प्रधान आयुक्त का कार्यालय,
Office of the Principal Commissioner,
केंद्रीय जीसटी अहमदाबाद दक्षिण आयुक्तालय
Central GST , Commissionerate- Ahmedabad South,
अपराध और अधिनिर्णय खंड, छठी मंजिल, अम्बावाड़ी GST ,
भवन,अहमदाबाद ३८००१५.
6th Floor,O&A Section,GST Bhavan, Ambawadi 380015

DIN-20220364WS000021212D

निबन्धित पावती डाक द्वारा/ By REGISTERED POST A.D.
फा./सं.F.No. STC/4-43/Shantigram/O&A/2020-21

आदेश की तारीख/Date of Order : 22-03-2022

जारी करने की तारीख/Date of Issue:22-03-2022

द्वारा पारित/Passed by:- सुनील कुमार सिंह प्रधान ,आयुक्त
SUNIL KUMAR SINGH, PRINCIPAL COMMISSIONER

मूल आदेश संख्या / Order-In-Original No.: AHM-EXCUS-001-COM-020-21-22 Dated 22-03-2022.

1. जिस व्यक्ति उसे व्यक्तिगत प्रयोग के लिए ,भेजी जाती है को यह प्रति (यों)निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्कउत्पाद , अ ,शुल्क एवं सेवाकर अपीलीय न्यायाधिकरणहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,सीमा शुल्क ,O-20, मेघाणीनगर 016 380-अहमदाबाद ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड ,को सम्बोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

3. उक्त अपील प्रारुप सं .एस .टी.-5 दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पद शुल्क (अपील) 2001 ,नियमावलीके नियम में विनिर्दिष्ट व्यक्त (2) के उप नियम 3ियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियों में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई होउसकी भी उतनी , । अपील से सम्बंधित सभी (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए) ही प्रतियाँ संलग्न की जाएँ दस्तावेज भी चार प्रतियाँ मेंo अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. S.T-5. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

.4 अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दा ,खिल की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी भी उतनी ही प्रतियाँ संलगन की जाएंगी , ।(उनमें से कम से कम एक प्रमाणित प्रति होगी)

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

.5 अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

.6 अधिनियम की धारा वहां ,बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है 35 सहायक रजिस्ट्रार के नाम पर रेखांकित के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. इस आदेश के विरूद्ध सीमा शुल्क उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण में शुल्क के , 7.5% जहां शुल्क अथवा शुल्क एवं जुरमाना का विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बारेमे विवाद है उसका भुकतान करके अपील की जा शकती है।

An appeal against this order shall lie before the Tribunal 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".

8. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूचीके अंतर्गत निर्धारित किए अनुसार संलग्न 6 मद ,1- पया का न्यायालय शुल्क टिकट लगा होना चाहिए।रू 1.00 किए गए आदेश की प्रति पर

The copy of this order attached therein should bear a court fee stamp of Rs. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

9. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।
Appeal should also bear a court fee stamp of Rs. 4.00.

विषय: -

Sub : Show Cause Notice No. SCN No.TECH/72/2020-TECH and LEGAL-O/O COMMR-CGST-ADT-AHMEDABAD dated 22.12.2020 issued to M/s Shantigram Estate Management Private Limited, Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad-380009.

BREIF FACTS OF THE CASE

M/s Shantigram Estate Management Private Limited, Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad-380009 ('assessee') is engaged in providing Works Contract Service, Business Auxiliary Service, Business Support Service, Construction of Commercial Complex Service, Renting of Immovable Property Service and is also paying Service Tax on Legal Consultancy Service as a recipient. The assessee is holding a Service Tax Registration No AAFCA6866LST001.

2. The records maintained by the assessee were audited for the period from April, 2015 to June 2017 by the Officers of the Audit Commissionerate, Ahmedabad. Final Audit Report No CE/ST-170/2020-21 dated 18.9.2020 was issued (RUD 1). The unsettled paras are discussed as under:

Revenue Para 1: Short payment of Service Tax on account of wrong classification of Service under Works Contract Service instead of construction of Residential Complex Service

3. On verification of records, it was noticed that the assessee was engaged in the construction of residential villas. From their ST3 returns, it was observed that they had discharged service tax as Works Contract Services in respect of the construction of the residential villas.

4. For the purpose of ascertaining the actual nature of services, the agreements provided by the assessee, one 'Agreement to Sale' dated 14.7.2014 (RUD 2) and another 'Sale Deed' dated 7.2.2017, entered by the assessee with Ms Achla Dipak Shah for Villa No C-059 ('buyer') (RUD 3) were analysed.

5. On scrutiny of the "Sale Deed" for Villa No C-059, it was seen that the land on which the villa was constructed belonged to the assessee. This is evident from Clause A of the sale deed which is reproduced below:

> *"A. SEMPL is the absolute owner and is seized and possessed of and otherwise well and sufficiently entitled as the owner of all those pieces and parcels of lands bearing Block No. 387, 388, 392, 393, 397 situate lying and being at Village Dantali, Taluka – District Gandhinagar and land bearing Block No. 387, 388 and 389 situated lying and being at Village Jaspur, Taluka – Kalol, District Gandhinagar admeasuring about 136,425 sq. mtrs. or thereabouts (hereinafter referred to as the "said Lands"), more particularly described in the First Schedule hereunder written."*

6. It appeared that the assessee was discharging service tax under 'Works Contract Services' by excluding the land value from the taxable value of services provided to their customers.

7. A clarification was sought on 1.7.2020 (RUD 4) from the assessee on the determination of land value and the corresponding payment of service tax inclusive of the land value. A final observation was also conveyed on 19.8.2020 (RUD 4). The assessee under their letter dated 7.9.2020 (RUD 5) have contended that the price at which the land/constructions were sold by them to various customers depended on a variety of commercial and other considerations/factors. Therefore, the question of determination of value following a blanket formula of 30% was not correct.

8. It appeared that the assessee was not able to explain the basis for determination of the value of land. Since the land belongs to the assessee and the entire consideration inclusive of land has been retained by the assessee, it appeared that the bifurcation of the consideration into land and construction was incorrectly made. It appeared that the assessee have not given any basis for arriving at the value of the land.

9. The Agreement to Sale dated 14.7.2014, made between the assessee and the buyer was analysed. The first and the foremost thing emanating from the 'Agreement for Sale' is that the assessee has promoted a residential project consisting residential Units (villas). It was seen that they had put on offer the residential units proposed to be constructed by them with an intention to sell the same. The same is evident from the Clause "C" of the Agreement to Sale which reads as below:

> *"SEMPL, as part of Township, is developing a scheme of residential villas, named as "The North Park" on the lands at Village Jaspur/ Dantali, Taluka-Gandhinagar, Kalol, District Gandhinagar"*

10. In response to above said offer, the buyers have expressed their willingness to purchase the residential Unit. The buyers were given the pre-decided plans and specifications of the said project, design and specifications for the construction of the residential bungalows, which has been accepted by the buyer. The relevant promises offered and accepted by either of the parties are listed under:

- *Para E of the agreement indicates that the buyer has desired to purchase the Villa as described in Schedule I of the agreement*
- *Para 2.4 of the agreement clearly indicates that the buyer shall have no right to claim partition of the common areas and facilities. It being agreed and declared by the buyer that the common area and facilities provided in the scheme shall be used by sharing with other occupants/ allotees of other units in scheme. In other words, his interest in the project shall be impartible and the possession of land cannot be demanded even if the buyer has paid the consideration towards land.*
- *Para 3.1 of the agreement specifies that the seller has agreed to allot to the buyer the said Villa for a total consideration of Rs. 2,60,45,825/-*
- *Para 5.2 of the agreement provides that the buyer will not be allowed to alter any portion of the villa that may change its external appearance without due authorization from the assessee. This is another indication that the buyer has no rights or say whatsoever in the design or structure of the construction to be carried out.*
- *Para 5.3 indicates that the assessee is empowered to carry out variations, modifications or alterations as may be considered necessary. The buyer is not vested with this right of change in the specifications of the construction.*
- *Para 7.11 of the agreement again indicates that the buyer shall become the owner of the said villa only on completion of various conditions, including payment of entire sale consideration, as mentioned in para 7.10. This is another indication that there is no vivisecting the unit and even if the land value has been given to the assessee and the value of construction is not given, the right and title of the land will not flow to the buyer. In other words, the agreement is not solely for the purpose of carrying out construction but is rather an agreement for sale of residential unit as has been rightly titled as 'Agreement for Sale'.*
- *Para 8 of the agreement indicates that in the event of failure of payment of any part of the amounts due and payable by the buyer, the assessee shall be entitled to resume possession of the said Residential Unit. In other words there is no vivisecting the unit and even if the land value has been given to the assessee and the value of construction is not given, the right and title of the land will not flow to the buyer. In other words, the agreement is not solely for the purpose of carrying out construction but is rather an agreement for sale of residential unit as has been rightly titled as 'Agreement for Sale'*

11. It appeared from the above clauses of the agreement that the contract has not been awarded by the buyer to the assessee for the purpose of carrying out construction. Had it been a contract for the purpose of carrying out construction, the buyer would have a major say and right in the manner and design in which the construction work is required to be carried out. It appeared that this aspect is completely absent in the entire agreement and the buyer does not hold the right to get the construction carried out as per his/her wish. Rather, the construction would be strictly carried out as per the pre-fixed designs of the assessee. Further, it is pertinent to note that the residential scheme developed by the assessee has common amenities like landscape gardens, lakeside promenade etc. The details mentioned on their website (www.adanirealty.com) for the

North Park Residential Villas are as under:

- *Golf course view from select few Villas*
- *Piped cooking gas*
- *Gymnasium*
- *Outdoor sitting area*
- *Private elevator in select few Villas*
- *Dedicated Car Parking*
- *Pooja room*
- *Separate Servant's quarter*
- *Private swimming pool in select few Villas*
- *Kids play areas*
- *Amphitheatre*
- *Walkway*
- *Party Lawn*
- *Water Features*
- *Yoga deck*
- *Landscaped Gardens*
- *Specious decks & terraces*
- *Basement room for Multi-purpose use*

12. The details mentioned on their brochure (RUD 10) provided by them are as under:

> *"The North Park at Shantigram is an exclusive enclave of uber-luxurious villas designed to be the epitome of aesthetically designed living spaces. Spread over 56 acres, this villa community will have a total of 261 villas in three different configurations – 6 BHKK, 5 BHK and 4 BHK Villas. Designed in two architectural styles – the Classical Style and the Modern style, villas in both the styles will have two variations to choose from. All villas are attended by expansive lawns and trees on all sides and graveled driveways to the garages. Each villa is crafted to appeal to the connoisseur of architecture in you".*

13. From the above, it appeared that the buyer did not hold the right to get the construction carried out as per his/her wish, rather the construction would be strictly carried out as per the designs of the assessee.

14. As per the provisions of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 ('Valuation Rules'), the value of the service portion in the execution of works contracts service can be determined in the following manner:

i. Actual value of service arrived at by reducing the value of land and goods from the gross amount of works contract or
ii. Gross amount charges minus abatement

15. It appeared that the assessee, while discharging the service tax, had adopted both the clauses. For the purpose of excluding the land value, clause (i) was adopted and abatement was taken under clause (ii) so as to exclude the value of property in goods transferred. It appeared that the land portion also belongs to the assessee and they have not been able to provide the basis for arriving at the value of the land. It appeared from the above that the activity carried out by the assessee is not covered under the ambit of Works Contract Service and the proper category of the services would be Construction of Residential complex, as declared under the provisions of Section 66E(b) of the Finance Act, 1944 ('Act'). The relevant text is as under:

> *"66E. The following shall constitute declared services, namely:-*
>
> *(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-*

certificate by the competent authority"

16. It appeared from the definition that the inclusive portion includes a complex or building intended for sale to a buyer and therefore, it appeared that the activity undertaken by the assessee would fall within the ambit of Construction of Residential complex services, as envisaged under the provisions of Section 66E(b) of the Act. It appeared that the wrong classification has resulted into short payment of service tax due to exceess availment of abatement under the works contract service. The assessee have paid service tax by excluding the cost of land and then availing the abatement @ 60% adv. whereas the abatement applicable under the residential complex services is only 70% adv, inclusive of the land value. The short payment of service tax for the financial year 2015-16 to June 2017 is tabulated below:

Table I (Rs in actuals)

Particulars/ Year		2015-16	2016-17	2017-18 (upto Jun-17)	Total
Value of Land	A	1467,50,462	1698,89,560	1067,91,487	4234,31,509
Constructio n of Framework	B	1017,02,895	869,27,070	1847,05,008	3733,34,973
Balance Work/ Finishing work	C	-	-	-	-
Total Construction income	D= A+ B+ C	2484,53,357	2568,16,630	2914,96,495	7967,66,482
Abatement @ 70%	E=D* 70 %	1739,17,350	1797,71,641	2040,47,547	5577,36,537
Net Taxable Value	F= D-E	745,36,007	770,44,989	874,48,949	2390,29,945
Rate	G	14.50%	15%	15%	
Service Tax payable	H= F* G	108,07,721	115,56,748	131,17,342	354,81,812
Service Tax paid	I	64,03,487	57,53,429	112,50,562	234,07,478
Differential Service Tax payable	J= H-I	44,04,234	58,03,319	18,66,780	**120,74,334**

17. From the foregoing facts and discussions, it appeared that the assessee had contravened the provisions of:

- Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 ('Rules') as they have failed to pay the appropriate service tax at the rate specified in Section 66B of the Act in such manner and within such period as may be prescribed; and
- Section 70 of the Act read with Rule 7 of the Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed.

