

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL  
BANGALORE**

REGIONAL BENCH - COURT NO. 1

**Service Tax Appeal No. 2089 of 2011**

(Arising out of Order-in-Original No. 27/2011-ST (Commr.) dated  
18.04.2011 passed by the Commissioner of Central Excise & Service  
Tax, Bangalore.)

**M/s. Sobha Developers Ltd.**

No.43, Second Floor,  
Dickenson Road,  
Bangalore – 560 042.

Appellant(s)

*VERSUS*

**The Commissioner of Central  
Excise and Service Tax**

Large Taxpayers Unit,  
JSS Towers, 100 Feet Ring Road,  
Banashankari III Stage,  
Bangalore – 560 085.

Respondent(s)

**WITH**

**Service Tax Appeal No. 1682 of 2012**

(Arising out of Order-in-Original No. 12/2012-ST (Commr.) dated  
22.02.2012 passed by the Commissioner of Central Excise & Service  
Tax, Bangalore.)

**M/s. Sobha Developers Ltd.**

No.43, Second Floor,  
Dickenson Road,  
Bangalore – 560 042.

Appellant(s)

*VERSUS*

**The Commissioner of Central  
Excise and Service Tax**

Large Taxpayers Unit,  
JSS Towers, 100 Feet Ring Road,  
Banashankari III Stage,  
Bangalore – 560 085.

Respondent(s)

**APPEARANCE:**

Shri Syed Peeran, Ms. Meghna Lal, Ms. Dwevedi, Advocates for the  
Appellant.

Shri M.A. Jithendra, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)  
HON'BLE MRS. R. BHAGYA DEVI, MEMBER  
(TECHNICAL)**

**FINAL ORDER NO. 20023 - 20024 /2026**

DATE OF HEARING: 09.09.2025

DATE OF DECISION: 15.01.2026

**PER: R. BHAGYA DEVI**

These are two appeals, Appeal No. ST/2089/2011 for the period from February 2009 to December 2009 and Appeal No. ST/1682/2012 for the period from January 2010 to May 2010 are filed by the appellant M/s. Shobha Developers Ltd. against Order-in-Original No. 27/2011-ST dated 18.04.2011 and Order-in-Original No.12/2012 dated 22.02.2012 passed by the Commissioner Central Excise and Service Tax LTU, Bangalore.

2. Briefly the facts are that the appellant is engaged in construction of commercial or industrial buildings and construction of residential buildings and maintenance and repairs of those buildings and has been discharging service tax on various services; also availing cenvat credit on the service tax paid on various inputs and input services. Based on the Circular No.108/02/2009 dated 29.01.2009, the appellant stopped discharging service tax and the same was intimated to the Revenue vide their letter dated 04.02.2009. However, Revenue issued show-cause notices stating that the Board Circular was not applicable to the appellant in the facts and circumstances discussed in the notice and accordingly, the Commissioner in the impugned orders held that the appellant is liable to discharge service tax during the disputed period and confirmed the demand of Rs.7,97,09,746/- and Rs.2,78,73,456/- respectively along with interest and imposed penalties under Section 76 and Section 78 of the Finance Act, 1994. Aggrieved by these orders the appellant is in appeal before us.

