

(2011) 08 GUJ CK 0021

In the Gujarat High Court

Case No : Special Civil Application No's. 8032, 9661, 11032, 11111, 12933 of 2010 and 707 of 2011

Cinemax India Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-08-2011

Acts Referred:

Finance Act, 1994 — Section 65, 65(105), 65(90)
Finance Act, 2004 — Section 65(105)(zzzz)
Finance Act, 2010 — Section 75, 75(5), 76
Specific Relief Act, 1963 — Section 41

Citation : (2011) 24 STR 3 : (2011) 32 STT 359

Hon'ble Judges : S. J. Mukhopadhaya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : S.N. Soparkar and P.R. Nanavati, for the Appellant; P.S. Champaneri and Y.N. Ravani, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, C.J.

1. In these writ petitions, as common question of law is involved and validity of sub-clause (zzzz) of clause (105) of section 65 of Finance Act, 1994 as amended by section 75(5)(h) and section 76 of the Finance Act, 2010 is under challenge, they were heard together and are disposed of by this common judgment.

2. In most of the petitions, the petitioners are tenants paying rents or license fees or business conducting fees for leasing/licensing of immovable properties in their favour for conducting/operating business from the said immovable properties in the course of business activities. Apart from the rent paid in case of the properties taken on rent or conducting fees basis, the petitioner companies pay "Common Amenities and Maintenance" ("CAM") charges on which service tax is charged and duly paid. They also reimburse dues for electricity and water on actual consumption and duly supported by the bills.

3. During the course of their operation, the petitioner companies also receive rent or license fees or conducting fees for leasing, licensing or use of immovable properties. In these cases also, wherever agreements so provide, the petitioner companies get reimbursed in respect of dues for electricity, water, housekeeping, security etc., which are based on actual consumption and duly supported by bills.

4. The Finance Act, 2007 amended section 65 of the Finance Act, 1994 and defined "renting of immovable property" including renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce with certain exclusions.

Clause (105) of section 65 of the Finance Act, 1994, which defines "taxable service" was also amended to introduce sub-clause (zzzz), which provided that a service provided by any other person in relation to "renting of immovable property" for use in the course or furtherance of "business or commerce".

5. By Notification No. 24/2007-ST, dated 22-5-2007, the effective date for levy of service tax on renting and leasing an immovable property was notified as 1-6-2007. According to the petitioners, the entire object and purpose of the service tax provision was to tax certain categories of services "in relation to" renting of any immovable property for use in the course or furtherance of business or commerce. Thus, according to the petitioners, what the Revenue sought to tax was not the "renting of immovable property", but in fact any service provided or to be provided 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. It was contended that on a bare reading of the provision itself, it was apparent that the same does not impose a tax "on renting or taking the premises on rent". This is, because, there is no value addition by any act of the owner of the premises, in renting his property to another person.

6. By Circular No. 98/1 /2008-ST, dated 4-1-2008, the Ministry of Finance, Government of India authorized proceeding of recovery of service tax on the same assumption that renting out of immovable property was by itself a service.

One Iskrupa Mall Management Company Private Limited filed Special Civil Application No. 5269 of 2008 before this Court challenging the levy of the service on immovable property let out on rent by virtue of amendment made in section 65(105)(zzzz) of the Finance Act, 2004, as amended and inserted by Finance Act, 2007, subsequent notifications and circulars were also challenged. This Court, by its order dated 28-3-2008, restrained the respondents from making any coercive recovery of service tax in respect of the amount of license fees for use of immovable property. Similar directions were also issued by this Court in other writ petitions, including Special Civil Application Nos. 8179, 8735, 7096, 2981, 8346, 3664, 3666, 7653, 8176, 8177, 8178 and 5269, all of 2008, by common order dated 6th August, 2008.

7. One Retailers Association of India and another Multiplex Association of India of which one of the petitioners is a member, filed a writ petition being Writ Petition

No. 1263 of 2008 before the Bombay High Court, challenging the levy of service tax on immovable property let out on rent by virtue of amendment made in section 65(105)(zzzz) of the Finance Act, 2004, as amended by the Finance Act, 2007. Consequent notifications and circulars were also under challenge. The said case was also admitted by the Bombay High Court, wherein, interim relief was granted on 30-7-2008, directing the Union of India and statutory authorities not to take any coercive step for recovery of service tax.