18. It also appeared that the assessee had wrongly classified their activity as 'works contract' instead of Construction of Residential complex services. It also appeared that they have excluded the land value and then calculated the abatement @ 60% adv and paid service tax whereas they had to include the land value and claim abatement @ 30% adv under the construction of complex services. It appeared that this has resulted in short payment of service tax as depicted in Table-I above. It appeared that they have

suppressed the material information in their ST3 returns (RUD 9) with intent to evade the payment of service tax. Therefore, the ingredients exist to invoke the extended period of five years, in terms of proviso to section 73(1) of the Act, for the demand of service tax amounting to Rs 1,20,74,334/-. As the service tax has not been paid, interest is to be charged from the assessee, under the provisions of Section 75 of the Act. It appeared that by the act of wrong classification and incorrect availment of abatement on the contract value and also by not paying the appropriate service tax, they have suppressed the facts with intent to evade the payment of service tax. Accordingly, they are also liable to penal action under Section 78(1) of the Act.

Revenue Para 2: Short payment of Service Tax on Finishing Work by claiming wrong abatement of 60% adv instead of 30% adv

19. During the course of audit and on verification of records, it was noticed that the assessee was engaged in construction of Residential Villas. The ST-3 returns of the assessee indicated that they were discharging service tax under the category of Works Contract Services.

20. For the purpose of ascertaining the actual nature of services, the agreements provided by the assessee, one 'Agreement to Sale' dated 14.7.2014 (RUD 2) and another 'Sale Deed dated 7.2.2017 (RUD 3), entered by them with Ms Achla Dipak Shah for Villa No C-059 ('buyer') were analysed. It was noticed that the sale consideration amount was totally Rs 2,60,45,825/- (Rs 2,23,21,500/- plus other charges of Rs 31,02,494/- and service tax of Rs 6,21,832/-). However, it was observed from the customer ledger (RUD 6) that the actual amount received by the assessee was Rs 3,98,86,826/-. It was seen that they had discharged stamp duty by considering the value of Rs 2,23,21,500/- and the actual amount received by them was not considered.

21. From the service tax returns and accounting records of the assessee, it was noticed that the assessee had discharged service tax on the above said additional consideration as works contract service on 40% of the amount charged, after claiming abatement @ 60%. However, on examination of the above documents and as discussed in following paragraphs, the additional consideration was related to carrying out of finishing services on the duly completed Villa.

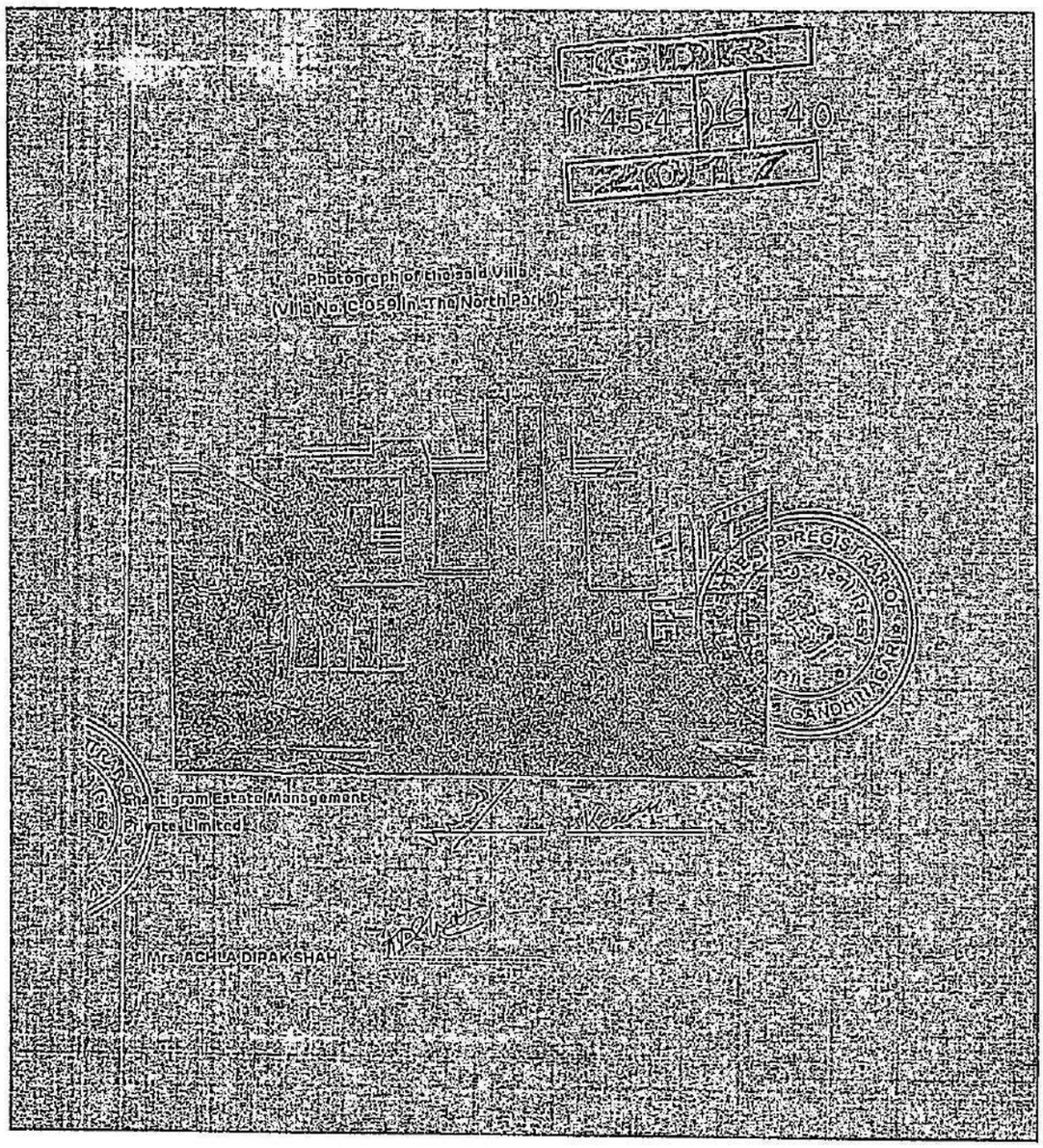
22. A communication was sent to the assessee on 13.1.2020 (RUD 4) to which the assessee under their letter dated Nil (RUD 5) have replied that price of construction included two components, one for construction of framework of villa and another for construction of balance work. The price of construction to the extent it is related to framework was stated in the agreement to sale and sale deed whereas the price related to balance work was collected over and above the amount specified in the agreement to sale.

23. However, clause 5 of the sale deed executed in respect of the above said villa, states the other way round. The said clause states that the villa under consideration was duly completed in all respect. The above said clause 5 is reproduced herewith:

> *"5. COMPLETION OF SALE & POSSESSION*
>
> *Simultaneous with the execution of this Deed, SEMPL has handed over the actual vacant and peaceful physical possession of the said Villa to the Purchaser(s) <u>duly completed in all respects</u> and in good and proper condition, as per lay-out plans, relevant permissions, construction plans, designs and detailed drawings and specification of the said Villa and Scheme in general approved and accepted by the Purchaser(s). The Purchaser(s) admits and acknowledges it and declares that he/she has satisfied himself/ herself about the same."*

24. From the above it appeared that the buyer had received fully constructed Villa as per construction plans, designs and detailed drawing and specification for the

consideration amount of Rs 2,23,21,500/- plus taxes and other charges, totally amounting to Rs 2,60,45,825/- (as per Agreement to Sale of the said Villa). **It may be noted that the stamp duty has also been paid on the said amount only.** Further, clause "J" of the Sale Deed in respect of Villa No C-059, which was studied on a sample basis, also states that construction under the said scheme including that of the said Villa was complete in all respects and the Building Use permission was under process. The photograph of the completed villa affixed on Page No 26 of the sale deed is depicted below:



25. In view of the above discussions, it appeared that the additional consideration demanded and received by the assessee from the buyer, over and above the consideration mentioned in Agreement to Sale and Sale Deed, was not in respect of construction of the villa. It was in lieu of finishing services such as interior designing, cosmetic design, electrification etc.

26. As per agreement to sale and Sale Deed, the consideration price for the duly completed villa No C-059 in all respects was Rs 2,60,45,825/- (Basic Value Rs. 2,23,21,500/- plus Other Charges Rs 31,02,494/- plus Service Tax Rs 6,21,832/-). In turn, the actual amounts demanded and received from the said customer as reflecting in the relevant customer ledger for the said villa was Rs 3,98,86,826/-. It appeared that that the assessee has received an additional amount of Rs 1,38,41,001/-, over and above the price of the duly completed villa in all respects. It appeared that the additional amount

were in lieu of the cost of additional finishing work such as interior designing and other cosmetic designing of the villa.

27. It further appeared that the assessee also furnished the agreement dated 31-3-2017 (RUD 7) entered by them with M/s Adani Township & Real Estate Co Pvt Ltd ('ATRECO'). The agreement stated that the assessee had assigned the finishing work on the villa constructed by the assessee to ATRECO and the cost of such finishing services in respect of villas which were yet to be constructed, should be directly collected by ATRECO from the buyer. It further stated that in respect of the villas wherein monies have been collected for finishing work by the assessee from the buyer of such villas, the assessee shall transfer such amount in favour of ATRECO. The relevant clauses of the said agreement are as under:

"2 *SEMPL hereby assigns the job of executing the Finishing Works and to accept the consideration in lieu thereof in favour of ATRECO, in respect of the villas developed / to be developed in the North Park scheme, subject to the terms of this Deed ("Assignment").*

3 *For the villas wherein monies have been collected for Finishing Work by SEMPL from the purchaser of such villas, SEMPL shall transfer such amount in favour of ATRECO along with necessary cost incurred for finishing such Villas.*

4 *With respect to the villas which are yet to developed / constructed, ATRECO shall directly charge for the Finishing Works to the purchasers of particular villa and all such payments from the purchaser shall be collected by ATRECO.*

5 *ATRECO shall be responsible to complete the Finishing Works in accordance with the terms agreed with the purchaser by ATRECO and / or SEMPL.*

6 *With respect to any liability arising out of the Finishing Works under the Assignment, ATRECO shall be responsible for the same and shall indemnify, and keep indemnified , SEMPL from all such claim, demands, order, liability etc. arising out the same".*

28. From the above agreement, it appeared that the assessee was also carrying out the finishing work which was not part of the agreement to sale. From the above discussions, it appeared that the assessee has received additional consideration in lieu of carrying out of the finishing work on the duly constructed villas, under a separate agreement with ATRECO. It appeared that there are separate agreements for construction of villas (agreement to sale) and another to carry out the finishing services. The consideration received on account of both the agreements and work are clearly identifiable and therefore, the same cannot be construed as a bundle of service, as defined under the provisions of Section 66F of the Act.

29. Further, in terms of Rule 2A (ii) (B) of the Valuation Rules, finishing work is eligible for abatement @ 30% only. The relevant portion of the above said rule is reproduced below:

> *(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-*
>
> > *(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent. of the total amount charged for the works contract;*

(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for,-

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or
(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

service tax shall be payable on seventy per cent. of the total amount charged for the works contract"

30. However, the assessee paid the service tax after claiming abatement @ 60% instead of 30%, which was actually admissible to them. The resulting short payment is depicted in Table II below.

Table II

(Rupees in actual)

Particulars/ Year		2015-16	2016-17	2017-18 (upto June 17)	Total
Balance work/ finishing work	A	2152,30,908	749,11,444	506,74,726	3408,17,078
Abatement @ 30%	B = A*30%	645,69,272	224,73,433	152,02,418	1022,45,123
Net Taxable Value	C=A-B	1506,61,636	524,38,011	354,72,308	2385,71,955
Rate	D	14.50%	15%	15%	
Service Tax payable	E=C*D	218,45,937	78,65,702	53,20,846	350,32,485
Service Tax paid	F	122.02,916	44,81,145	30,40,484	197,24,545
Differential Service Tax payable	G=E-F	96,43,021	33,84,557	22,80,362	**153,07,940**

31. The observation was communicated to the assessee on 19.8.2020. The assessee, vide their letter of 7.9.2020, have contended that they have valued the transaction correctly as original works and paid service tax accordingly.

