

Suggestions to the esteemed readers

The issue has now been settled by the Central Government by amending the taxable clause to provide that renting per se is a taxable service. The amendment shall be applicable from retrospective effect i.e. w.e.f 01.06.2007. The Central Government through validation clause 76 of Finance Bill 2010 has also erased the litigation in this regard. However, author is of the opinion that constitutional validity of this service can still be challenged in court of law on the following two grounds:-

- (i) Renting per se does not involve any service;
- (ii) If at all for the sake of discussion it is presumed that Renting is a service then this service is in relation to immovable property on which only State Government can levy tax as taxes on land and building falling under List II in the Seventh Schedule can only be levied by the State Government per the provisions of Article 246 of the Constitution of India.

Till the validity of this service is being challenged and any judgment is pronounced, renting per se has been made taxable w.e.f 01.06.2007 as per the amendments made by Finance Act 2010. After this development following important issues arise:-

- (i) Whether landlords are liable to discharge their respective Service Tax liability since 18.04.2009 (in view of the judgment of Delhi High Court in Home Solutions Retails India Pvt. Ltd.) even though they have not recovered any Service Tax from their concerned tenants?
- (ii) If landlords are liable to pay Service Tax then whether they need to pay interest u/s 75 and penalty u/s 76?
- (iii) In case landlords have already filed their Service Tax Returns, Whether they are required to revise their returns. What to do if time limit for revision of return has elapsed? If Service Tax Return is not filed then how they should discharge their Service Tax liability?
- (iv) What are the recourses available with the landlords if their tenants have not paid Service Tax to them?
- (v) Whether tenants after making payment of Service Tax for the past periods shall be able to claim CENVAT credit in respect of service tax on rent while discharging their output liability?

(i) Whether landlords are liable to discharge their respective Service Tax liability since 18.04.2009 (in view of the judgment of Delhi High Court in Home Solutions

Retails India Pvt. Ltd.) even though they have not recovered any Service Tax from their concerned tenants?

Qua the law, it is landlord who is liable to discharge its Service Tax liability on the taxable service provided by it i.e. renting of immovable property provided by him. Who has to bear the incidence of such tax shall depend on the arrangement between two private parties and Service Tax Department has no role to play. If landlord feels that as per the terms of agreement or otherwise it is the tenant who has to bear the incidence of tax he can file civil suit against his occupant / tenant. Service Tax Department cannot help the landlord in this regard in any manner. However, it is pertinent to note that as per the provisions of Section 67 (2) of Finance Act 1994, where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged. To say it differently, if service recipient i.e. occupant / tenant of the premises does not pay Service Tax to the landlord for any reason, then the amount realized by the landlord shall be treated as inclusive of Service Tax and landlord can calculate its Service Tax liability by applying the reverse formula i.e. $\text{Amount Received} \times \frac{\text{Rate of Tax}}{100 + \text{Rate of tax}}$.

Thus, it is clear from the above discussion that the landlord shall have to discharge its Service Tax liability on the amount realized from tenant / occupant treating the amount received as inclusive of Service Tax.

(ii) If landlords are liable to pay Service Tax then whether they need to pay interest u/s 75 and penalty u/s 76?

As discussed herein above, that the landlord is liable to discharge its Service Tax liability since 18.04.2009 even though Service Tax has not been recovered from their tenants. Now, the next question arises whether such liability paid by the landlord shall be subject to penalties and interest under the provisions of Finance Act, 1994. So far as, the issue of penalty is concerned, in the opinion of author no penalty can be levied because as per the decision of Hon'ble Delhi High Court pronounced on 18.04.2009 in the case of **M/s. Home Solutions Retails India Ltd., renting *per se* was held to be non-taxable**. Further, in the judgment given by the Hon'ble Delhi High Court in the case of M/s/ SSIPL [2010] TIOI 84 HC DEL ST in Dec'09, the aforesaid position has been reiterated and it has been confirmed that the decision of Hon'ble Delhi High Court in the case of M/s Home

Solutions Retails India Pvt. Ltd. is applicable on all the assessee all over the country.