8. One Home Solution Retail India Limited filed a writ petition, being W.P. (C) No. 1659 of 2008 challenging the Notification No. 24/2007-ST, dated 25-5-2007 and Circular No. 98/1/2008-ST, dated 4-1-2008, which proceeded on an assumption that renting of immovable property was taxable service. The said writ petition was heard by Delhi High Court along with other writ petitions preferred on the same issue.

The respondent, Union of India, at that stage, moved before the Supreme Court by filing Transfer Petition (Civil) Nos. 807-821 of 2008 for stay and transfer of different cases pending in different High Courts to Delhi High Court relating to the common issue of service tax on renting of immovable property. In view of pendency of such petitions, many of the High Courts did not pass any order, in the meantime, in absence of any stay, the matters were heard and disposed of by Delhi High Court by a common judgment and order dated 18-4-2009.

9. In case of Home Solution Retail India Ltd. Vs. Union of India (UOI) and Others, Delhi High Court, by its judgment dated 18-4-2009, held that section 65(105)(zzzz) does not, in terms, entail that the renting out of immovable property would, by itself, constitute taxable service and, therefore, the notifications and circulars issued on the basis of such assumption were ultra vires the Act. Consequently, the same were set aside to the extent that they authorized levy of service tax on renting of immovable property per se.

Delhi High Court further held that service tax is value added tax levied on value addition provided by some service provider; insofar as it relates to immovable property, any value addition would not be discerned, therefore, it cannot be regarded as service. Delhi High Court in the above judgment held as follows:

35. From this analysis, it is clear that we have to understand as to whether renting of immovable property for use in the course or furtherance of business or commerce by itself is a service. There is no dispute that any service connected with the renting of such immovable property would fall within the ambit of section 65(105)(zzzz) and would be eligible to service tax. The question is whether renting of such immovable property by itself constitutes a service and, thereby, a taxable service. We have already seen that service tax is a value added tax. It is a tax on the value addition provided by some service provider. Insofar as renting of immovable property for use in the course or furtherance of business or commerce is concerned, we are unable to discern any value addition. Consequently, the renting of immovable property for use in the course or

furtherance of business of commerce by itself does not entail any value addition and, therefore, cannot be regarded as a service. Of course, if there is some other service, such as air conditioning service provided along with the renting of immovable property, then it would fall within section 65(105)(zzzz).

36. 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 eligible 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.

The aforesaid judgment has been challenged by the Union of India before the Supreme Court in SLP (Civil) No. 13850 of 2009, but in spite of the petition for interim relief, the Supreme Court has not granted any stay and merely issued notice to the parties.

10. It appears that because of the decision rendered by the Delhi High Court, Union of India relooked into the matter on 26-2-2010 and the Hon''ble Finance Minister of Union of India presented Budget 2010 before the Parliament, being Finance Bill, 2010 which received Presidential assent on 11-5-2010 giving effect to the Finance Act, 2010.

11. Through Finance Act, 2010, by section 75(5)(h) and section 76, the Union of India sought to introduce certain amendment retrospectively and thereby sought to validate all actions taken by Union of India notwithstanding anything in the judgment of Delhi High Court or other High Courts and also provided liberty to the tax authorities to make all recoveries of service tax with interest, penalty or fine along with other charges as if amendment to section 65(105)(zzzz), in the Finance Act, 1994 by Finance Act, 2010, always stood incorporated retrospectively from 1-6-2007.

12. By Notification No. 24/2010-ST, dated 22-6-2010, the operative date of the provisions of the Finance Act, 2010 was notified as 1-7-2010.

