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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **W.P.(C) 3398/2010**

HOME SOLUTIONS RETAILS LTD Petitioner
Through : Mr A. M. Singhvi, Sr Advocate with
Mr Rishi Aggarwala, Mr Amit Naik,
Mr Nakul Mohta and Mr Pankaj Patel

versus

UOI AND ORS Respondents
Through : Mr H. C. Bhatia with Mr Pratap Singh
Parmar for R 1 & 3/UOI.
Mr Sumit Batra for Mr Mukesh Anand
for R-2 & 4.

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

ORDER
% **18.05.2010**

CM Nos. 6828-6829/2010

Allowed subject to all just exceptions.

WP(C) 3398/2010 & CM 6827/2010

In this writ petition there is a challenge to Section 65(105)(zzzz) of the Finance Act, 1994 inasmuch as it purports to levy service tax on the renting of immovable property to be used for commercial / business purposes. This provision has been recently amended by the Finance Act, 2010 with retrospective effect from 01.06.2007.

Earlier also, this provision was the subject matter of consideration of this Court in the case of the very same petitioner and certain others, in WP(C) No. 1659/2008 and other petitions, decided by a Division Bench of this Court on 18.04.2009. In that decision, this Court, *inter alia*, had taken the view that service tax is a tax on value addition provided by the service provider and that there must be a connection with the service and some value addition by that service. If there is no value addition, then there is no service. This Court also took the view that real estate by itself cannot by any stretch of imagination be regarded as a service. This Court also held that insofar as renting of immovable property for use in the course or furtherance of business or commerce is concerned, no value addition is discernible. It was consequently observed that the renting of immovable property for such purposes by itself did not entail any value addition and, therefore, cannot be regarded as a service. This Court, however, observed that in case there is some other service, such as air conditioning service provided alongwith the renting of immovable property, then it would fall within Section 65(105)(zzzz). This Court also observed as under:-

"In view of the foregoing discussion, we hold 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 of commerce would by itself constitute a taxable service and be exigible to service tax under the said Act. The obvious consequence of this finding is that the interpretation placed by the impugned notification and circular on the said provision is not correct. Consequently, the same are *ultra vires* the said Act and to the extent

that they authorize the levy of service tax on renting of immovable property *per se*, they are set aside.”

It is perhaps as a consequence of this decision, which is the subject matter of an appeal before the Supreme Court in which no stay has been granted, that the present amendment has been introduced to Section 65(105)(zzzz) by virtue of the Finance Act, 2010 and in particular to Section 76 thereof. The said Finance Act, 2010 received the assent of the President on 11.05.2010 and the aforesaid provision has been introduced with retrospective effect from 01.06.2007. The amendment that has been introduced by virtue of the Finance Act, 2010 is that in place of the words “in relation to renting of immovable property” appearing in Section 65(105)(zzzz), the following words have been substituted:-

“by renting of immovable property or any other service in relation to such renting”.

Dr Singhvi, the learned senior counsel who appears on behalf of the petitioner, states that the amendment sought to be introduced, puts the petitioner in a worse position than the original provision which has already held not to have any element of service so as to be exigible to service tax.

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.

Issue notice. Notice is accepted by the counsel appearing on behalf of the respondent Nos. 1 and 3 and the counsel appearing on behalf of the respondent Nos. 2 and 4. Notice shall issue to respondents 5-10.

The respondents shall file the counter-affidavits within four weeks and the petitioner shall file the rejoinder/ affidavits thereto within two weeks thereafter. In the meanwhile, there shall be no recovery of service tax from the petitioner in respect of renting of immovable property alone. No such service tax would also be recovered from respondents 5-10 in the meanwhile.

It is made clear that in the event the writ petition is dismissed, the liability to pay service tax along with any other liability as a result of the demand made, will solely be that of the petitioner. We make it clear that there is no challenge in this writ petition to the second part of the aforesaid provision, namely, "any other service in relation to such renting" and consequently, if there is any other such service, the service provider would be liable to pay service tax on such service and in respect of this portion of the provision there is no stay.

Renotify on 21.09.2010.

Dasti.

BADAR DURREZ AHMED, J

V.K. JAIN, J

MAY 18, 2010
SR