



The Delhi High Court by its Interim Order stays recovery of Service tax on Renting of Immovable Property

Background

Service tax was imposed on services in relation to renting of immovable property for use in business or commerce with effect from 1 June 2007.

Subsequent notification¹ and clarification issued by the Government indicated that the intention of the Government was to impose tax on activity of renting *per se*.

However, this gave rise to the following interpretation issues:

- Whether renting can be treated as a ‘service’ in the first place to fall within the ambit of Service tax
- Whether or not activity of pure renting is covered under the taxable category of renting of immovable property
- Whether this is a levy of tax on land which falls outside the legislative competence of the Centre (since the same would then fall within the exclusive domain of the State legislature)

Against the above backdrop, various writ petitions were filed and the Delhi High Court, by way of a common judgment dated 18 April 2009², held that the taxable category of “Renting of Immovable Property” does not cover renting *per se* and only extends to activities related to renting such as air-conditioning provided along with renting of immovable property. The Court also observed that renting of immovable property is not a ‘service’ *per se* as there is no value addition in the same. The said matter is *sub-judice* before the Hon’ble Supreme Court.

The Finance Act 2010 seeks to partly overcome the above decision of the Delhi High Court by amending the definition of renting of

¹ 24/2007- ST [F.No.B1/5/2007-TRU], dated 22 May 2007

² Home Solutions Retail India Ltd and Others v. UOI 2009 (14) STR 433 (Del)

immovable property with retrospective effect from 1 June 2007. The said Act has amended the definition to read that service provided by renting of immovable property or any other service in relation to such renting will be liable to Service tax. The intent of the retrospective amendment is to levy Service tax on renting of immovable property *per se* used for business or commerce.

Recently, Home Solutions Retail Limited filed a writ petition before the Delhi High Court challenging the above amendment made by Finance Act 2010.

Interim Order of the Delhi High Court

The Delhi High Court has re-iterated its earlier view that Service tax is a tax on value addition and that real estate by itself cannot be regarded as a 'service'. By the Interim Order³ the Delhi High Court has held that there shall be no recovery of Service tax from Home Solutions Retail Limited in respect of renting of immovable property alone. The Delhi High Court has made the following observation:

"Prima facie, it appears that renting of immovable property itself has been regarded as a service by virtue of the recent amendment even though this Court by virtue of the said decision on 18.04.2009 had categorically concluded that renting of immovable property by itself cannot be regarded as a service."

The Delhi High Court had also held that there is no challenge to the second part of the definition, that is *any other service in relation to renting*, and therefore Service tax will be payable on any other service, such as air conditioning, etc. and no stay has been granted in respect of such services.

Our Comments

- The issues as to whether renting of immovable property could constitute a service and that of legislative competence are likely to attain finality only when the matter is decided by the Supreme Court. However, the stay granted by Delhi High Court provides some relief to the petitioners.
- Given the nature of the issue and amount involved, it will not be surprising if other assesseees also follow suit and seek similar relief from Courts.
- Till the time the matter is decided finally, a view would need to be taken by the assesseees on payment of Service tax. This would be particularly important in situations where the recipient does not have an ability to avail Cenvat credit of Service tax charged (e.g. retailers). In such a situation, one option could be to pay tax 'under

³ W.P. (C) 3398/2010 dated 18.05.2010

protest' and claim refund from the Government at a later stage, if the issue is settled in the favor of the assesseees.

- As we look forward to implementation of GST by April 1, 2011, the Government may need to examine all aspects of this issue (including those relating to legislative competence and constitutional validity) such that these ambiguities do not arise under the GST regime.

Bangalore

Maruthi Infotech Centre, 11-12/1
Inner Ring Road
Koramangala, Bangalore 560071
Phone: + 91 80 3980 6000
Fax: +91 80 3980 6999

Chennai

KPMG House
No.10, Mahatma Gandhi Road,
Nungambakkam High Road,
Chennai 600034
Phone: +91 44 39145000
Fax: +91 44 39145999

Chandigarh

SCO 22-23
1st Floor, Sector 8 C
Madhya Marg
Chandigarh 160019
Tel: 0172 3935778
Fax: 0172 3935780

Delhi

DLF Cyber City, Building no. 10,
Block B, Phase II
Gurgaon, Haryana 122 002
Phone: +91 124 307 4000
Fax: +91 124 254 9195

Hyderabad

KPMG, 8-2-618/2
Reliance Humsafar, 4th Floor
Road No.11, Banjara Hills
Hyderabad - 500 034
Phone: +91 40 30465000
Fax: + 91 40 30465299

Kolkata

KPMG Infinity Benchmark
Plot No. G-1, 10th floor Block - EP & GP,
Sector - V, Salt Lake City
Kolkata - 700091
Phone: +91 33 4403 4000
Fax: +91 33 4403 4199

Mumbai

Lodha Excelus, Apollo mills compound,
NM Joshi Marg, Mahalaxmi,
Mumbai 400 011
India
Phone: +91 22 39896000
Fax: + 91 22 39836000

Pune

703, 7th Floor Godrej Castlemaine, Next
to Ruby Hall Clinic,
Bund Garden Road, Pune 411001
Phone: +91 20 30585764/65
Fax: +91 20 3058 5775

Kochi

4/F, Palal Towers, M. G. Road,
Ravipuram, Kochi 682016
Phone: +91 (484) 305 9000
Fax: +91 (484) 305 9001