आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009

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निबन्धित पावती डाक द्वरा/By R.P.A.D DIN 20201264WT000000C251

फा.सं./F.No. STC/15-59/OA/2018 आदेश की तारीख़/Date of Order :- 31.12.2020

जारी करने की तारीख़/Date of Issue :- 31.12.2020

द्वारा पारित/Passed by:- ऍम.एल.मीणा / *M.L.Meena*

अपर आयुक्त / Additional *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 29/ADC/ MLM /2020-21

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

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इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रू .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) 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. (as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू) 2.00 .दो रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice No. VI/1(b)CTA/Tech-25/SCN/Pacifica/2018-19 dated 18.10.2018 issued to M/s Pacifica (India) Projects Pvt. Ltd., formerly known as *M/s Pacifica(Chennai Old Mahabalipuram Road Project)* Infrastructure Co Pvt Ltd, 4-5, Sigma Corporate-1, Near Mann Party Plot Behind Rajpath Club, Bodakdev, Ahmedabad 380059.

Brief facts of the case:

M/s Pacifica (India) Projects Pvt Ltd (Formerly known as M/s. Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co Pvt Ltd), 4-5, Sigma Corporate-1, Near Mann Party Plot, Behind Rajpath Club, Bodakdev, Ahmedabad, Gujarat 380059 ('assessee') are engaged in the activity of providing and receiving various services namely Legal Consultancy Services, Security & Detective Agency Service, Works Contract Services, Manpower Recruitment/Supply agency service, Goods & Transport Services, Construction of Residential complex service, Special service provided by builders, etc. The assessee was holding Service Tax registration number AADCP7522NST001.

2. During the course of audit of the assessee's records covering the period from July 2012 to March 2017, it appeared that they had shown other income of Rs 61,67,494/- under the head 'sundry balance written back' in their Balance Sheet for Financial Year 2016-17.

Revenue Para No.2: Service Tax not paid on the declared service under Section 66(E)(e) of the Finance Act, 1994.

3. It was observed from the ledger that the assessee had forfeited the amount of Rs 61,83,529/- as penalty for non-performance of a contract. As it appeared to be a consideration to the assessee, an observation was raised to the assessee under a letter No CGST-A/ 04-39/ Circle-VII/ AP-48/2017-18 on 24.5.2018 by the Superintendent (Audit), AP-48, Circle VII, Audit Commissionerate, Ahmedabad. It was stated in the letter dated 24.5.2018 that there was non-payment of service tax amounting to Rs 9,27,529/- on the forfeited deposit amount.

4. The assessee under their reply dated 31.5.2018 stated that the forfeiture was due to non-performance of a contract. They cited provisions of Section 74 of the Indian Contract Act, 1872 as under:

"74, Compensation for breach of contract where penalty stipulated for.-- 1 When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

5. It was submitted by the assessee that forfeiture was nothing but the amount stipulated in the contract for breach in performance of the same. Since the amount forfeited is a sum mutually agreed by the parties for breach of contract, it has to be regarded as an adjustment flowing from the contract itself read with Section 74 of the Indian Contract Act, 1872 and not under any other separate contract wherein they have agreed to refrain from doing any act against the concerned vendor. Once the forfeiture amount is stipulated in the contract, they could only sue for recovery of such amount, but cannot enforce mandatory performance of the deficiency. In such a scenario, it was submitted that the amount forfeited could not be said to be a consideration against agreeing to the obligation to refrain from an act, or to tolerate an act. Hence the same cannot be subjected to service tax.

6. It was argued by the assessee that to get covered under 'declared service' defined under Section 66E (e) of the Finance Act, 1994 ('Act'), it has to be a stand-alone transaction. The effect of breach of a contract cannot be treated as a separate transaction of service. The act of forfeiting is effect of breach of contract. Contract and effect of breaching a contract is a whole body and the same cannot be separated. What is covered under Section 66E(e) of the Act is the stand alone transaction like non competence agreement. The assessee stated that the amount forfeited by them is towards the inconvenience caused to them and the cost for searching the new contractors to finish the job not done by previous contractors.

7. It appeared that the contention of the assessee was not tenable due to the fact that as soon as the retention money is forfeited as penalty due to non-performance of the contract, it gets converted into a consideration received by the assessee in order to get itself covered within the ambit of the definition of clause (e) to Section 66E of the Act. It appeared that the assessee has tolerated an act of non-performance of the contract for which they have forfeited the retention amounts. The assessee has agreed to the obligation to refrain from act, or to tolerate an act or a situation within the coverage of clause (e) to Section 66E of the Act.

8. 'Activity' has not been defined in the Act. In terms of the common understanding of the word, activity would include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term with very wide connotation. Activity could be active or passive and would also include forbearance to act. Agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a declared service under section 66E of the Act

9. Non-monetary consideration essentially means compensation in kind such as the following:

- Supply of goods and services in return for provision of service
- Refraining or forbearing to do an act in return for provision of service
- Tolerating an act or a situation in return for provision of a service
- Doing or agreeing to do an act in return for provision of service

10. It appeared that the assessee had forfeited the retention money as penalty for non-performance of contract. The assessee has provided services of agreeing or tolerating an act for non-performance of contract. The assessee have refrained from doing an act/tolerated an act for which they have forfeited the retention amounts. The forfeiture of the retention amounts as penalty for non-performance of contract have been agreed upon by the assessee. It appeared that there is an element of consideration to the assessee by forfeiting the retention amounts. There is a request to tolerate/refrain/do an act from the receiver which is agreed by the assessee. It, therefore, appeared that by forfeiting the retention amounts, a service has been rendered by the assessee for a consideration by tolerating an act and for refraining to do an act, which appeared to fall within the ambit of clause (e) to Section 66(E) of the Act. It, therefore, appeared that the contention of the assessee that the amounts were towards the inconvenience caused to them and for the cost of searching new contractors is not tenable and acceptable. The activity would amount to service within the ambit of the definition of 'service' in terms of Section 65B (44) of the Act. Further, by getting a consideration for the service provided by them, 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, as defined under Section 65B (51) of the Act.

11. Section 67(1)(i) of the Act says that "in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him". Explanation (a)(i) to Section 67(1) of the Act defines "consideration" to include any amount that is payable for the taxable services provided or to be provided. It, therefore, appeared that service tax amounting to Rs 9,27,529/- is leviable on the amount of Rs 61,83,529/- received as consideration for forfeiture of the retention amounts.

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

- Section 67 of the Act as they have failed to take. the gross amount of Rs 61,83,529/- as consideration in money for the forfeiture of retention amounts falling under the ambit of clause (e) to Section 66E of the Act;
- Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 ('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.

13. The assessee had not disclosed to the revenue that they had agreed to refrain/tolerate an act and took retention money. At no point of time, the assessee have shown receipt of money against the head 'sundry balance written back', forfeited as penalty for non-performance 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 on forfeiture of the retention amounts in any of the records/returns before the audit objection was detected.

14. Section 73(1) of the Act reads as under:

SECTION [73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, [Central Excise Officer] may, within [thirty months] from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words ["thirty months"], the words "five years" had been substituted"

15. It, therefore, appeared that they have suppressed the material facts with an intent to evade the payment of service tax of receiving a consideration on the declared service provided within the ambit of clause (e) to Section 66E of the Act and accordingly, the proviso to Section 73(1) of the Act is applicable for invoking the extended period of 'five years' and the relevant date has to be taken as per the provisions of Section 73(6)(i)(a) of the Act for issuance of show cause notice.

16. On going through the Balance Sheet for Financial Year 2016-17, the assessee have shown an income of Rs 61,83,529/- as retention amounts forfeited and therefore, service tax not paid amounting to Rs 9,27,529/- is liable to be demanded and recovered from the assessee under the proviso to Section 73(1) of the Act by invoking the extended period of time of five years as there is a case of suppression of facts with an intent to evade the payment of service tax.

17. Section 75 of the Act related to interest on delayed payment of service tax reads as under:-

"SECTION [75. Interest on delayed payment of service tax. Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest [at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette] for the period] by which such crediting of the tax or any part thereof is delayed :]".

18. It appeared that the assessee has not paid the service tax amounting to Rs 9,27,529/- as discussed above and therefore, interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Act.

19. Section 78(1) of the Act reads as under:

"SECTION [78. Penalty for failure to pay service tax for reasons of fraud, etc. - (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax".

20. It appeared that by the act of not disclosing the amount of consideration received on account of forfeiting the retention amounts and by providing a declared service to their customers by refraining/tolerating an act falling within the ambit of clause (e) to Section 66E of the Act as discussed above, the assessee suppressed the material facts with an intention to evade the payment of service tax and it, therefore, appeared that the assessee in addition to the payment of service tax along with interest would also be liable for penal action under the provisions of Sections 78(1) of the Act.

Revenue Para No 3: Wrong transfer of Education Cess and Secondary & Higher Education Cess in the main Service Tax credit.

21. During the course of audit, it was observed that the assessee have wrongly transferred the unutilized credit balance of Education Cess amounting to Rs 1,79,788/- and Secondary & Higher Education Cess amounting to Rs 89,894/- to the credit of service tax credit, as shown in their ST-3 returns filed for the period from October 2016 to March 2017. It appeared that this kind of transfer of credit of Education Cess and Secondary & Higher Education Cess is not allowed, under the 1st and 2nd proviso to Rule 3(7)(b) of the Cenvat Credit Rules, 2004.

22. An observation was raised to the assessee under a communication No CGSTA/04-39/Circle-VII/AP-48/2017-18 on 24.5.2018 by the Superintendent (Audit), AP-48, Circle VII, Audit Commissionerate, Ahmedabad. It was requested to reverse the improper transfer of cenvat credit of Rs 2,69,682/- (Rs 1,79,788/- (Education Cess) + Rs 89,894/- (Secondary & Higher Education Cess).

23. The assessee vide their reply dated 31.5.2018 stated that the cess was already reversed on 23.2.2018 and was not utilized for payment of service tax. Further, the GST network system did not allow the reversal of CGST alone, without reversing SGST. This facility had been provided on the website after 20 May, 2018. It was further submitted that they had reversed an amount of Rs 2,69,682/- and shown them in the GSTR 3B return filed for the month of March 2018. However, it was noted that they had not paid the interest and penalty leviable.

24. The relevant text to Rule 3(7)(b) of the Cenvat Rules reads as under:

"[(b) CENVAT credit in respect of-
(i)....

(vi) the education cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);

[(via) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and]

(vii) .....

shall be utilised towards payment of duty of excise or as the case may be, of service tax leviable.

[**Provided** that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services :

Provided further that the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services :]"

25. The 1st and the 2nd proviso to Rule 3(7)(b) of the Cenvat Rules clearly says that cenvat credit of education cess and secondary & higher education cess availed on taxable services could only be utilized for payment of education cess and secondary & higher education cess on taxable services. The Rule *does not allow transfer* of education cess and secondary & higher education cess to any other duties

mentioned in the ST 3 returns. It appeared that the assessee could not have transferred unutilized cenvat credit balance of education cess &secondary &higher education cess to the service tax credit and could have not utilized the credit availed by them.

26. It, therefore, appeared that the assessee have contravened the provision of:

1st and 2nd proviso to Rule 3(7)(b) of the Cenvat Rules as they have wrongly transferred the unutilized cenvat credit of education cess and secondary & higher education cess to the service tax credit amounting to Rs 2,69,682/- (Rs 1,79,788- - education cess + Rs 89,894/- secondary & higher education cess), as detailed above.

27. It appeared that the assessee have wilfully transferred the unutilized cenvat credit on education cess and secondary & higher availed on taxable services to service tax credit when it was known to them that this was not allowed as per the 1st and 2nd proviso to Rule 3(7)(b) of the Cenvat Rules. The assessee had at no point of time provided the information of transfer of this unutilized cenvat credit of education cess and secondary & higher education cess to the revenue. Only after the audit pointed it out by an observation raised on 24.5.2018, the assessee have reversed the unutilized cenvat credit amounting to Rs 2,69,682/-, as shown in their GSTR 3B return filed for the month of March 2018.

28. Rule 14(1)(ii) of the Cenvat Rules reads as under:

"[RULE 14. Recovery of CENVAT credit wrongly taken or erroneously refunded. (1) (ii) Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply *mutatis mutandis* for effecting such recoveries".

29. Rule 15(3) of the Cenvat Rules reads as under:

"[RULE 15. Confiscation and penalty. (3 In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then, the provider of output service shall also be liable to pay [penalty in terms of the provisions of sub-section (1) of section 78) of the Finance Act.

30. The assessee have suppressed the material facts with an intent to evade the payment of duty by irregular transfer of unutilized cenvat credit of education cess and secondary & higher education cess to service tax credit. Accordingly, the proviso to Section 73(1) of the Act is applicable for invoking the extended period of 'five years' for demand and recovery of the wrongly transfer and utilized cenvat credit read with the provisions of Rule 14(1)(ii) of the Cenvat Rules. The relevant date for issuance of this show cause notice is applicable as per the provisions of Section 73(6)(i)(a) of the Act, for issuance of this show cause notice.

31. Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made

thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed is also liable to pay interest on the delayed payment as per the provisions of Section 75 of the Act.

32 It appeared that the assessee has reversed the credit transferred by them only after the audit pointed it out, as discussed above and therefore, interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Act read with the provisions of Rule 14(1)(ii) of the Cenvat Rules.

33. It appeared that by the act of transferring unutilized cenvat credit which was not allowable as per the 1st and the 2nd proviso to Rule 3(7)(b) of the Cenvat Rules and not disclosing the same in their ndreturns, the assessee have suppressed the material facts with an intention to evade the reversal of cenvat credit, as discussed above and only after it being pointed out by the audit, has reversed the cenvat credit. It, therefore, appeared that the assessee in addition to the payment of service tax along with interest would also be liable for penal action under the provisions of Sections 78(1) of the Act read with the provisions of Rule 15(3) of the Cenvat Rules.

Revenue Para No.06: - Discharging service tax by classifying service as "Works Contract Service" instead of "Construction Service": -

34. The ST-3 returns of the assessee indicated that they are discharging service tax under the category of Works Contract Services. However, the financials records of the assessee indicated that the revenue income had been booked under the head 'Sale of Properties'. It appeared that there was some mis-match in the heads under which income had been shown in the ST-3 returns and that in the financial records . For the purpose of ascertaining the actual nature of activity against which the assessee had received the consideration, the agreements/contracts pertaining to such works were called for by the audit. They submitted two agreements entered into with Mrs. Jyoti B Kalola of which one was titled 'Deed of Conveyance' and other was titled 'Agreement for sale'. It was explained by them that the income shown under the head of Works Contract Services in the ST-3 returns pertained to a project named 'The Meadows' consisting of villas and the above two agreements were specimen copies in respect of Villa No. 194.

35. Scrutiny of the agreement titled 'Agreement for sale' indicates that a society in the name and style of Shree Yogeshwar Co-operative Housing Society Ltd is in possession of N.A. land which is described at length in the said agreement. The society in turn has granted Development Rights of the said land with full power and absolute authority to develop the same and to market the premises thereof to such person/s for such consideration and on such terms and conditions as the Developer may deem fit and proper. Towards this, the assessee paid the entire consideration i.e. Rs 50 crores to the land owner at the time of execution of the agreement. In terms of the authority vested by the Society to the assessee under Development Agreement dated 26.9.2008, the assessee have entered into an Agreement for Sale with the Prospective Acquirer. Such authority has been vested in light of fact that the entire rights of the land have been transferred by the society to the assessee and in terms of the provisions of Section 2(47) of the Income Tax Act, 1961, the act of extinguishment of any right in the assets *tantamount to* transfer of the asset. The Development Agreement clearly stipulates that the society have

extinguished their rights on the land and as such in terms of the above provisions, the land is deemed to have been transferred to the assessee.