13. It is in this background the present petitions were preferred challenging the validity of section 75(5)(h) and section 76 of the Finance Act, 2010, whereby amendment was made in clause (105) of section 65, relevant portions of which are reproduced hereunder:

75. In the Finance Act, 1994,--(A) in section 65, save as otherwise provided, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint,--

(5) In clause (105),--

(h) in sub-clause (zzzz),--

(i) for the portion beginning with the words "to any person" and ending with the words "business or commerce", the following shall be substituted and shall be deemed to have been substituted with effect from the 1st day of June, 2007, namely:--

to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or, for furtherance of, business or commerce;

(ii) In Explanation 1, after item (iv), the following item shall be inserted, namely:--"(v) vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;

76. Any action taken or anything done or omitted to be done or purported to have been taken or done or omitted to be done under sub-clause (zzzz) of clause (105) of section 65 of the Finance Act, 1994 (32 of 1994), at any time during the period commencing on and from the 1st day of June, 2007 and ending with the day, the Finance Bill, 2010 receives the assent of the President, shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done or omitted to be done as if the amendment made in sub-clause (zzzz) of clause (105) of section 65, by sub-item (i) of item (h) of sub-clause (5) of clause (A) of section 75 of the Finance Act, 2010 had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, Tribunal or other authority,--

(a) any action taken or anything done or omitted to be taken or done in relation to the levy and collection of service tax during the said period on the taxable service of renting of immovable property, shall be deemed to be and deemed always to have been, as validly taken or done or omitted to be done as if the said amendment had been in force at all material times;

(b) no suit or other proceedings shall be maintained or continued in any court, Tribunal or other authority for the levy and collection of such service tax and no enforcement shall be made by any court of any decree or order relating to such action taken or anything done or omitted to be done as if the said amendment had been in force at all material times;

(c) recovery shall be made of all such amounts of service tax, interest or penalty or fine or other charges which may not have been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, would not have been refunded, as if the said amendment had been in force at all material times.

Explanation.-- For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this amendment not come into force.

14. The challenge is made on the grounds that (i) the amendment is

unconstitutional being beyond the legislative competence of the Parliament; (ii) Delhi High Court having held that renting of immovable property is not service in absence of any value addition, the Union of India cannot change the nature of tax by changing the event of transaction and; (iii) the amendment being not clarificatory in nature, it cannot be enforced retrospectively.

15. The ground taken by the Union of India for amending the provision is that renting of immovable property is taxable service if such renting is for use in the course of or for furtherance of business or commerce.

16. Mr. S.M. Soparkar, learned Sr. Counsel and Mr. Mihir Joshi, learned Sr. Counsel appearing on behalf of one or the other petitioners, submitted that renting of immovable property is, in fact, a transaction by which rights in or in relation to immovable property are transferred for a certain period and for consideration. It is not an activity involving performance, skill, expertise or knowledge and the amount received by the lesser or licensor is merely consideration for transfer of right in or in relation to immovable property on the basis of the market value thereof; the same does not amount to service at all. It was further contended that the use which the licensee/lessee puts the property to, viz. end-use, is not determinative of the nature of the transaction as to whether the same is taxable service or not. They placed reliance on some of the decisions of the Supreme Court and other High Courts which will be discussed at appropriate stage.

17. By analogy, it was submitted that concept of manufacture under the provisions of the Central Excise Act, 1944 is independent of the use to which article is put to. What is required is that there must be a manufacture and the goods so produced must satisfy the test of salability and marketability. In fact, end-use is not considered as determinative even for the classification of the goods, far from being determinative for concluding whether such goods have been manufactured or not. The use of the goods/services is an occurrence which is post taxable event and therefore, is not relevant factor for considering whether or not the taxable event has occurred.

18. Therefore, according to the learned counsel for the petitioners, "end-use" does not create taxable event, but at the highest, can bring about a valid classification for the purpose of taxation etc. Just as the goods have to be "manufactured" or "produced" for the purpose of attracting levy of excise duty, which is a concept independent of the use to which such goods are put, on the principle of equivalence, the services also have to be "manufactured" or "produced" and the use to which such services are produced is not determinative of the fact as to whether in fact, the services were so manufactured or produced. There is legislative indication of this proposition since section 65(90a) defines "renting of immovable property" as including renting etc. of immovable property for use in course or furtherance of business or commerce, meaning thereby that renting of immovable property for residence would be covered in the inclusive definition. However, what is sought to be taxed under the present regime is only

that class of service which is renting for use in the course of or for furtherance of business or commerce. Section 65(105)(zzzz) expressly makes this classification of service and excludes renting of building used solely for residential purposes etc.

