(2010) 12 DEL CK 0057

In the Delhi High Court

Case No : Writ Petition (C) No''s. 3398, 7605, and CM 6827, 19776, 3398, 6827, 3746, 7483, 3750, 7486, 3782, 7590, 3783, 7593, 3809, 7648, 3837, 7716, 3838, 7719, 3856, 7751, 3867, 7765, 3868, 7767, 3869, 7769, 3881, 7789, 3886, 7797, 3936, 7880, 4010, 7980, 4025,

Home Solutions Retails Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Finance Act, 1994 — Section 65(105), 65(90)

Citation : (2010) 6 AWC 109

Hon'ble Judges : Dipak Misra, C.J;Manmohan, J

Bench : Division Bench

Advocate : Harish N. Salve, Neeraj Kishan Kaul, S. Ganesh and Rishi Aggarwala, Amit Naik and Harshwardhan, In Item Nos. 24, 26, 27, 28, 29, 36, 39, 53, 54, 57, 59 and 67, Puneet Agrawal, Amit Kumar Gupta, in Item No. 2, M.P. Devnath, Manish Panda and Abhisek Anand, in Item Nos. 22, 44, 47, 91, 117 and 187, Neeraj Kishan Kaul and Tanuj Khurana, in Item No. 23, Ajay Bhargawa, Vanita Bhargava and Nitin Mishra, in Item Nos. 25, 37, 45, 48, 50, 68, 97, 98 and 131, Tarun Gulati, Neil Hilderth, Kishore Kunal, Sparsh Bhargava, Rony O. John and Sashi Mathews, in Item Nos. 28, 43, 46, 60, 63, 88, 90, 119, 122, 146 and 148, Rupal Bhatia, in Item Nos. 30 to 34, 38, 56, 95 and 172, Balbir Singh, Deepak Sinhmar, Rupender Singh and Abhishek Singh Baghel, in Item No. 35, Ruchir Bhatia, in Item Nos. 40, 61, 93, 94, 138, 158, 160 and 161, Sanjeev Kumar, in Item No. 42, Shikha Sapra and Abhinav Jain, in Item Nos. 41 and 58, Satyen Sethi and Arta Trana Panda, in Item Nos. 47 and 110, Kunal Tandon, in Item Nos. 49, 108, 109 and 167, S. Ganesh, S. Sukumaran, Anand Sukumar and Bhupesh Kumar Pathak, in Item No. 55., Sandeep Jha, in Item Nos. 51 and 87, Manu Nair and Arun Mohan, in Item Nos. 60 and 72, Aradhana Patra, in Item Nos. 64, 150, 151 and 153, K.C. Joshi, in Item No. 65, Amir Singh Pasrich and Aditya Jain, in Item No. 66, Harish N. Salve, L.K. Bhushan, Gaurav Bahl and Swaty S. Malik, in Item No. 69, Rajiv Bansal and Amandeep, in Item Nos. 70 and 89, Rakesh Mukhija and Amit Ojha, in Item Nos. 77, 114, 133 and 166, Sumesh Dhawan and Vatsala Kak, in Item Nos. 78 and 79, Rajeev Kumar, in Item Nos. 80 to 84 and 84, Amit Sood, in Item Nos. 85 and 149, Amit Gupta and A.S. Aman, in Item No. 86, Vivek Bhagat, in Item No. 92 and 102, Meenakshi Arora, Mohit D. Ram and Sakshi Chopra, in Item No. 99, Manu Monga, in Item No. 100, Manish Sharma, in Item No. 103, Rakesh Chitkara and Rajesh Gupta, in Item Nos. 101, 104, 105, 107, 134, 135, 136, 171 and 174, D. Moitra and Rajat Jain and Alka Dahar, in Item No. 106, Vikram Saini, in Item No. 119, Manish Singhvi and D.K. Devesh, in Item Nos. 112, 112 and 133, R.K. Gupta, Item No. 116, Vikram Saini, in Item No. 119, Rajiv K. Garg, in Item No. 120, Niraj Singh, in Item No. 121, Milanka Chaudhury, in Item No. 122, Rohan Ahuja, in Item Nos. 123, 127, 129 and 130, Raj K. Batra and Simranjeet Singh, in Item No. 125, Pankul Nagpal in Item No. 126, Rahul Chaudhary, in Item Nos. 128 and 141, Kunal Sinha, in Item No. 132, Mohan K. Kukreja, in Item No. 139, Saurabh Tiwari and Jasmeet Singh, in Item Nos. 142, 145 and 165, Vibha Datta Makhija and Philemon Nangbri, in Item No. 143, Ajit Warrier and Tarun Dua, in Item No. 147, Rakesh Sinha and Pawan Kumar Bansal, in Item No. 148, Prem Prakash, in