36. In the instant case the assessee have classified their services in respect of the above Project under the Works Contract Service, however, the documents primarily indicate that the same is a Project for Residential Units it would be appropriate to examine whether the nature of activity is covered under the ambit of Works Contract Service as interpreted at Sec. 65(B)(54) of the Finance Act, 1994 which reads as under:

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

37 The above definition indicates that the basic ingredients required to be fulfilled for an activity to be categorized under Works Contract Service is as under:

a) Transfer of property in goods should occur during the course of execution of works contract
b) The contract should be for the purpose of construction (in this case)
c) The property in goods should be leviable to tax as sale of goods

38. In the instant case, the works revolves around a residential scheme and as such, the activity to be covered under the Works Contract Service, the contract ought to be for the purpose of carrying out construction. The contract is entered into between the assessee and the Prospective Acquirer and the consideration is flowing from the Prospective Acquirer to the assessee and as such it appeared that the service recipient in the instant case is the Prospective Acquirer. In a nutshell, it can be construed that Works Contract Service has been rendered only in the event that it is established that the Prospective Acquirer has awarded a contract to the assessee for the purpose of carrying out construction.

39. The first and the foremost thing emanating from the 'Agreement for Sale' (hereinafter referred to as the agreement) is that the assessee has promoted a residential project consisting residential units and thus has put on offer the said residential units proposed to be constructed by them with an intention to sell the same. In response to above said offer, the prospective acquirer has desired to acquire for him/her said residential unit. The prospective acquirer has also been given the predecided plans and specifications of the said project, and also design and specifications of construction of residential bungalows to be put up thereon, which the prospective acquirer has accepted. The relevant promises offered and accepted are by either of the parties are listed under:

Page 4 of the agreement indicates that the Prospective Acquirer has desired to acquire for her the unit of land and bunglow as described in Second Schedule which reads as under:

The Second Schedule

(Description of Said Residential Unit under sale)

All that the said Residential Villa-No: 194 (As per attached (Annexure-P1) in AUDA approved plan it is shown a Villa No. R57 and as per attached (Annexure-P2) in Brochure it is shown as Villa No. 194), gross land area admeasuring about 349.00 Sy.Yds, equivalent to 291.81 Sq.mts., which include undivided share in the common areas of the project, and construction of bungalow, admeasuring about 300.00 Sy. Yds, equivalent to 250.84Sq.mts., in the project known as "The Meadows", standing on/ forming part of the land more particularly described in the first schedule hereinabove written.

- Para 1 of the agreement indicates that the plans and specifications of the said project, and also design and specifications of construction of residential bungalows to be put up thereon are pre-decided by the assessee and the same have been offered to the Prospective Buyer
- Para 2 of the agreement specifies that the Developer agrees to sell and convey to the Prospective Acquirer the said Residential Unit
- Para 3 of the agreement indicates that a Residential Unit will be made available and the specifications of the construction will be as pre-decided by the assessee
- Para 5(b) of the agreement indicates that the Prospective Acquirer shall have no right or claim to reject or accept the same in part or parts for the unit of land and bunglow. This clearly indicates that there is no option for the Prospective Acquirer to acquire only the land or the construction only. The entire Residential Unit as a whole is only available on offer by the assessee which has been accepted by the Prospective Acquirer.
- Para 12 of the agreement indicates that in the event of failure of payment of any part of the amounts due and payable by the Prospective Acquirer, 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 Prospective Acquirer. 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 25(b) of the agreement specifies that the Prospective Acquirer shall not make any temporary or permanent additions or alterations in the structure of the residential unit, nor shall do anything which may cause damage or which may weaken the structure of the residential unit. Similarly, the Prospective Acquirer shall not cover the balcony nor shall put up any shed or any other temporary or permanent construction in the terrace. This is another indication that the Prospective Acquirer has no rights or say whatsoever in the design or structure of the construction to be carried out.
- Para 25(c) of the agreement indicates that it has been specifically agreed by the Prospective Acquirer that the main door and other opening by way of doors, window or any other in the said residential unit shall not be changed. This is another indication that the Prospective Acquirer has no free-will in the manner in which the construction is to be carried out.
- Para 26(e) of the agreement says that the shed parking will be erected by the developer as part of the said residential unit, the Prespective Acquirer shall pay Rs.75,000/- for the same. Colour, design, size, etc. of the same shall be as will be fixed by the developer at its sole description. This clause again indicates that the Prospective Acquirer has no choice whether to have the parking shed or otherwise. The manner and design of the construction is solely the discretion of the assessee.
- Para 35 of the agreement clearly indicates that the Prospective Acquirer shall at no time demand

partition of his/her/it/their interest from the entire project. It being agreed and declared by the Prospective Acquirer that his interest in the Project shall be impartible. In other words, possession of land can not be demanded even if the prospective acquirer has paid the consideration towards land.

- Para 37(b)(i) indicates that the assessee is empowered to change the specifications of the construction as the nature and circumstances may require. The Prospective Acquirer is not vested with this right of change in the specifications of the construction.

- Para 37(b)(ii) indicates that any internal changes, alterations or changes in design that the Prospective Acquirer desires is at the sole discretion of the assessee and the assessee is not bound by the desire of the Prospective Acquirer in this regard.

40. The above clauses of the agreement clearly indicate that the contract has not been awarded by the Prospective Acquirer to the assessee for the purpose of carrying out construction. Had it been a contract for the purpose of carrying out construction, the Prospective Acquirer (in this hypothetical case, it would be the awarder of the contract) would have a major say and right in the manner and design in which the construction work is required to be carried out. This aspect is completely absent in the entire agreement and the Prospective Acquirer 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 designs of the assessee. In such circumstances, it can by no stretch of imagination be considered that the Prospective Acquirer has awarded a contract for the purpose of carrying out construction to the assessee. Resultantly, the activity is not covered under the ambit of Works Contract Service in terms of the provisions of Sec. 65B(54) of the Finance Act, 1994 in as much as the contract is not for the purpose of carrying out construction.

Looking at the nature of the activity/ services rendered, the proper category of the services would be Construction Services as declared at Sec. 66E(b) of the Finance Act, 1994 which reads as under:

> ***66E. The following shall constitute declared services, namely:-***
>
> *(a) ..... .*
>
> *(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*
>
> *Explanation.- For the purposes of this clause,*
>
> *(I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-*
>
> *(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or*
>
> *(B) chartered engineer registered with the Institution of Engineers (India); or*
>
> *(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;*
>
> *(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure.*

41. The inclusive portion in the above definition *"including a complex or building intended for sale*

to a buyer" is appropriately covering the activity undertaken by the assessee in the instant case on the following grounds:

- the assessee is engaged in construction of residential complex consisting of Bungalows named as "The Meadows" which is apparent from page 3 of the agreement wherein it has been narrated as *"The Developer has promoted a residential project of Residential Units, to consist of units of land and construction and development of residential bunglows thereon, and common infrastructure".*

- The assessee acquired development rights to develop residential bungalows/ units on the land.
- The Development Agreement shows that the land owner has extinguished whole rights, barring legal title, in respect of that land in favour of the assesseeand towards this the assessee paid the entire consideration i.e. Rs. 50 Crore to the Land Owner at the time of execution of the agreement.
- the assessee enters into agreement with the persons desirous to acquire abovesaid units in the project (buyer) on such terms and conditions as it may deem fit and in conformity thereof may put them in possession thereof.

- The assessee also collects and retains entire consideration or all other amounts that may be decided by and between the assessee and the prospective purchaser of the above said units.

- The assessee entered into an agreement for sale with the Prospective Buyer of residential unit of which the relevant clauses read as under:

(i) *Clause 5b: The transfer and final vesting of the said residential unit by the society (land owner) and the developer (assessee) in favour of the prospective acquirer shall be done either by way of sale or by way of allotment by/ through society or in any other manner at the sole and absolute discretion of the developer in consultation with the said solicitors. The said residential unit is aggregate of the unit of land and bungalow thereon. However, the transaction under this agreement has been agreed to be one composite transaction for the said residential unit and for the said total price. The prospective acquirer shall have no right or claim to reject or accept the same in part or parts for the unit of land and bungalow.*

(ii) *Clause 14: The possession of the said residential unit shall be given by the developer to the prospective acquirer only upon all payments required to be made under this agreement by the prospective acquirer have been made to the developer and in accordance with other provision herein.*

(iii) *Clause 15: Nothing contained in this agreement shall be construed so as to confer upon the prospective acquirer any right, title or interest of any kind whatsoever in, to or over the said residential unit.*

(iv) Clause 35: The prospective acquirer shall at no time demand partition of his interest from the project. It being agreed and declared by the prospective acquirer that his interest in the project shall be impartible.

- Final allotment of the residential unit by the society *(being land owner)* and the assessee (developer) to the buyer is made through a tripartite agreement. In other words, the property in the land (title) passes to the buyer at one stage only, i.e. on completion of the construction. At the time of agreement to sale and during construction period, the property in the land remains with the owner only. Certain Provisions, stipulations and covenants on the part of the member that are listed in the conveyance deed (i.e. Tripartite agreement), which are relevant, are stated as below:

(i) Clause 5d: The developer has acquired sole and absolute development rights of the land from the society. The project on the land is developed by the developer. The residential units thereof have been marketed and sold by the developer. The member

(buyer) has realized, agreed and accepted that the role of the society is now reduced to SPV for and of the developer, and the prospective members to derive title from the developer through society as its member and shareholder. The over-all ownership of the project remains with the developer.

(ii) *Clause 20: The member shall at no time demand partition of their interest from the entire scheme. It being agreed and declared by the member that their interest in the scheme shall be impartible, but specific as regards the said residential unit only.*

- The entire consideration purportedly bifurcated for land and construction, received from the buyer, is retained by the assessee only.

- The description of residential unit under sale as shown in the second schedule of agreement to sale entered into between the assessee (being developer) and the customer (Villa No. 194) stipulates that Gross land area of the residential unit under sale, against which land consideration appropriated, includes undivided share in the common areas of the project also. In other words, the purported land value that is being excluded while ascertaining service tax, includes the undivided share in the common areas of the project and the development of the common area also includes a service component.

42. In view of the above, it appeared that the assessee (developer) is engaged in development of the residential complex project intended for sale which is further substantiated from the following facts:

(i) the project plan of residential unit has been approved by the competent authority i.e. Ahmedabad Urban Development Authority (AUDA)
(ii) the project has common area
(iii) it has also common amenities and facilities like park, community hall, Common water supply (Overhead Water Tank) etc.
(iv) It has obtained building use permission from the competent authority.
(v) As per the agreement between assessee (developer) and the Buyer, the buyer shall at no time demand partition of his interest from the project. It is being agreed and declared by the buyer that his interest in the project shall be impartible.

43. Further, in terms of the provisions Section 66F(2) of the Finance Act, 1994, even in the event where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description and the relevant text reads as under:

66F (2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

44. Further, the agreement between assessee and the customer/ member (service recipient, from whom the consideration flows) clearly shows that it is an agreement for acquisition of residential unit being constructed by the assessee with an intention to sale. Further, the property in land passes along with the construction thereon i.e. at one stage only, on completion of the construction therefore, it can not be said as merely a contract to carry out construction. Furthermore, though shown value of land is above 50 lacs, no separate deduction of tax (TDS) in respect of shown value of land was made u/s 194 IA of the Income Tax Act, 1961. The TDS was deducted in one go at the time of final payment on entire consideration of the residential unit and the stamp duty is also paid on overall amount. Here it also pertinent to note that the pattern of payment made by the buyer also does not discriminate the

payment against land value or against the construction cost (case studied (Villa no. 194))

45. In view of the above, it appeared that, in the agreement, vivisection of total consideration towards land and construction is merely a ritual and apart from the ascertainment of Service Tax has no other relevance.

46. Para 6.2 of the "Taxation of Services: An Education Guide" issued by the Central Board of Excise & Customs reads as under:

> ***6.2 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 certificate of completion by a competent authority.***
>
> This service is already taxable as part of construction of residential complex service under clause (zzzh) of sub-section 105 of section 65 of the Act and as part of service in relation to commercial or industrial construction under clause (zzq) of sub-section 105 of section 65 of the Act. This entry covers the services provided by builders or developers or any other person, where building complexes, civil structure or part thereof are offered for sale but the payment for such building or complex or part thereof is received before the issuance of completion certificate by a competent authority.

The above portion of the Education Guide also clarifies the nature of service of 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 certificate of completion by a competent authority.

47. Further, the assessee has not paid service tax on properties sold after obtaining Building Use permission from the competent authority. It is pertinent to note that clause (b) of the section 66E of the Finance Act, 1994, which deals with the construction service, specifically exclude the construction service from the ambit of service tax where the entire consideration is received after issuance of completion certificate (building use permission) by the competent authority. The service tax law does not provide such provision in case of works contract service (Ref. Clause (h) of Section 66E of the Finance Act, 1994). Therefore, before obtaining building use certificate, the assessee was classifying the service as "Works Contract Service" and on obtaining the- Building Use permission, the assessee itself treated the project as construction of residential complex and availed the benefit of non-payment of service tax where the entire consideration was received after issuance of completion certificate (building use permission) by the competent authority. Even for the sake of argument, the assessee's classification of the service under Works Contract Service is considered, the assessee would be liable to pay the service on the units for which exemption has been sought on the count that the same are sold after BU permission and there is no exclusion clause under the Works Contract Service for units sold after BU permission. This exclusion would be only applicable in respect of the construction services as declared under Sec. 66E(b) of the Finance Act, 1994. Moreover, by the act of claiming the exclusion as provided under Sec. 66E(b) of the Finance Act, 1994, the assessee have themselves inherently accepted that their services fall within the category of construction services as per Sec. 66E(b) of the Finance Act, 1994. Even going by the assessee's own submissions of the service being Works Contract Service, they have failed to pay the service tax appx. amounting to Rs. 53 lakhs on the 28 units which have been sold after obtaining BU permission by claiming the exclusion as provided under Sec. 66E(b) of the Finance Act, 1994. Thus, the assessee ought to have paid such service tax on the units sold after BU in consonance to their own theory of the service being Works Contract Service.

48. In view of the above, it appeared that the assessee is rendering construction service as declared under Section 66(E)(b) and discharging of Service Tax liability by classifying the service as works

contract service is not appropriate. The wrong classification has resulted into short payment of service tax. The short payment of Service Tax for the Financial Year 2013-14 to 2016-17 worked out to Rs.71,99,416/- and the assessee is required to pay the service tax liability along with applicable interest and penalty.