19. It was further contended that renting would not amount to a service since the lessee/licensee would only upon such renting not necessarily, carry on his business or commerce. Same would be the position even in case of acquisition of immovable property by purchase which would then enable the purchaser to use it for any purpose and may be in the course or furtherance of business or commerce. However, such purchase would certainly not also be a service. Therefore, according to learned counsel for the petitioners, renting enabling a person to carry on his activity or business or commerce would not amount to a service for the purpose of charging service tax. He, therefore, submitted that if renting of immovable property is not service at all, the utility value or use of the premises/immovable property is irrelevant for considering whether such transaction is or is not a service in the first place.

20. The next contention advanced on behalf of the petitioners is that the act of the consumer is not value addition contemplated for considering an activity "a service". The value addition must be by the service provider. He relied upon the decision of the Supreme Court in the case of All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, and in the case of Association of Leasing and Financial Service Companies Vs. Union of India (UOI) and Others,

Therefore, according to the counsel for the petitioners, in absence of any activity being undertaken by the lesser/licensor in the transaction of renting and there being no value addition on account of renting of immovable property simplicitor, albeit for commercial purpose, the same does not amount to a service, eligible to service tax.

21. Learned counsel would further submit that the contention of the respondents would lead the taxable event to a fortuitous circumstance of use by the service recipient. This may be explained by an example where landlord/lesser/licensor may have premises which are capable of being used both for residential and/or for commercial purpose. If the same premises are rented and used for residential purpose, on the contention of the respondents, the taxable event would not have happened as there is no provision of any service by the lesser to the lessee, whereas if the same premises is rented and thereafter used for commercial purpose or partly for commercial purpose and partly for residential purpose, would be liable to tax on the ground that service had been provided by the service provider to the service recipient. There is no difference in the "activity" undertaken by the lesser/ licensor, nor value addition by him in the latter case and in fact, there is no qualitative difference in the transaction undertaken at all, despite which, it would be considered as production of service in one case and not in the other. There would be a similar irrationality even as regards service

provided by real estate agent in relation to renting of immovable property if the contention of the respondents is accepted. The issue is not that levy of service tax on renting for business or commerce is bad because no such tax is levied on renting for residence, since it is well-settled that the Legislature does not have to tax everything for taxing something. The issue is sustainability of a contention that renting of immovable property for any other purpose may not be a service but renting of immovable property amounts to provision of services if such property is used for commercial purpose. Such determination of a taxable event would be irrational and the levy would consequently be rendered invalid.

22. Mr. P.S. Champaneri, learned Assistant Solicitor General appearing for the Revenue, opposed the prayer on the ground that the writ petitions are premature as no notice has been served on the petitioners and even in absence of such show-cause notice, the present petitions have been preferred and therefore, they are fit to be rejected.

23. Referring to section 65(105)(zzzz) of Finance Act, 1994 and the Explanation given there under, he would submit that an immovable property used solely for residential purpose would not be covered under the definition of "immovable property" for the purpose of taxing event. It is only in the event if immovable property is used for furtherance of business or commerce partly and partly for residential purpose or for any other purpose, the same shall be deemed to be immovable property for use in the course or for furtherance of business for the purpose of attracting service tax.

24. He would further contend that for valid classification of imposing service tax by defining "immovable property" in the Service Tax and making it limited when services, to any person, by any other person by renting of immovable property or any other service in relation to such renting for use in the course or for furtherance of business of commerce, the Legislature has specifically made a class different than what is defined under other enactment, namely Transfer of Property Act or any other Act.

25. Learned counsel submitted that in a transaction there may be two or more taxing events which may occur, therefore, any of them cannot be ignored. There is always value addition by rendering service of renting of immovable property when it is in furtherance of business and commerce in favour of service recipient.

26. Challenging the locus stand of the petitioners, he would contend that service tax is imposed on service recipient. The petitioners herein, are the owners of the premises and they do not to bear the liability of paying service tax. In view of the principle enumerated u/s 41(j) of the Specific Relief Act, in absence of having personal interest of the petitioners, this Court may not grant relief. The present petitions have not been filed in the nature of Public Interest Litigation nor in the representative capacity and therefore, the petitioners being not affected party, they have no right to challenge the Central enactment. They have also failed to show that any of their fundamental and statutory rights has been infringed as

they are not liable to pay tax and thus, the writ petitions at the behest of the service provider, are not maintainable.