So far as interest is concerned, payment of interest is compensatory in nature. If an amount is due to the revenue on a particular date and the same is discharged by the assessee on a later date, then there is no doubt that the assessee is liable to pay interest for the intervening period i.e. the period when liability has become due to the revenue till the date of actual payment paid by the assessee. If landlord has been discharging its Service Tax regularly till the pronouncement of judgment by Hon'ble Delhi High Court in the Case of M/s. Home Solutions Retails India Pvt. Ltd. on 18.04.2009, no Service Tax was payable to the Government of India from 18.04.2009 till the date of notification in this regard. Thus, the amount becomes due to the Government only on i.e. the day when the notification in this regard is issued.

Therefore, if landlord was from the beginning discharging its Service Tax liability well within due date but has ceased to deposit Service Tax in view of the judgment of the Delhi High Court in the case of M/s. Home Solutions Retails India Pvt. Ltd., then, In such case, in the opinion of the Author, no interest is payable to the revenue by the landlord. However, it is pertinent to note that if landlord has not been discharging its Service Tax liability regularly upto 18.04.2009, in such case, the landlord shall be liable for payment of interest on the amount which became due upto 18.04.2009 till the date of payment made by it. To illustrate, if a landlord is liable to pay a sum of Rs. 1 Lac from 01.06.2007 to 18.04.2009, he is liable to pay interest on the said amount from the day of his liability accrued to the day of actual payment of such liability.

(iii) In case landlords have already filed their Service Tax Returns, Whether they are required to revise their returns? What to do if time limit for revision of return has elapsed? If Service Tax Return is not filed then how they should discharge their Service Tax liability?

It is again an important issue, that under the given circumstances how an assessee can discharge its Service Tax liability if he has already filed its Service Tax Return or if he has not submitted its return with the Service Tax Department

(i) In case, if landlord has already submitted its Service Tax Returns,

Assessee (landlord) need not revise its Service Tax Return if they had already filed it with the department. As per the provisions of Section 73 (3) Where any

service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise officer before service of notice on him under section 73 (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under Section 73 (1) in respect of the amount so paid. Therefore, it is clear that assessee can pay the tax along with interest wherever applicable as per the discussions in preceding paragraph and inform the Jurisdictional Superintendent that it has already discharged its Service Tax liability after which the department shall not issue the Show Cause Notice. Thus, there is no need to revise the return and assessee shall not get worried about the time limit for revision of return which is 90days from the filing of original return, as he is not supposed to revise the return.

(ii) In case, if landlord has not submitted its return with the Service Tax Department

In the opinion of the author, the assessee was liable to file the return and in case assessee has failed to do so then he has clearly violated the provision of Section 68 read with rule 70. Thus, assessee shall be liable for penalty under the provisions of the Act.

However, the assessee can still file the Service Tax Return with the department by paying the late filing fees as stipulated in Rule 7C of Service Tax Rules, 1994.

Specimen letter which should be addressed to the Range Superintendent is enclosed as Annexure.

(iv) What are the recourses available with the landlords if their tenants have not paid Service Tax to them?

As discussed in Query No. 1 the only option available to the landlord is to contest the issue in Civil Court. It was suggested to the landlords not depositing Service Tax in view of the Home Solution judgment to take an undertaking from their tenants that in case Service Tax becomes payable then the tenants shall pay the Service Tax amount to their landlords. On the basis of such an undertaking / affidavit the landlord can file a civil suit in the Civil Court if their

tenants have still not paid Service Tax to them. The Finance Act, 1994 governing Service Tax cannot provide any assistance in this regard to the landlord.

(v) Whether tenants after making payment of Service Tax for the past periods shall be able to claim CENVAT credit in respect of service tax on rent while discharging their output liability?

As per provisions of Rule 4 sub rule 7 of Cenvat Credit Rules, 2004 which are reproduced here as under clearly shows that credit of Service Tax on input service is available only when the assessee has made payment for the value of Services and Service Tax there on:-

“The CENVAT credit in respect of input service shall be allowed, on or after the day which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9”

Therefore, it is amply clear that once the payment of the value of services as well as Service Tax has been Service Tax made by the Tenant and it is an input service in the hands of occupant / tenant, such amount is available as CENVAT in the month of payment made by him. Needless to mention that occupant / tenant must have duty paying documents as specified in Rule (9) of CENVAT Credit Rules, 2004. A clarification in this regard has recently been given in Circular No. 122 dated 30.04.2010.