32. From the foregoing facts and discussions, it appeared that the assessee had contravened the provisions of:

- Section 68 of the Act read with Rule 6 of the Rules as they have failed to pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed;
- Section 70 of the Act read with Rule 7 of the Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed; and
- Rule 2A (ii) (B) of the Valuation Rules as they have failed to avail the abatement properly

33. It appeared that the assessee had at no point of time shown the receipts of these incomes to the department. They have not informed that they had collected additional amounts and collected them, over and above the price of the residential villa. It, therefore, appeared that they have suppressed the material facts with intent to evade the

payment of service tax. Accordingly, the proviso to Section 73(1) of the Act would be applicable for invoking the extended period of 'five years' for recovery of service tax amounting to Rs 1,53,07,940/-. As the assessee had not paid the service tax, interest is to be charged from them, under the provisions of Section 75 of the Act. It appeared that the assessee had suppressed the material facts with an intention to evade the payment of service tax, as discussed above. Hence, they are also liable for penal action under the provisions of Sections 78(1) of the Act.

Revenue Para 3: Short payment of service tax on Cancellation charges received during the period 2015-16 and 2016-17.

34. During the course of audit and on verification of records, it was noticed that the assessee had wrongly claimed 60% abatement on the cancellation charges received by them during the period from 2015-16 and 2016-17 and had paid Service tax on the remaining amount. The assessee discharged the service tax on cancellation charges treating it as Works Contract Service, which is not the case. It may be noted that the service is in the nature of tolerance of an act or situation as mentioned in Section 66 E(e) of the Act. Therefore, the same is not eligible for any abatement as claimed by the assessee. The differential service tax is calculated in Table III below, which is required to be recovered from the assessee:

Table III (Rs in actuals)

Financial year	Total cancellation charges received	Amount on which service tax paid	Amount claimed as abatement on which service tax recoverable	Service Tax rate	Service tax recoverable
2015-16	1927822	771129	1156693	14.50%	167721
2016-17	1799068	719627	1079441	15.00%	161916
Total	3726890	1490756	2236134		329637

35. The relevant text to Section 65B(44) of the Act defining 'service' reads as under:

"'service' means any activity carried out by a person for another for consideration, and includes a declared service"

36. 'Taxable Service' defined under Section 65B(51) of the Act reads as under:

"taxable service" means any service on which service tax is leviable under section 66B"

37. The definition of 'declared service' under Section 65B(22) of the Act reads as under:

"declared service' means any activity carried out by a person for another person for consideration and declared as such under section 66E"

38. The text to Section 66(E) of the Act reads as under:

"Section 66E: The following shall constitute declared service namely:

e. *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"*

39. A communication was sent to the assessee on 19.8.2020 (RUD-4). The assessee under their reply dated 7.9.2020 (RUD 5) have replied that the cancellations are nothing but retention of the amount short refunded to their customers.

40. It appeared that the assessee had received the income for tolerating an act of cancellation from their customer for the years 2015-16 and 2016-17. It appeared that there is an element of consideration to the assessee on this account. It, therefore, appeared that there had been a service made by the assessee for a consideration as discussed above, which appeared to fall within the ambit of clause (e) to Section 66(E) of the Act. It appeared that there is no rule or law which provided for abatement for payment of service tax on the income earned within the ambit of Section 66E(e) of the Act. The service tax has to be paid on the entire income shown by them in their financial records. It, therefore, appeared that there has been a short payment of service tax by the assessee. By getting a consideration and tolerating an act, as discussed above, the service appeared to fall within the meaning of 'declared service' as per clause (e) to Section 66E of the Act. The activity appeared to be taxable and is also defined under Section 65B(51) of the Act.

41. From the foregoing facts and discussions, it appeared that the assessee had contravened the provisions of:

- Section 68 of the Act read with Rule 6 of the Rules as they have failed to pay service tax at the rate specified in Section 66B of the Act in such manner and within such period as may be prescribed; and
- Section 70 of the Act read with Rule 7 of the Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed.

42. It appeared that the assessee had at no point of time shown the receipts of these incomes to the department. They have not informed that they were providing a declared service falling within the ambit of clause (e) to Section 66E of the Act. They have nowhere shown receipt of any consideration in any of the records/returns before the audit objection was detected.

43. It, therefore, appeared that they have suppressed the material facts with intent to evade the payment of service tax of receiving a consideration on the declared service provided by them. Accordingly, the proviso to Section 73(1) of the Act would be applicable for invoking the extended period of 'five years' for recovery of service tax.

44. As mentioned above, the service tax not paid amounting to Rs 3,29,637/- is liable to be demanded and recovered from the assessee, under the proviso to Section 73(1) of the Act. The extended period of time of five years is to be invoked as there is a case of suppression of facts with an intent to evade the payment of service tax. It appeared that the assessee has not paid the service tax as discussed above and therefore, interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Act. It appeared that by the act of not disclosing the amount of consideration received by them and having provided a declared service as discussed above, they have suppressed the material facts with an intention to evade the payment of service tax. Hence, they are also liable for penal action under the provisions of Sections 78(1) of the Act.

45. A pre-consultation discussion was held on 1.10.2020. Mr Rahul Patel, Chartered Account appeared for the discussions. He disagreed with all the objections.

46. Therefore, SCN No.TECH/72/2020-TECH and LEGAL-O/O COMMR-CGST-ADT-AHMEDABAD dated 22.12.2020 was issued by the Commissioner of Central Tax, Audit Commissionerate, Ahmedabad to M/s Shantigram Estate Management Private Limited, Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad 380 009 by which they were called upon to show cause to the Principal Commissioner/Commissioner of Central Tax, Ahmedabad South Commissionerate, having his office at GST Bhawan, Near Panjarapole, Ambawadi, Ahmedabad 380015

as to why:

i. service tax amounting to Rs 2,77,11,911/- (Rs 1,20,74,334/- + Rs 1,53,07,940/- + Rs 3,29,637/-) (Rupees Two crores seventy seven lacs eleven thousand nine hundred eleven only) as detailed in Table I to III of Revenue Para Nos 1 to 3 above, should not be demanded and recovered from them, under the proviso to Section 73(1) of the Act;
ii. penalty should not be imposed on them, under the provisions of Section 78(1) of the Act against the proposed demand; and
iii. interest should not be charged and demand from them, under the provisions of Section 75 of the Act against the proposed demand;

PERSONAL HEARING

47. The assessee did not file reply to the show cause notice despite being asked to file the reply. Therefore opportunity for personal hearing was granted and virtual personal hearing was held on 22.02.2022 when Shri Rahul Patel, Chartered Accountant attended the hearing. He submitted a written submission through email dated 22.02.2022 and reiterated the contents of the same.

48. In the written submissions, the assessee, *inter alia,* has made the following main contentions:

- Important aspects of the arrangement made by and between the Buyer and the Noticee are briefly stated as under :
  a. Buyer would select the Land according to his will and desire;
  b. Noticee would offer the Land Price for sale of Land to the Buyer;
  c. Upon acceptance of the Land Price, Noticee would offer the Framework Price for construction of Framework of the Villa and indicative Balance Work Price;
  d. Upon expression of interest by the Buyer and receipt of consent by the Noticee as regards construction of Villa, the Noticee would enter into an Agreement to Sell with the Buyer clearly specifying the Land Price and Framework Price;
  e. Meanwhile, the Noticee would offer various options, styles and designs for construction of Balance Work;
  f. Upon selection and finalisation of the designand style of Villa, the Noticee would offer a fixed Balance Work Price for construction of Balance Work;
  g. Meanwhile, the construction of Framework would begin subject to receipt of agreed payments by the Noticee from the Buyer;
  h. Upon acceptance of the Balance Work Price, the consolidated statement of Construction Price will be issued by the Noticee to the Buyer which *inter alia* comprises the Framework Price and Balance Work Price;
  i. Subject to receipt of Framework Price and Balance Work Price, the Noticee would complete the construction of both Framework and Balance Work;
  j. After completion of the construction of entire Villa comprising Framework and Balance Work and receipt of full consideration towards construction of Villa, the Noticee would execute a deed of conveyance in favour of the Buyer along with transfer of possession of the Villa.

- Contract for sale of building being treated as works contract inasmuch as it is entered into prior to completion of the construction by virtue of the verdict given by Apex Court, as *a fortiori* the same shall be treated as works contract services for the purpose of service tax.

- Having taken into consideration the validity granted retrospectively by the exchequer, the transactions involving sale of units by the developer can be subjected to tax under various options briefly listed out as under :

  (a) If Services classified under clause (b) of section 66E of the Act
    i. Deduction of 70% was to be claimed under Notification No. 26/2017-ST and balance to be taxed;
    ii. Total amount, excluding land value on actual, to be taxed and credit of inputs and input services to be availed;

  (b) Classification under clause (h) of section 66E of the Act
    (i) Total amount, excluding land value on actual, shall be subjected to rule 2A(i) and the value of works contract services involved in the total amount to be determined after allowing deduction of specified amounts on actual;
    (ii) Total amount, excluding land value on actual, shall be subjected to rule 2A(ii) and the value of works contract services involved in the total amount to be determined after allowing presumptive deduction at the rate of 60%;
    (iii) Total amount, including land value, shall be subjected to rule 2A(ii) and the value of works contract services involved in the total amount to be determined after allowing presumptive deduction at the rate of 75%/70% as the case may be.

- History stated briefly hereinbefore clearly demonstrates that the sale of building by a developer was capable of being classified as works contract services under the Act.

- It is to be appreciated that the value of both the elements were clearly discernible from the agreement and other records. Value of the land was clearly stated in the Agreement as well as Sale Deed whereas the Framework Price was stated in the Agreement whereas the Balance Work Price was mentioned in the other records.

- It is therefore essential to understand and appreciate the very fundamental aspect that the land is not a necessary concomitant of the works contract. Merely because the land is involved in the holistic arrangement made by the parties, same cannot be construed to have expanded the scope of works contract. With no stretch of imagination the works contract as a concept shall include the land.

- It is therefore required to be appreciated that the value of the land as involved in the arrangement was clearly discernible and distinguishable. Therefore, it is necessary to vivisect the arrangement and see two different transactions comprised therein i.e. land and works contract.

- If the arrangement is perceived in holistic manner, intention of the Buyer to get the construction of Villa is clearly visible. It is very much obvious to see from the perspective of the Buyer that the intent is to get a dwelling unit to be constructed over the land. Without undertaking the Balance Work, the unit cannot be called a complete residential unit fit for residential purposes. It was therefore necessary to undertake construction of Framework as well as Balance Work in order to give a shape of residential dwelling unit.

- It is no more *res integra* that the label of consideration is not decisive but the nature of transaction is. Mere bifurcation of the Construction Price into two different elements for the ease and commercial convenience, is incapable of deciding differential treatment to both the splits. Though the prices were separated it cannot be taken to have separated the entire transaction. Construction of Villa remained the single activity of constructing the Villa comprising *inter alia* the

Framework and Balance Work. Hence, considering the Framework to be a different specie and Balance Work to be a works contract by ld. Audit Officer in the Notice, is purely arbitrary and capricious in nature.

- It is not open to the Audit Officers to attribute different color and characteristic to the arrangement already made by the parties with their willingness and consent, especially when the sanctity and credibility of the arrangement has not been challenged or disputed.

- Ld. Audit Officer could have examined the Buyer independently in case he had any doubts or questions as regards the correctness and genuineness of the Land Price and Construction Price. Moreover, ld. Audit Officer could have referred the matter to the independent valuer for independent ascertainment of the values. However, ld. Audit Officer neither felt it necessary nor it actually chosen to follow such a procedure for examination of the facts and re-determination of value.

- Noticee also placed all the records before ld. Audit Officer from which the Land Price and Construction Price were determinable. It was also evident that the Land Price agreed between the parties was reduced in writing in the Agreement as well as Sale Deed which was eventually registered with the office of appropriate authority under appropriate laws. Hence, the Land Price mentioned in the Agreement and Sale Deed was to be construed as the correct and genuine price determined by the parties according to their free will, desire, consent and market conditions and therefore the second question was answered negative.

- It is clearly demonstrated that the transaction involving construction of unit for consideration in part or full received before completion of the construction shall be regarded as a works contract consequent to the decisions of K. Raheja and Larsen & Toubro delivered by Apex Court. Subsequent amendments made in the law by parliament in 2017 also fortified the classification as works contract. Hence, following the judicial position set out by the Apex Court, it was required that all the transactions involving sale of units by the developer to prospective buyer to be regarded as works contract and be taxed accordingly. It is no matter of dispute in the present case that the construction of Villa was undertaken by the Noticee against the consideration received in form of Construction Price prior to completion of construction and thus it formed the works contract.