27. Relying on the Supreme Court decision in the case of Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, learned counsel would contend that if Central Act is challenged as being beyond the legislative competence of the Parliament, it is enough to enquire if it is a law with respect to matters of taxes enumerated in state list, if it is not, no further question arises. If the Central Act enters or invades the prohibited fields, there is no point in trying to decide as to under which list or Entry the Central Act will fit in. He also placed reliance on the Supreme Court decision in the case of Tamil Nadu Kalyana Mandapam am Assn. Vs. Union of India (UOI) and Others, and submitted that the definition of "taxable services" includes renting in the course or furtherance of business.

28. Specifically with regard to providing service of renting a premises for business and commercial activities, learned counsel would contend that since the event of making available premises for industrial and business purposes is a rendition of service, though it may be even event of leasing or licensing under Transfer of Property Act and/or Easement Act, the concept of catering and rendering services is attracted. The fact that the tax on sale of goods involved in the said service can be levied does not mean that service tax cannot be levied on the aspect of catering. Similarly, rent is to be collected while providing service of renting the premises, it does not mean that service tax cannot be levied on the aspect of rendition of service of renting the premises. Reliance was placed on a decision of Punjab & Haryana High Court in the case of Shubh Timb Steels Ltd. v. Union of India (2010) 29 STT 479.

29. So far as the validation of Act is concerned, learned counsel for the Revenue would contend that the Act can be validated by the validation Act. It is settled law that competent Legislature can validate any Act even retrospectively by an enactment or validation Act. It is within the domain of competent Legislature to clarify or validate law retrospectively. The object of validating law is to rectify the defect in phraseology or lacuna and to effectuate and to carry out the object for which earlier law was enacted. Now, the Parliament has made by way of amendment, even renting of immovable property as covered by definition of "taxable service" instead of service "in relation to renting of property"; amendment is made by clarifying the intention of the legislation and curing the defects. He placed reliance on the decision of the Supreme Court in the case of Gujarat Ambuja Cements Ltd. and Another Vs. Union of India (UOI) and Another, wherein, while upholding the validation Act, the Supreme Court laid down the principle.

30. According to learned counsel for the revenue, renting of commercial property internationally is considered as provision/supply of service. The Apex Court, in the case of All India Federation of Tax Practitioners (supra) also held that; "service tax is on value addition by rendition of services". Similar views are expressed by the Supreme Court in the case of Moti Laminates Pvt. Ltd. and

Others Vs. Collector of Central Excise, Ahmedabad, wherein it has been held that there is no difference between production and manufacture of salable goods and production of marketable/salable services in the form of an activity undertaken by the service provider for consideration.

31. Learned counsel on behalf the revenue would contend that the Court should give liberal approach to the taxing enactment as it is always burden on the person who is challenging the same to prove violation of guarantee of equal protection. In the economic and tax matters, classification by Legislature is almost sustained by the Court which generally lacks expertise and familiarity with the local problem so necessary for making wise decision in respect of raising and disposing of public revenue. Reliance was placed on the Supreme Court decision in the case of R.K. Garg and Others Vs. Union of India (UOI) and Others,

32. He would further contend that the impugned provision has already been upheld by Punjab & Haryana High Court in the case of Shubh Timb Steels Ltd. (supra).

33. We have heard the learned counsel for the parties, noticed their respective submissions and also perused relevant provisions and decisions rendered by one or the other Court and Supreme Court in particular.

34. Sub-clause (90a) of clause 65 of the Finance Act, 1994 defines "renting of immovable property" which reads as follows:

(90a): "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include--

(i) renting of immovable property by a religious body or to a religious body;

(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation 1.--For the purposes of this clause, for use in the course or furtherance of "business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings.

Explanation 2.--For the removal of doubts, it is hereby declared that for all the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;

35. Clause (105) of section 65 defines "taxable service" which means any service provided and shown there under. Sub-clause (zzzz) brings renting of immovable property or any other service in relation to such renting for the use in the course of or for furtherance of the business or commerce within the definition of "taxable service" which reads as follows:

Section 65(105): "taxable service" means any service provided,--

(zzzz) to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or for furtherance of, business or commerce.