49. The query letter dated 24.05.2018 was issued to the assessee for the payment of service tax of Rs.71,99,416/- under Section 73 of Finance Act-1994. The assessee submitted their reply vide letter dated 31.05.2018 as below-

"You have observed in the referred audit report that we have discharged the service tax under "works contract" service whereas the same was required to be discharged under "construction service"
We submit that the cost of land as well as cost of construction has been specifically indicated separately in the booking document as well as sale deed already submitted to you

We place reliance on the decision of Hon. Bangalore Tribunal in the case of ***Mantri Developers P. Ltd. v. Commissioner 2014 (36) S. T.R. 944 (Tri. Bang.)****. In this case an issue arose in respect of the classification of services provided by the appellant. The appellant is a builder/developer of commercial and residential complexes and has projects in many parts of the country. Appellant classified the services under "works contract service" and offered tax on the construction portion and not on the undivided share of land. Hon. Tribunal held as under:*

"6. *The definition of works contract in Section 65(105)(zzzza) clearly covers construction of new residential complex or a part thereof Therefore in the case of construction of a new residential complex, if the contract involves transfer of property in the execution of such contract leviable to tax on sale of goods, such a contract can be classified as works contract. In this case, the appellants have registered for payment of tax in respect of portion involving transfer of property under the AP VAT Act and the appellant is engaged in the construction of residential complex. Therefore, we find that the activity is clearly covered by works contract service. Further, we also find that the Hon'ble Supreme Court in the case of Larsen and Toubro Ltd. and Another v. State of Karnataka and Another -(2013) 65 VST 1 (SC) = 2014 (34) S.T.R. 481 (S. C.) = 2014 (303) E. L. T. 3 (S. C.) also took the view that activities of construction of residential complex and transfer of individual flats after construction has to be treated as works contract for the purpose of levy of VAT."*

It may also be noted that though appeal against the above decision has been filed before the Supreme Court 2015 (38) S.T.R. J277 (S. C.)J, Supreme Court has not granted stay against the operation of said decision. Hence unless the ruling is reversed, Department is bound to apply the same in similar facts. Hence we submit that our classification of service as "works contract" is in line with the law and deserves to be accepted".

50. Here it is pertinent to note that the facts of case cited by the assessee in its reply of query memo (i.e. Mantri Developers P. Ltd. v. Commissioner 2014 (36) S.T.R. 944 (Tri. - Bang.) and facts of the present case are not similar. In the said case, the appellant entered into individual contracts in two stages with the buyers of flats, the first one for undivided share of land and second is for construction of

the flat. Further, an appeal against the above decision has been filed before the Supreme Court and said matter is still subjudice. Moreover, the position w.e.f. 1.7.2012 witnessed a sea change in the approach of service tax in as much Further, the assessee also referred judgement of Hon'ble Supreme Court in the case of Larsen and Toubro Ltd. and Another v. State of Karnataka (2014) (303) E.L.T. 3 (S.C.). In this regard, it is pertinent to note that the underlying question of the above said judgment was whether taxing sale of goods in an agreement for sale of flat, which is to be constructed by the developer/ promoter, is permissible under the constitution or not. In other words, the above said judgment is relating to VAT and vide said judgment it was held that sale of goods is involved in works contract therefore, VAT can be imposed. Here it is pertinent to note that under the VAT law, there is no separate category which deals with the contracts for construction of residential complex. However, under the Service Tax law a specific category of service i.e. "Construction of Residential Complex" has been carved out of the broad category of "Works Contract Service" and in terms of Section 66F(2) of the Finance Act, 1994, the specific description shall be preferred over a more general description. In view of the above, the contention of the assessee is untenable.

51. From the above and discussions, it appeared that the assessee have 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 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.

• In this era of self-assessment the onus of correctly classifying the service has been passed on the assessee. In other words, it is the responsibility of the assessee to correctly classify the service and accordingly avail legitimate abatement. Based on the fact that land value is showing separately in the conveyance deed, the assessee is claiming that the underlying service is Works Contract Service. Although the assessee is showing the land value and value of construction separately in the conveyance deed but the entire property i.e. Land and Construction thereon passes on at one stage only as amply discussed hereinabove. From the above facts discussed hereinabove, it appeared that all the clauses related to the agreement and the nature of activity performed were well within the knowledge of the assessee and therefore, they should have properly classified their service. However, they have resorted to wrong classification resulting in short payment of service tax. Hence, the facts of the present case clearly suggest suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed there under with an intent to evade the demand of service tax as would be covered by the proviso of Sub-section (1) of Section 73 of the Finance Act, 1994. Therefore, the extended period of limitation in terms of the provisions of proviso of Sub-section (1) of Section 73 are applicable to the facts of the case. It appeared that interest would be liable to be charged and recovered under the provisions of Section 75 of the Act. The assessee have willfully mis-declared their service as works contract service despite having full knowledge that they were engaged in the construction of residential complexes and thereby, had made themselves liable for penal action, under the provisons of Section 78(1) of the Act.

52. The Government has from the very beginning placed full trust on the manufacturers/ service providers and accordingly measures like Self-assessments etc., based on mutual trust and confidence are in place. Further, a manufacturer/service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made there under, as considerable amount of trust is placed on them and private records maintained by them, for normal business purposes are accepted, practically for all the purposes. All these operate on the basis of honesty of the assessee; therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. From the evidences, it appeared that the said assessee has knowingly misclassified the service with intent to evade payment of Service Tax. The deliberate nonpayment of duty/ tax and/or availing of ineligible Cenvat Credit and suppression of value of taxable services provided/received is in utter disregard to the requirements of law and breach of trust deposed on them, and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime.

Revenue Para No 9: Reversal of cenvat credit taken on the units which are unsold at the time of BU permission

53. During the course of audit, it was also observed that the assessee was engaged in the activity of construction services of residential units and was also availing the Cenvat credit of the service tax paid on the services received by them for their construction activity and utilizing the same for payment of service tax. Out of the various residential units constructed during the period, some of them had been booked and sold after the issuance of the completion certificate by the competent authority namely Ahmedabad Municipal Corporation.

54. Under the negative list regime of service tax, with effect from 1.7.2012, certain activities had been made chargeable to service tax, as 'declared services' by virtue of Section 66E of the Act. One such declared services is Construction Services and the relevant text of the statute reads as under:

"Section 66E: The following shall constitute declared services, namely:-

a).....

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 completioncertificate by the competent authority.

Explanation. - For the purposes of this clause,-

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(BJ chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village

or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure"

55 When the construction is completed and the "Completion Certificate" is obtained, what turns out is an immovable property. When such property is sold/transferred after 'Completion Certificate' is received, it is deemed to be sale of immovable property which is specifically excluded from the definition of service, in terms of Section 65 (B)(44) of the Act, the relevant text of which reads as under:

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, **but shall not include-**

(a) an activity which constitutes merely,-

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

56. From the above definition, it is clear that sale/transfer of title of immovable property, by way of sale, gift or in any other manner is excluded from the definition of service. Therefore, such a sale does not constitute 'Service'.

57. A plain reading of the above provisions of law makes it explicit that the activity of construction attracts service tax, if a part or whole of the consideration towards such construction is received prior to Completion Certificate/Building Use permission. The activity of construction in which the entire consideration is received after Building Use permission, has been kept out of the scope of 'declared services'.

58. Accordingly, the assessee is liable to pay service tax only for those units/residences, which have been booked/sold before the issue of building use (BU) permission dated 23.10.2013 for their scheme 'The Meadows, Ph-I', under Section 66 of the Act read with the Service Tax Rules, 1994. Consequentially, no service tax would be paid for those units/residences, which have been sold after the issue of BU permission.

59. The builders undertake the construction of the building having different Units/Bungalows. All the material, labour and other expenses are incurred in lump sum. However, the agreement for sale (booking) in respect of different units can be at different stage, right from Bhoomi-poojan to various phases of construction or even after completion of construction and obtaining completion certificate/BU permission. However, during the course of construction of complex, the builder/ developer utilizes the services of various labour contractors, such as electrical contractors, furniture contractors (for doors/ windows), tiles fitting contractors, color contractors, etc., constituting major part of expenditure incurred by the builder/ developer. In addition, they also utilize certain services such as security service, telephone service, housekeeping service, etc. The builder/ developer receives service tax paid invoices from such contractors/service providers and avail the Cenvat Credit of service tax paid by the contractors/service providers.

60. The eligibility and admissibility of Cenvat Credit flows from the authority of Rule 3 of the

Cenvat Rules, which reads as under:

"RULE 3. CENVAT credit.-(1) *A manufacturer or producer of final products or* a *provider of output service shall be allowed to take credit (hereinafter* referred *to as the CENVA T credit) of* the duties, taxes, cess specified in the said rule paid on

(i) any input or capital goods received in the factory of manufacture of final product or [by] the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004

61. The above definition clearly specifies the class of persons, who are entitled to Cenvat credit, as (i) Manufacturer or Producer of Final Products and (ii) Output service provider.

62. Though 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, is considered to be a declared service under Section 66E(b) of the Act, the developer/builder cannot be said to have provided or agreed to provide such service in respect of each individual flat/unit/shop, till such unit is booked/sold on full or part payment, before the requisite permission is obtained from the competent authority. This situation exists because the sale of unit after receipt of "completion certificate" does not constitute service.

63 In the typical case of Construction service, service is said to be provided to each individual who books/purchases units, on payment of part/full consideration and not in respect of the entire building constructed. In other words, the builder is agreeing to provide or provide services to multiple service recipients in respect of individual flat/ unit of the same project. Till the time, an individual flat/unit is booked/sold, there is no element of service involved in as much as there is no service recipient and the natural corollary that follows is that no service is provided or agreed to be provided. In such a situation, it is service to self and therefore the developer/builder cannot be said to be the provider of output service (emphasis supplied) for the flats/units not booked/sold, at the time the requisite permission from the competent authority was issued. This will be the case for each individual unit constructed. This is the crux of the matter especially in light of the interpretation of the term 'declared service' at Section 65B(22) of the Act, which read as under:

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

64 In other words, the developer/builder is deemed to be the provider of output service only in those cases where the flats/units are booked/sold prior to obtaining the 'Completion Certificate' from the competent authority. Consequentially, no Cenvat Credit can be availed in terms of Rule 3(1) of the Cenvat Rules, till the time a flat/unit is booked on part/full payment of consideration, as till such time, the person indulged in construction cannot be said to be the "Service provider" and is providing service to self, in so far as the flats/units not booked/sold. The fact remains that the builder is very well aware of the booking status of the individual flats/ units and this leads to his knowledge of the fact whether he is an output service provider for that particular flat / unit or otherwise. This position is very clear in

light of the provisions of Section 658(22) of the Act to which the builder cannot claim ignorance. Thus, the assessee cannot be held to be an output service provider for the individual flat / unit till such time every single flat/ unit is booked, prior to obtaining Completion Certificate. This is especially so in light of the fact that in the event that the unit is booked after receipt of Completion Certification, the builder is engaged in the activity of sale of immovable property and if the unit is booked before receipt of Completion Certification, the builder is engaged in providing construction services to the proposed owner of the unit.

65 In a nutshell, till the time a flat/unit is booked on payment of part/full consideration, no service is provided or agreed to be provided. Thus, the assessee cannot be said to be an output service provider in respect of such flats/ units in as much as there is no service recipient for such flats/ units and resultantly, no service is provided or agreed to be provided.

66 In view of the above, it appeared that the assessee is not entitled to take Cenvat Credit proportionate to the services utilized for construction of residential units which have not been booked / sold prior to receiving Completion/BU certificate i.e Units for which the assessee is not an output service provider. Rule 3(1) of the Cenvat Rules clearly stipulates that only an output service provider is entitled to take cenvat Credit.

67. It may be generally claimed by the builders that at the time of incurring expenses or availing services, it is not known if it is being used for providing 'output service' or is being used for construction of flats/units sold after receipt of completion certificate and therefore, not liable to payment of service tax. So far so good, but the builders availing credit of the entire expenses incurred on goods and services, even for those flats sold after receipt of completion certificate and where no service is provided and where no tax is paid, is not in consonance with law. This in itself should have been the cause for the builders to not avail the Cenvat Credit, till each individual unit is booked on receipt of consideration, prior to obtaining completion/Building use certificate or in other words to say that they could have availed the cenvat credit only as and when the individual flat/unit was booked and that to prior to obtaining completion/Building use Certificate. The said assessee has therefore wrongly taken the cenvat credit, in respect of those units which do not constitute a service, in violation of Rule 3(1) of the Cenvat Rules.

68 In the case of construction service, every project is a differently identifiable business and the provision of service element would begin on the booking of each individual unit & would cease on completion of the project and obtaining of completion/BU certificate, and therefore, as exemplified above, no output service is said to be provided till the individual flat/unit is booked on payment of part/full consideration, prior to obtaining completion/BU certificate. Moreover, as soon as the completion/BU certificate is obtained, no service element exists in respect of the flats/units sold/booked thereafter. However, majority of input services are used for the entire project and the cenvat credit of the tax paid there on is availed much prior to the completion of the project and obtaining completion/BU certificate & is also utilised for payment of service tax on the flats/units booked/sold prior to obtaining such certificate. Hardly any credit availed, is in balance which would lapse on

completion of the project/obtaining of completion certificate. In such a scenario, the exchequer would be defrauded of its legitimates dues in so far as the Cenvat Credit of the tax paid on the services used in the construction of units sold after completion/BU certificate is obtained, is availed, and in which case there is neither any element of Service nor any Service Tax is paid.

69 To exemplify, a builder starts construction of project having 100 units. All the services of landscaping, works contractor (for construction), electrical fittings, architect service, furniture contractors (for doors/ windows), tiles fitting contractors, color contractors, etc. are availed and utilised prior to completion of the project subsequent to which a completion/BU certificate is issued. Assuming that Rs 10 lacs of cenvat credit is involved/ availed in the construction of these hundred units, which works out to say Rs 10,000 per unit, assuming all the units are of equal dimensions. Now, if out of 100 units constructed 60 are sold/booked prior of obtaining the completion certificate, output service will be said to be provided on these 60 units only, in terms of provisions of Service Tax Act/Rules and service tax will be paid on the value of these 60 units only. In fact, no service is provided in respect of the remaining 40 units & no service tax is payable/paid on these units. Consequentially the builder should be entitled to Cenvat Credit proportionate to the units in case where output service is provided, i.e. Rs 6 lacs (60 x 10000) and should have availed the same only, as and when they provided output service to those persons who booked the flats prior to obtaining completion certificate/BU permission. Therefore availing & utilizing the entire credit of Rs 10 lacs was neither intended by law nor is in consonance with the provisions of Cenvat Credit Rules. The availment of Cenvat Credit in respect of all 100 units while paying service tax only in respect of 60 units, goes not only against the will of the statute but also enriches the assessee by permitting him to pay almost all his dues utilizing cenvat credit, which in fact was never due to him. Permitting the Cenvat Credit of all the services used for the entire project would result in double benefit & unjust enrichment of the builders at the cost of exchequer. This cannot be countenanced by law. Therefore, Cenvat Credit wrongly availed in excess of the entitlement is required to be recovered under the provisions of Rule 14(1)(ii) of the Cenvat Rules.

70. Further, in terms of Rule 2(1) of Cenvat Credit Rules, 2004, *"input service"* means any service used by a provider of output service for providing an output service (emphasis supplied). Rule 2(l) reads thus.