- According to the definition of 'works contract', a contract for specified purposes and involving transfer of property in goods shall be reckoned as works contract. In the case on hand, it is evident that the construction of Villa including the construction of Framework and Balance Work was undertaken by the Noticee using its own goods and the property in such goods passed onto the Buyer eventually in form of Villa. It is also undisputed that the activity carried out by the Noticee, inasmuch as it related to construction of Villa, was with respect to the construction of immovable property as contemplated in the definition. Hence, the construction of Villa undertaken by the Noticee was very well falling into the purview of what is defined as 'works contract' in clause (54) and thus attracted by clause (h) of section 66E.

- Ld. Audit Officer has accepted the classification of Balance Work as part of works contract taxable in terms of clause (h) of section 66E. It is necessary corollary to treat another component of construction of Villa to be integral part of works contract when the other part is accepted to be works contract. Balance Work and Framework were integral parts of activity of constructing a Villa and hence the treatment available to the Balance Work must be given to the Framework. If ld. Audit Officer has accepted the classification as a works contract for Balance Work as *a fortiori* same classification shall be followed for the Framework.

- Contention of ld. Audit Officer that the agreement did not result into a contract awarded by the buyer to the assessee for construction, raises a serious fundamental question as to when the contract was not for construction how the classification can be made either under clause (h) or even under clause (b) of section 66E of the Act. It is needless to state that both the entries i.e. clause (b) and clause (h) requires the construction as a necessary concomitant and in absence of which neither of those clauses shall apply to the transaction.

- Ld. Audit Officer failed to appreciate the correct position of law. It is discussed at length hereinbefore that the works contract as contemplated in Article 366(29A) and the definition given in section 65B, is the result of assimilation of works with goods. Land has never been an element of the works contract like goods and services. Land along with the construction of Villa may form a composite contract but does not become a works contract in its entirety. Hence, it was necessary to deduct the value of Land from the composite contract in order to determine the value of works contract. Once the value of works contract is arrived at, the need for valuation of works contract as per rule 2A comes into play.

- The very act of deducting the value of Land from the total value of Agreement, did not require machinery provided in Rule 2A as the value of Land was not the integral part of the works contract. In other words, the works contract which can be subjected to Rule 2A will be valued only after deduction of the value of Land from the total value. Hence, it is completely incorrect in law on part of the Notice to contend that the deduction of Land was claimed by the Noticee under clause (i) of Rule 2A. Hence, it is equally incorrect in contending in the Notice that the Noticee had adopted hybrid method for valuation under Rule 2A. Accordingly, the first contention of ld. Audit Officer to invoke re-classification was factually and legally incorrect and unsustainable.

- The Agreement which was duly entered into and executed under respective laws, was the basis for arriving at the value of Land for the purpose of determination of value of works contract. As the copy of Agreement was made available along with the list and summary to ld. Audit Officer during the course of audit, it was not open to him to contend that the basis for arriving at the value of land was not explained by the Noticee.

- Nowhere in the Notice it has been proved as to why and how the classification adopted by the Noticee was impermissible or illegal. Ld. Audit Officer also failed to prove as to how the classification of construction service contemplated in clause (b) merits over the classification already adopted by the Noticee under clause (h).

- The classification adopted by the Noticee under clause (h) was backed by the decision of Apex Court in case of Larsen & Toubro *supra* and thus must not be rejected without express and explicit infirmity. Nonetheless, Ld. Audit Officer ought to have appreciated, according to the history of works contract service elaborately discussed hereinbefore, that pursuant to the decision of Apex Court in case of K. Raheja *supra*, the classification under clause (b) and clause (h) shall have to be treated as optional machineries which the assessee was at liberty to choose and the option chosen by the assessee must not be challenged in absence of clear defiance of conditions if any attached thereto. In the case on hand, the arrangement was intended to construct the Villa in its entirety for and on behalf of the Buyer which satisfied all the conditions laid down in clause (h) as well as the decision of Apex Court. Accordingly, the Noticee ought to had option to classify its services under clause (b) or clause (h) and it had chosen to classify under clause (h) which suffered from no infirmity. Therefore, it was not open to the Department to shift him from one option to another on the basis of amplitude of tax liability.

- Works contract is a different specie as against contract for services *simplicitor*. Works contract is a fiction created by Article 366(29A) of the Constitution against the different genres of constructions contracts

- In case the services of construction of Villa were capable of being classified under clause (h) as well as clause (b), the services described in clause (h) must be preferred over the services described in clause (b) of section 66E of the Act and hence the classification already adopted by the Noticee under clause (h) ought to have passed the test of classification contemplated by sub-section (2) of section 66F of the Act. Whereas the classification made by ld. Audit Officer, in sheer ignorance and disregard of the provisions of sub-section (2) of section 66F of the Act, is to be rejected *in limine*.

- Ld. Audit Officer, in case believed the correct classification was clause (b) instead of clause (h), should have put the Noticee as to exact allegation in terms of the provisions of section 66F of the Act. In absence of any specific allegation and proper notice for re-classification in terms of the provisions of section 66F of the Act, the Notice shall be construed as illegal, *ultra vires* and bad-in-law inasmuch as it proposes to demand the additional liability by resorting to re-classification of the services.

- During the course of audit, the Noticee had furnished the list of the values taken as value of land for each of the cases along with the summary and the sample copies of Agreements wherein the value of Land was clearly identified and specified by way of Schedule. Noticee had vehemently pressed during the course of audit that the value of Land taken for the determination of the value of works contract services, was based on the amount specified in the Agreement. Thus, the Agreement was the basis for determination of the land value while carrying out the valuation of works contract services. As submitted before, the sanctity of the Agreement had not been questioned by ld. Audit Officer and thus the value stated in the Agreement becomes *sacrosanct* to the case on hand. In such circumstances, it is required to be appreciated that the Noticee had sufficiently and adequately explained the basis for determination of value of land.

- Transfer of titles in immovable property includes sale of land and by way of an exclusion provided as per above, sale of land in the present case stood outside the scope of 'service' and thus beyond the reach of Service Tax. Definition was designed by the Parliament with an objective of not encroaching upon the State jurisdiction to levy taxes on land. Hence, according to the scheme and concept of 'service' and Service Tax, the sale of land as it was involved in the Agreement cannot be included in the value of taxable services. Land Price charged by the Noticee was undisputedly the consideration towards sale of Land and thus whole of the Land Price shall remain outside the levy of tax directly as well as indirectly. Though the tax cannot be levied on the Land Price directly, the question which requires due consideration is whether the tax can be levied indirectly as proposed by ld. Audit Officer. Ld. Audit Officer has re-determined the value of taxable services by including the amount of Land Price.

- Clause (i) of sub-section (1) of section 67 of the Act determines gross amount charged for service to be the value for the purpose of tax. Definition of 'consideration' as provided in the Explanation also refers to the amount payable for the taxable services provided or to be provided.Amount 'charged for taxable services' was the common thread running across the provisions of section 67. Nexus of the amount charged and the provision of service is of utmost relevance and necessity in order to bring the amount within the fold of Service Tax. If the amount charged for anything other than the taxable service, the same does not

form part of the value of taxable service. Views expressed hereinabove are fortified by the decision of Hon'ble Apex Court in case of **Union of India v. Intercontinental Consultants and Technocrats Pvt Ltd – 2018 (10) GSTL 401.**

- In view of foregoing and the provisions of section 67, it is essential that the amount required to be taxed under the Act, shall form the consideration for provision of service and not otherwise. The consideration towards sale of land cannot be regarded as the consideration towards provisions of services notwithstanding the same flows and sails along with the consideration for provision of services. In the case on hand, it is clear and undisputed that the Land Price was the consideration for sale of land and sale of land was not the 'service' as per the meaning ascribed to it in clause (44) of section 65B. Accordingly, the Land Price did not form a consideration for provision of construction services and therefore the 'gross amount' charged by the Noticee to the Buyer shall not include the Land Price.

- In view of foregoing discussion and position of law, the Land Price, which was clearly discernible from the Agreement and undisputed in the Notice, did not form part of the value of taxable services under section 67 of the Act. The very act of ld. Audit Officer to include the Land Price in the value of taxable services, notwithstanding classification of services under clause (b) or clause (h),was contrary to the provisions of section 67 and thus be declared illegal.

- If the value of Land as determined by the Parties to the Agreement is *sacrosanct* in absence of the contrary finding by ld. Audit Officer or allegation in the Notice, tax cannot be levied by any stretch on such value of Land. It is no dispute that the Parliament does not have power to levy service tax on the Land which is otherwise a State subject. In catena of the decisions, it has been made clear that the tax shall be restricted to the respective subject matters. Service Tax shall be restricted to the value of services and Sales Tax shall be levied on the value of goods involved.

- Hon'ble Supreme Court has clearly recognized in **Larsen & Toubro Ltd v. State of Karnataka – 34 STR 481**, that a composite contract comprising works contract and transfer of immovable property shall be taxed to the extent of value of materials involved in execution of works contract. In another case **State of Jharkhand v. Volta Ltd – 2007 (7) STR 106**, Hon'ble Apex Court clearly laid down the scope of taxation and held that the tax on goods shall be restricted to the value of goods involved.

- Dichotomy between two tax subjects is *sacrosanct* as per the above decisions. In no case the Parliament should be allowed to tax the subject other than service and the State shall be allowed to tax on services. Drawing the same principles and analogy, having direct application and binding nature, Service Tax cannot be levied on the land being the foreign subject of taxation for Parliament. Inasmuch as the Service Tax is purported to be levied on the land, it suffers from severe infirmity of validity and legality. Provisions of the Act, as discussed at length hereinbefore, does not permit levy of Service Tax on anything other than the service portion involved in execution of works contract, nothing shall allow the levy of Service Tax on anything other than service including Land.

- Ld. Audit Officer had not dispute or rejected the value of Land. In absence of conclusive rejection and re-determination of the value of Land, it has to be accepted that the addition in the tax liability is on account of inclusion of Land value. Thus, the additional liability is deemed to be the Service Tax on the value of Land and accordingly illegal in light of submissions made hereinbefore.

- Value of Land determined by the Parties to the Agreement, in absence of any contrary evidences brought on record by ld. Audit Officer and in absence of rejection thereof, shall be deemed to be the actual value of land, and was required to be deducted from the value of taxable services. Failure on part of ld. Audit Officer to rely on such effective machinery for assessment would vitiate the entire additional liability and thus it is not open for him to extend the levy of Service Tax on the foreign subject matter i.e. Land.

- The contention made by ld. Audit Officer is factually incorrect. It is contended that the Noticee had not included the Land Value in the value of taxable services stated in periodical returns filed in Form ST-3. The Land Price was considered as the consideration toward sell of land attracting no service tax according to the definition of 'service' given in clause (44) of section 65B of the Act and therefore the same was not required to be shown anywhere in the return. As per the format of Form ST-3 prescribed by Rules, the value of anything not resulting into 'service' shall not be required to be shown and thus non-reflection of the such amounts did not result into suppression of material facts in Form ST-3.

- It is already demonstrated and proved that the classification of works contract adopted by the Noticee was well within the framework of section 66E and supported by the decisions of Hon'ble Apex Court and Board Circulars. According to the classification of services as per clause (h) of section 66E only the value of service portion involved in execution of a works contract i.e. amount to be determined as per Rule 2A, shall be required to be included in the value of taxable services to be shown in periodical returns. Resorting to the abatement provided by Notification No. 26/2012-ST by classifying the services under clause (b) of section 66E by ld. Audit Officer, which was an optional machinery for the Noticee in specific circumstances, cannot become the basis for alleging suppression of material facts. Accordingly, it is patently incorrect to hold a contention that the Noticee had suppressed material facts in periodical returns.

- Notwithstanding anything contained anywhere, the Noticee shall submit following important aspects concerning the arrangement with the Buyer:
    a. Composite arrangement had two elements – a) sale of Land b) construction of Villa;
    b. Construction of Villa *inter alia* comprised a) construction of Framework b) construction of Balance Work;
    c. Construction of Framework and construction of Balance Work collectively constituted a single and turnkey contract for works;
    d. Framework Price and Balance Work Price was merely the split of consideration received towards construction of Villa.

- Kind reference is invited to the brief facts narrating the important features of the arrangements made by the Noticee with the Buyers. It clearly transpires therefrom that it was two-fold arrangement comprising sale of Land and construction of Villa. Though the Agreement and Sale Deed were did not bear the Balance Work Price, the arrangement inasmuch as it involved construction of Villa was one and the comprehensive. If the Agreement is carefully perused, it implies that all the activities as may be required in respect of the construction of Villa including the Balance Work, were to be carried out by the Noticee though the Balance Work Price was not stated in the Agreement. It has been well demonstrated that how the Balance Work Price was being determined after entering into the Agreement and that also explains why the same was not possible to be stated therein.

- Noticee did not carry out any activity under the said arrangement and against the price in form of Construction Price including Balance Work Price post conveyance and transfer of possession to the Buyer. Therefore, it was essential

that all the activities being carried out with respect to construction, not involving transfer of titles in the Land, shall be collectively assessed and examined.

