Dispute Resolution Hotline

April 25, 2009

HAS YOUR LANDLORD BECOME A REALTOR?

As odd as the question might sound, in the context of service tax, this question came up for consideration before the Delhi High Court in the case of *Home Solution Retail India Limited* v. *Union of India*[1]. The case clubbed approximately 20 writ petitions and the petitioners included such well known brands as Lifestyle, Shopper's Stop, Barista and Bata. The petitioners are primarily lessors or lessees with respect to immovable properties that are used for business or commercial purposes.

The dispute in question arose with respect to Notification No. 24/2007 dated 22/05/2007 (the "**Notification**") and Circular No. 98/1/2008-ST sated 04/01/2008 (the "**Circular**") issued by the Secretary, Ministry of Finance, Department of Revenue, Government of India, New Delhi. The Notification and Circular sought to levy service tax on the letting out/ renting out of properties *per se*. The petitioners contended that the Notification and the Circular arose out of an erroneous construction of Sections 65 (90a) and 65 (105) (zzzz) of the Finance Act, 1994, which in turn defined the terms "taxable service" and "renting of immovable property". In terms of the definition of "immovable property" it is made amply clear that the term, for the purposes of Section 65 (105) (zzzz) refers specifically to immovable property used in the course of business or commerce and not in respect of other property such as residential property.

Section 65 (105) (zzzz) reads as follows:

"Taxable service" means any service provided or to be provided… (zzzz) 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".

This appears to refer to services such as the service provided by a realtor that are in relation to the immovable property and not the actual renting out of the property.

The petitioners contended that this amounted to a tax on immovable property which is *ultra vires* the powers of the Union Government since the said subject falls under List II of Schedule 7 of the Constitution of India (the 'State List'). However, the primary contention of both the petitioners and the respondent drew from *TN Kalyana Mandapam Association* v. *Union of India*[2], which held that the renting of a 'mandap' was a service and would be subject to service tax. The Court in the instant case clarified that the renting of a mandap included several value added services such as catering and decoration and that it was not the rent or lease of immovable property *per se*. In *All India Federation of Chartered Accountants* v. *Union of India*[3], the Supreme Court had held that service tax is essentially a value added tax.

What became the final 'bone of interpretation' in the instant case was the construction of the words "in relation to" in Section 65 (105) (zzzz). In the context of service tax, these words essentially find use as "A" providing a service to "B" 'in relation to' "C". The Court observed that in certain cases, "C" may be a service (e.g. "in relation to dry-cleaning") wherein the service itself is taxable. However, the Court observed that in the instant case, "C" was not a service and hence that while such a tax may be levied on services relating to the renting/ leasing of immovable property, it may not be applied to the renting/ leasing of immovable property per se. To answer the unusual question posed in the title, your landlord has not mutated into a realtor under the auspices of the Department of Revenue.

- Arjun Rajgopal & Rajesh Simhan

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1 Judgment delivered on: 18.04.2009

2 (2004) 5 SCC 632

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3 (2007) 7 SCC 527

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