3. The Learned Counsel submits that the appellant is engaged in the activity of Construction of Commercial or Industrial Buildings and Construction of Residential Buildings on works contract basis and is registered with the service tax department under the taxable services of construction of residential complex service and other services and later amended the registration by adding Works Contract Services which came into effect from 01.06.2007. The appellant was also registered under the Karnataka Value Added Tax (KVAT) for payment of tax on Works Contract wherein VAT was paid on 70% of the value which is considered as material cost and service tax @ 4.12% on 30% of the service value. However, considering the Circular No.108/02/2009 dated 29.01.2009 wherein it was clarified that there is no service tax liability to be discharged by a builder/promoter/developer of a residential unit construction project, when a sale of the unit is happened prior to 01.07.2010. Since, the property remains under the ownership of the builder till the completion of construction and payment of the agreed sum and the ownership gets transferred to the ultimate owner, they are not liable to discharge service tax considering it in the nature of service as self-service. Accordingly, the appellant vide letter dated 04.02.2009 intimated to the Revenue that they shall stop collecting service tax from the customers and stop paying service tax w.e.f. 29.01.2009. However, the Revenue issued show-cause notice dated 22.04.2010 and show-cause notice dated 11.04.2011 confirming the demand of service tax during the disputed periods from February 2009 to May 2010. It is submitted that in view of the decision of the Supreme Court in the case of **CCE & Customs vs. Larsen & Tourbo Ltd.: 2015 (39) S.T.R. 913 (SC)**, the appellant is not liable to discharge service tax prior to 01.06.2007 since the services are works contract services which are not liable to service tax prior to 01.06.2007 and further, the appellant has not collected any service tax from their customers during the disputed period. It is

also submitted that in view of the Board Circular, they are not liable to pay service tax prior to 01.07.2010. Reliance is placed on the following decisions:

- **Krishna Homes vs. CCE, Bhopal: 2014 (34) STR 881 (Tri-Del.)**
- **Commissioner of Customs, Central Excise and Service Tax, Visakhapatnam-I vs. Pragati Edifice Pvt. Ltd.: 2019 (31) GSTL 241 (Tri. Hyd.)**

3.1. The appellant also protested against the Commissioner's objection in not appropriating the duty amount of Rs.7,97,09,746/- paid towards the demand through cenvat credit. Reliance is placed on **Bombay Well Print Inks Pvt. Ltd. vs. Commissioner of C.Ex. & ST: 2016 (45) STR 418 (Tri.-Mumbai)** whereby the Hon'ble Tribunal observed that Circular No.962/05/2012 -CX. dated 28.03.2012 makes it very clear that the payment of arrears is made for a demand under Section 73 of the Finance Act, 1994, then the restriction under Rule 3(4) of the Cenvat Credit Rules, 2014 shall not apply and the credit can be duly utilized for making the payment. Further, it is submitted that interest is not liable to be paid since interest is only compensatory in nature and the demand of duty itself is not sustainable in terms of the submissions made above, the interest cannot be justified. In addition, penalty also cannot be sustained in view of the fact that there is no suppression or fraud held against the appellant.

4. The learned Authorised Representative (AR) for the Revenue reiterated the findings of the Commissioner in the impugned orders and the appellant is liable to discharge service tax for the reasons discussed in the impugned orders. Further, it is submitted that since the appellant has availed cenvat credit and has discharged duty liability utilizing cenvat credit, they cannot claim that they are not liable to service tax. Moreover,

the cenvat credit availed during the disputed period in the second appeal has been utilized for payment of service tax in the disputed period of the first appeal. In case the Hon'ble Tribunal decides to set aside the service tax liability, the cenvat credit availed by the appellant is to be recovered.

5. Heard both sides. Since in both these appeals issues are common the same are disposed of by a common order. The main issue in these appeals since the appeal periods are between February 2009 to May 2010, they are not liable to discharge service tax in view of the Board Circular No.108/02/2009-ST dated 29.01.2009 and Circular No. 151/2/2012-ST dated 10.02.2012. The Commissioner in the impugned orders has denied the benefit of the above circular only on the ground that it is applicable only to the services provided by the service providers under 'construction of residential complex service and not to the service providers under 'works contract service. This issue is no longer relevant in as much as the liability to pay service tax prior to 01.07.2010 is settled by various decisions of the Tribunals and in one such case in the case of Commissioner of **Customs, Central Excise and Service Tax, Visakhapatnam-I Vs. Pragati Edifice Pvt. Ltd.** (supra) the Tribunal held as follows:

m) Thus, as far as Service Tax, under 'construction of complex service' in respect of residential complexes is concerned, prior to 1-7-2010 (when the explanation was inserted), no tax could be levied. This was also clarified by the C.B.E. & C. in Circular No. 108/2/2009-S.T., dated 29-1-2009. The question as to whether this limitation on taxation prior to insertion of the explanation in 'construction of complex services' also extends to cases where such services are rendered as 'works contract service' was examined and answered in affirmative in the case of *Krishna Homes* (supra) by the Tribunal. This ratio has been followed in subsequent orders including by this bench. The relevant portion of the order in the

case of *Krishna Homes v. CCE, Bhopal* [[2014 \(34\) S.T.R. 881](#) (Tri. - Del.)] is as follows :

"Coming first to the question as to whether the activity of M/s. Krishna Homes and M/s. Raj Homes was taxable during the period of dispute or not, by Finance Act, 2005, Clause (zzzh) was introduced into Section 65(105) of Finance Act, 1994, so as to bring within the purview of the term 'taxable service', a service provided or to be provided to any person by any other person "in relation to construction of complex". The expression "construction of complex" was defined in sub-section (30a) of Section 65 and accordingly this expression covered - "(a) construction of a new residential complex or a part thereof or (b) completion of finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex". The expression residential complex was defined in Section 65(91a) of the Finance Act, 1994 as any complex comprising of - "(i) a building or buildings, having more than twelve residential units; (ii) a common area; and (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by any authority under law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person". There is no dispute that the complex constructed by both the assesseees in these appeals are covered by the definition of "residential complex" as given in Section 65(91a). There is also no dispute that both the assesseees had engaged contractors for construction of the complexes. The dispute in these appeals is as to whether the assesseees would be liable to pay Service Tax on the amounts charged by them from their customers with whom they had entered into agreements for construction of the residential units and whose possession was to be handed over on completion of

the construction and full payment having been made by the customers. It is seen that on this point, the Tax Research Unit of the Central Board of Excise & Customs, which is a wing of the C.B.E. & C. dealing with legislation work, had vide Circular No. 332/35/2006-TRU, dated 1-8-2006 clarified that in case where a builder, promoter, developer builds a residential complex having more than 12 residential units by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay Service Tax on the gross amount charged for the construction service provided to the builder/promoter/developer under construction of complex service falling under Section 65(105)(zzzh) of the Finance Act, 1994 and that if no person is engaged by the builder, promoter, developer for construction work who undertakes construction work on his own without engaging the services of any other person than in such cases, in absence of the service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise. W.e.f. 1-7-2010 an explanation was added to Section 65(105)(zzzh) which was as under :-

*"Explanation.* - For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorized by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer."

Thus, in terms of this explanation, when a builder/promoter/developer got a residential complex constructed for his customers with whom he had individually entered into agreements, in terms of which the prospective customers were required to make payments for the residential units to be constructed in instalments and the possession of the residential units was to be given to the customers on completion of the complex and full payment having been made, the builder/promoter/developer was to be treated as a deemed provider of construction of residential complex service to his

customers. Thus, by this explanation, the scope of the Clause (zzzh) of Section 65(105) has been expanded and this amendment by adding an explanation has been held by this Tribunal in the case of *CCE, Chandigarh v. U.B. Construction (P) Ltd.* (supra) as prospective amendment. In this regard, para 5 of this judgment is reproduced below :-

“5. In *Maharashtra Chamber of Housing Industry v. Union of India* - (Bom.), the validity of the ‘Explanation’ added to Sections 65(105)(zzq) and (zzzh) was challenged on several grounds. The Bombay High Court, also considered the issue whether the explanation was prospective or retrospective in operation and ruled that the explanation inserted by the Finance Act, 2010 brings within the fold of taxable service a construction service provided by the builder to a buyer where there is an intended sale between the parties whether before, during or after construction; that the ‘Explanation’ was specifically legislated upon to expand the concept of taxable service; that prior to the explanation, the view taken was that since a mere agreement to sell does not create any interest in the property and the title to the property continues to remain with the builder, no service was provided to the buyer; that the service, if any, would be in the nature of a service rendered by the builder to himself; that the explanation expands the scope of the taxable service, provided by builders to buyers pursuant to an intended sale of immovable property before, during or after the construction and therefore the provision is expansive of the existing intent and not clarificatory of the same; and is consequently prospective”.