Item No. 154, Arun Kumar Roy, in Item No. 155, Mritunjay Kumar Tiwary, in Item No. 157, J.K. Mittal, Brajesh Pandey and Pooja Bahuguna, in Item No. 159, Amita Gupta and Parveen Kumar, in Item No. 162, Dhanesh Relan, in Item No. 169, Rajesh Bhatnagar and Shivanand Thakur, in Item No. 170, for the Appellant; A.S. Chandiok, ASG, H.C. Bhatia, Vibha Dhawan, G.S. Parwanda, Bhagat Singh for R 1/UOI in Item Nos. 21, 23, 24, 27, 28, 29, 30, 32, 33, 35, 36, 39, 42, 43, 44, 47, 49, 52, 58, 67, 71, 73, 83, 96, 99, 100, 104, 107, 113, 122, 155, 157, 162, 166, 171 and 173, Sonia Mathur, Vibha, Dhawan, G.S. Parwanda, Bhagat Singh for R 1/UOI in Item Nos. 22, 25, 26, 31, 34, 37, 38, 40, 41, 45, 48, 50, 51, 53, 54, 55, 56, 62, 78, 79, 97, 98, 107, 113, 154, 159, 160 and 161, Sonia Sharma A.S. Chandiok, ASG, Vibha Dhawan, G.S. Parwanda and Bhagat Singh for R 1/UOI in Item Nos. 57, 59, 60, 61, 63, 64, 66, 68, 69, 74, 75, 76, 86, 88, 90, 95, 101, 103, 105, 106, 108, 111, 114, 121, 123, 124, 127, 133, 138, 139, 141, 143, 145, 147, 150, 154, 164, 168, 170, 172 and 174, Mukesh Anand, R.C.S. Bhadoria, Shailesh Tiwari for Service Tax Department and Central Board of Customs and Excise in Item Nos. 21, 82, 84, 85, 87, 89, 91, 96, 99, 101, 103, 131, 139, 141, 143, 144, 154, 155, 157, 159, 163, 164, 166, 168 and 171, Satish Kumar, for Customs, Central, Excise Service Tax, DGCEI, DGRI in Item Nos. 2, 83, 86, 88, 90, 92, 95, 97, 98, 102, 104-130, 132, 135, 38, 142, 145-153, 156, 158, 162, 165, 167, 169, 170 and 174, Amiet Andlay, for R 4 in Item No. 2, Baldev Malik, for R 1, 2 and 3 in Item No. 18, Malini Sud, Deepak Khurana and Shobit Chandra for R 8 in Item No. 24 Sumesh Dhawan and Vatsala Kak, in Item No. 27 for R 7, Item No. 138 for R 4, 5 and 6, Item No. 156 for R 15, Sumit Bansal, Ateev Mathur and Ajay Monga, in Item Nos. 36 for R 6 to, 8, Item No. 69 for R 5, N. Kumar, for R 5 in Item No. 36, Harpreet Singh, for R 15 in Item No. 39, Rupal Bhatia, for R 25, Amit Ojha, Rakesh Mukhija for R 108, Ayushya Kumar and Vaibhav Kalra for R 113 in Item No. 40, Rajat Aneja, Shweta Singh, Sachin Sachdeva for R 7 to 11 and B.B. Gupta, for R 36, 51, 66, 89 and 90 in Item No. 47, Mahesh B. Chibber, for R 12 to 16 in Item No. 51, A.K. Mehta, Anshul Arora for R 54 in Item No. 54, Rakesh Diwedi Tarun Gulati, Neil Hilderth, Kishore Kunal, Sparsh Bhargava, Rony O. John and Sashi Mathews for DIAL in Item No. 55, Anjana Gosain and Kavery Dua for R 1/UOI in Item Nos. 60 and 72, Digvijay Rai, for AAI in Item Nos. 60, 72 and 148, Murti Chaudhary and Sahil Chopra for R 5 in Item No. 61, A.S. Chandiok, ASG, Atul Nanda, Sugandha for R 1/UOI. Item Nos. 65, 77, 122, 125, 126, 149, 163, 165 and 167, K.K. Aggarwal in Item Nos. 65, 106 and 156, Neeraj Chaudhari, CGSC, Akshay Chandra, for R 1/UOI in Item Nos. 70 and 89 Keshari K. Tiwari, for Anil K. Batra, for YMCA in Item No. 70, A.S. Chandiok, ASG, Neeraj Chaudhari, Akshay Chandra, Moit Kumar Auluck and Khalid Arshad for UOI. Item Nos. 89, 134, 137 and 144, Rajiv Nanda, Rachna Saxena for Deptt. of Finance, Debesh Panda and Vaibhav Chaudhary for R 5 and Manav, for Mandeep Singh, for R 6 in Item No. 91, Sanjeev Ailawadi, for Ajay Enterprises Pvt. Ltd. in Item No. 94, Amish Tandon, for R 36, 37, 38 in Item No. 106, Rajiv

