

Legal Updates

Taxable service of renting of immovable property: 'Immovable' irritants

Home Solution Retail India Ltd filed a writ petition before the Delhi High Court challenging the legality, validity and vires of notification dated May 22, 2007, of the Department of Revenue (DR) (Service tax Wing) and its Circular of January 4, 2008. By virtue of the notification the Central Government exempted the 'taxable service of renting of immovable property', referred to in sub-clause (zzzz) of clause (105) of Section 65 from so much of the service tax levy as was in excess of service tax calculated on a value which is equivalent to the gross amount charged for renting of such immovable property less taxes on such property, namely, property tax levied or collected by local bodies.

It was the petitioners' contention that while the Act does not treat renting of immovable property as a taxable service, the notification proceeds on the basis that the taxable service is the renting of immovable property itself. Similarly, the impugned circular, while giving a clarification in respect of commercial and industrial construction service, has purported to clarify that the "right to use immovable property is exigible to service tax under the 'renting immovable property service'".

Consequently, by the said clarification, the Centre was seeking to levy service tax on renting of immovable property instead of on services in relation to renting of immovable property. Consequently, the notification and the circular were held ultra vires the Act.

HC's decision

The court held that Section 65(105)(zzzz) does not, in terms, entail that the renting out of immovable property for use in the course or furtherance of business or commerce would by itself constitute a taxable service and be exigible to service tax under the Act. According to the court, service tax is a value-added tax. It is a tax on value addition provided by a service provider.

It is obvious that it must have connection with a service and there must be some value addition by that service. If there is no value addition, then there is no service. Section 65(105)(zzzz) has reference to a service provided 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'.

The wordings of the provision are so structured as to entail a service provided or to be provided. In the court's view, any service connected with the renting of such immovable property would fall within the ambit of Section 65(105)(zzzz) and would be exigible to service tax.

The question is whether renting of such immovable property by itself constitutes a service and, thereby, a taxable service. According to the court, the renting of immovable property for use in the course of furtherance of business or commerce by itself does not entail any value addition and,

therefore, cannot be regarded as a service. Hence the notification has been held ultra vires of the Act and per se set aside.

Corrective action

To supersede the High Court's decisions, the provision relating to “renting of immovable property” service in the Finance Act 1994 is proposed to be amended to:

provide explicitly that the activity of ‘renting’ itself is a taxable service. The change has been given retrospective effect from June 1, 2007; and

levy of service tax on rent of vacant land where there is an agreement or contract between the lessor and lessee for undertaking construction of buildings or structures on such land for furtherance of business of commerce during the tenure of the lease. Thus, the SLP against the High Court's order has been sought to become ineffective.

It is unfortunate that a well-reasoned order of the High Court has been superseded by the Government ignoring the logic that mere renting of immovable property cannot be considered as providing service. It is true that under the Constitution, the powers of the Executive, Legislature and Judiciary are clearly defined and the Legislature has power of overruling court's decisions.

If irrationality occurs in a statute and the High Court cogently mentions about it and holds in favour of the taxpayer, the Legislature need not rush to overrule the court's decision.