> "[(I) "input service" means any service,
> (i) used by a provider of output service for providing an output service; or
> (ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal"

71. The said assessee is not an output service provider in respect of the bungalows/units which have not been booked/sold, on the date the completion certificate/BU permission is received. Resultantly, the portion of services utilized for construction of such flats/ units would not qualify as 'input service' in as much as such portions of services have not been utilized for providing an output service. Therefore, the said assessee is not eligible to take Cenvat Credit of such portion of input services, utilized in an activity, which does not constitute 'service'.

72. The Cenvat Credit scheme has been introduced with a view to avoid the cascading effect of

taxes. The question of cascading effect would not arise in respect of the activity on which no service tax is payable. Consequently, the Cenvat Credit would not be admissible in respect of such activities which are not chargeable to service tax. This, analogy is amply specified in the legal statuette by virtue of Rule 6(1) of the Cenvat Rules which read as under at the material time:

"The CENVA T credit shall not be allowed on such quantity of ***input used in*** **or** ***in relation*** **to** ***the manufacture*** **of** ***exempted*** **goods or** ***for provision*** **of** ***exempted services,*** **or** ***input service used in*** **or** ***in relation*** **to** ***the manufacture*** **of** ***exempted*** **goods** ***and their clearance up to the place of removal or for provision of exempted services except in the circumstances mentioned in sub-rule (2)"***

73. The above rule also clarifies the intention of the law makers to the effect that the assessee is not to be benefitted by Cenvat Credit of inputs/ input services used in the activity exempted from tax. It is pertinent to note that the provisions of Rule 6 of the Cenvat Rules are not applicable to the facts of the instant case, since the said Rule deals only with the limited circumstances wherein the assessee is provider of both taxable and exempted output services. However in the instant case, the said assessee is provider of taxable services in respect of only those units booked on full or partial payment which is received prior to obtaining Completion Certificate. The sale of units with full/partial consideration after 'Completion Certificate' is received does not constitute 'service' at all. Such an activity is entirely out of the scope of 'service' in terms of the definition provided at Section 668(44) of the Act. Therefore, the Cenvat Credit in respect of such non taxable activity not constituting 'service' is not admissible in terms of Rule 3(1) of the Cenvat Rules itself. The text of Rule 6 of the Cenvat Rules has been discussed only for the purpose of arriving at the intention of the legislature to the effect that the cenvat credit would not be admissible in respect of such activities which are not chargeable to service tax.

74. Further Section 66B of the Finance Act provides as under:

"SECTION [66B.Charge of service tax on and after Finance Act, 2012.-There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]".

75. From the foregoing, it is explicit that service tax is levied only on the value of the services provided or agreed to be provided by one person to another and conversely no service tax is levied when no service is provided (emphasis supplied), as in the case where the bungalows/units are sold after obtaining requisite permission from the competent authority.

76. However, in the instant case, builder/developer has taken Cenvat Credit in respect of services received for the construction of the entire building/complex and the unit-wise segregation of such input services is not possible. Therefore, it is not possible to segregate the Cenvat Credit for each unit since the services of construction, security, etc. are utilized for the entire project. In such circumstances, the best recourse to determine such ineligible cenvat credit on a composite project would be to ascertain it on proportionate basis, either based on the number of units, if all the units are of equal dimension or on the basis of constructed area, if the units are having different dimensions.

77. In view of the above discussion, it appeared that the builder/developer including the assessee in this case, was eligible to take proportionate credit only for the units booked on payment of consideration, either based on the total area of construction or number of units (if all the units are of equal dimensions). In such a scenario, neither undue credit would be availed nor there would be any requirement of recovery of excess credit availed. This will also not entail any financial burden on the builders as they will avail the proportionate credit at the time of booking the flats and the service tax will also be paid thereafter on receipt of payment/advance including service tax from the service recipient. On an illustration basis let us assume that a builder proposes to construct 1000 sq. mts. of residential complex and commences construction by utilizing various services. Assuming that 200 sq. mts. are booked/sold on part/full payment during the first month of the commencement, the builder can avail 20% of the service tax paid on the various services utilised and also can utlise the said credit for payment of service tax on the amount so received for booking/sale. This is so because the builder is an output service provider only in respect of 20% of the construction which has been booked/sold. As and when further booking/sale is made, the builder can take the subsequent credit proportionately, including the flats/units previously booked. This was coherently explained in the table below para 73 of the show cause notice.

78. From the above table, it is seen that in the first month of commencement of construction only 10% of the proposed area to be constructed (1000 sq. mts.) is booked on full/partial payment and therefore, service is said to be provided in respect of only 10% of the proposed construction. Though service tax paid on the services utilized for construction during the month is Rs 200/-, the builder would be entitled to take credit only to the extent of 10% of the service tax paid on the input services, i.e. Rs 20/-. In the subsequent month, though there is no further booking, service tax paid on the services utilised in the month is Rs 400/-. As the services used in the second month are also used for the construction of the 10% of the area booked in the previous month, the builder would be entitled to take credit of 10% of the service tax of Rs 400/- paid in the second month, i.e. Rs 40/-. Thus, at the end of second month, the builder will have availed Cenvat Credit to the tune of Rs 60/-, i.e. 10% of the total service tax paid (Rs 600/-) till the end of the month, as service is said to be provided only in respect of 10% of the proposed construction. Further in the third month of construction, assuming another 200 sq. mts. are booked, service is now said to be provided in respect of 30% of the proposed construction area. Assuming the builder has paid service tax of Rs 500/- on the input services used in the third month, the builder will be entitled to take Cenvat Credit of Rs 270/- i.e. @ 30% of the Service Tax paid in all the three months (Rs 500/- + Rs 400/- + Rs 200/-), i.e. Rs 330/- less Rs 60/- Cenvat Credit already availed till the end of the second month and therefore, by the end of the third month they will have availed Cenvat credit equivalent to Rs 330/- i.e. 30% of the service tax paid (Rs 1100/-) on the services utilized so far. Accordingly by the end of the sixth month, the builder will be entitled to avail 50% of the cenvat credit (Rs 2050/-) of the service tax paid (Rs 4100/-) on the input services utilised, as by the time 50% of the total proposed construction area is booked on payment of full/partial amount and in which case the service is said to be provided. This should be the scheme of the things, till the time the completion/BU certificate is obtained, instead of the builder availing the entire credit of the service tax paid on the services utilised, as once the completion/BU certificate is received, there is no element of service on the flats/units booked/sold post receipt of the said certificate.

79.. Even if the said assessee takes a stand that they had taken Cenvat Credit in respect of all the services utilized for construction of project/building under the belief that the said project was an 'ongoing concern' and he would be in a position to sell all the units/flats/shops prior to obtaining 'Completion Certificate', the said assessee should have paid back the ineligible Cenvat Credit with interest at the time, the 'Completion Certificate' is obtained. At least, at the time of obtaining "Completion Certificate", the assessee was aware that they had taken ineligible 'Cenvat Credit in respect of units, the sale of which would not constitute a service. Therefore, at least at the time the "Completion Certificate" was obtained the assessee ought to have paid the excess amount of Cenvat Credit availed on the units, the sale of which did not constitute service. Even the said fact of obtaining 'Completion Certificate', by virtue of which the need to pay back ineligible Cenvat Credit arose, was never disclosed to the department. The assessee had suppressed these facts from the department to illegally avail the cenvat credit which was ineligible by the virtue of Rule 3(1) of the Cenvat Rules

80. The said assessee has taken and utilized the Cenvat Credit of the services used for the construction of entire project i.e. for the units booked/sold prior to obtaining the BU permission on which service tax was paid, as well as on the units booked/sold after obtaining the BU permission and on which no Service tax was paid and in fact, in which case no service was provided by the assessee. However, no Cenvat Credit is admissible for the sales made after obtaining the B.U. permission/completion certificate as no output service is provided in such cases and the services utilized for the construction of the units unsold at the time BU permission is obtained, proportionate to the total area constructed cannot be termed as input service and hence such portion of cenvat credit availed and utilized for construction of residential units sold after obtaining BU permission is not admissible under Rules 3(1) read with Rule 2(1) of the Cenvat Rules.

81 It appeared that the assessee has taken Cenvat Credit to the tune of Rs 58,54,115/- of the Service Tax paid on the services utilized for the construction of the entire project.

82 As ascertained by the Audit officers, the BU permission was given on 23.10.2013 for their scheme 'The Meadows, Ph-I' by the competent authority. Out of the total built-up area of 38155 sq yards, 7530 Sq. yd. was unsold at the time the BU permission was received, as is seen from the ledgers maintained by the assessee. The individual bungalow ledger maintained by the assessee clearly shows that no payment in respect of bungalows totally admeasuring 7530 Sq. yd, had been received prior to obtaining Completion/BU certificate. Hence, proportionate Cenvat Credit to the extent of Rs 11,55,327/-as worked out, availed & utilized for the part of the construction in which no element of service was involved, is not admissible, as discussed supra.

83 Therefore, such Cenvat credit availed by the assessee is found to be availed in contraventions of Rules 3(1) read with 2(1) of the Cenvat Rules with an intent to evade the payment of service tax, as the said wrong and inadmissible Cenvat Credit has been used for payment of Service Tax.

84 Further, Rule 9(6) of Cenvat Credit Rules, 2004 stipulates that the burden of proof regarding the admissibility of Cenvat Credit on input services shall lie upon the manufacturer or provider of output

services, taking such credit. In this era of self assessment, the onus of taking legitimate Cenvat Credit has been passed on the assessee in terms of the said rule. In other words, it is the responsibility of the assessee to take Cenvat Credit only if the same is legally admissible. Therefore, it appeared that there is an intention to evade payment of Service Tax and the assesse have contravened the provisions of Rules 3(1) read with 2(1) of the Cenvat Rules. Therefore, the wrongly availed and utilized input service tax credit of Rs 11,55,327/- is liable to be demanded and recovered by invoking the extended period of five years, under the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of the Cenvat Rules. Applicable interest is also to be demanded and recovered from them, in terms of Section 75 of the Act.

85.. In the case of Rathi Steel & Power Ltd reported at 2015 (321) EL T 200 (All), the High court of Judicature at Allahabad held that:

"32. We further find that under Rules, 2004, a burden is cast upon the manufacturer to ensure that Cenvat credit is correctly claimed by them and proper records are maintained in that regard.

33. The assessee, in response to the show cause notice had stated that there is no provision in Central Excise Law to disclose the details of the credit or to submit the duty paying documents, which in our opinion is false and an attempt to deliberately contravene the provisions of the Act, 1944 and the rules made thereunder with an intent to evade the duty.

34. In our opinion, the facts of the present case clearly suggest wilful suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed thereunder with an intent to evade the demand of duty as would be covered by Clauses IV and V of Section 11A(1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified."

86. Similar view was expressed by the Hon'ble High Court of Judicature for Andhra Pradesh at Hyderabad which held that:

"9. The contention of the learned counsel for the assessee that the extended period of limitation of five years for recovery of the duty under the proviso to Section 11A(1) of the Central Excise Act, 1944 would not be available to the Revenue in this case, as the penalty proposed to be levied was dropped, does not hold water. The extended period of five years for recovery of. duties either levied or short-levied arises under various situations such as fraud, collusion, wilful mis-statement, suppression of facts or contravention of the provisions of the Act or the Rules made thereunder with intention to evade payment of duty. It is no doubt true that the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty [Union of India v. Rajasthan Spinning and Weaving Mills - (2009) 13 SCC 448 = 2009 (238) E.L.T. 3 (S.C.)]. But merely because the ingredients for both are the same, it would not mean that in case penalty is not imposed, the duty also cannot be recovered. Once the assessee availed credit under Rule 2(k) of the Rules of 2004 without entitlement it amounts to contravention of the rule with the intention of evading payment and the extended period of limitation would be available to the Revenue, notwithstanding the decision not to purpose penalty upon the assessee."

87. An observation was raised on the assesse under a communication from F No CGST-A/04-39/Circle-VII/Ap-48/2017-18 dated 24.5.2018, asking for the reversal of Cenvat Credit of Rs

11,55,327/-, under the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of Cenvat Rules.

88. The assessee has submitted their reply vide letter dated 31.5.2018 wherein they referred to the relevant provisions of the Cenvat Credit Rules, 2004 and also stated that the sale of units post BU permission has not been regarded as an exempted service and hence, Rule 6(1) shall not apply for the period prior to 01.04.2016. They stated that reversal under Rule 6 of CCR, 2004 shall not be applicable in respect of credits claimed in respect of units sold after receiving BU permission".

89. The assessee's reply was not acceptable to the Department in light of the aforesaid discussion. The Cenvat Credit of Rs 11,55,327/- is required to be reversed under the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of the Cenvat Rules by invoking the extended period of time along with applicable interest under the provisions of Section 75 of the Act and penalty under the provisions of Section 78(1) of the Act read with Rule 15(3) of the Cenvat Rules.

90. The assessee had wrongly taken Cenvat Credit of tax paid on various services, proportionate to those used in the constructions of bungalows/units, booked/sold after obtaining BU permission, in as much as they are neither the provider of output service nor are these services (proportionate to the unsold flats) used for providing an output service, as contemplated in Rule 2(1) of the Cenvat Rules. The provisions of the Cenvat Rules are explicit in as much as they clearly lay down the provisions for eligibility/ineligibility for availing credit of duty paid on goods & capital goods as well as service tax paid on services. What construes "Capital Goods", "Inputs" & "Input Services" is well defined under the Rules. Therefore, there cannot be any ambiguity regarding the eligibility for availing Cenvat Credit and the assessee could not have bred any doubt as regards the same. However the assessee in sheer disregard to the provisions of law availed and utilized ineligible Cenvat Credit and thereby, they contravened the provisions of Rule 3(1) of the Cenvat Rules read with Rule 2(1) of the Cenvat Rules. Further, it appeared that the event of obtaining of BU was never disclosed to the department and consequent reflecting of the non-taxable value in their ST3 returns was never brought to the notice of the department by the assessee. Thus, it appeared that the assessee has suppressed the said facts with intent to evade payment of tax by utilizing such inadmissible cenvat credit. Moreover, in the present regime of liberalization, self-assessment and filing of ST3 returns online, no documents whatsoever are submitted by the assessee to the department and therefore, the department would come to know about such wrong availing of Cenvat Credit only during audit or preventive/other checks. Therefore the Government in its wisdom has incorporated the provisions of sub-rule 5 & 6 to Rule 9 of the Cenvat Rules to cast upon the burden of proof of admissibility of cenvat credit on the manufacturer or output service provider taking such credit. As the wrong and inadmissible credit taken is in contravention of the provisions of the Cenvat Rules by resorting to suppression & misrepresentation, the same is required to be recovered under the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of the Cenvat Rules, by invoking the extended period. In the case of Mahavir Plastics Vs CCE, Mumbai reported at 2010 (255) EL T 241, it has been held that if facts are gathered by department in subsequent investigation, extended period can be invoked. In the case of Lalit Enterprises Vs CST, Chennai reported at 2009 (23) STT 275, it was held that extended period is invokable when the department came

to know of the service charges received by appellant on verification of his accounts. Interest at the appropriate rate is also required to be recovered from them under the provisions of Section 75 of the Act read with Rule 14(1)(ii) of the Cenvat Rules. All the above mentioned acts of contravention of the provisions of the Finance Act and Rules framed thereunder on the part of the assessee have been committed with intent to evade payment of duty and thereby, they have rendered themselves liable for penalty under the provisions of Section 78(1) of the Act read with Rule 15(2) of the Cenvat Rules.

