



Renting of immovable property – whether a service – Decision of Delhi High Court

Summary

The Delhi High Court has held that ‘renting of immovable property’ is not a taxable service, but what is covered under service tax law is any service ‘in relation to’ renting of such immovable property. The Court has not examined the constitutional validity of the provision.

Background

With effect from 1 June 2007, the levy of service tax was extended to include ‘any service provided or to be provided to any person, by any person, *in relation to renting of immovable property* for use in the course of furtherance of business of commerce’.

The Central Government by Notification No. 24/2007-S.T. dated 22 May 2007 (effective from 1 June 2007), allowed for deduction of property taxes from the gross amount charged for **renting** of such immovable property.

Circular 98/1/2008-S.T. dated 4 January 2008 while issuing certain clarifications on input tax credit of service tax stated that ‘**right to use immovable property** is leviable to service tax under **renting of immovable property service**’.

Decision of Delhi High Court – pronounced on 18 April 2009

The Petitioners mainly challenged the validity and *vires* of the aforesaid Notification and Circular on grounds that what is sought to be taxed is not ‘renting of immovable property’ but ‘services *in relation to* renting of immovable property’.

The Court before coming to its conclusion observed the following:

- Service tax is a value added tax and hence, if there is no value addition, there is no service.
- Since the wordings used in the definition is ‘in relation to renting of immovable property’, the intention is to levy tax on activities which are incidental or connected with renting and not ‘renting’ *per se*.
- Depending upon the context, the subject following the expression ‘in relation to’ may or may not be a service in itself. For instance, ‘services in relation to dry cleaning’ would also cover ‘dry cleaning’ as a service, whereas ‘services in relation to real estate’ cannot cover ‘real estate’ as a service.

Based on above the Court held that:

- Renting of immovable property by itself cannot be regarded as a service in the context of the definition.
- If there is some other service, such as air conditioning service provided along with the renting of immovable property, then it would fall within the concerned taxable service.
- The impugned Notification and Circular on the said provision are not correct and are ultra vires the Finance Act, 1994 and to the extent they seem to authorize levy of service tax on renting of immovable property *per se*, has been set aside.

Points for consideration

- Since it was concluded that renting is not a taxable service, the Court considered it unnecessary to examine the constitutional validity of the levy itself. It needs to be examined as to whether the levy could survive this test, in case of an expansion of the ambit (through an amendment to the definition of taxable category).
- The expression ‘in relation to’ has been widely used under the service tax law and the interpretation placed by the Court may have implications on the other taxable categories of services
- It is likely that the Central Government would approach the Supreme Court against the decision of High Court. Therefore, the controversy may continue till such time the matter is finally adjudicated by the Supreme Court.
- In the interim, the landlord/ lessor may choose not to charge service tax. However, possibility of Supreme Court reversing this decision cannot be ruled out. Therefore, appropriate commercial arrangement may need to be worked out between the landlord/ lessor and tenants/ lessee to address such contingency.
- It is possible for lessor or the lessee to claim a refund from the authorities for the tax paid in past. The finer aspects such as period for which refund can be claimed, applicability of ‘unjust

enrichment', documentation requirements etc. would need to be carefully analysed.

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