9. In view of the above, though in view of the Apex Court judgment in the case of *M/s. Larsen & Toubro Limited and Others v. State of Karnataka & Others* (supra), the agreements entered into by a builder/promoter/developer with prospective buyers for construction of residential units in a residential complex against payments being made by the prospective buyers in instalments during construction and in terms of which the possession of the residential unit, is to be handed over to the customers on completion of the residential complex and full payment having been made, are to be treated as works contracts, it has to be held that during the period of dispute,

there was no intention of the Government to tax the activity in terms of such contracts a builder/developer with prospective customers for construction of residential units in a residential complex. Such works contracts involving transfer of immovable property were brought within the purview of taxable service by adding explanation to Section 65(105)(zzzh) w.e.f. 1-7-2010, and therefore, it has to be held that such contracts were not covered by Section 65(105)(zzzh) during the period prior to 1-7-2010."

(n) To sum up, as far as construction of 'residential complexes' by the builders are concerned :

(i) Prior to 1-6-2007, if it is a composite works contract, no Service Tax is leviable in view of the judgment of the Hon'ble Apex Court in the case of *Larsen & Toubro* (supra).

(ii) After 1-6-2007, it is chargeable as 'works contract' only if it is a composite contract and under 'construction of complex services' if it is a service simpliciter.

(iii) However, after 1-6-2007 but prior to 1-7-2010, whether it is a service simpliciter or a works contract, if the service is rendered prior to issue of completion certificate and transfer to the customer, it is not taxable being in the nature of self service.

(iv) Further, whenever the service is rendered for completion or construction of a flat for personal use of the service recipient, no Service Tax is payable in view of the exclusion in the definition of residential complex service.

(v) After 1-7-2010, Service Tax is chargeable under the head of 'construction of complex services' if it is service simpliciter and under 'works contract service' if it is a composite works contract.

(o) In view of the above, it is well settled legal position that whether the service is rendered as service simpliciter or as a works contract, no Service Tax can be levied on construction of residential complex prior to 1-7-2010.

5.1. In view of the above since the disputed period in both the appeals is prior to 01.07.2010 the demands cannot be sustained in accordance with the Board Circulars referred above.

6. However, we find that in Appeal No. ST/2089/2011 the appellant has availed cenvat credit to the extent of Rs.7,97,09,746/- to discharge the service tax liability. This cenvat credit admittedly was lying in their books of account as on 29.06.2010, thus the accumulated credit is for the period up to June 2010. The appellant in view of the Board Circular No. 962/05/2012-CX dated 28.03.2012 and in view of the decision in the case of Bombay Well Print Links Pvt. Ltd. Vs. Commissioner of C.Ex. & ST. (supra) claimed the right to utilize the credit available with them at a future date to discharge the service tax accumulated as arrears. Since we have held that the appellant is not liable to pay service tax in both the appeals it is incumbent on the appellant to reverse the entire credit availed by them. To determine the exact amount of credit availed by the appellant which needs to be reversed in view of the fact that the appellant is not liable to pay service tax on the output services, in the interest of justice the matter needs to be remanded to the original authority to redetermine the reversal of cenvat credit in accordance with the provisions of Cenvat Credit Rules, 2004.

Appeals are disposed of by way of remand.

(Order pronounced in Open Court on 15.01.2026.)

**(D.M. MISRA)**  
**MEMBER (JUDICIAL)**

**(R. BHAGYA DEVI)**  
**MEMBER (TECHNICAL)**

rv