91. The Government has from the very beginning placed full trust on the manufacturers/ service providers and accordingly, measures like self-assessment etc., based on the mutual trust and confidence are in place. Further, a manufacturer/service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder, as considerable amount of trust is placed on them and private records maintained by them, for normal business purposes are accepted, practically for all the purposes. All these operate on the basis of honesty of the assessee. Therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. From the evidences, it appeared that the said assessee has knowingly not disclosed the taxable value with an intent to evade payment of Service Tax. The deliberate non-payment of duty/ tax and suppression of value of taxable services provided/received or wrong availment of Cenvat Credit is in utter disregard to the requirements of law and breach of trust deposed on them, and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime.

92. Therefore, M/s. Pacifica (India) Projects Pvt. Ltd. Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure co. Pvt. Ltd.), 4,5, Sigma Corporate-1, Near Mann Party Plot, Behind Rajpath Club Bodakdev Ahmedabad, Gujarat-380059 was called upon to show cause to the Additional/Joint Commissioner, Central Goods & Services Tax, Ahmedabad (North), Ahmedabad as to why:

i. service tax should not be demanded and recovered from them amounting to Rs 9,27,529/- on the total income of Rs 61,83,529/-, received as consideration against forfeited amounts by invoking the extended period of five years, 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 on the service tax demand at (i) above;

iii. interest should not be charged and recovered from them, under the provisions of Section 75 of the Act on the service tax demand at (i) above;

iv. the Cenvat Credit amounting to Rs 2,69,682/-, should not be demanded and recovered from them by invoking the extended period of five years, under the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of the Cenvat Rules. As the assessee have paid/reversed the sum, they are required to show cause as to why the said amount should not be appropriated towards the proposed recovery of the Cenvat Credit;

v. penalty should not be imposed on them under the provisions of Section 78(1) of the Act

read with Rule 15(3) of the Cenvat Rules on the Cenvat Credit recovery at (iv) above.

vi. Interest should not be charged and recovered from them, under the provisions of Section 75 of the Act read with Rule 14(1)(ii) of the Cenvat Credit Rules on the Cenvat recovery demand at (iv) above

vii. Why the service provided by the assessee for the project 'The Meadows-Gokuldham' should not be considered as construction of residential service as per clause (e) of Section 66E of the Finance Act, 1944 instead of work contract service.

viii. Service tax should not be demanded and recovered from them amounting to Rs.71,99,416/- received as consideration for construction of residential units, by invoking the extended period of five years under the proviso to Section 73(1) of the Act,

ix. penalty should not be imposed on them, under the provisions of Section 78(1) of the Act on the service tax demand at (viii) above;

x. interest should not be charged and recovered from them, under the provisions of Section 75 of the Act on the service tax demand at (viii) above;

xi. the Cenvat Credit amounting to Rs 11,55,327/-, wrongly availed and utilized by the assessee should not be disallowed and recovered from them, by invoking the extended period of time, under the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of the Cenvat Credit Rules;

xii. penalty should not be imposed on them under the provisions of Section 78(1) of the Act read with Rule 15(3) of the Cenvat Rules on the Cenvat Credit recovery at (xi) above.

xiii. interest should not be charged and recovered from them, under the provisions of Section 75 of the Act read with Rule 14(1)(ii) of the Cenvat Rules on the Cenvat recovery demand at (xi) above.

Defence Reply:

93. The assessee vide their letter dated 07.07.2020 have submitted their reply to the show cause notice wherein they inter-alia stated that -

Regarding Revenue Para No.2, they submitted that the forfeiture was due to non-performance of a contract. They explained the provisions of Section 74 of the Indian Contract Act, 1872 wherein a compensation for breach of contract i.e. penalty have been stipulated. They further submitted that the amount stipulated in the contract for breach in performance of the same. The amount forfeited is a sum mutually agreed by the parties for breach of contract, it has to be regarded as an adjustment flowing from the contract itself read with Section 74 of the Indian Contract Act, 1872 and not under any other separate contract wherein they have agreed to refrain from doing any act against the concerned vendor. Once the forfeiture amount is stipulated in the contract, they could only sue for recovery of such amount, but cannot enforce mandatory performance of the deficiency. In such a scenario, the amount forfeited could not be said to be a consideration against agreeing to the obligation to refrain from an act, or to tolerate an act. Hence the same cannot be subjected to service tax.

94. They further submitted that to get covered under 'declared service' defined under Section

66E(e) of the Finance Act, 1994 (Act), it has to be a stand-alone transaction. The effect of breach of a contract cannot be treated as a separate transaction of service. The act of forfeiting is effect of breach of contract. Contract and effect of breaching a contract is a whole body and the same cannot be separated. What is covered under Section 66E(e) of the Act is the stand alone transaction like non competence agreement. For example, if a street food vendor starts a food stall in your office premises and you tolerate it, because at the lunch time he presented a nice meal to you free of cost and you continue the habit for full month. This is the situation where you tolerate the act of street food vendor for a consideration (free lunch meal). Such situation are covered under Section 66E(e) of the Act and not the situation where your kids tutor provider abruptly decided not to teach your kid and you decided not to pay for the classes which he has already taken. In the second situation, money not paid is compensation for the inconvenience caused and the cost of searching new tutor and mental agony, whatever it may be. Money not paid is the effect of non-performance of obligation by tutor which he alternatively performed by way of forfeiting the amount retained. Similarly. the amount forfeited by them is towards the inconvenience caused to them and the cost for searching the new contractors to finish the job not done by previous contractors.

95. They referred to the relevant terms of Section 65B(44), Section 65B(51), Section 65B(22), Section 66(E) of the Finance Act, 1994. They further submitted that they had forfeited the retention money as penalty for non-performance of contract. It does not mean that they have provided any taxable services for a consideration, of the services of agreeing or tolerating an act for non-performance of contract. The forfeiture of the retention amount as penalty for non-performance of contract. Therefore, there is no element of consideration so as to say that a taxable service is provided, even so in terms of Section 66E ibid. The allegation that their contention that the amounts were towards the inconvenience caused to them and for the cost of searching new contractors is not at all tenable and acceptable. The activity would therefore not amount to any service within the ambit of the definition of 'service' in terms of Section 65B(44) of the Act. Further, since there is no consideration for a taxable service, and there is no tolerance of any act by them, it cannot be said that the service is covered under 'declared service' as per clause (e) to Section 66E of the Act. Hence, the demand of Rs. 9,27,529/- is not at all sustainable and they requested to drop the demand.

96. With reference to Demand of Rs. 2,69,682/-, as per Revenue Para No 3 of audit report on Wrong transfer of Education Cess and Secondary & Higher Education Cess in the main Service Tax credit, they stated that entire amount of Rs. 2,69,682/- has been reversed well before the issue of the impugned SCN, and shown them in the GSTR 3B return filed for the month of March 2018. Since the entire amount has been reversed from the ITC available on credit, in the GST Electronic Credit Ledger, no interest can be charged on the same in view of various settled law positions. They further submitted that there is no attempt or intention to evade duty of tax, nor anything has been brought on record, and the same was only a clerical mistake which is condonable. Therefore, no penalty also can be imposed in his case. Therefore, they requested to drop the show cause notice on this issue.

97. Regarding demand of Rs.71,99,416/- as per Revenue Para No.6 on Service Tax paid under Discharging Service Tax by classifying service as "Works Contract Service" instead of "Construction Service', they submitted that they have correctly classified the taxable services under the service 'works contract service' and has also paid the service tax under the same category. The nature of activity is covered under the ambit of Works Contract Service as interpreted at Section 65(B)(54) of the Finance Act, 1994.

98. They submitted that in the instant case, the contract includes the construction of a residential complex and as such, the activity to be covered under the Works Contract Service, the contract ought to be for the purpose of carrying out construction. The contract is entered into between the assessee and the Prospective Acquirer and the consideration is flowing from the Prospective Acquirer to the assessee and as such the service recipient in the instant case is the Prospective Acquirer. In a nutshell, it can be construed that Works Contract Service has been rendered only in the event that it is established that the Prospective Acquirer has awarded a contract to the assessee for the purpose of carrying out construction. Therefore, as per the terms of the said contracts entered into with each of the prospective buyer, they have promoted a residential project consisting residential units and thus has put on offer the said residential units proposed to be constructed by them with an intention to sell the same after construction. In response to above said offer, the prospective acquirer desired to acquire for him/her said residential unit. The prospective acquirer has also been given the pre-decided plans and specifications of the said project, and also design and specifications of construction of residential bungalows to be put up thereon, which the prospective acquirer has accepted.

99. They stated that the construction was carried out by them which can always be verified even by a casual visit by the Adjudicating authority, to see that the residential complexes have been constructed by them under the said contract as described above. Since the construction was carried out, and also as per the agreed upon terms of the said contract, the entire construction included the use of various services, and materials, construction included the use of various services, and materials and as a consolidated residential complex, it was handed over to the prospective buyer. Therefore, the said activity would correctly get classified under the works contract and not under the "Construction Service" as alleged in the impugned notice.

100. They placed reliance on the CBEC letter No.B1/16/2007-TRU dated 22.05.2007 wherein Optional Composition Scheme for Works Contract has been clarified. They also to submitted that the said works contracts assessed under service tax are also the same works contracts for the purpose of VAT/ Sales Tax, and as per the above circular, it has been very well clarified that contracts treated as works contract for the purpose of VAT/Sales tax, shall also be treated as works contract for the purpose of Finance Act, 1994. Therefore, they submitted that they have correctly collected and paid services tax under the works contract, and there cannot be any differential tax payable as alleged in the impugned Notice. They relied the following case laws:-

(1) 2019(31) GSTL 434 (Tri-Chennai) – Ben Foundation Pvt.Ltd Vs CE & ST Chennai.

(2) 2019 (31(GSTL J140 (SC) – Commissioner Vs Ben Foundation Pvt.Ltd .

(3) 2019(31) GSTL 476 (Tri-Chennai) – Aswin Apartments Vs CGST & CEX, Chennai South.

(4) Commissioner Vs Aswini Apartments – 2019 (31) GSTL J146 (SC)

(5) Mantri Developers P.Ltd Vs CST cited in 2014 (36) STR 944 (Tri-Bang).

(6) 2015 (38) STR J277 – in the above case (Sr.No.5)

101. The assessee has stated that they have correctly classified their services as 'works contract services' and have also paid appropriate service tax during the relevant period of time. They stated that when the point is raised, and recovery of the differential tax is demanded, which is badly time barred, as it is hit by the law of limitation as there is no suppression of facts, as they were already paying tax under the service tax. Moreover, they have also explained how the allegations are vague and not sustainable on merits of the case also. Therefore, the demand is not sustainable on both the grounds of limitation as well as merits. Hence, the demand of Rs. 71,99,416/- is not at all sustainable and they requested to drop this demand.

102. Regarding the Demand of Rs. 11,55,327/-as per Revenue Para No 9 - Reversal of Cenvat Credit taken on the units which are unsold at the time of BU Permission, the assessee submitted that in terms of Rule 2(1) of Cenvat Credit Rules, 2004, "input service' means any service used by a provider of output service for providing an output service (emphasis supplied). They explained Rule 2(1) of the Cenvat Credit Rules, 2004.

103. They further submitted that the work of construction of residential complex was going on and various goods, and services were received till the completion of the construction work, and thereafter the completion certificate was obtained. The Cenvat credit of such goods and services were used was taken even before the completion certificate was issued/obtained. Therefore, as on the date of availing of Cenvat credit, the completion certificate was not issued, and such material was used for the purpose of construction only. It is also a settled law that the eligibility of the Cenvat credit is to be seen on the date of availment, that the output service is taxable. Since the credit was availed before the completion certificate when the construction was going on, and even though the some of the residential units were sold later on after completion certificate (BU) was issued, this will not alter the position on the eligibility of Cenvat credit. They also referred to Rule 6(1) of the Cenvat Credit Rules, 2004 and also the definition under Rule 2(e) of Cenvat Credit Rules, 2004 and stated that reversal under Rule 6 of the Cenvat Credit Rules shall not be applicable in respect of credit claimed on units sold after receiving the completion certificate (BU permission).

104. They stated that there are two grounds on which the said demand of service tax by way of reversal of Cenvat credit on the residential units sold after the completion certificate is issued, is not sustainable, one that the said sale of residential complexes is not a 'taxable service' alter completion certificate is issued as it amounts to sale, and hence, it is not even an 'exempted service', and hence, the question of reversal does not arise, and secondly, that the Cenvat credit was availed at the time of receipt of goods and services, during the relevant time when the construction of the residential complex was going on, well before the completion certificate was issued. Therefore, the eligibility of Cenvat credit is only when the services or goods were received before sale of the residential complexes. They

also placed reliance on judgment of Hon'ble CESTAT, Ahmedabad in the case of Shreno Ltd (Real Estate Division) and Alembic Ltd by a common order cited in 2019(28) GSTL 71 (Tri-Ahmedabad) wherein the Hon'ble CESTAT held that "Appellant not required to reverse Cenvat Credit availed during the period when output service was wholly taxable before receipt of completion certificate". They also stated that the above judgement was challenged by the Principal Commissioner before the Hon'ble Gujarat High Court and the appeal was dismissed by the Hon'ble High Court.(in the case of Principal Commissioner vs Shreno Ltd (Real Estate Division) cited in 2020 (34) G.S.T. L. 416 (Guj.).

105. They submitted that they have correctly taken the Cenvat credit on the inputs and input services which was used in the payment of service tax on construction services, before issue of the completion certificate. There is no dispute about the eligibility of the Cenvat credit already taken during the relevant time, and there is no such allegation also. They were already paying tax under the service tax and filing service tax ST-3 returns. Hence, the demand of Rs. 11,55,327/- is not at all sustainable and they requested to drop the demand.

106. They also stated that their record has been audited for 3 times in the past by the Service Tax Department and once by the Central Excise Revenue Audit (CERA) team, but such an objection was never raised and submitted copies of Audit report. They finally requested to drop the proceeding initiated in the show cause notice and also requested for an opportunity to be heard in person before any decision in the matter is taken.

Personal Hearing:

107. Personal hearings in this case were fixed on 24.03.2020, 24.07.2020, 15.09.2020 and 14.10.2020. Shri R.S.Subramanya, Advocate, appeared through virtual hearing on 14.10.2020. He stated that a written reply dated 07.07.2020 has been submitted explaining their stand in this case. They have also submitted various case laws highlighting non-maintainability of the show cause notice. In the case of wrong transfer of Education Cess and Secondary & Higher Education Cess, they have already reversed the amount of Rs.269682/- well before issue of SCN. They requested to drop the SCN proceedings.

Discussion and Findings:

108. I have carefully gone through the records of the case, submission made by the assessee in reply to the show cause notice as well as during the course of personal hearing. The following issues are to be decided in the present case.

1) Non-payment of Service Tax to the tune of Rs.9,27,529/- on the declared service under Section 66E(e) of the Finance Act, 1994.
2) Wrong transfer of Education Cess and Secondary & Higher Education Cess of Rs.2,69,682/- in the main Service Tax Credit.
3) Discharging Service Tax by classifying Service as "Works Contract Service" instead of

"Construction Service" involving short payment of Service Tax of Rs.71,99,416/-.

4) Reversal of Cenvat Credit on the units which are unsold at the time of BU permission involving of Service Tax of Rs.11,55,327/-..