- Having submitted that the construction of Framework and Balance Work collectively constituted a single works contract, the Noticee shall further submit that vivisection of the single works contract on the basis of splits of price is artificial and impermissible in law.

- It is proven beyond doubt in foregoing para that ld. Audit Officer had bifurcated the single works contract for construction of Villa merely on account of prices attributed to different elements and not adduced with the help of cogent facts and plausible explanations. It was therefore not open to him to vivisect the works contract into different pieces for the purpose of taxation under the same law. Ld. Audit Officer has already taken it for acceptance that the construction of Framework was certainly that of original works involving construction of Villa. It means that part of the activity of the construction of Villa has been considered as original works by ld. Audit Officer, however remaining part known as Balance Work is being treated as other than original works. This differential treatment is nowhere possible under the Service Tax Law.

- Ld. Audit Officer was required to consider whole of the works contract comprising the construction of Framework and Balance Work, for classification and taxation. Either the whole of the work was to be treated as construction services or whole of it ought to have been classified as original works classifiable under Rule 2A. For sake of clarity, the Noticee shall submit at the cost of repetition that with notwithstanding anything contained anywhere the single works contract shall not be construed to have included the Land Price within its fold as the sale of Land was not the element of works contract, as per discussion made at length hereinbefore.

- Conducive facts emerging from the records and the findings of ld. Audit Officer, which have remained undisputed in the Notice, are recapitulated for better appreciation as under :

    a. Both the Framework Price and Balance Work Price were received collectively by the Notice from the Buyer;
    b. Both the Framework Price and Balance Work Price were in respect of the Villa;
    c. Both the Framework Price and Balance Work Price were received by the Noticee prior to execution of Sale Deed;
    d. Both the Framework Price and Balance Work Price were collectively referred to as value of works contract services by the Notice in periodical returns and paid Service Tax;
    e. At the time of entering into Agreement, the Balance Work Price was not finally ascertained;
    f. At the time of execution of Sale Deed, the construction of Villa was complete in all respects;
    g. Photograph of the Villa reproduced in the Notice indicates that the Villa was complete in all respects and ready;
    h. Para 5 of the Sale Deed referred to in the Notice demonstrated that the peaceful possession of the Villa which was complete in all respects and as per the lay-outs, designs, drawings, requirements, specifications, was handed over to the Buyer and Buyer had accepted and approved;
    i. No evidence was brought on record by ld. Audit Officer to prove that the Noticee had provided or agreed to provide any other services of whatsoever nature to the Buyer;

j. Noticee had consistently claimed that the Framework Price and Balance Work Price collectively formed the consideration in lieu of construction of Villa.

- Merely because the Balance Work Price was not stated in the Agreement and Sale Deed, it is not open for anyone to deduce that the Balance Work Price constituted a separate contract. However, without admitting but for better appreciation, if it is believed that the Balance Work Price constituted another agreement, it is required that both the agreements, written as well oral, shall be taxed collectively as single works contract. It is a settled law of works contract that the tax shall be levied and assessed as single works contract, despite of having separate prices and separate agreements entered into by the parties for same cause. In the case on hand, it is proven beyond any doubt that the cause for which the parties had joined hands, in the Agreement as well as otherwise, was to handover fully constructed Villa to the Buyer and therefore it is necessary that both the prices shall be treated as consideration of single works contract.

- Noticee had been consistently treating both the prices i.e. Framework Price and Balance Work Price, as the consideration in lieu of construction of Villa and accordingly taxed in the periodical returns. Moreover, the Noticee had claimed the facts and the stand to be correct during the course of audit. Despite of the same, ld. Audit Officer failed to prove and bring on record any evidence as to whether the Noticee had engaged himself in any activity other than the construction of Villa. Ld. Audit Officer also failed to bring on record any evidences to suggest what exactly was carried out by the Noticee in lieu of additional consideration i.e. Balance Work Price. Ld. Audit Officer merely presumed that the additional consideration was in lieu of finishing services. Ld. Audit Officer also failed to prove that if the construction was complete in all respects and accepted by the Buyer and the possession of the Villa was taken by the Buyer on the date of Sale Deed which was executed for a price exclusive of Balance Work Price, what was the Balance Work Price meant for and what was remained pending for execution on part of the Noticee.

- If the presumption of ld. Audit Officer is believed to be true, it implies that the consideration equal to construction of the Villa was charged by the Noticee and which the Buyer had willingly paid to the Noticee for finishing services which included merely interior designing. It is evident from the photograph and findings in the Sale Deed that all the constructions including tiling, painting, and electrifications were already done and covered in the Sale Deed and so they were covered in the Framework Price. If all the works including tiling, painting, plumbing, electrifications were already covered in the Framework Price, what remains for the Balance Work is interior decoration, furniture and fixtures and thus a logical question emerges is why one rational man would pay the amount equivalent to the construction of Villa for mere interior decoration. And, if at all it is believed that the additional consideration was for interior decoration, the same shall be treated as sale of goods as most of the interior decoration would involve supply of movable properties only.

- Balance Work, as it involved in the question, was certainly that of the original works as defined in rule 2A and the fact cannot be disputed. Hence, despite of fact that the some elements of Balance Work were in the nature of finishing services, whole of the Balance Work shall be construed as original works and accordingly be valued as per clause (A) instead of clause (B).
- Having submitted and proved that the clause (B) is subservient rule and did not get attracted when the situation was covered by clause (A), a further attempt is made to demonstrate that the class of services specified in clause (B) by way of specific description did not cover the Balance Work within its fold.

- The list of specified services i.e. completion and finishing services, has been provided after the expression "maintenance or repair". It signifies that the list followed by the expression "maintenance or repair" shall be read in continuity and further thereof but not in isolation. Completion and Finishing services as used in sub-clause (ii) shall be construed as *ejusdem generis* and thus they shall be deemed to take colour from the preceding words i.e. maintenance or repairs. "Completion and finishing services" is a general description being capable to be referred to in case of new construction as well as repairs and maintenance. Whereas the "maintenance or repairs" as used in sub-clause (ii) is the specific expression. Hence, the general description shall take the colour from the specific description and be read in furtherance thereof. Hence, applying the doctrine of *ejusdem generis,* it shall be construed that only such completion and finishing services which were carried out in the course of maintenance or repairs shall be covered by sub-clause (ii). In support of the views, reliance is placed on the decision of Hon'ble Supreme Court in case of **Commissioner of Trade Tax v. Kartos International 2011 (268) ELT 289.**

- It clearly transpires from the language employed in clause (A) and clause (B) that the "original works" were covered in clause (A) whereas the works other than "original works" were covered in clause (B). Both the "original works" as well as "other than original works" are capable of involving completion and finishing services. If the sub-clause (ii) of clause (B) is interpreted to include all kinds of "completion and finishing services" it would go against the very scheme of Rule 2A(ii). "Completion and finishing services" involved in "original works" shall be required to be classified under clause (A). Hence, it is necessary that the expression used in sub-clause (ii) of clause (B) shall be read in context of "maintenance or repairs" only.

- In the case on hand, it is no matter of dispute that all the activities relating to the Villa, including glazing, plastering, flooring, tiling, electrifications etc were in relation to new construction of Villa and not involving any activity in the nature of maintenance or repairs.

- The Notice is illegal inasmuch as it has re-determined the value of taxable services without following the procedures contemplated in rule 4 of the Valuation Rules.

- Without generality of the submissions being separately made hereinafter on the aspects of Limitation, Noticee shall submit that the contention made by ld. Audit Officer is factually incorrect. It is contended that the Noticee had not furnished the receipts of the Balance Work Price to the Department. However, the Noticee had undoubtedly shown the receipts of the Balance Work Price in the respective returns filed in Form ST-3 and on which the tax was by determined value as per Rule 2A(ii)(A).

- It is already accepted by ld. Audit Officer that the value of Balance Work Price had already been subjected to taxation by the Noticee at the rate of 40% which *ipso facto* indicates that the value of the Balance Work Price were reflected in periodical returns but the valuation was determined differently. Hence, it cannot be alleged on part of the Noticee that the receipts of Balance Work Price were not shown to the Department.

- The very act of invoking larger period of limitation in the Notice by ld. Audit Officer is purely mechanical, arbitrary and baseless. No concrete reason or plausible explanation has been attributed by ld. Audit Officer in the Notice in order to demonstrate positive and deliberate action on part of the Noticee resulting into suppression of material facts to evade payment of tax. Mere, observations of non-payment of tax and non-reflection of the bifurcation in the periodical returns

filed in Form ST-3 are not sufficient to charge the Noticee with a grave and serious allegation of suppression of material facts with an intent to evade payment of tax. It appears that the act of invoking larger period of limitation is an outcome of anxious efforts on part of ld. Audit Officer to bring the whole of the demand within the fold of a valid notice. Audit Officer has failed in discharging his onus to prove the availability of larger period of limitation. Audit Officer has overlooked and ignored the fact that all the figures, to the extent required, were reflected in the periodical returns filed in Form ST-3. Ld. Audit Officer also ignored an important fact that the Department was very much aware of the practice adopted by the Noticee by way of the Previous Audit and wherein on objection was made in the Previous Audit Report.

- From the plain reading of the provisions of section 73(1), it emanates that the proviso incorporated therein enables the Department to issue the show cause notice for a larger period. However, it is necessary to appreciate that the provision of sub-section (1) are primarily enacted to allow the Department to issue the show cause notice for a normal period of limitation i.e. thirty months whereas the larger period of limitation i.e. five years is to invoked in specified circumstances. Period of five year is specified by way of a conditional proviso which implies that the proviso is an except to the general rule of thirty months. It is needless to submit that the conditional exception incorporated in the statute has to be strictly construed and the total compliance of the conditions is *sine qua non.* It is a settled position of law that when the powers are vested conditionally they shall be exercised carefully, diligently and in strict accordance of the statute. Onus to prove the availability and compliance of the statutory provisions, in such circumstances, always lie on the Central Excise Officer.

- Proviso laid down that the larger period of limitation is to be invoked only in five specified situations. Therefore, firstly the Department should gather sufficient evidences so as to indicate which one of the five reasons, the Noticee has been indulged into, before invoking larger period and then it shall demonstrate the applicability of the specified reason with contemporaneous evidences and plausible explanations.

- Words 'fraud' etc is of highest amplitude and requires deliberate and *mala fide* intentions on part of the assesse with an object to deceive the tax authorities by acting in sheer defiance of law to make unlawful and illegal monetary advantage. Therefore before taking recourse to proviso, it is expected from the Department that proper and adequate findings are brought on records having direct and proximate relation to stated practices of tax evasion by the assessee. Merely because demand involved stands barred by normal period of one year, revenue tend to invoke larger period in anxiety of initiating actions will defeat the very purpose of drawing a legislative line of demarcation between the normal period and extended period. The way ld. Audit Officer has proposed to invoke larger period in present case before your good selves, if accepted, we are afraid the very provision of normal limitation legislated by the parliament would loose its sanctity and the Department would misuse the machinery without any discrimination.

- Onus of proof to invoke larger period shall therefore be discharged unconditionally and meticulously with the help of contemporaneous evidences indicating positive act of wilful and deliberate withholding of information fro the Department.

- The facts stated in the periodical returns filed in Form ST-3 were duly made in accordance with the requirements of the Rules. It is the sole allegation made by ld. Audit Officer to substantiate larger period of limitation that the receipts were

not shown in the periodical returns. A general observation that receipts were not shown in the periodical returns is factually and technical incorrect and misleading.

- Value of land does not form integral part of the works contract services as defined in clause (h) of section 66E of the Act, was not required to be reflected anywhere in the return as per the prescribed format nor it was possible for the Noticee to mention in the electronic format of return available in ACES. Expecting the Noticee to provide bifurcation of bare shell / framework construction, balance works of construction and land value, is contrary to the format prescribed by the Rule as well as impractical according to the framework made available by the ACES. According to the legal maxim *lex non cogit ad impossibilia,* the Noticee cannot be expected to deliver which is impossible. Hence, mere non-reflection of the bifurcation and non-reflection of the value of land in the periodical returns shall not be the basis to allege suppression on part of the Noticee.

- The Department and ld. Audit Officer were well aware of the facts and the practices adopted by the Noticee for classification and determination of value.

- Reference is invited to the certificate of registration issued by the Department to the Noticee which *inter alia* comprised the category of works contract services. Copy of the certificate is enclosed and marked as **Annexure : C**. Reference is also invited to Previous Audit Report, copy of which is enclosed and marked as **Annexure : A**which was issued to the Noticee by ld. Audit Officer upon successful completion of the Previous Audit of the books and records of the Noticee for the period immediately preceding to the Period involved. Classification of the activity as works contract services and determination of the value according to the practice adopted in the Period involved, was also followed by the Noticee in the period prior to the Period involved in the Notice and which was scrutinized and examined by ld. Audit Officer in Previous Audit. Hence, it is clear and evident that ld. Audit Officer and the Department were well aware that the activity had been classified by the Noticee under the category of Works Contract Services and value thereof has been determined in accordance with Rule 2A(ii).

