

WHETHER SERVICE TAX ON COMMERCIAL RENTAL IS REALLY OUT OF TAX NET?

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The recent news item that attracted millions of the people in India, who were either land lord or the tenant of some premises, was that "High Court has held that there is no service tax on the rental of commercial premises". This article attempts to give an insight of the Delhi High Court Decision in case of Home Solutions Retail India Limited and others v. UOI [2009-TIOL-196-HC-DEL-ST].

Statutory Provision

The Finance Act 2007 introduced a taxable service namely renting of immovable property used in the furtherance of business or commerce. The taxable service in this regard is defined in section 65(105)(zzzz) means any service provide or to be provided to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

"Immovable property" has been defined to include -

- ┆ Building and part of a building and the land appurtenant thereto
- ┆ Land incidental to the use of such building or part of a building
- ┆ Common or shared areas and facilities relating thereto and
- ┆ In case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate

"Immovable property" would not include -

- ┆ Vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes
- ┆ Vacant land (whether or not having facilities clearly incidental to the use of such vacant land)
- ┆ Land used for education, sports, circus, entertainment and parking purposes and
- ┆ Building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Where an immovable property is used partly for residential purposes and partly for use in the course of furtherance of business or commerce, it shall be deemed to be immovable property for use in the course of furtherance of business or commerce.

The phrase "renting of immovable property" has been defined u/s 65(90a) to include renting, letting, leasing, licensing, or other similar arrangements of immovable property for use in the course

or furtherance of business or commerce but does not include -

- ┆ Renting of immovable property by a religious body or to a religious body or
- ┆ Renting of immovable property to an educational body imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre

The phrase "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings.

Finance Act 2008 had also inserted another explanation in Section 65(90a) to include the act of allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property, within the meaning of the phrase "renting of immovable property".

Further exemption notification 24/2007- ST dated 22.05.2007 provided exemption for the municipal taxes paid. This notification provided the value for this service as gross amount charged for renting of such immovable property less taxes on such property, namely property tax levied and collected by local bodies

Department issued a circular 98/1/2008-ST dated 04.01.2008 restricting the credit of construction service of the immovable property. The circular took a view that "Right to use immovable property is leviable to service tax under renting of immovable property service."

Insight of High Court Proceeding

The issue before the HC to resolve was as under

- a. Validity and vires of notification no. 24/2007 dated 22/05/2007 and circular no. 98/1/2008-ST dated 04/01/2008 issued by the Secretary, Ministry of Finance, Department of Revenue, Government of India, New Delhi (whether in line with the provision of section 65(105)(zzzz) and 65(90a))
- b. The provisions of section 65(90a), section 65(105)(zzzz) and section 66 insofar as they relate to the levy of service tax on renting of immovable property whether constitutional in being covered under Entry 49 of list II of the Constitution of India

First issue was examined by the High Court and the question that arose was the definition of the taxable service was "**service provided in relation to renting immovable property**" however on reading of said notification and circular gives the impression that renting of immovable property itself is

a taxable service. Therefore whether the levy arises on mere renting of immovable property or whether it arises on service provided in relation to renting.

In many services the definition is having the phrases "service in relation to" like in case of service in relation to fashion designing, services in relation to dry cleaning and accordingly fashion designing and dry cleaning was also included in the tax net. However there were also some other service such as in relation to real estate etc where the levy is not on real estate service. The High court brought out very important observation with this illustration- a service provided or to be provided to 'A' by 'B' in relation to 'C'. Here, 'A' is the recipient of the service, 'B' is the service provider and 'C' is the subject matter. The expression 'in relation to' may be of widest amplitude, but it has been used in the said Act as per its context. Sometimes, 'in relation to' would include the subject matter following it and on other occasions it would not. The expression "in relation to" would, therefore, have different meanings depending on whether 'C' is a service or is not a service. If 'C' is a service, then the expression 'in relation to' means the service 'C' as well as any other service having connection with the service 'C'. Where 'C' is not a service, the expression 'in relation to' would have reference only to some service which has a connection with 'C'. But, this would not imply that 'C' itself is a service.

Another important aspect considered by high court was that the service tax is a value added tax that is to say service tax is levied on the value addition done by the service provider. Reliance was placed on the Supreme Courts decision in case of All India Federation of Tax Practitioners Association. The view taken by High Court in this regard that if no value is added by the service provider then there may not be service tax and accordingly merely renting does not have any value addition. High Court also clearly distinguished the Supreme Court decision in case of Tamil Nadu Mandapam Association.

High Court on examination of the above aspects and other various Supreme Court Judgment, concluded that mere renting of immovable property in the course of furtherance of business or commerce does not attract service as per the provision of section 66, 65(105)(zzzz) and 60(90a). However renting of immovable property along with the other facility like Air Conditioner, decorations, provision of furniture, and many facilities etc attracts service tax. High Court held the notification 24/2007- ST and circular 98/1/2009-ST to be ultra vires to the Finance Act and not very section 65(105)(zzzz) itself.

High court did not examine the constitutional validity of renting of immovable property, whether it can be a subject under the Entry 49 of list II of the Constitution of India or it is a state legislative subject.

Paper writers feels that the outcome of this judgment not only keeps mere renting out of the tax net but may also have impact on other services like mere renting of cab, pandal or shamiana, mere supply of tangible goods service and mere sale of space or time.

Considering the implication of the judgment it is almost sure that appeal to Supreme Court by the department would be made.

However since the service "renting of immovable property" is not held unconstitutional the matter cannot be regarded as settled. Therefore the land-lords, who want to be very cautious, can continue to make the payment under protest till the matter reaches the finality. The tenant if eligible for the credit can avail the credit of such amount paid to the landlord as service tax as long as the matter is not settled. On the other hand the land lords who are not in a position collect the service tax from the tenants, may stop payment of service tax with prior intimation to the department. However in case there being a contrary stand taken by SC on a later date the interest for the delay payment is a cost which maybe kept in mind. ■