109. In the case of non-payment of Service Tax on the declared service under Section 66(E)(e) of the Finance Act, 1994, to examine the issue in depth, the relevant Section 65B(44) of the finance Act, 1944 is to be examined. The same is reproduced below:-

Section 65B(44) of the Act, defining 'service' –

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

'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".

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".

The text to Section 66(E) of the Finance Act, 1994 ('Act') reads as under:

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

(a) Renting of immovable property ;

(b) .....

(c) .....

(d) .....

(e) Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

(f) .....

(g) .....

(h) .....

(i) Assignment by the Government ..... transfers thereof"

110. Department is of the view that the assessee had forfeited the retention money as penalty for non-performance of contract. The assessee has provided services of agreeing or tolerating an act for non-performance of contract. They have refrained from doing an act/tolerated an act for which they have forfeited the retention amounts. The forfeiture of the retention amounts as penalty for non-performance of contract have been agreed upon by them. There is an element of consideration to the assessee by forfeiting the retention amounts. There is a request to tolerate/refrain/do an act from the receiver which is agreed by the assessee. Therefore, by forfeiting the retention amounts, there has been a service made by the assessee for a consideration by tolerating an act and for refraining to do an act, which would fall within the ambit of clause (e) to Section 66(E) of the Act. The contention of the assessee that the amounts were towards the inconvenience caused to them and for the cost of searching new contractors is not tenable and acceptable. The activity would amount to service within the ambit of the definition of 'service' in terms of Section 65B (44) of the Act. By getting a consideration for the service provided by them, the service would fall within the meaning of 'declared service' as per clause (e) to Section 66E of the Act. The activity is taxable, as defined under Section 65B (51) of the Act.

111. The assessee in reply to the show cause notice has submitted that the forfeiture was due to non-performance of a contract and as per the provisions of Section 74 of the Indian Contract Act, 1872 penalty have been stipulated. They also submitted that the amount stipulated in the contract for breach in performance. The amount forfeited is a sum mutually agreed by the parties for breach of contract, it has to be regarded as an adjustment flowing from the contract itself read with Section 74 of the Indian Contract Act, 1872 and not under any other separate contract. Therefore, the amount forfeited could not be said to be a consideration against agreeing to the obligation to refrain from an act, or to tolerate an act and the same cannot be subjected to service tax.

112. They also submitted that to get covered under 'declared service' defined under Section 66E(e) of the Finance Act, 1994 (Act), it has to be a stand-alone transaction. The effect of breach of a contract cannot be treated as a separate transaction of service. The act of forfeiting is effect of breach of contract. Contract and effect of breaching a contract is a whole body and the same cannot be separated. Under Section 66E(e) of the Act is the stand alone transaction like non competence agreement.

113. The assessee also stated that since there is no consideration for a taxable service, and there is no tolerance of any act by them, it cannot be said that the service is covered under 'declared service' as per clause (e) to Section 66E of the Act and the demand of Rs. 9,27,529/- is not sustainable and requested to drop the demand.

114. I find that agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a 'Declared Service' under Section 66E of the Finance Act, 1994. I find that the present case is appropriately falls under Section 66E (e) of the Finance Act, 1994 as by forfeiting the deposit the assessee kept silence and not taken any other legal remedies. Therefore, I find that this is an act of tolerance for which they received consideration.

115. Further, I find that in the case present case, the assessee has refrained from filing a civil suit seeking compensation against forfeiture of the advance received. The agreement between the assessee and their client indicates that both the parties have entered into a contractual agreement to abide by the terms and conditions. Further, the assessee has agreed to tolerate the act of breach of contract by the customer i.e. cancellation of order subject to forfeiture of advance paid which is in the nature of damages towards breach of contract. The scheme of things clearly indicates that the assessee has agreed to tolerate the breach of contract by the buyer, if any, against receiving the compensation in the form of forfeiture of advance received by them.

116. The compensation/consideration received by the assessee in the form of forfeited advance payment is nothing but for "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" which is a declared service under Section 66(E) of the Finance

Act, 1994.

117. Further, in the case of Order-in-original NO.12/ADC/2020-21/MSC dated 20.08.2020 passed by the Additional Commissioner, CGST & Central Excise, Ahmedabad North on similar issue, the Additional Commissioner had dropped the proceedings initiated against the assessee. The Department had not accepted the said order-in-original and preferred an appeal before Commissioner(A), Central Tax, Ahmedabad.

118. In view of the above, I hold that the service rendered by the assessee is falls under clause (e) to Section 66E of the Finance Act, 1994 and the assessee is liable to pay Service Tax of Rs.9,27,529/-.The said amount of Service Tax is recoverable in terms of Section 73(1) of the Finance Act, 1994 by invoking the extend period of five years. They are also liable to pay interest on the said Service Tax amount in terms of Section 75 of the Finance Act, 1994. For their failure to pay Service Tax they are also liable to pay penalty under Section 78(1) of the Finance Act, 1994.

119. Regarding the issue of wrong transfer of Education Cess and Secondary & Higher Education Cess in the main Service Tax Credit, I find that the assessee has accepted the audit objection and vide their letter dated 31.05.2018, stated that they have already reversed the same on 23.02.2018 and the said credit had not utilized by them for payment of service tax. The said reversal has been shown by them in the GSTR 3B filed for the month of March, 2018. However, the said assessee had not paid the applicable interest and penalty leviable on the disputed amount of Rs.2,69,682/-. The amount of Rs.2,69,682/- paid/reversed by the assessee is required to be appropriated and adjusted towards the wrongly availed of Cenvat Credit.

120. The assessee has stated that the demand of interest and penalty on the amounts already paid before issuance of the SCN, is not sustainable. I find that Rule 14(1)(ii) of the Cenvat Rules, 2004 is clearly states that "Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply *mutatis mutandis* for effecting such recoveries". Therefore, I hold that the interest on the amount of Rs.2,69,682/- is recoverable from the assessee in terms of Section 75 of the Finance Act, 1994 read with Rule 14(1) (ii) of the Cenvat Credit Rules, 2004. They are also liable to pay penalty in terms of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

121. Regarding the issue of discharging service tax by classifying service as "Works Contract Service" instead of "Construction Service", the show cause notice has alleged that the ST-3 returns of the assessee indicated that they are discharging service tax under the category of Works Contract Services. The financials records of the assessee had shown that the revenue income had been booked under the head 'Sale of Properties'. There was some mis-match in the heads under which income

had been shown in the ST-3 returns and in the financial records. They submitted two agreements entered into with Mrs. Jyoti B Kalola of which one was titled 'Deed of Conveyance' and other was titled 'Agreement for sale'. It was explained by them that the income shown under the head of Works Contract Services in the ST-3 returns pertained to a project named 'The Meadows' consisting of villas and the above two agreements were specimen copies in respect of Villa No. 194.

122. Scrutiny of the agreement titled 'Agreement for sale' indicates that a society in the name and style of Shree Yogeshwar Co-operative Housing Society Ltd is in possession of N.A. land which is described at length in the said agreement. The society in turn has granted Development Rights of the said land with full power and absolute authority to develop the same and to market the premises thereof to such person/s for such consideration and on such terms and conditions as the Developer may deem fit and proper. Towards this, the assessee paid the entire consideration i.e. Rs 50 crores to the land owner at the time of execution of the agreement. In terms of the authority vested by the Society to the assessee under Development Agreement dated 26.9.2008, the assessee have entered into an Agreement for Sale with the Prospective Acquirer. Such authority has been vested in light of fact that the entire rights of the land have been transferred by the society to the assessee and in terms of the provisions of Section 2(47) of the Income Tax Act, 1961, the act of extinguishment of any right in the assets tantamount to transfer of the asset. The Development Agreement stipulates that the society have extinguished their rights on the land and as such in terms of the above provisions, the land is deemed to have been transferred to the assessee.

123. The assessee have classified their services in respect of the above Project under the Works Contract Service, however, the documents primarily indicate that the same is a Project for Residential Units. It would be appropriate to examine whether the nature of activity is covered under the ambit of Works Contract Service as interpreted at Sec. 65(B)(54) of the Finance Act, 1994. The Definition of Works Contract is as below:-

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

124. I find that the above definition indicates that the basic ingredients required to be fulfilled for an activity to be categorized under Works Contract Service would be-

a) Transfer of property in goods should occur during the course of execution of works contract
b) The contract should be for the purpose of construction (in this case)
c) The property in goods should be leviable to tax as sale of goods

125. In the present case, the works revolves around a residential scheme and as such, the activity to be covered under the Works Contract Service, the contract ought to be for the purpose of carrying out construction. The contract is entered into between the assessee and the Prospective Acquirer and the consideration is flowing from the Prospective Acquirer to the assessee and as such the service recipient

in the instant case is the Prospective Acquirer. It can be construed that Works Contract Service has been rendered only in the event that it is established that the Prospective Acquirer has awarded a contract to the assessee for the purpose of carrying out construction.

126. The assessee has stated that the contract includes the construction of a residential complex and as such, the activity to be covered under the Works Contract Service, the contract ought to be for the purpose of carrying out construction. The contract is entered into between the assessee and the Prospective Acquirer and the consideration is flowing from the Prospective Acquirer to the assessee and as such the service recipient in the instant case is the Prospective Acquirer. The Works Contract Service has been rendered only in the event that it is established that the Prospective Acquirer has awarded a contract to the assessee for the purpose of carrying out construction. As per the terms of the said contracts entered into with each of the prospective buyer, they have promoted a residential project consisting residential units and thus has put on offer the said residential units proposed to be constructed by them with an intention to sell the same after construction. In response to above said offer, the prospective acquirer desired to acquire for him/her said residential unit. The prospective acquirer has also been given the pre-decided plans and specifications of the said project, and also design and specifications of construction of residential bungalows to be put up thereon, which the prospective acquirer has accepted.

127. I find that the 'Agreement for Sale' is that the assessee has promoted a residential project consisting residential units and thus has put on offer the said residential units proposed to be constructed by them with an intention to sell the same. In response to above said offer, the prospective acquirer has desired to acquire for him/her said residential unit. The prospective acquirer has also been given the pre-decided plans and specifications of the said project, and also design and specifications of construction of residential bungalows to be put up thereon, which the prospective acquirer has accepted. As indicated above paras, the nature of contract indicates that the Prospective Acquirer has desired to acquire for her the unit of land and bunglow. The contract clearly establish the nature of the activity/services rendered, the proper category of the services would be Construction Services as Declared at Section 66E(b) of the Finance Act, 1994. For convenience, definition of Section 66E of the Finance Act, 1994 is reproduced below:-

"Section 66E: The following shall constitute declared services, namely:-

a).....

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.

Explanation. - For the purposes of this clause,-

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(BJ chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure"

128. I find that the inclusive portion in the above definition *"including a complex or building intended for sale to a buyer"* is appropriately covering the activity undertaken by the assessee in the instant case on the grounds indicated below:-

- the assessee is engaged in construction of residential complex consisting of Bungalows named as "The Meadows" which is apparent from page 3 of the agreement wherein it has been narrated as *"The Developer has promoted a residential project of Residential Units, to consist of units of land and construction and development of residential bunglows thereon, and common infrastructure".*

- The assessee acquired development rights to develop residential bungalows/ units on the land.
- The Development Agreement shows that the land owner has extinguished whole rights, barring legal title, in respect of that land in favour of the assessee and towards this the assessee paid the entire consideration i.e. Rs. 50 Crore to the Land Owner at the time of execution of the agreement.
- the assessee enters into agreement with the persons desirous to acquire above said units in the project (buyer) on such terms and conditions as it may deem fit and in conformity thereof may put them in possession thereof.

- The assessee also collects and retains entire consideration or all other amounts that may be decided by and between the assessee and the prospective purchaser of the above said units.

- The assessee entered into an agreement for sale with the Prospective Buyer of residential unit of which the relevant clauses read as under:

(i) *Clause 5b: The transfer and final vesting of the said residential unit by the society (land owner) and the developer (assessee) in favour of the prospective acquirer shall be done either by way of sale or by way of allotment by/ through society or in any other manner at the sole and absolute discretion of the developer in consultation with the said solicitors. The said residential unit is aggregate of the unit of land and bungalow thereon. However, the transaction under this agreement has been agreed to be one composite transaction for the said residential unit and for the said total price. The prospective acquirer shall have no right or claim to reject or accept the same in part or parts for the unit of land and bungalow.*

(ii) *Clause 14: The possession of the said residential unit shall be given by the developer to the prospective acquirer only upon all payments required to be made under this agreement by the prospective acquirer have been made to the developer and in accordance with other provision herein.*

(iii) *Clause 15: Nothing contained in this agreement shall be construed so as to confer upon the prospective acquirer any right, title or interest of any kind whatsoever in, to or over the said residential unit.*

(iv) Clause 35: The prospective acquirer shall at no time demand partition of his interest from the project. It being agreed and declared by the prospective acquirer that his interest in the project shall be impartible.

- Final allotment of the residential unit by the society *(being land owner)* and the assessee (developer) to the buyer is made through a tripartite agreement. In other words, the property in the land (title) passes to the buyer at one stage only, i.e. on completion of the construction. At the time of agreement to sale and during construction period, the property in the land remains with the owner only. Certain Provisions, stipulations and covenants on the part of the member that are
- listed in the conveyance deed (i.e. Tripartite agreement), which are relevant, are stated as below:
- *(i) Clause 5d: The developer has acquired sole and absolute development rights of the land from the society. The project on the land is developed by the developer. The residential units thereof have been marketed and sold by the developer. The member (buyer) has realized, agreed and accepted that the role of the society is now reduced to SPV for and of the developer, and the prospective members to derive title from the developer through society as its member and shareholder. The over-all ownership of the project remains with the developer.*
- (ii) *Clause 20: The member shall at no time demand partition of their interest from the entire scheme. It being agreed and declared by the member that their interest in the scheme shall be impartible, but specific as regards the said residential unit only.*
- The entire consideration purportedly bifurcated for land and construction, received from the buyer, is retained by the assessee only.
- The description of residential unit under sale as shown in the second schedule of agreement to sale entered into between the assessee (being developer) and the customer (Villa No. 194) stipulates that Gross land area of the residential unit under sale, against which land consideration appropriated, includes undivided share in the common areas of the project also. In other words, the purported land value that is being excluded while ascertaining service tax, includes the undivided share in the common areas of the project and the development of the common area also includes a service component.

129. From the above mentioned conditions it is obvious that the assessee (developer) is engaged in development of the residential complex project intended for sale which is further substantiated from the following facts:

(i) the project plan of residential unit has been approved by the competent authority i.e. Ahmedabad Urban Development Authority (AUDA)
(ii) the project has common area
(iii) it has also common amenities and facilities like park, community hall, Common water supply (Overhead Water Tank) etc.
(iv) It has obtained building use permission from the competent authority.
(v) As per the agreement between assessee (developer) and the Buyer, the buyer shall at no time demand partition of his interest from the project. It is being agreed and declared by the buyer that his interest in the project shall be impartible.