- The Notice has proposed to demand interest u/s 75 of the Act which is not sustainable as the very demand for which interest has been proposed in the Notice fails to survive in view of foregoing discussions and submissions. It is therefore most respectfully submitted to your good self to drop the demand of interest.

- The penalty u/s 78 of the Act is not required to be imposed looking to the facts and circumstances of the case. It is already established and proved beyond a doubt that the demand of Service Tax proposed in the Notice as well the very proceeding initiated by the Notice are illegal and bad-in-law and therefore no penalty shall be imposable upon the Noticee.

- The penalty u/s 78 is not imposable in absence of tenable demand of Service Tax against the Noticee. It is convincingly demonstrated that the demand of Service Tax made in the Notice substantially lack the merit and thus found unsustainable. In such circumstances, question of imposing penalty u/s 78 of the Act does not arise.
- The penalty is not imposable for the reasons and grounds more particularly discussed and raised hereinbefore with respect to invocation of extended period of limitation. It should be appreciated by your good self that the grounds for invoking larger period of limitation as contemplated in proviso to sub-section (1) of section 73 of the Act and grounds for imposition of penalty under sub-section (1) of section 78 of the Act are same and thus all the grounds and submissions made hereinbefore as regards applicability of proviso to sub-section (1) of section

(i) Whether the service provided by the assessee is 'works contract' or 'construction service';

(ii) Whether the additional consideration recovered is part of original work; and

(iii) Whether the assessee was required to discharge service tax on the entire value of cancellation charges.

49.5 Having analysed each issue, my findings are given in the following paragraphs.

50.1 The first issue is that the assessee had wrongly classified their activity as 'works contract' instead of Construction of Residential complex services. It would be prudent to discuss some important legal provisions relevant to the case before coming to a conclusion in the said matter. Accordingly, some are reproduced below for ready reference:

Section 65B (44) of the Finance Act, 1994 defines 'service' as *any activity carried out by a person for another person for a consideration, and not falling under the categories of activities stipulated under Section 66D of the Finance Act, 1994. The term 'service' also includes declared services stipulated under the provisions of Section 66E of the Finance Act, 1994.*

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

50.3 Section 66E of the Finance Act, 1994 reads as;

SECTION 66E. Declared services. — *The following shall constitute declared services, namely:—*

(a) renting of immovable property
(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.
(c) ----------
(d) ----------
(e) ----------
(f) ----------
(g) ----------
(h) service portion in the execution of a works contract.

51.1 The assessee, in the present case, was discharging their liability towards payment of service tax classifying the service provided as 'works contract'. The show cause notice, on the contrary, is contemplating the payment of service tax under the category of 'construction service'. The department has built up the show cause notice on the premises that there is no contract for construction of villa in the sales deed or agreement entered into by the assessee and the buyer of the property. Therefore let me look into the definition of 'works contract' provided in the statute. Clause (54) of Section 65B of the Finance Act, 1994 states that:

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

73 of the Act shall *mutatis mutandis* apply to the imposition of penalty u/s 78. It is abundantly demonstrated that the extended period of limitation is not applicable to the present case as the Noticee had not suppressed material facts with an intent to evade payment of tax and therefore, *per* grounds and submissions made in respect thereof, it is being submitted that the penalty u/s 78(1) is not imposable. For sake of convenience to your good self, all the grounds and submissions are not reiterated hereinafter.

- In light of foregoing, penalty u/s 78 as proposed in the Notice shall be found illegal, bad-in-law and unwarranted and thus be dropped *in limine*.

DISCUSSION AND FINDINGS:

49.1 I have carefully gone through the facts of case on record and the submissions made by the assessee. The assessee was engaged in the construction of residential villas. From their ST3 returns, it was observed that they had discharged service tax as Works Contract Services in respect of the construction of the residential villas. However, during the course of audit of the records of the assessee, the agreements provided by the assessee, one 'Agreement to Sale' dated 14.7.2014 (RUD 2) and another 'Sale Deed' dated 7.2.2017, entered by the assessee with Ms Achla Dipak Shah for Villa No C-059 ('buyer') (RUD 3) were analysed and it appeared that the contract has not been awarded by the buyer to the assessee for the purpose of carrying out construction. The Agreement to Sale dated 14.7.2014, made between the assessee and the buyer was analysed and first and the foremost thing emanating from the 'Agreement for Sale' is that the assessee has promoted a residential project consisting residential Units (villas). It was seen that they had put on offer the residential units proposed to be constructed by them with an intention to sell the same. Therefore, it appeared that the assessee had wrongly classified their activity as 'works contract' instead of Construction of Residential complex services. It also appeared that they have excluded the land value and then calculated the abatement @ 60% adv and paid service tax whereas they had to include the land value and claim abatement @ 30% adv under the construction of complex services.

49.2 Second objection raised by the audit officer was that the sale consideration amount was totally Rs 2,60,45,825/- (Rs 2,23,21,500/- plus other charges of Rs 31,02,494/- and service tax of Rs 6,21,832/-). However, it was observed from the customer ledger (RUD 6) that the actual amount received by the assessee was Rs.3,98,86,826/-It was seen that they had discharged stamp duty by considering the value of Rs 2,23,21,500/- and the actual amount received by them was not considered. The assessee had discharged service tax on the above said additional consideration as works contract service on 40% of the amount charged, after claiming abatement @ 60%. However, on examination of the above documents and as discussed in following paragraphs, the additional consideration was related to carrying out of finishing services on the duly completed Villa. In terms of Rule 2A (ii) (B) of the Valuation Rules, finishing work is eligible for abatement @ 30% only.

49.3 Third objection raised by the audit officer was that the assessee had wrongly claimed 60% abatement on the cancellation charges received by them during the period from 2015-16 and 2016-17 and had paid Service tax on the remaining amount. The assessee discharged the service tax on cancellation charges treating it as Works Contract Service, which is not the case. It may be noted that the service is in the nature of tolerance of an act or situation as mentioned in Section 66 E(e) of the Act. Therefore, the same is not eligible for any abatement as claimed by the assessee.

49.4 Thus, there are three issues to be determined in the present show cause notice as under:

51.2 From the perusal of the above definition, it can be seen that the said definition specifies a clear boundary that a transaction would be covered under 'Works Contract' if and only if the following elements are present in the transaction:

a) There should be a 'contract'.

b) During the execution of such contract, the element of transfer of property in goods should be involved.

c) Such goods should be leviable to tax as sale of goods.

d) The contract should be for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

51.3 In the present case, I find that, sale deed entered into by the assessee and the buyer of the property was for purchase of a 'Villa' constructed in the plot owned by the assessee. For the purpose of ascertaining the actual nature of services, the agreements provided by the assessee, one 'Agreement to Sale' dated 14.7.2014 and another 'Sale Deed' dated 7.2.2017, entered by the assessee with Ms Achla Dipak Shah for Villa No C-059 ('buyer') (RUD 3) were analysed in the show cause notice. Paragraph 2.1 and 2.2 of the agreement to sale read as under:

2. PROPERTY

2.1 The Prospective Buyer(s) is desirous of purchasing the said Villa forming part of the scheme known as "The North Park" being developed on the Subject Land by SEMPL.

2.2 The Prospective Buyer(s) is aware that SEMPL may carry out the development of the Subject Land, on its own or through any other person or party. SEMPL has obtained necessary permission for township development and is in the process of obtaining further necessary permissions, as applicable. The

51.4 The sale deed reads as follows:

F. The Purchaser(s) herein being desirous of purchasing a Villa in the said Scheme known as **The North Park** , had booked Villa No. **C-059** having Super Built up Area of 6822 sq.ft. (Carpet Area of 5924 sq.ft.), together with part of Land area admeasuring 6579 sq. ft. (Carpet area of 4746 sq. ft.) or thereabouts, out of the Total Land area Admeasuring BLOCK NO. 408- AREA- 7487 SQ. MTRS. and BLOCK NO. 410- AREA 7698 SQ. MTRS. of Block No. 408,410 Dantali Village-Dantali , Taluka- , District-Gandhinagar and subsequently had executed Agreement to Sale with SEMPL, together with the rights to use and enjoy the common areas, passages and amenities and facilities of the Cluster (hereinafter referred to as the "**Said Villa**"). more particularly described in the **Second Schedule** hereunder written. for the Consideration as detailed in the **Third Schedule** hereunder written. For the purpose of this Deed, the term "**Cluster**" shall mean and comprise of all buildings in the said Scheme having certain common facilities and amenities.

51.5 From the above, it is clear that the agreement is for purchase of Villa which is being constructed by the assessee in their scheme known as 'The North Park'. It is written in lucid English that the 'prospective buyer(s) is desirous of **purchasing the said Villa'**. Thus, one of the elements of the definition of 'Works Contract', as mentioned at (d) above, does not find fulfilled in the said agreement which stipulate that the contract should be for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property. There is no mention of the assessee agreeing to construct villa on behalf of the buyer; but, contrary to the claim of the assessee, the agreement says that the Villa is being developed by the assessee as evident from Para 2.1 of the agreement reproduced above. I do not see any intention of the buyer of the property to get the construction as claimed by the assessee in their defense reply.

51.6 In the case laws of *M/s Super Poly Fabriks Ltd-2008 (10) S.T.R. 545 (S.C.), M/s Kone Elevators (India) Ltd-2005 (181) E.L.T. 156 (S.C.) and M/s Mahindra & Mahindra Ltd.- 1995 (76) E.L.T. 481 (S.C.)* the Hon'ble Apex Court has laid down the principle that a contract/ document has to be examined by the tone and tenor of the agreement. The Hon'ble Tribunal had the occasion to examine the principles of interpretation of a document in the case of *M/s SS Associates-2010 (19) STR 438 (T)* wherein they have observed that the crux of the above three judgments of the Hon'ble Apex Court is that the contract is to be understood in terms of the tone of agreement and the observations are reproduced as under:

> *"We find that the Hon'ble Supreme Court in the case of Super Poly Fabriks Ltd. v. CCE, Punjab (supra) in paragraph 8 has specifically laid down the ratio which is as under :*
> *"There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive."*
>
> *An identical view was taken up by Hon'ble Supreme Court in the case of State of AP v. Kone Elevators (India) Ltd. (supra) and UOI v. Mahindra and Mahindra in similar issues. The ratio of all the three judgments of the Hon'ble Supreme Court, is that the tenor of agreement between the parties has to be understood and interpreted on the basis that the said agreement reflected the role of parties."*

51.7 Further, the Tribunal has made identical observation in the case of *M/s Ritesh Enterprises- 2010 (18) STR 17 (T)* and the text of the said observation is reproduced under:

> *"We find that the Hon'ble Supreme Court in the case of Super Poly Fabriks Ltd. v. CCE, Punjab (supra) in paragraph 8 has specifically laid down the ratio which is as under :*
> *"There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive."*
> *An identical view was taken up by Hon'ble Supreme Court in the case of State of A.P. v. Kone Elevators India Ltd. (supra) and UOI v. Mahindra and Mahindra in a similar issues. The ratio of all the three judgments of the Hon'ble Supreme Court, is that the tenor of agreement between the parties has to be understood and interpreted on the basis that the said agreement reflected the role of parties."*

51.8 The above clearly indicates that the tone and tenor of the document plays a vital role in examination of the nature of the activity undertaken by virtue of the said document. In the instant case, the documents on record viz., agreement to sale and sale deed have to be examined in terms of the tone and tenor of the said document. As already discussed above, the agreement to sale reveals that the same is for the sole purpose of sale/purchase of Villa and is definitely not for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of immovable property. Therefore, in this case it cannot be said that the assessee has entered into a contract with their customers for the purposes as specified under the definition of the term 'Works Contract'.

51.9 In light of the above discussion, it is clearly visible that one of the limbs of the definition of 'Works Contract' as defined under Section 65B(54) of the Finance Act, 1994 viz. contract for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of movable or immovable property is not satisfied and hence the service cannot be considered as 'Works Contract'.

52.1 The assessee has relied upon the ratio of the case law of *M/s K Raheja- 2006 (3) STR 337 (SC)* which was affirmed in the case of *M/s Larsen& Toubro Ltd- 2014 (303) ELT 3 (SC)* to drive home the point that an agreement to sell an immovable property could also be treated as 'Works Contract'. In this regard, I find that the ratio of the decision in case of *M/s K Raheja* is not applicable to the facts of the case since the factual matrix of the same is entirely on a different footing than the case at hand in as much as the activity undertaken by M/s K Raheja was construction of residential apartments and commercial complexes after entering in to development agreement with the owners of the land as evident from the text of the said ruling.