Explanation 1.--For the purposes of this sub-clause, "immovable property" includes--

- (i) building and part of a building, and the land appurtenant thereto;
- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto;
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate; and
- (v) vacant land given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce,

but does not include-

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports, circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2.--For the purpose of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;"

Explanation 1 below sub-clause (zzzz) while defines "immovable property",

Explanation 2 there under makes it clear that for the purpose of the said sub-clause (zzzz), an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall also be deemed to be immovable property for use in the course or furtherance of business or commerce.

36. One of the thrusts of the arguments made on behalf of the petitioners is that renting of immovable property is a transaction by which right in or in relation to

immovable property is transferred for certain period. It is not an activity involving performance, skill, expertise or knowledge and the amount received by the lesser/licensor is consideration for transfer of right in or in relation to immovable property. But such analogy cannot be applied in the case of renting of immovable property by a service provider to a service recipient, who hires the property for use in the course of or for furtherance of business or commerce. Such renting of immovable property is an activity which amounts to rendition of service in the course of or for furtherance of business or commerce.

37. It is true that in the normal course of renting of immovable property, provision of service tax is not attracted, in absence of any activity involving performance, skill, expertise or knowledge. This is also accepted by counsel on behalf of the Revenue who relied upon the impugned provision which stipulates that only when any person rents immovable property for use in the course or furtherance of business or commerce. The provision of section 65(105)(zzzz) specifically deals with exclusion category while defining "immovable property". That definition of "immovable property" as described in Explanation 1 below sub-clause (zzzz) does not include four categories of immovable property, which are as follows:

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports, circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

38. In the case of All India Federation of Tax Practitioners (*supra*), the Supreme Court was considering the question of validity of levy of service tax on the services rendered by the Chartered Accountants, Cost Accountants and Architects. While so considering, the Supreme Court held that service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals etc., it covers wide range of activities, the service sector which is occupying centre stage of the Indian economy has become an industry by itself. In the said case, the Supreme Court held as follows:

7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be livable only on services provided within the country. Service tax is a value added tax.

8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. Performance based services are services provided by service providers like stock-brokers, practicing chartered accountants, practicing cost accountants, security agencies, tour operators, event managers, travel agents etc.

The Supreme Court added that service tax is a value added tax and value addition is on account of activity, as in the case of manufacture of goods and thereby it attracts service tax. In other words, the word "service" is substituted in place of the word "goods" by applying principle of prevalence. In the case of Association of Leasing & Financial Service Companies (supra), the Supreme Court, while dealing with banking and other financial services observed that service tax is tax on activity whereas sales tax is tax on sale of thing or goods. Taxable event under the service tax is each exercise/activity undertaken by service provider and it is imposed every time service is rendered to customer/client, it is a value added tax. Relevant observation is quoted hereunder:

38. In All-India Federation of Tax Practitioners case this Court explained the concept of service tax and held that service tax is a value added tax ("VAT", for short) which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer. That, service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/ saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation, etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of section 65(105)(zm) of the Finance Act, 1994 (as amended). Thus, the taxable event is each exercise/activity undertaken by the service

provider and each time service tax gets attracted.

39. Mandap Keepers of Tamilnadu Kalyana Mandapam Association moved before the Supreme Court, challenging the validity of tax and services provided by mandap-keepers in relation to use of Mandap. While dealing with the said matter, the Supreme Court, in the case of Tamil Nadu Kalyana Mandapam Association (supra) noticed that definition of "taxable service" provided by mandap-keepers is not limited to providing of premises on a temporary basis for the purpose specified, but includes even other facilities supplied in relation thereto. Mandap-keepers provided a variety of services apart from the services of allowing temporary occupation of Mandap. Definition of "taxable service" included service provided "in relation to use of mandap in any manner" and includes "facilities provided to the client in relation to such use" and also services "rendered as a caterer". The Supreme Court observed and held as follows:

Taxable services, therefore, could include the mere providing of premises on a temporary basis for organizing any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels, etc. which provide limited access to property for specific purpose.

The Supreme Court further observed that service could not be struck down on the ground that it does not conform to a common understanding of the word "service". It further held that it does not certainly involve transfer of movable property nor does it involve transfer of movable property of any kind known to the law. The Supreme Court observed as under:-

Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution.