130. Further, the agreement between assessee and the customer/ member (service recipient, from whom the consideration flows) clearly shows that it is an agreement for acquisition of residential unit being constructed by the assessee for sale. The property in land passes along with the construction thereon i.e. at one stage only, on completion of the construction, therefore, it can not be said as merely a contract to carry out construction. Though shown value of land is above 50 lacs, no separate deduction

of tax (TDS) in respect of shown value of land was made u/s 194 IA of the Income Tax Act, 1961. The TDS was deducted in one go at the time of final payment on entire consideration of the residential unit and the stamp duty is also paid on overall amount. It also significant to note that the pattern of payment made by the buyer also does not discriminate the payment against land value or against the construction cost (case studied (Villa no. 194))

131. Para 6.2 of the "Taxation of Services: An Education Guide" issued by the Central Board of Excise & Customs reads as under:

> ***6.2 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 certificate of completion by a competent authority.***
>
> This service is already taxable as part of construction of residential complex service under clause (zzzh) of sub-section 105 of section 65 of the Act and as part of service in relation to commercial or industrial construction under clause (zzq) of sub-section 105 of section 65 of the Act. <u>This entry covers the services provided by builders or developers or any other person, where building complexes, civil structure or part thereof are offered for sale</u> but the payment for such building or complex or part thereof is received before the issuance of completion certificate by a competent authority.

132. I find that the above portion of the Education Guide also clarifies the nature of service of 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 certificate of completion by a competent authority.

133. It is also noticed that the assessee has not paid service tax on properties sold after obtaining Building Use permission from the competent authority. It is worth to note that clause (b) of the section 66E of the Finance Act, 1994, which deals with the construction service, specifically exclude the construction service from the ambit of service tax where the entire consideration is received after issuance of completion certificate (building use permission) by the competent authority. The service tax law does not provide such provision in case of works contract service (Ref. Clause (h) of Section 66E of the Finance Act, 1994). **Therefore, before obtaining building use certificate, the assessee was classifying the service as "Works Contract Service" and on obtaining the- Building Use permission, the assessee itself treated the project as construction of residential complex and availed the benefit of non-payment of service tax where the entire consideration was received after issuance of completion certificate (building use permission) by the competent authority.** If the assessee's classification of the service under Works Contract Service is considered, the assessee would be liable to pay the service on the units for which exemption has been sought on the count that the same are sold after BU permission and there is no exclusion clause under the Works Contract Service for units sold after BU permission. This exclusion would be only applicable in respect of the construction services as declared under Sec. 66E(b) of the Finance Act, 1994. Moreover, by the act of claiming the exclusion as provided under Sec. 66E(b) of the Finance Act, 1994, the assessee have themselves inherently accepted that their services fall within the category of construction services as per Sec. 66E(b) of the Finance Act, 1994. Even going by the assessee's own submissions of the service being Works Contract Service, they have failed to pay the service tax appx. amounting to Rs. 53 lakhs

on the 28 units which have been sold after obtaining BU permission by claiming the exclusion as provided under Sec. 66E(b) of the Finance Act, 1994. The assessee ought to have paid such service tax on the units sold after BU in consonance to their own theory of the service being Works Contract Service.

134. Therefore, it is clear that the assessee is rendering construction service as declared under Section 66(E)(b) and discharging of Service Tax liability by classifying the service as works contract service is not correct. The wrong classification of Service by the assessee has resulted into short payment of service tax to the tune of Rs.71,99,416/- for the Financial Year 2013-14 to 2016-17 which is required to be recovered along with applicable interest and penalty.

135. The assessee also relied various case laws in their support. I find that the facts of the said cases are different and not comparable with the present case. I find that in the case of Mantri Developers P. Ltd. v. Commissioner 2014 (36) S.T.R. 944 (Tri. - Bang.) and facts of the present case are not similar. In the said case, the appellant entered into individual contracts in two stages with the buyers of flats, the first one for undivided share of land and second is for construction of the flat. Further, an appeal against the above decision has been filed before the Supreme Court and said matter is still subjudice. Moreover, the position w.e.f. 1.7.2012 witnessed a sea change in the approach of service tax in as much Further, the assessee also referred judgement of Hon'ble Supreme Court in the case of Larsen and Toubro Ltd. and Another v. State of Karnataka (2014) (303) E.L.T. 3 (S.C.). In this regard, it is pertinent to note that the underlying question of the above said judgment was whether taxing sale of goods in an agreement for sale of flat, which is to be constructed by the developer/ promoter, is permissible under the constitution or not. The above said judgment is relating to VAT and vide said judgment it was held that sale of goods is involved in works contract therefore, VAT can be imposed. Here it is pertinent to note that under the VAT law, there is no separate category which deals with the contracts for construction of residential complex. However, under the Service Tax law a specific category of service i.e. "Construction of Residential Complex" has been carved out of the broad category of "Works Contract Service" and in terms of Section 66F(2) of the Finance Act, 1994, the specific description shall be preferred over a more general description. In view of the above, the contention of the assessee to treat the services rendered by them as Works Contract Service can not be accepted and not tenable.

136. In view of the above facts, it is clear that the assessee have 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 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.

137. I find that the assessee is failed to correctly classify the service rendered by them and fulfill the correct Service Tax liabilities. It is their responsibility to correctly classify the service and accordingly avail legitimate abatement. I find that they were showing land value separately in the conveyance deed, they were claiming that the underlying service is Works Contract Service. Although they were showing the land value and value of construction separately in the conveyance deed but the entire

property i.e. Land and Construction thereon passes on at one stage only as elaborated above. In view of the above facts, it is apparent that all the clauses related to the agreement and the nature of activity performed were well within their knowledge and therefore, they should have properly classified their service. They have resorted to wrong classification resulting in short payment of service tax. Therefore, the facts of the present case clearly suggest suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed there under with intent to evade the demand of service tax as would be covered by the proviso of Sub-section (1) of Section 73 of the Finance Act, 1994. Therefore, I hold that extended period of limitation in terms of the provisions of proviso of Sub-section (1) of Section 73 are applicable in the present case. Also, interest would be liable to be charged and recovered under the provisions of Section 75 of the Act. They have willfully mis-declared their service as works contract service despite having full knowledge that they were engaged in the construction of residential complexes and thereby, had made themselves liable for penal action, under the provisons of Section 78(1) of the Act.

138. Regarding the issue of non-reversal of Cenvat Credit taken on the units which are unsold at the time of BU permission, the show cause notice has alleged that various residential units constructed during the period, some of them had been booked and sold after the issuance of the completion certificate by the competent authority, namely Ahmedabad Municipal Corporation.

139. Under the negative list regime of service tax, with effect from 1.7.2012, certain activities had been made chargeable to service tax, as 'declared services' by virtue of Section 66E of the Act. One such declared services is Construction Services. Section 66E of the Finance Act, 1994 has already been discussed above.

140. The construction is completed and the "Completion Certificate" is obtained, it turns out to be an immovable property. When the property is sold/transferred after 'Completion Certificate' is received, it is deemed to be sale of immovable property which is specifically excluded from the definition of service, in terms of Section 65 (B)(44) of the Act, 1994.

141. In view of the above definition, it is clear that sale/transfer of title of immovable property, by way of sale, gift or in any other manner is excluded from the definition of service. Therefore, such a sale does not constitute 'Service'.

142. The above provisions of law makes it explicit that the activity of construction attracts service tax, if a part or whole of the consideration towards such construction is received prior to Completion Certificate/Building Use permission. The activity of construction in which the entire consideration is received after Building Use permission, has been kept out of the scope of 'declared services'.

143. Therefore, the assessee is liable to pay service tax only for those units/residences, which have been booked/sold before the issue of building use (BU) permission dated 23.10.2013 for their scheme 'The Meadows, Ph-I', under Section 66 of the Act read with the Service Tax Rules, 1994. Consequentially, no service tax would be paid for those units/residences, which have been sold after the issue of BU permission.

144. The eligibility and admissibility of credit has been stipulated under Rule 3 of the Cenvat Rules. The definition clearly specifies the class of persons, who are entitled to Cenvat credit, as (i) Manufacturer or Producer of Final Products and (ii) Output service provider.

145. Though 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, is considered to be a declared service under Section 66E(b) of the Act, the developer/builder cannot be said to have provided or agreed to provide such service in respect of each individual flat/unit/shop, till such unit is booked/sold on full or part payment, before the requisite permission is obtained from the competent authority. This situation exists because the sale of unit after receipt of "completion certificate" does not constitute service.

146. In the case of Construction service, service is said to be provided to each individual who books/purchases units, on payment of part/full consideration and not in respect of the entire building constructed. The builder is agreeing to provide or provide services to multiple service recipients in respect of individual flat/ unit of the same project. Till the time, an individual flat/unit is booked/sold, there is no element of service involved in as much as there is no service recipient and the natural corollary that follows is that no service is provided or agreed to be provided. In such a situation, it is service to self and therefore the developer/builder cannot be said to be the provider of output service (emphasis supplied) for the flats/units not booked/sold, at the time the requisite permission from the competent authority was issued. This will be the case for each individual unit constructed. This is the crux of the matter especially in light of the interpretation of the term 'declared service' at Section 65B(22) of the Finance Act, 1994 which states that - "declared service" means any activity carried out by a person **for another person** for consideration and declared as such under section 66E".

147. The developer/builder is deemed to be the provider of output service only in those cases where the flats/units are booked/sold prior to obtaining the 'Completion Certificate' from the competent authority. Consequentially, no Cenvat Credit can be availed in terms of Rule 3(1) of the Cenvat Rules, till the time a flat/unit is booked on part/full payment of consideration, as till such time, the person indulged in construction cannot be said to be the "Service provider" and is providing service to self, in so far as the flats/units not booked/sold. The fact remains that the builder is very well aware of the booking status of the individual flats/ units and this leads to his knowledge of the fact whether he is an output service provider for that particular flat / unit or otherwise. This position is very clear in light of the provisions of Section 65B(22) of the Act to which the builder cannot claim ignorance. Thus, the assessee cannot be held to be an output service provider for the individual flat / unit till such time every single flat/ unit is booked, prior to obtaining Completion Certificate. This is especially so in light of the fact that in the event that the unit is booked after receipt of Completion Certification, the builder is engaged in the activity of sale of immovable property and if the unit is booked before receipt of Completion Certification, the builder is engaged in providing construction services to the proposed owner of the unit.

148. Till the time a flat/unit is booked on payment of part/full consideration, no service is provided or agreed to be provided. Thus, the assessee cannot be said to be an output service provider in respect of

such flats/ units in as much as there is no service recipient for such flats/ units and resultantly, no service is provided or agreed to be provided.

149. Therefore, the assessee is not entitled to take Cenvat Credit proportionate to the services utilized for construction of residential units which have not been booked / sold prior to receiving Completion/BU certificate i.e Units for which the assessee is not an output service provider. Rule 3(1) of the Cenvat Rules clearly stipulates that only an output service provider is entitled to take Cenvat Credit.

150. The builders that at the time of incurring expenses or availing services, it is not known if it is being used for providing 'output service' or is being used for construction of flats/units sold after receipt of completion certificate and therefore, not liable to payment of service tax. So far so good, But the builders availing credit of the entire expenses incurred on goods and services, even for those flats sold after receipt of completion certificate and where no service is provided and where no tax is paid, is not in consonance with law. This in itself should have been the cause for the builders to not avail the Cenvat Credit, till each individual unit is booked on receipt of consideration, prior to obtaining completion/Building use certificate or in other words to say that they could have availed the Cenvat Credit only as and when the individual flat/unit was booked and that to prior to obtaining completion/Building use Certificate. The said assessee has therefore wrongly taken the Cenvat Credit, in respect of those units which do not constitute a service, in violation of Rule 3(1) of the Cenvat Rules, 2004. The said wrongly taken Cenvat Credit is to be recovered in terms of Rule 14(1)(ii) of Cenvat Credit Rules, 2004 along with interest and penalty in terms of the Finance Act, 1994.

151. Further, in terms of Rule 2(1) of Cenvat Credit Rules, 2004, *"input service"* has been defined.

152. Going by the circumstances and facts of the case, I find that the said assessee is not an output service provider in respect of the bungalows/units which have not been booked/sold, on the date the completion certificate/BU permission is received. Resultantly, the portion of services utilized for construction of such flats/ units would not qualify as 'input service' in as much as such portions of services have not been utilized for providing an output service. Therefore, they are not eligible to take Cenvat Credit of such portion of input services, utilized in an activity, which does not constitute 'service'.

153. The Cenvat Credit scheme has been introduced with a view to avoid the cascading effect of taxes. The question of cascading effect would not arise in respect of the activity on which no service tax is payable. Consequently, the Cenvat Credit would not be admissible in respect of such activities which are not chargeable to service tax. This, analogy is amply specified in the legal statuette by virtue of Rule 6(1) of the Cenvat Rules which read as under at the material time:

"The CENVA T credit shall not be allowed on such quantity of ***input used in*** or ***in relation*** to *the manufacture* of *exempted* goods or *for provision* of *exempted services,* or ***input service used in*** or ***in relation*** to *the manufacture* of *exempted* goods *and their clearance up to the place of removal or for provision of exempted services except in the circumstances mentioned in sub-rule (2)"

154. The above rule also clarifies the intention of the law makers to the effect that the assessee is not to be benefitted by Cenvat Credit of inputs/ input services used in the activity exempted from tax. However in the instant case, the said assessee is provider of taxable services in respect of only those units booked on full or partial payment which is received prior to obtaining Completion Certificate. The sale of units with full/partial consideration after 'Completion Certificate' is received does not constitute 'service' at all. Such an activity is entirely out of the scope of 'service' in terms of the definition provided at Section 668(44) of the Act. Therefore, the Cenvat Credit in respect of such non taxable activity not constituting 'service' is not admissible in terms of Rule 3(1) of the Cenvat Credit Rules itself. The text of Rule 6 of the Cenvat Rules has been discussed only for the purpose of arriving at the intention of the legislature to the effect that the Cenvat Credit would not be admissible in respect of such activities which are not chargeable to service tax.

155. From the above, it is explicit that service tax is levied only on the value of the services provided or agreed to be provided by one person to another and conversely no service tax is levied when no service is provided (emphasis supplied), as in the case where the bungalows/units are sold after obtaining requisite permission from the competent authority.

156. However, in the instant case, builder/developer has taken Cenvat Credit in respect of services received for the construction of the entire building/complex and the unit-wise segregation of such input services is not possible. Therefore, it is not possible to segregate the Cenvat Credit for each unit since the services of construction, security, etc. are utilized for the entire project. In such circumstances, the best recourse to determine such ineligible Cenvat Credit on a composite project would be to ascertain it on proportionate basis, either based on the number of units, if all the units are of equal dimension or on the basis of constructed area, if the units are having different dimensions.

.157. In view of the above discussion, it is clear that the builder/developer including the assessee in this case, was eligible to take proportionate credit only for the units booked on payment of consideration, either based on the total area of construction or number of units (if all the units are of equal dimensions). In such a scenario, neither undue credit would be availed nor there would be any requirement of recovery of excess credit availed. This will also not entail any financial burden on the builders as they will avail the proportionate credit at the time of booking the flats and the service tax will also be paid thereafter on receipt of payment/advance including service tax from the service recipient. On an illustration basis let us assume that a builder proposes to construct 1000 sq. mts. of residential complex and commences construction by utilizing various services. Assuming that 200 sq. mts. are booked/sold on part/full payment during the first month of the commencement, the builder can avail 20% of the service tax paid on the various services utilised and also can utlise the said credit for payment of service tax on the amount so received for booking/sale. This is so because the builder is an output service provider only in respect of 20% of the construction which has been booked/sold. As and when further booking/sale is made, the builder can take the subsequent credit proportionately, including the flats/units previously booked. This was coherently explained in the table below para 73 of the show cause notice.