> *2. Briefly stated the facts are as follows:*
> *The Appellants carry on the business of real estate development and allied contracts. They are having their office at Bangalore.* ***They enter into development Agreements with owners of lands.*** *Thereafter they get plans sanctioned. After approval of the plans they construct residential apartments and/or commercial complexes. In most cases before they construct the residential apartments and/or commercial complexes they enter into Agreements of Sale with intended purchasers. The Agreements would provide that on completion of the construction the residential apartments or the commercial complex would be handed over to the purchasers who would get an undivided interest in the land also. The owners of the land would then transfer the ownership directly to the society which is being formed under the Karnataka Ownership Flats (Regulation of Promotion of Construction, Sales, Management and Transfer) Act, 1974.*

52.2 As could be seen from the above facts of the case, there was tripartite agreement made in the case, one with the owner of the land for development by the developer and and the other by the developer with the buyer for sale of apartment. In the present case, the land is owned by the assessee and the assessee himself constructed the Villa. On scrutiny of the "Sale Deed" for Villa No C-059, it was seen that the land on which the villa was constructed belonged to the assessee. This is evident from Clause A of the sale deed which is reproduced below:

> *"A. SEMPL is the absolute owner and is seized and possessed of and otherwise well and sufficiently entitled as the owner of all those pieces and parcels of lands bearing Block No. 387, 388, 392, 393, 397 situate lying and being at Village Dantali, Taluka – District Gandhinagar and land bearing Block No. 387, 388 and 389 situated lying and being at Village Jaspur, Taluka – Kalol, District Gandhinagar admeasuring about 136,425 sq. mtrs. or thereabouts (hereinafter referred to as the "said Lands"), more particularly described in the*

First Schedule hereunder written."

52.3 Therefore, the ratio of the said decision cannot be made applicable in the present circumstances of the case. I also find that the said case law has been delivered in the context of Karnataka Sales Tax Act as evident from paragraph 10 of the order which is reproduced below:

> *"10. Mr. Mehta drew the attention of this Court to relevant provisions of the Karnataka Sales Tax Act (hereinafter called the said Act). Section 2(1)(k)(viii) defines a "dealer" as follows :*
>
> *"2(1)(k) "dealer" means any person who carries on the business of buying, selling or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes -*
>
> *xxx xxx xxx*
>
> *xxx xxx xxx*
>
> *(viii) a person engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.*
>
> *xxx xxx xxx*
>
> *xxx xxx xxx"*
>
> *Thus a person engaged in the business of transfer of property in goods, whether as goods or in some other form, involved in execution of a works contract would be a dealer.*
>
> *Section 2(1)(u1) defines the words "taxable turnover" as under :*
>
> *"2(1)(u1) "taxable turnover" means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India."*
>
> *Section 2(1) (v-i) is relevant. It defines a "works contract" as follows :*
>
> *"2(1)(v-i) "works contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any moveable or immovable property."*
>
> *It is thus to be seen that under the Karnataka Sales Tax Act the definition of the words "works contract" is very wide....."*

52.4 Therefore, the analogy of the case of M/s K Raheja *supra* cannot be made applicable to the facts of the case at hand. Further it is held by a Larger Bench of Tribunal in the case of *Western Agencies Pvt. Ltd-2011 (22) S.T.R. 305 (Tri. - LB)* that rule of construction suggests that when two statutes remain different and distinct and each is to be judged with reference to their object, there is no scope for adoption of provisions of one statute by the other. In the present case, Hon'ble Supreme Court has delivered the judgment of K. Raheja in the context of Karnataka Sales Tax Act and hence the ratio of the same cannot be made applicable to the present case. In the case of *Cibatul Limited, PO. Atul-1979 (4) E.L.T. (J 407)(Guj.)* Hon'ble Gujarat High Court also held that it is risky to rely upon the definition given in one Act, for the purpose of

applying the provisions of another Act. Hon'ble High Court has held as under:

> *85. The department has treated the manufacturer and the buyer as "related persons" because of the declaration made under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) stating that they are "inter-connected undertakings" as defined by Section 2(g) of that Act. In the affidavits filled on behalf of the department "inter-connected undertakings" has been transferred into "inter-related undertakings"-an altogether new and unknown expression. From "interrelated undertakings", the department has jumped to "related persons" conveniently overlooking the statutory definition of "related person" given in the Excise Act. This state of affairs reflects loose thinking. Now, definition of an expression given in one Act cannot be used for the purpose of another Act. In our opinion, the argument raised by Mr. Bhatt in that behalf is well founded. The definition given in one statute is for effectuating the provisions of the statute and not for effectuating the provisions of another statute. It is, therefore, risky to rely upon the definition given in one Act, for the purpose of applying the provisions of another Act.*
>
> *86. In Ram Narain v. The State of Uttar Pradesh and others, AIR 1957 S.C. 18, it has been laid down by the Supreme Court: "It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act. The meanings of words and expressions used in an Act must take their colour from the context in which they appear."*
>
> *87.In Smt. Lila Vati Rai v. State of Bombay, AIR 1957 S.C. 521, the Supreme Court has observed :*
>
> *"...observations made by a Court with reference to the constructions of one statute cannot be applied with reference to the provision. of another statute which is not pari materia with the statute which forms the subject matter of the provisions decision."*
>
> *88. In The Commissioner of Sales Tax, Madhya Pradesh, Indore v. M/s. Jaswant Singh Charan Singh, AIR 1967 S.C. 1454, it has been observed : "It is a well-settled principle that in construing a word in an Act caution is necessary in adopting a meaning ascribed in that word in other statutes." (paragraph 8 of the report).*

52.5 In the case of M/s Larsen& Toubro Ltd (*supra)* also the decision of delivered in the context of Karnataka Sales Tax Act where the decision of K. Raheja was considered. In view of the above settled position, the decision delivered in the context of Karnataka Sales Tax Act cannot be followed in the instant case.

53.1 Having ruled out the taxability of the service provided by the assessee under the category of 'works contract', the question arises is whether the said service merits classification under 'construction service' or otherwise as proposed in the show cause notice. Section 65B (44) of the Finance Act, 1994 defines 'service' as *any activity carried out by a person for another person for a consideration, and not falling under the categories of activities stipulated under Section 66D of the Finance Act, 1994. The term 'service' also includes declared services stipulated under the provisions of Section 66E of the Finance Act, 1994.*

53.2 Section 66E(b) of the Finance Act, 1944 ('Act') reads as under:

> *"66E. The following shall constitute declared services, namely:-*
>
> *(b) construction of a complex, building, civil structure or a part thereof,*

including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority"

53.3 From the plain reading of the said definition, it can be deduced that the inclusive portion includes a complex or building intended for sale to a buyer and therefore, the activity undertaken by the assessee would fall within the ambit of Construction of Residential complex services, as envisaged under the provisions of Section 66E(b) of the Act. The activity carried out by the assessee in the present case is nothing but construction of Villas, in a plan approved by the proper authorities like Ahmedabad Urban Development Authority with the intention for sale to a buyer as evident from the agreement to sale and sale deed executed after completion of the construction work. The term 'construction' is conspicuous by its presence in definition of 'works contract' and the declared service under Section 66E(b) of the Finance Act 1994. So, what makes the difference between 'works contract' and 'construction service', in my considered view, is that a works contract is an agreement that is a mixture of service or labor and transfer of goods. Thus, it is a contract for building, construction, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration, or commissioning of any immovable property wherein transfer of property in goods is involved. Construction services, on the other hand, is a civil structure intended for sale to a buyer shall be the supply of services except where the entire consideration has been received after issuance of completion certificate. In the former case, there is very requirement of a contract for construction and in the agreement to sale and sale deed entered into by the assessee with its customers, there is no agreement for construction of Villa, but it is merely an agreement to sale/purchase of Villa being constructed by the assessee and therefore it falls under the latter category of service i.e. construction of building intended for sale and the entire consideration are received before completion certificate. Thus the answer to the first question is that the service provided by the assessee is NOT 'works contract' but it is 'construction service', a declared service as per Section 66E(b) of the Finance Act 1994 and the service tax is to be levied accordingly.

54.1 Having decided the nature of the service provided, there arises the issue of valuation of service. The assessee, while discharging service tax under the category of 'works contract', has discharged the service tax liability on a value after deducting certain amount toward the value of land from the total consideration received. As per the contention raised by the assessee in this regard, service tax is to be discharged only on the value of service portion of the works contract and they are eligible for deducting the value of land from the total consideration received in the whole transaction of sale of Villa. In this regard, I find that, when the service provided is held to be classified under the category of 'construction service' a declared service as per Section 66E(b) of the Finance Act 1994 applicability of rule 2A of Service Tax (Determination of Value) Rules, 2006 ceases to be applicable and the service tax is to be discharged as per Sr.No.12 of Notification No.26/2012-ST dated 20.06.2012 which reads as under:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act), and in supersession of notification number 13/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 211(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of the description specified in column (2) of the Table below, from so much of the service tax leviable thereon under section 66B of the said Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (3) of the said Table, of the amount charged by such service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table, namely :-

TABLE

Sr.No.	Description of taxable service	Percent-age	Conditions
12.	Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority.	25	(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004. (ii) The value of land is included in the amount charged from the service receiver.

C. For the purposes of exemption at Serial number 12 -

The amount charged shall be the sum total of the amount charged for the service including the fair market value of all goods and services supplied by the recipient(s) in or in relation to the service, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services supplied to the service provider, if any; and
(ii) the value added tax or sales tax, if any, levied thereon :

Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

54.2 Sr. No.12 of Notification No.26/2012-ST was replaced vide Notification No. 2/2013-S.T., dated 1-3-2013 as under:

"12.	Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority,-		(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004;
	(i) for residential unit having carpet area upto 2000 square feet or where the amount charged is less than rupees one crore;	25	(ii) The value of land is included in the amount charged from the service receiver."
	(ii) for other than the (i) above.	30	

54.3 Sr. No.12 was further replaced vide Notification No. 9/2013-S.T., dated 8-5-2013

12.	Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly, except where entire consideration is received after issuance of completion certificate by the competent authority,-		(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004
	(a)for a residential unit satisfying both the following conditions, namely :-	25	
	(i) the carpet area of the unit is less than 2000 square feet; and		ii) The value of land is included in the amount charged from the service receiver
	(ii) the amount charged for the unit is less than rupees one crore;		
	(b)for other than the (a) above.	30	

54.4 Sr. No.12 of Notification No.26/2012-ST dated 20.06.2012 was further replaced

vide Notification No. 8/2016-S.T., dated 1-3-2016 as under:

12	*Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority*	*30*	*(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004.* *(ii) The value of land is included in the amount charged from the service receiver.";*

54.5 The period involved in the show cause notice is 2015-16 to 2017-18 (upto June 2017) and therefore the Sr. No.12 of Notification No.26/2012-ST dated 20.06.2012 as stood after amendment vide Notification No. 9/2013-S.T., dated 8-5-2013 and Notification No. 8/2016-S.T., dated 1-3-2016 is to be considered. During the relevant period service tax was to be levied on 30% of the value of the service provided where the carpet area of the residential unit was more than 2000 sq. feet and the amount charged was more than rupees one crore. As per the sale deed, the carpet area of the Villa was more than 2000 sq.feet and the cost was more than rupees one crore. The abate value for discharge of service tax was subjected to the condition that CEVAT credit on inputs is not taken and value of land is included in the amount charged from the service provider.

54.6 In this regard, I find that, there is no allegation in the show cause notice about the assessee taking CENVAT credit on inputs used in providing taxable service. Moreover, the total cost of the Villa included the value of the land. Though the assessee contended in their reply that value of land is separately mentioned in the agreement to sale and sale deed and accordingly they have discharged service tax on the service portion only after deducting the value of land, I do not find any such separation of value of land in the agreement to sale and sale deed executed by the assessee with the buyer of the Villa. Therefore, the value of the Villa mentioned in the sale deed is to be considered as the total cost inclusive of the land value and accordingly, the demand of service tax as computed at Table-1 of paragraph 16 of the show cause notice is required to be confirmed.

55.1 The second objection raised by the audit officer which culminated into issue of the show cause notice is that the sale consideration amount was totally Rs 2,60,45,825/- (Rs.2,23,21,500/- plus other charges of Rs 31,02,494/- and service tax of Rs 6,21,832/-) whereas as per customer ledger the actual amount received by the assessee was Rs 3,98,86,826/- and the assessee had discharged service tax on the above said additional consideration as works contract service on 40% of the amount charged, after claiming abatement @ 60%. It is alleged in the show cause notice that, on examination of the above documents and as discussed in following paragraphs, the additional consideration was related to carrying out of finishing services on the duly completed Villa and in terms of Rule 2A (ii) (B) of the Valuation Rules, finishing work is eligible for abatement @ 30% only. The arguments put forth by the assessee, in this regard, are that both framework price and balance work price were received collectively and were in respect of the Villa and they have paid service tax under Works Contract service. They contended that at the time of entering into agreement, the balance work price was not finally ascertained and at the time of execution of sale deed the construction of Villa was complete in al respect.

