CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 3

Service Tax Appeal No. 879 of 2012

(Arising out of Order-in-Appeal No. 37/2012 dated 25.01.2012 passed by the Commissioner of Central Excise (Appeals), Mangalore.)

Sri. Ramesh Shenoy,
902, "Ashishwang"
Sir Pochkanwala Road,
Worli Seaface, Worli,
Mumbai – 400 024.

Appellant(s)

VERSUS

Commissioner of Central Excise (Appeals),
5th Floor, Trade Centre,
Jyothi Circle,
Bunts Hostel Road,
Mangalore.

Respondent(s)

APPEARANCE:

None for the Appellant

Mr. Maneesh Akhoury, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

Final Order No. 21560 /2025

DATE OF HEARING: 24.09.2025
DATE OF DECISION: 24.09.2025

PER : DR. D.M. MISRA

None present for the appellant. Heard the learned AR for the Revenue.

2. Learned AR for the Revenue submits that the present issue relates to refund claim of Service Tax of Rs.1,56,966/- which has

been paid during the period prior to 06.07.2009 in connection with rendering of taxable service of construction services in respect of Commercial or Industrial Construction and Sale Shops. He submits that the present refund claim has been filed pursuant to Board Circular No. 108/02/2009-ST dated 29.01.2009 and the said circular is applicable only to the construction of residential complex whereas the present construction service relates to 'Commercial Complex Services', hence not applicable. Also, he submits that the refund claim was filed on 03.11.2010 pertaining to the period prior to 06.07.2009 for the service tax paid, therefore barred by limitation as prescribed under Section 11B of the Central Excise Act, 1944, as applicable to service tax refunds. In support, he refers to the judgment of the Hon'ble Gujarat High Court in the case of Indian Oil Corporation Ltd. Vs. UOI [2016(342) ELT 48 (Guj.)].

3. I find that the present refund claim was filed by the appellant on 03.11.2010 pertaining to the service tax paid erroneously for the period prior to 06.07.2009. Further, on going through their grounds of appeal, it is very clear that the service tax was paid by the appellant in relation to Commercial Construction Service i.e. Commercial Shops. Hence, the Circular No.108/02/2009-ST dated 29.01.2009 is not applicable to the present case. The said Circular is as follows:

> **Construction of Residential Complex service — Service tax liability of builders, promoters, developers and contractors clarified**
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> Circular No. 108/2/2009-S.T., dated 29-1-2009
> F.No. 137/12/2006-CX.4
> Government of India
> Ministry of Finance (Department of Revenue)
> Central Board of Excise & Customs, New Delhi
>
> *Subject : Imposition of Service tax on Builders - Regarding.*
>
> Construction of residential complex was brought under service tax w.e.f. 1-6-2005. Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction linked payment. The 'Construction of Complex' service has been defined under Section 65 (105)(zzzh)

of the Finance Act as "**any service provided or to be provided to any person, by any other person, in relation to construction of a complex".** The 'Construction of Complex' includes construction of a 'new residential complex'. For this purpose, 'residential complex' means any complex of a building or buildings, having more than twelve residential units. A complex constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex intended for personal use as residence by such person has been excluded from the ambit of service tax.

2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of the residential unit and subsequent activity of a builder for construction of residential unit is a service of 'construction of residential complex' to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked payment after entering into agreement to sell, the nature of transaction is not a service but that of a sale. Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'.

> However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.
> 4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific case, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned.

4. Also, I find that the refund is barred by limitation in as much as, it was filed on 03.11.2010 for payments made prior to 06.07.2009, hence beyond the period of one year as prescribed under Section 11B of the Central Excise Act, 1944, as applicable to Service Tax matters. Consequently, the appeal is rejected.

(Order dictated and pronounced in Open Court.)

(D.M. MISRA)
MEMBER (JUDICIAL)

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