40. The stand of the Government of India has been made clear by letter dated 26th February, 2010 issued by the Revenue Department, Ministry of Finance, Government of India, Tax Unit, New Delhi. It was brought to the notice of the Court by the learned counsel appearing on behalf the Union of India that with regard to service of renting of immovable property, stand of the respondent is that it was introduced in the year 2007 with a view to tax all commercial use of immovable property higher. The tax on rent paid is available as input credit if the commercial activity involves provision of taxable service or manufacture of dutiable goods. However, as Delhi High Court, by its judgment dated 18-4-2009, in the case of Home Solution Retail India Ltd. (supra) has struck down the levy by observing that renting of immovable property does not involve any value addition and, therefore, it cannot be regarded as service, in order to clarify the legislative intent and also bring any certainty in tax liability, relevant definition of tax service is being amended to clarify the activity of renting of immovable property per se could constitute taxable service if made or used in the course or

furtherance of business or commerce.

41. We have noticed the stand taken by Union of India which is also clear from Explanation 1 below sub-clause (zzzz) of clause (105) of section 65 which does not include vacant land only used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purpose having facilities incidental to the use of such vacant land, land used for educational, sports, circus, entertainment and parking purpose and building used solely for residential purpose and building used for purpose of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities. It is only "renting of immovable property" which includes renting, letting, licensing or other similar arrangements of immovable property for the use "in course or furtherance of business or commerce". It comes within the definition of "taxable service".

Renting of any property ipso facto would not amount to service for the purpose of service charge. This is also accepted by learned counsel for the revenue. However, in case of renting of immovable property, if service recipient uses it in the course of or furtherance of business or commerce, it can safely be stated that the service provider has rendered service, enabling the service recipient in value addition. Thus, if renting of immovable property is made in the course of or for furtherance of business or commerce, value addition is made by service provider in favour of service recipient. Such activity undertaken by the service provider for value addition in the course of or for furtherance of business or commerce, i.e. to carry on activity or business or commerce of the service recipient amounts to rendition of service and will fall within the meaning of definition of "service tax".

The meaning of "furtherance", as per Black's Law Dictionary, 6th Edition, 11th reprint, 1997, is "act of furthering, help forward, promotion, advancement or progress". Furtherance of business will, thus mean, act of furthering business, helping forward business, promotion of business, advancement of business or progress of business. Therefore, if a service provider is renting the property in the course of or for furtherance of business or commerce, it will amount to an activity in favour of service recipient for helping forward business, promotion of business, advancement of business and progress of business. It automatically generates value addition and comes within the meaning of "service tax" as defined u/s 65(105)(zzzz).

42. The Supreme Court in the case of Tamil Nadu Kalyana Mandapam Association (supra), has already held that levy of service of particular kind of service would not be struck down on the ground that it does not conform to a common understanding of the word "service" so long it does not transgress any specific restriction contained in the Constitution.

43. The aforesaid impugned section 65(105)(zzzz) fell for consideration before the Bench of Punjab & Haryana High Court in Shubh Timb Steels Ltd. 's case (supra). In the said case, the Punjab & Haryana High Court upheld the validity of

section 65(105)(zzzz) and dismissed the appeal.

44. For the reasons aforesaid, while upholding section 65(105)(zzzz) of Finance Act, 1994 as amended by section 75(5)(h) and section 76 of the Finance Act, 2010, we hold that the provision of section 65(105)(zzzz) introducing service tax is not attracted if (i) the vacant land is used solely for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes; (ii) it is a vacant land, whether or not having facilities clearly incidental to the use of such vacant land; (iii) land is used for educational, sports, circus, entertainment and parking purposes and; (iv) building is used solely for residential purposes and buildings are used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities. The said provision levying service tax will be attracted if the immovable property is rented for the use in the course of or for furtherance of the business of commerce.

45. In view of the discussion as made above and as we find that the petitioners could not make out a case to declare section 65(105)(zzzz) as unconstitutional or ultra vires any provisions of the Constitution, we have no option but to dismiss the writ petitions in absence of any merit. The Writ petitions are accordingly dismissed. There shall be no order as to costs.