55.2 In regard to the contention of the assessee that the composite agreement had two elements-a) sale of land and b) construction of villa, I find that the said contention is fallacious in as much as the agreement and sale deed entered into by the assessee with the buyer was for sale of villa, as discussed in the foregoing paragraphs, and not a

composite contract for sale of land and construction of villa. As per the agreement and sale deed, the value of the entire transaction viz. the purchase and sale of Villa constructed in a piece of land was mentioned. They have discharged the stamp duty on the value of property mentioned in the sale deed only. I find that the assessee has, in the written submission, fairly conceded that the agreement and sale deed did not bear the balance work price. Therefore the contention of the assessee, that frame work price and balance work price was merely the split of consideration received towards construction of villa, is not tenable. On the contrary it can be concluded that the additional consideration received, over and above the sale price as per sale deed, is towards additional works carried out were in lieu of the cost of additional finishing work such as interior designing and other cosmetic designing of the villa.

55.3 The show cause notice has discussed about an agreement dated 31-3- 2017 (RUD 7) entered by them with M/s Adani Township & Real Estate Co Pvt Ltd ('ATRECO') produced by the assessee. The agreement stated that the assessee had assigned the finishing work on the villa constructed by the assessee to ATRECO and the cost of such finishing services in respect of villas which were yet to be constructed, should be directly collected by ATRECO from the buyer. It further stated that in respect of the villas wherein monies have been collected for finishing work by the assessee from the buyer of such villas, the assessee shall transfer such amount in favour of ATRECO. The relevant clauses of the said agreement are as under:

"2 *SEMPL hereby assigns the job of executing the Finishing Works and to accept the consideration in lieu thereof in favour of ATRECO, in respect of the villas developed / to be developed in the North Park scheme, subject to the terms of this Deed ("Assignment").*

7 For the villas wherein monies have been collected for Finishing Work by SEMPL from the purchaser of such villas, SEMPL shall transfer such amount in favour of ATRECO along with necessary cost incurred for finishing such Villas.

8 With respect to the villas which are yet to developed / constructed, ATRECO shall directly charge for the Finishing Works to the purchasers of particular villa and all such payments from the purchaser shall be collected by ATRECO.

9 ATRECO shall be responsible to complete the Finishing Works in accordance with the terms agreed with the purchaser by ATRECO and / or SEMPL.

10 With respect to any liability arising out of the Finishing Works under the Assignment, ATRECO shall be responsible for the same and shall indemnify, and keep indemnified , SEMPL from all such claim, demands, order, liability etc. arising out the same".

55.4 From the above agreement, it is very much clear that the assessee was also carrying out the finishing work which was not part of the agreement to sale and the assessee has received additional consideration in lieu of carrying out of the finishing work on the duly constructed villas, under a separate agreement with ATRECO. I find that there are separate agreements for construction of villas (agreement to sale) and another to carry out the finishing services. In terms of Rule 2A (ii) (B) of the Valuation Rules, finishing work is eligible for abatement @ 30% only. The relevant portion of the above said rule is reproduced below:

> ***RULE [2A. Determination of value of service portion in the execution of a works contract. —*** *Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-*

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods [or in goods and land or undivided share of land, as the case may be] transferred in the execution of the said works contract.

.....

.....

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent. of the total amount charged for the works contract;

(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for,-

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

service tax shall be payable on seventy per cent of the total amount charged for the works contract"

55.5 In view of the above provisions of law, the assessee was required to pay service tax on 70% of the total amount charged for the works contract. However, the assessee paid the service tax on 40% of the value of total amount charged after claiming abatement @ 60% considering it as original work, instead of 30%, which was actually admissible to them. I have already held in earlier part of my order that the work carried out by the assessee is not works contract, but it is construction service. Though the assessee claimed in their defense reply that construction of frame work and balance work collectively constituted a single works contract, the documentary evidences proved otherwise. Had the entire consideration received is towards the cost of Villa sold by the assessee, they should have shown the entire value in the sale deed and should have paid the stamp duty accordingly. In the present case, from the agreement to sale and sale deed, I find that the assessee has paid stamp duty on the value shown in the sale deed and not added the value of balance work. Therefore it is evident that additional consideration received is not part of the Villa sold, but it is towards some other additional work carried out. Thus, the abatement claimed by the assessee @ 60%, instead of 30%, considering it as original works contract is not in accordance with the law and therefore the differential service tax as demanded in the show cause notice is required to be confirmed.

55.6 I also find that the assessee has made a feeble attempt to prove the show cause notice illegal contending in as much as the notice is re-determining the value of taxable service without following the procedures contemplated in Valuation Rules. I am in total disagreement with the said contention of the assessee. The show cause notice did not challenge the value of the service provided in either of the issues raised in it. In the first issue, the notice challenged the classification of service adopted by the assessee. In the second issue was regarding claiming wrong abatement. Thus, the contention of the assessee is incongruous and not tenable.

56.1 The third issue involved in the show cause notice is that the assessee had wrongly claimed 60% abatement on the cancellation charges received by them during the period from 2015-16 and 2016-17 and had paid Service tax on the remaining

amount. The assessee discharged the service tax on cancellation charges treating it as Works Contract Service.

56.2 In this regard, I find that when it is already held that the service provided by the assessee in sale of Villa is not Works Contract, the payment of service tax on cancellation charges collected by them under works contract itself is totally wrong. Therefore the payment of service tax on abated value is against the provisions of law. Moreover, the amount collected towards cancellation of booking is 'tolerance of an act' and is separately defined 'declared service' under Section 66E of the Finance Act. As per definition of 'service' as defined under Section 65B(44) service means any activity carried out by a person for another for consideration, and includes a declared service. The definition of 'declared service' under Section 65B(22) of the Act reads as under:

"declared service' means any activity carried out by a person for another person for consideration and declared as such under section 66E"

56.3 Section 66(E) (e) of the Act reads as under:

"Section 66E: The following shall constitute declared service namely:

e. *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"*

56.4 In reply to a communication sent to the assessee, they contended that cancellation charges are nothing but retention of the amount short refunded to their customers. Thus it is evident that the assessee had received the income for tolerating an act of cancellation from their customer for the years 2015-16 and 2016-17 and it squarely falls under the definition of 'declared service' under clause (e) to Section 66(E) of the Act. In respect of the said declared service, as far as my knowledge is concerned, there is no specific exemption available or any notification issued granting abatement in value for the purpose of assessment of service tax on it. The service tax has to be paid on the entire income shown by them in their financial records. The assessee. I observe, has not made any submission in this regard in their written submission and therefore, it is to be presumed that they have accepted the objection and they do not have any valid ground to rebut the allegation leveled against them. In view of the above, I hold that the assessee is liable to pay service tax on the entire value of the cancellation charges and no abatement of value will be available to them.

57.1 Other contentions raised by the assessee are that the show cause notice is hit by limitation and there is no suppression of facts so as to invoke extended period of limitation. In this regard, I find that, the assessee has entered into agreement to sale of villa and the agreement was not for construction of villa. Yet, they have paid service under the category of 'works contract', which too, on a value arrived upon after deducting a certain amount towards value of land. Thus they have mis-classified the nature of service so as to evade service tax and suppressed the actual value of the Villa in the sale deed. Section 70 of the Finance Act, 1994 stipulates that every person liable to pay the service tax shall himself assess the tax due. The Government has introduced self-assessment system under a trust based regime which casts the onus of proper assessment and discharging of the service tax on the assessee. The definition of "assessment" available in Rule 2(b) of Service Tax Rules, 1994 is reproduced as under:

> *"assessment" includes self assessment of service tax by the assessee, re-assessment, provisional assessment, best judgment assessment and any order of assessment in which the tax assessed is nil; determination of the interest on the tax assessed or re-assessed.*

57.2 In the instant case the assessee has failed to properly assess the service tax liability and also failed to reflect the correct information in the ST-3 returns. Thus, they have resorted to suppression of material facts by not reflecting the taxable income in their ST-3 returns.

57.3 Further, it is noticed that during the material period the assessee has neither discharged their Service Tax liability properly nor have furnished any material information to the Department relating to provision or receipt of such taxable services, either in their ST-3 returns, or otherwise. Had the revenue officers not intervened and unearthed the material facts, the short payment/ non-payment of service tax would not have been detected resulting in revenue loss to the Government. I find that the assessee has suppressed their taxable income for the above mentioned period and contravened the various provisions of Finance Act 1994 and rules made thereunder as they have failed to properly assess their Service Tax liability within the time frame as prescribed under the law despite the fact that they were in possession of relevant facts/documents/records. Thus, I find that the assessee has short-paid/ not-paid service tax by resorting to suppression of facts and contravention of the provisions of law with intent to evade payment of tax. Therefore, extended period of limitation as envisaged in the proviso to Section 73(1) of the Act is correctly invokable in the instant case for recovery of unpaid Service Tax alongwith interest u/s 75 of the Finance Act 1994.

57.4 Moreover in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the assessee to the department and therefore the department would come to know about such non-payment of duty/service tax only during audit or preventive/other checks. In the instant case, the assessee has failed to reflect the taxable income in their ST-3 returns and have concealed such income from the department deliberately, consciously and purposefully to evade payment of service tax. Even though the sale deed and the books of account mentioned the value of the property sold, they have not paid service tax on the whole value of service; but paid service tax only on part of the value after mis-classifying the service and evaded service tax payment. In the case of *Mahavir Plastics-, 2010 (255) ELT 241*, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In case of *Lalit Enterprises, 2009 (23) STT 275*, it is held that extended period can be invoked when department comes to know of service charges received by appellant on verification of his accounts. Therefore, I find that the all essential ingredients exist to invoke the extended period under proviso to Section 73 (1) of Finance Act, 1994 in the case at hand. Accordingly, I find that the service tax is liable to be recovered by invoking the extended period of limitation as provided for under Section 73 of the Finance Act, 1994 along with interest in terms of the provisions of Section 75 of the Finance Act, 1994.

58. It was contended that there was no willful suppression of facts or intention to evade payment of service tax and as such penalty under Section 78 was not imposable. However, the discussion at the foregoing paragraphs clearly indicates that the assessee has resorted to suppression of facts and contravention of the provisions of law with intent to evade payment of service tax and as such I find that penalty under Section 78 of the Finance Act, 1994 is imposable. In the instant case, the discussions above establishes the fact that the assessee has suppressed the facts and contravened the provisions of the Finance Act, 1994 or the rules made thereunder and as such the consequences shall automatically follow. The Hon'ble Supreme Court has settled this issue in the case of *Dharmendra Textile Processors reported in 2008 (231) E.L.T. 3 (S.C.)* and in the case of. *R. S. W. M. reported in 2009 (238) E.L.T. 3 (S.C)*. Hon'ble Supreme Court has observed that the presence of malafide intention is not relevant for imposing penalty and *mens rea* is not an essential ingredient for penalty for tax delinquency which is a civil obligation. Thus, I find that the assessee have rendered themselves liable to penalty under Section 78 of the Finance Act, 1994.

59. In view of the above discussion and findings, I pass the following order.

ORDER

(a) I confirm the demand of service tax amounting to Rs 2,77,11,911/- (Rs 1,20,74,334/- + Rs 1,53,07,940/- + Rs 3,29,637/-) (Rupees Two crores seventy seven lakhs eleven thousand nine hundred eleven only) as detailed in Table I to III of Revenue Para Nos 1 to 3 above, under the proviso to Section 73(1) of the Finance Act 1994;

(b) I impose penalty of to Rs 2,77,11,911/- (Rupees Two crores seventy seven lakhs eleven thousand nine hundred eleven only) under the provisions of Section 78(1) of the Finance Act 1994 against the proposed demand. However, in view of clause (ii) of the second proviso to Section 78(1), if the amount of Service Tax confirmed and interest thereon is paid within period of thirty days from the date of receipt of this Order, the penalty shall be twenty five percent of the said amount, subject to the condition that the amount of such reduced penalty is also paid within the said period of thirty days.

(c) I order to recover interest on Rs 2,77,11,911/- under the provisions of Section 75 of the Finance Act 1994.

(Sunil Kumar Singh)
Principal Commissioner
CGST, Ahmedabad South

F.No. STC/4-43/Shantigram/2020-21 Date: 22.03.2022

BY R.P.A.D/SPPED POST

To

M/s Shantigram Estate Management Private Limited,
Adani House, Near Mithakhali Six Roads,
Navrangpura, Ahmedabad 380 009

Copy to:

1. The Chief Commissioner, Central Tax, Ahmedabad Zone.
2. The Asstt. Commissioner, Central Tax, Division-VI, Ahmedabad South.
3. The Asst. Commissioner, Central Tax, TAR Section, HQ, Ahmedabad South
4. The Asstt.Commissioner (Prosecution), Central Tax, HQ, Ahmedabad South.
5. The Superintendent, Central Tax Range-V, Div.-VI, Ahmedabad South
6. The Superintendent, Central Tax, Systems HQ. Ahmedabad South for uploading on the website
7. Guard file