



## NO SERVICE TAX – A GOOD SERVICE

April 2009

### Introduction

The Delhi High Court (“DHC”), in its recent judgment of *Home Solution Retail India Ltd. & Others vs. Union of India*, has given a huge respite to companies, realtors, retailers and firms who run their businesses from rented immovable property. The Ministry of Finance, Department of Revenue had issued a notification no. 24/2007 dated May 22, 2007 (“**Notification**”) and circular no. 98/1/2008-ST dated January 04, 2008 (“**Circular**”), subsequent to which the lease of any commercial space attracted service tax @ 12 % approximately of the total monthly rent. However, following the DHC’s judgment of April 18, 2009, no service tax will be levied on the renting of any immovable property. This decision has been welcomed by all, especially in today’s recessionary financial climate where “a penny saved is a penny earned.”

### Brief Facts

Various writ petitions were filed in the DHC by retail outlets and companies challenging the legal validity of the impugned Notification and Circular. It was the contention of the petitioners that the Notification and Circular led to a completely erroneous interpretation of section 65 (90a) of the Finance Act (“**Act**”), that defines “renting of immovable property,” and section 65 (105) (zzzz) of the Act, that defines “taxable service.” Therefore, the main question arising out of these multiple writ petitions was whether the Act envisages the levy of service tax on letting out/renting out of immovable property *per se*.

### Arguments on law

The petitioners contended that the Notification and Circular were contradictory to the provisions of the Act, and, as such, no notification or circular can supersede the provisions of a central legislation. Section 65 (105) (zzzz) of the Act refers to the 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 term “service” was referred to as something that was *in relation to* the renting of immovable property and not the renting of immovable property itself. The Notification referred to “taxable service as a taxable service of renting of immovable property,” which was not provided under the Act.

Similarly, the Circular purported to clarify that the “right to use immovable property is leviable to service tax under the renting of immovable property service.” The implication of this Circular was that Government of India was seeking to levy service tax on renting of immovable property instead of on services *in relation to* renting of immovable property. The DHC held that service tax is a value added tax and as far as renting of

any immovable property for use in the course or in furtherance of business or commerce is concerned, no “value add” is involved. However, if any other service *in relation to* renting is provided, it will fall within the purview of section 65 (105) (zzzz) of the Act and be eligible for service tax.

Therefore, in light of the above arguments, the DHC held that the impugned Notification and Circular on the aforementioned provision is not correct and consequently *ultra vires* the Act only to the extent of authorizing levying of service tax on renting of immovable property *per se*. For example, the mere renting of immovable property will not attract service tax but any value addition, such as providing air conditioning service, for instance, will fall within the ambit of section 65 (105) (zzzz) of the Act.

### **Our observation**

This decision of the DHC is applicable throughout the country and has been welcomed by all who run their operations from rented properties, especially the retail sector as service tax was a huge un-recovered tax cost to the sector. We feel that the Government will in all probability file an appeal to the Supreme Court against this judgment asking for an interim stay. Chances are the Government may amend the aforesaid provisions of the Act with retrospective effect to overcome the judgment of the DHC. We can only wait and watch if the petitioners end up with the last laugh!

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