158. It is assumed that in the first month of commencement of construction only 10% of the proposed area to be constructed (1000 sq. mts.) is booked on full/partial payment and therefore, service is said to be provided in respect of only 10% of the proposed construction. Though service tax paid on the services utilized for construction during the month is Rs 200/-, the builder would be entitled to take credit only to the extent of 10% of the service tax paid on the input services, i.e. Rs 20/-. In the subsequent month, though there is no further booking, service tax paid on the services utilised in the month is Rs 400/-. As the services used in the second month are also used for the construction of the 10% of the area booked in the previous month, the builder would be entitled to take credit of 10% of the service tax of Rs 400/- paid in the second month, i.e. Rs 40/-. Thus, at the end of second month, the builder will have availed Cenvat Credit to the tune of Rs 60/-, i.e. 10% of the total service tax paid (Rs 600/-) till the end of the month, as service is said to be provided only in respect of 10% of the proposed construction. Further in the third month of construction, assuming another 200 sq. mts. are booked, service is now said to be provided in respect of 30% of the proposed construction area. Assuming the builder has paid service tax of Rs 500/- on the input services used in the third month, the builder will be entitled to take Cenvat Credit of Rs 270/- i.e. @ 30% of the Service Tax paid in all the three months (Rs 500/- + Rs 400/- + Rs 200/-), i.e. Rs 330/- less Rs 60/- cenvat credit already availed till the end of the second month and therefore, by the end of the third month they will have availed Cenvat credit equivalent to Rs 330/- i.e. 30% of the service tax paid (Rs 1100/-) on the services utilized so far. Accordingly, by the end of the sixth month, the builder will be entitled to avail 50% of the cenvat credit (Rs 2050/-) of the service tax paid (Rs 4100/-) on the input services utilised, as by the time 50% of the total proposed construction area is booked on payment of full/partial amount and in which case the service is said to be provided. This should be the scheme of the things, till the time the completion/BU certificate is obtained, instead of the builder availing the entire credit of the service tax paid on the services utilised, as once the completion/BU certificate is received, there is no element of service on the flats/units booked/sold post receipt of the said certificate.

159. The said assessee takes a stand that they had taken Cenvat Credit in respect of all the services utilized for construction of project/building under the belief that the said project was an 'ongoing concern' and he would be in a position to sell all the units/flats/shops prior to obtaining 'Completion Certificate', the said assessee should have paid back the ineligible Cenvat Credit with interest at the time, the 'Completion Certificate' is obtained. At the time of obtaining "Completion Certificate", the assessee was aware that they had taken ineligible 'cenvat credit in respect of units, the sale of which would not constitute a service. Therefore, at least at the time the "Completion Certificate" was obtained the assessee ought to have paid the excess amount of cenvat credit availed on the units, the sale of which did not constitute service. Even the said fact of obtaining 'Completion Certificate', by virtue of which the need to pay back ineligible Cenvat Credit arose, was never disclosed to the department. The assessee had suppressed these facts from the department to illegally avail the cenvat credit which was ineligible by the virtue of Rule 3(1) of the Cenvat Credit Rules,2004.

160. The said assessee has taken and utilized the Cenvat Credit of the services used for the construction of entire project i.e. for the units booked/sold prior to obtaining the BU permission on

which service tax was paid, as well as on the units booked/sold after obtaining the BU permission and on which no Service tax was paid and in fact, in which case no service was provided by the assessee. However, no Cenvat Credit is admissible for the sales made after obtaining the B.U. permission/completion certificate as no output service is provided in such cases and the services utilized for the construction of the units unsold at the time BU permission is obtained, proportionate to the total area constructed cannot be termed as input service and, hence, such portion of Cenvat Credit availed and utilized for construction of residential units sold after obtaining BU permission is not admissible under Rules 3(1) read with Rule 2(1) of the Cenvat Credit Rules 2004.The assessee has taken Cenvat Credit to the tune of Rs 58,54,115/- of the service tax paid on the services utilized for the construction of the entire project.

161. The assessee has contended that Cenvat Credit taken on the units which are unsold at the time of BU Permission, in terms of Rule 2(1) of Cenvat Credit Rules, 2004, "input service' means any service used by a provider of output service for providing an output service (emphasis supplied).

They also submitted that the work of construction of residential complex was going on and various goods, and services were received till the completion of the construction work, and thereafter the completion certificate was obtained. The Cenvat credit of such goods and services were used was taken even before the completion certificate was issued/obtained. Therefore, as on the date of availing of Cenvat credit, the completion certificate was not issued, and such material was used for the purpose of construction only. It is also a settled law that the eligibility of the Cenvat credit is to be seen on the date of availment, that the output service is taxable. Since the credit was availed before the completion certificate when the construction was going on, and even though the some of the residential units were sold later on after completion certificate (BU) was issued, this will not alter the position on the eligibility of Cenvat credit. They also referred to Rule 6(1) of the Cenvat Credit Rules, 2004 and also the definition under Rule 2(e) of Cenvat Credit Rules, 2004 and stated that reversal under Rule 6 of the Cenvat Credit Rules shall not be applicable in respect of credit claimed on units sold after receiving the completion certificate (BU permission).

162. They placed reliance on judgment of Hon'ble CESTAT, Ahmedabad in the case of Shreno Ltd (Real Estate Division) and Alembic Ltd by a common order cited in 2019(28) GSTL 71 (Tri-Ahmedabad) wherein the Hon'ble CESTAT held that "Appellant not required to reverse Cenvat Credit availed during the period when output service was wholly taxable before receipt of completion certificate". They also stated that the above judgement was challenged by the Principal Commissioner before the Hon'ble Gujarat High Court and the appeal was dismissed by the Hon'ble High Court.(in the case of Principal Commissioner vs Shreno Ltd (Real Estate Division) cited in 2020 (34) G.S.T. L. 416 (Guj.).

163. They submitted that they have correctly taken the Cenvat credit on the inputs and input services which was used in the payment of service tax on construction services, before issue of the completion certificate. There is no dispute about the eligibility of the Cenvat credit already taken during the relevant time, and there is no such allegation also. They were already paying tax

under the service tax and filing service tax ST-3 returns.

164. I find that the explanation submitted by the assessee in this regard is not convincing and not tenable. Going by the facts, I find that, BU permission was given on 23.10.2013 for their scheme 'The Meadows, Ph-I' by the competent authority. Out of the total built-up area of 38155 sq yards, 7530 Sq. yd. was unsold at the time the BU permission was received, as is verified by the Audit Officers from the ledgers maintained by them. The individual bungalow ledger maintained by the assessee clearly shows that no payment in respect of bungalows totally admeasuring 7530 Sq. yd, had been received prior to obtaining Completion/BU certificate. Hence, proportionate Cenvat Credit to the extent of Rs 11,55,327/-as worked out, availed & utilized for the part of the construction in which no element of service was involved, is not admissible, as discussed supra.

165. Therefore, such Cenvat Credit availed by the assessee is in contraventions of Rules 3(1) read with 2(1) of the Cenvat Credit Rules with an intent to evade the payment of service tax, as the said wrong and inadmissible Cenvat Credit has been used for payment of Service Tax.

166. As per the provisions of Rule 9(6) of Cenvat Credit Rules, 2004 which stipulates that the burden of proof regarding the admissibility of Cenvat Credit on input services shall lie upon the manufacturer or provider of output services, taking such credit. They failed to comply with the self –assessment scheme, the onus of taking legitimate Cenvat Credit has been passed on the assessee in terms of the said rule. It is the responsibility of the assessee to take Cenvat Credit only if the same is legally admissible. Therefore, there is a definite intention on their part to evade payment of service tax and the assesse have contravened the provisions of Rules 3(1) read with 2(1) of the Cenvat Credit Rules 2004. Therefore, the wrongly availed and utilized input service tax credit of Rs 11,55,327/-, is liable to be recovered by invoking the extended period of five years, under the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of the Cenvat Credit Rules,2004. Applicable interest is also to be demanded and recovered from them, in terms of Section 75 of the Act. They are also liable to penal action for their failure to pay/reverse the wrongly taken/availed Cenvat Credit under the provisions of Finance Act, 1994.

167. The assessee has relied the case of Principal Commissioner Vs Shreno Ltd (Real Estate Division) reported in 2020 (34) GSTL 416 (Guj) stating that they have correctly taken the Cenvat Credit. I find that the case has not been reached finality and an appeal filed by the Department has been admitted by the Hon'ble Supreme Court [Principal Commissioner Vs Shreno Ltd (Real Estate Division) reported in 2020 (34) GSTL J 82 (SC)].

168. I find that in the present case, there is a definite attempt has been made on the part of the assessee to evade the Service Tax by taking illegitimate Cenvat Credit, contravening various provisions of Cenvat Credit Rules, 2004. The deliberate non-payment of duty/ tax and suppression of value of taxable services provided/received or wrong availment of Cenvat Credit is in utter disregard to the requirements of law and breach of trust deposed on them, and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime. Therefore, extended period is invokable in this case. I find that in this regard the case laws cited in the Show Cause Notice by the Department are appropriate to the present case.

169. In view of the above discussion, I summarize and hold that the assessee is liable to pay/reverse Service Tax/Cenvat Credit on the four issues as discussed in my findings above and as mentioned in table below.

Sr.No.	Issue involved	Amount of Service Tax payable/reversible /Rs.
01	Revenue Para No.2: Service Tax not paid on the declared service under Section 66(E)(e) of the Finance Act, 1994.	9,27,529.00
02	Revenue Para No 3: Wrong transfer of Education Cess and Secondary & Higher Education Cess in the main Service Tax credit.	Interest on Rs.2,69,682.00
03	Revenue Para No.06: - Discharging service tax by classifying service as "Works Contract Service" instead of "Construction Service": -	71,99,416.00
04	Revenue Para No 9: Reversal of cenvat credit taken on the units which are unsold at the time of BU permission	11,55,327.00

170. The said amounts of Service Tax are to be recovered in terms of provisions of Section 73(1) of the Finance Act, 1994 and wrongly availed Cenvat Credit under Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 along with interest in terms of Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004. They are also liable to pay penalty in terms of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

171. In view of the above discussion and my findings above, I pass the following orders:-

ORDER

i. I confirm the Service Tax amounting to Rs 9,27,529/- (Rupees nine lakhs twenty seven thousand five hundred and twenty nine only) on the total income of Rs.61,83,529/-, received by the assessee as consideration against forfeited amount under Section 73(2) of the Finance Act, 1994 and order M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd, Ahmedabad to pay the said Service Tax amount immediately.

ii. I impose a penalty of Rs.9,27,529/- (Rupees Nine Lakhs, Twenty Seven Thousand, Five Hundred and Twenty Nine only) on M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd, Ahmedabad under the provisions of Section 78(1) of the Finance Act, 1994.

iii. I order that interest at the appropriate rate be recovered from M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd, Ahmedabad under the provisions of Section 75 of the Finance Act, 1994 on the Service Tax confirmed at (i) above;

iv. I disallow the wrongly availed Cenvat Credit amounting to Rs 2,69,682/- and order recovery of the same under Section 73(2) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules 2004. As the assessee have already paid/reversed the amount of Rs. 2,69,682/-, I appropriate the same towards the wrongly availed Cenvat Credit.

v. I impose a penalty of Rs.2,69,682/- on M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd, Ahmedabad , under the provisions of Section 78(1) of the Act read with Rule 15(3) of the Cenvat Credit Rules, 2004 on the Cenvat Credit recoverable at (iv) above.

vi. I order that interest be recovered from them, under the provisions of Section 75 of the Act read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 on the wrongly availed Cenvat Credit recoverable at (iv) above

vii. I order that the service provided by the assessee for the project 'The Meadows-Gokuldham' be considered as construction of residential complex service as per clause (e) of Section 66E of the Finance Act, 1944 instead of works contract service.

viii. I confirm the demand of Service Tax amounting to Rs.71,99,416/- (Rupees Seventy One Lakhs, Ninety Nine, Thousand Four Hundred and Sixteen only) leviable on consideration received for construction of residential units under Section 73(2) of the Finance Act, 1994.

ix. I impose a penalty of Rs.71,99,416/- (Rupees Seventy One Lakhs, Ninety Nine Thousand, Four Hundred and Sixteen only) on M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd, Ahmedabad, under the provisions of Section 78(1) of the Finance Act, 1994 on the service tax demand at (viii) above;

x. I order that interest be recovered from M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co. Pvt. Ltd, Ahmedabad, under the provisions of Section 75 of the Finance Act, 1994 on the Service Tax amount confirmed at (viii) above;

xi. I disallow the wrongly availed Cenvat Credit amounting to Rs 11,55,327/- (Rupees Eleven Lakhs, Fifty Five Thousand, Three Hundred and Twenty Seven only) and order for recovery of the same from M/s.Pacifica (India) Projects Pvt. Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd, Ahmedabad, under Section 73(2) of the Finance Act, 1994, read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004;

xii. I impose a penalty of Rs.11,55,327/- (Rupees Eleven Lakhs, Fifty Five Thousand, Three Hundred and Twenty Seven only) on M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd, Ahmedabad under the provisions of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004 on the wrongly availed Cenvat Credit recoverable at (xi) above.

xiii. I order that interest be recovered from M/s.Pacifica (India) Projects Pvt.Ltd, Formerly known as Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co.Pvt.Ltd,

Ahmedabad under the provisions of Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 on the wrongly availed Cenvat Credit recoverable at (xi) above.

Xiv I further Order that in the event the entire amount demanded as above is paid within thirty days from the receipt of this Order along with applicable interest, the amount of penalty liable to be paid by them shall be 25% (twenty five per cent) of the penalty imposed at Sr. No.(ii, v, ix and xi) above, subject to the condition that such reduced penalty is also paid within the said period of 30 days (thirty days) in terms of clause (ii) of Section 78(1) of the Finance Act, 1994.

173.. Show Cause Notice F No VI/1(b)CTA/T ech-25/SCN/Pacifica/2018-19 dated 18.10.2018 issued to M/s Pacifica (India) Projects Pvt. Ltd, Formerly known as M/s Pacifica (Chennai Old Mahabalipuram Road Project) Infrastructure Co Pvt Ltd, 4-5, Sigma Corporate-1, Near Mann Party Plot Behind Rajpath Club, Bodakdev, Ahmedabad 380 059 is disposed-of in the above manner.

(M.L. Meena)
Additional Commissioner.
31/12

F No STC/15-59/OA/2018
By Registered Post A.D./Speed Post.

Date : 31.12.2020.

To
M/s Pacifica (India) Projects Pvt. Ltd.
Formerly known as M/s Pacifica (Chennai Old Mahabalipuram Road Project)
Infrastructure Co Pvt Ltd
4-5, Sigma Corporate-1, Near Mann Party Plot Behind
Rajpath Club, Bodakdev,
Ahmedabad 380 059

Copy to:

1) The Commissioner, Central GST & Central Excise, Ahmedabad North.
2) The Deputy Assistant Commissioner, Division-VI, CGST & Central Excise, Ahmedabad North
3) The Superintendent, Range I, Division-VI, CGST & Central Excise, Ahmedabad North.
4) Guard File.