

Service Tax on Rentals Conflicting HC decisions add to confusion ..., – Dec 1, 2010

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By S Sivakumar, CA

NO other service would have seen so many writs being filed in the High Court, as ‘Renting of Immovable Property’ service. The latest decision of the Punjab and Haryana High Court in the *Shubh Timb Steels Ltd case*, reported in [2010-TIOL-765-HC-P&H-ST](#) comes as a major victory for the Government. As we know, the Government’s attempts to legalize the levy of and collection of service tax on commercial rentals, on a retrospective basis, from June 1, 2007, would seem to have met with some judicial resistance, at least, in so far as the retrospectivity of the levy is concerned. While the Delhi High Court has given a stay in the *Home Solution Retail Ltd v. Union of India and others* [2010-TIOL-341-HC-DEL-ST](#), the AP High Court, in *Trent Limited v. Union of India and Others* [2010-TIOL-402-HC-AP-ST](#), has stayed the recovery of service tax only for the period June 1, 2007 to March 31, 2010. Further, while the Karnataka High Court has been given blanket stay in respect of the writs filed before it, challenging the constitutional validity of the levy of service tax on rentals, the Allahabad High Court, in a very recent decision, viz. *Orient Craft Limited v. Union of India and others*, had refused to stay the prospective operation of the service tax levy on rentals.

We also have this recent interesting development, wherein, the Supreme Court has, in its orders dated November 19, 2010, has asked the Delhi Court to expeditiously dispose of the petition filed before it in the Home Solutions case, without acceding to the request of the Central Government for staying the orders of the Delhi High Court.

One interesting feature that I have come across the writs filed by the retail players is that, the developers, landlords and lessors have been included as respondents in many of these writs, in addition to the Central Government. The Karnataka High Court has given a blanket stay on collection of tax by the Central Government, without clarifying if the developers/landlords/lessors are also covered by the stay. Service tax is a liability to be discharged by the developers/landlords/lessors directly to the Central Government. Since the Central Government does not collect service tax from the petitioners, i.e. the retail players who have filed the writs, I would wonder as to whether a stay restraining the Government to collect service tax would cover the developers/landlords/lessors.

So, we have conflicting decisions from the High Courts on the following issues concerning the levy of service tax on renting services, viz.

++ *Is the levy of service tax on renting services constitutionally valid and if so, is it valid prospectively or retrospectively with effect from June 1, 2007 in terms of the statutory amendment?*

++ *Is the levy valid when only the bare/warm shell is rented out or is the levy attracted only when additional services like air-conditioning is provided?*

++ *Would the stay given by the High Courts cover the developers/landlords/lessors, as aforesaid?*

++ *Can the developers/landlords/lessors be, at all, made as respondents in writs filed before the High Courts?*

Be that as it may.... how could developers/landlords/lessors protect themselves in this scenario?

++ As is the case with regard to the writs filed in the case of construction services, Realty Developers are being included as respondents in many of these writs, as aforesaid. It becomes very important for the Developers and Lessors, to approach the High Courts for specific directions on their statutory obligation to discharge the service tax liability in respect of renting services and to clarify if the stay orders specifically covers them.

++ Would the orders passed by a High Court have applicability in other States. Of course, Not. Developers and Lessors would need to bear in mind that an order passed by a High Court on a writ petition questioning the constitutionality of a statutory provision under Article 226 of the Constitution will have effect only in the particular State or States covered by its jurisdiction. Hence, what is relevant would be the orders passed by the jurisdictional High Court. Thus, for developers and lessors operating in Karnataka, what would be relevant would be the orders of the Karnataka High Court.

++ And, in the case of renting services, Developers would need to bear in mind that, what is covered by the writs are cases, where the Developers are only involved in the renting/leasing of the bare shells. When additional services like air-conditioning are provided, service tax is very much applicable, as has been held by the Delhi High Court, in the famous Home Solutions case. Hence, when additional services are provided, there is absolutely no case to continue to believe that service tax is not applicable.

++ In some cases, I find that some High Courts are admitting writ petitions filed by the retailers on the basis that their registered offices fall within the jurisdiction of the respective High Courts. But, in some of these cases, stay is being asked in respect of immovable properties situated in other States. This is clearly not allowed as any issue arising out of the levy of tax in respect of immovable property would have to be decided by the High Court in whose jurisdiction, such immovable property is situated.

++ The Law Commission of Government of India had taken note of this unfortunate position regarding conflicting decisions from the various High Courts, on the same Central taxing statute, as far back as in 1990. The Law Commission had brought this issue to the notice of the Central Government by stating that "the Commission felt exercised by the frustrating situation stemming from the identical Central Law being interpreted, applied and administered in different and inconsistent fashion in different parts of India as a result of conflicting judgments of the concerned High Courts. The resultant legal chaos has created a situation where similarly situated citizens governed by the same Central Law 'have' a right in one part of the country and 'do not have' such a right in another part of the country." The Law Commission had observed that to allow a conflict of views between High Courts to arise and languish in comfort for many years, even decades, before resolving it, is less than an exemplary solution.

++ Now, a final solution to this vexatious issue of levy of service tax on renting services can come, only from the Supreme Court, in the light of the conflicting decisions. The Department, armed with the favourable decision from the Punjab and Haryana High Court, is not getting to rest and will litigate the matter up to the Apex Court.

++ It is indeed, trying times for developers, landlords and lessors. On the one hand, most of their tenants and especially, those who are in the retail sector, are not willing to pay service tax, based on the stay orders issued by the High Courts. Now, armed with this latest decision, the Department will insist on service tax to be paid. They are indeed caught between the devil and deep blue sea. They would be strongly advised to ensure that appropriate clauses are included in the lease/rental agreements to that, any eventual liability to pay service tax on rentals with interest, can be recovered from their tenants.