived proportionately based on identical lands of customers mentioned in Enclosure WS-1 appears to be exempt from service tax.

3.5 Accordingly the service tax liability is arrived villa wise and detailed in Annexure C enclosed to this notice. Further the villa wise Year wise and Service wise liability is detailed in **Enclosure WS-3 & WS-4** to this notice.

3.6 The total service tax payable for both **Enclosure WS-1** and **Enclosure WS-2** customers together works out to Rs 14,35,330/- in respect of site formation service, Rs 40,80,581 in respect of works contract service, Rs 7,01,784/- in respect of other taxable services totaling to Rs 62,17,785/- M/s KMH have paid an amount of Rs 19,00,736/- during the period from October 2010 to March 2015 and the differential amount payable works out to Rs 43,17,049/- (Details as per **Enclosure WS-5** to this notice) .

4 Service Tax under Works Contract Service has been arrived @ 4.12% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued vide Notification No.32/2007-ST dated 22.5.2007 for the period 01.10.2010 to 31.03.2011 as the value of goods and materials consumed in the project could not be arrived as provided under Rule 2A and 3 of the Service Tax (Determination of Value) Rules, 2007.

4.1 Service Tax under Works Contract has been arrived @ 40% of the consideration received for rendering the services for the period from 01.04.2012 to 31.03.2015 as per the provisions of Section 2A[(ii)(A)] of the Service Tax (Determination of Value) Rules, 2007 as the value of the goods and materials consumed in the project could not be provided by the declarant.

5 Contraventions

By their acts of omission and commission as above, it thus appears that M/s. KMH have contravened the various provisions of Finance Act, 1994 and the Service Tax Rules, 1994, with an intent to evade payment of Service Tax as follows

5.1 **Section 73A(1)** of the Finance Act 1994 (hereinafter referred to as the Act) in as much as they have not paid the service tax collected from the customers completely.

5.2 **Section 65A(2)(a)** of the Finance Act, 1994 inasmuch as they have not classified their services of construction of villas under "Works Contract service" during the period from October 2010 to September 2011" under Section 65 (105) (zzzza) and not classified the service of land development under Site formation Service under Section 65 (105)(zzza) from October 2010 to 30.06.2012.

5.3 **Section 67** of the Finance Act 1994 read with Rule 2A of the Service Tax (Determination of Value) Rules, 2006, inasmuch as they have

not assessed correct values and not paid proper service tax on amounts received pertaining to the "Works Contract Service" during the period October 2010 to March 2015 and on site formation service from October 2010.

5.4 Section 68 (1) of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994 inasmuch as they had not paid appropriate Service Tax under "Works Contract Service", "Site formation Service and Other taxable service on the considerations received for the services rendered.

5.5 Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 inasmuch as they have not filed the statutory Returns under "Works Contract Service" during the period October 2010 to March 2012, And under Site formation Service from October 2010 and not assessing the taxable values correctly,

6 Justification for extended period of Limitation

M/s Kadakia & Modi Housing have been rendering taxable services under the category of "Works Contract Services" and site formation service however they have not paid the of service tax charged and collected from the customers to the account of the Central Government properly during the period from October 2010 to March 2015 They have not discharged service tax on site formation service and they have not discharged service tax on works contract service by undervaluing the services they have not discharged service tax on the total value of common amenities. These facts have been suppressed from the Department and would not have come to its notice but for the investigation conducted. Therefore, it appears that the assessee has intentionally suppressed the facts to evade the payment of service tax. Hence, it appears that the period of limitation under proviso to Section 73 (1) is invokable to recover the short paid/not paid service tax along with interest under Section 75 of the Finance Act, 1994. The assessee appears to be liable for penalty under Section 78 of the Finance Act, 1994 for suppression of facts, with an intent to evade payment of Service Tax

7 In view of the above, M/s. Kadakia & Modi Housing, are hereby required to show cause to the Commissioner of Service Tax, Service Tax Commissionerate, 11-5-423/1/A, I st Floor Sitaram Prasad Towers Red Hills Hyderabad 4, within 30 (Thirty) days from the date of receipt of this notice as to why:

(i) An amount of Rs. 14,35,330 /- (Rupees Fourteen lakhs thirty five thousand three hundred thirty Only)(including all cesses) being the service tax payable on Site formation Service (as per Enclosure WS-5 read with WS-3 & WS-4 to this notice) during the period October 2010 to March 2015 should

not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(ii) An amount of Rs. 40,80,581 /- (Rupees Forty lakhs eighty thousand five hundred and eighty one Only)(including all cesses) being the service tax payable on Works Contract Service (as per **Enclosure WS-5 read with WS-3 & WS-4** to this notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(iii) An amount of Rs. 7,01,874 /- (Rupees seven lakhs one thousand eight hundred and seventy four Only) (including all cesses) being the service tax payable on other taxable Services (as per **Enclosure WS-5 read with WS-3 & WS-4** to this notice) during the period October 2010 to March 2015 should not be demanded from them, under proviso to Section 73 (1) of the Finance Act, 1994;

(iv) an amount of Rs 19,00,736/- (Nineteen lakhs seven hundred and thirty six only) paid towards service tax (as per **Enclosure WS-5**) Should not be appropriated towards the service tax demanded at Sl No (i) to (iii) above

(v) Interest as applicable, on an amount at Sl.no (i) to (iii) above should not be paid by them under Section 75 of the Finance Act, 1994;

(vi) Penalty should not be imposed on the amount at Sl. No. (i) to (iii) above under Section 78 of the Finance Act, 1994 for contraventions cited supra;

(vii) Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for delayed Registration.

8 M/s.Kadakia & Modi Housing, Secunderabad are also required to produce all the evidence upon which they intend to rely in their defense while showing the cause. 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 and if the noticee does not appear for the personal hearing on the appointed day, then it will be presumed that they do not have anything to state in their defense and the case will be decided on merits on the basis of evidence available on record.

9. This notice is issued without prejudice to any other action that has been or may be taken against the noticee under this Act or under any other law for the time being in force in India.

10. Reliance for issue of this notice is placed on the following documents:
- (i) Agreement of Sale dated 12.11.2009 entered with Major Achyut Ranjan (Enclosure E.1 Pages 38to45)
 - (ii) Sale deed dated 10.09.2012 entered with Sri Abdul Rahim (Enclosure E.2 Pages 46 to 50)
 - (iii) ST-3 returns filed for the period 2011-12 to 2014-15 (Enclosure E.3 No of Pages 51 to 121)
 - (iv) Copies of Agreement of Sales, Sale deeds Agreement of Land Development Charges, Agreement of Construction provided vide letter dated 05.10.2015 submitted on 27/10/2015 (Enclosure E.4 No of Pages 122 to 765)
 - (v) Statement of receipts date wise and villa wise submitted on 01.02.2016 (Enclosure E.5 Pages 766 to 780)
 - (vi) Statements dated 16.11.2015 and 01.02.2016 of Sri M.Jaya Prakash authorized signatory of M/s KMH (Enclosure E.6 Pages 781 to 785)

(D.PURUSHOTAM)
COMMISSIONER

To

M/s. Kadakia & Modi Housing,
5-4-187/3&4 II Floor, Soham Mansion,
M.G Road, Secunderabad 500 003

(Through the Superintendent of Service Tax AE (Group VIII), Service Tax Commissionerate, Hyderabad with a direction to submit dated Acknowledgement in token of receipt of SCN from the Assessee.) & By
RPAD/SPEED POST

Copy to :

- 1) The Asst Commissioner of Service Tax Division III, Service Tax Commissionerate , Hyderabad.
- 2) The Superintendent, Service Tax (Adjudication) Service Tax Commissionerate , Hyderabad along with a copy of relied upon documents.
- 3) The Superintendent, Service Tax Range III A Service Tax Commissionerate , Hyderabad.
- 4) The Superintendent, Service Tax, Anti-Evasion(Gr-VIII), Service Tax Commissionerate , Hyderabad

Attested

T.V.S.R. PRASAD
Superintendent
Central Tax & Customs
Secunderabad GST Commissionerate
Hyderabad



By Speed Post

ON INDIA GOVERNMENT SERVICE

To,

M/s. Kadakia & Mod. Housing,
S-4-187/3 & 4, 2nd Floor,
Soham mansion, M.G. Road,
Secunderabad - 500003



From :
Office of the Commissioner of
Central Tax & Central Excise
Secunderabad GST Commissionerate
GST Bhavan, Basheerbagh, Hyderabad - 500 004.

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