

## SERVICE TAX ON RENT: GOVERNMENT 4 - 0 PETITIONERS

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The Indian Government appears to gain an upper hand in the current round of countrywide litigation concerning levy of service tax on commercial renting of immovable properties. Following favorable determinations by the Punjab and Haryana High Court ("PHC") in November 2010, the Karnataka High Court ("KHC") in March 2011 and the Orissa High Court ("OHC") in March 2011, now even the Bombay High Court ("BHC") has ruled in favour of the Government.

Service tax on commercial rents was first applied by the Government in 2007, through its annual Finance Act. The Delhi High Court ("DHC") has struck down the applicability in 2009, by striking down the concerned circular and notification. Thereafter, the Government, in the Finance Act of 2010 again amended the law, to levy the tax retrospectively, rendering the DHC judgment ineffective. The amendments by Finance Act of 2010, again gave rise to spur of writ petitions across India challenging the levy. This round of litigation however, so far, seems to be going in favour of the Government.

While disposing off all the writ petitions pending before it, concerning the current round, the BHC in its judgment dated August 4, 2011 (released last week) upheld the levy, as well as its retrospective effect. The BHC observed that the assumption by a legislative body that an element of service was involved in renting of immovable property was certainly not an assumption which could be regarded as manifestly absurd or perverse. According to BHC, even if it was assumed that no element of service was involved in renting of immovable property, it would not render the legislation beyond legislative competence of Parliament. The BHC observed that so long as legislation did not tread in a field reserved for the State legislatures, the law must be treated as valid and within the purview of the legislative competence of Parliament.

BHC has also upheld the operation of the amendments with retrospective effect with an observation that the plenary power of Parliament to legislate could extend to enacting legislation both with prospective and with retrospective effect. The BHC has taken the view that the provision has been given a retrospective effect to cure the deficiency which was found upon interpretation by the DHC in its judgment dated April 18, 2009. The judgment incorporates long discussion on the related aspects. It is available at the website of BHC [<http://bombayhighcourt.nic.in/data/judgements/2011/OSWP232810.pdf>].

Prior to the BHC, three other High Courts had already ruled in favour of the Government, albeit with different reasons and observations. The PHC had ruled in favour of the Government primarily observing that renting of property for commercial purposes was certainly a service, and had value for the service receiver. The KHC adopted the view that the petitioners (tenants) were not the service providers and therefore had no locus standi to challenge the levy. The OHC had observed that "renting of immovable property" itself was covered under Section 65(90a) of the Finance Act and therefore was subject to levy of service tax.

In a nutshell, so far four High Courts have dismissed the writ petitions challenging levy of service tax on commercial renting of immovable property in favour of the Government with different reasons and observations. The difference in reasoning and observations amongst different High Courts make the

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probable battle before the Supreme Court more challenging for the landlords and tenants. Since the BHC has granted four weeks breather to the petitioners to approach the Supreme Court before its judgment takes effect, one can expect that some of the petitioners would knock at the doors of the Supreme Court at their earliest.

The concerned parties across India are in the meantime eagerly awaiting the verdict of DHC relating to the current round. This time, the DHC constituted a special three judge bench to adjudicate the issues regarding validity of the levy and its retrospective effect. The hearing before DHC was concluded in May, 2011.

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