Nanda, Rachna Saxena for Deptt. of Finance in Item No. 108, Praveena Guatam, L.P. Asthana for R 5, Bhanita Patowary, for R 7, Dinesh Kumar Gupta, Vikas Mishra, for R 14, Bindra Rana, Meenua Sharma for R 21, Sudhir Sukhija, for R 31 in for R 12 and 34 and Ruchir Bhatia, Sushmita Lal, Malbika, Sharkar and G.K. Sharkar for R 8 in Item No. 142, Nirbhay Sharma, for Anjum Javed, for R 4 in Item Nos. 142 and 145, Ravinder Agarwal, CGSC, Nitish Gupta for R 1/UOI, Digvijay Rai, for R 7, Manjula Baxla, for R 13 and 14, Sahil Mongia, Abhishake Sharma and Sharad Baijal for R 20, 21 and 22, Neeraj Gupta, for R 24, 25, D.D. Dayani, for R 28 and 29 in Item No. 156, Jatan Singh, CGSC for R-1/UOI in Item No. 157 and B.V. Niren, CGSC and Aarumugam M., for R 1/UOI in Item No. 169, for the Respondent

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Judgement

1. In this batch of writ petitions, the basic prayer is to declare Section 65(90a) read with Section 65(105)(zzzz) of the Finance Act, 1994 (for short "the Act") as amended by the Finance Act, 2007, Finance Act 2008 and Finance Act, 2010 as ultra vires the Constitution of India as there is colourable exercise of power inasmuch as the Legislature does not have the legislative competence in this field as it basically pertains to List II of the Seventh Schedule of the Constitution of India.

2. Quite apart from above, various averments have been made in the writ petitions stating, inter alia, that Section 65(105)(zzzz) of the Act cannot really cover mere renting of immovable property in the net of service tax. It is averred that in the earlier definition of the said provision words used in relation of renting of immovable property were ''for use in the course or furtherance of business or commerce and the present provision has only made a different kind of contour but by such an amendment, it cannot be held that mere renting of immovable property without any kind of rider would tantamount to service and thereby would be covered in the ambit and sweep of service tax.

3. In the course of hearing of these writ petitions, Mr. Harish N. Salve, learned senior counsel and other learned senior counsel appearing for Petitioners have commended us to the decision rendered in Home Solution Retail India Ltd. v. UOI and Ors. 158 (2009) DLT 722 (DB). Mr. Salve has drawn inspiration from paragraph Nos. 31, 34 and 35 of the said judgment. We think it apt to reproduce paragraphs 34 and 35 of Home Solution (supra):

34. From the above discussion, it is apparent that service tax is a value added tax. It is a tax on value addition provided by a service provider. It is obvious that it must have connection with a service and, there must be some value addition by that service. If there is no value addition, then there is no service. With this in mind, it would be instructive to analyse the provisions of Section 65(105)(zzzz). It has reference to a 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". The wordings of the provision are so structured as to entail - a service provided or to be provided to "A" by "B" in

relation to "C". Here, "A" is the recipient of the service, "B" is the service provider and "C" is the subject matter. As pointed out above by Mr Ganesh, the expression "in relation to" may be of widest amplitude, but it has been used in the said Act as per its context. Sometimes, "in relation to" would include the subject matter following it and on other occasions it would not. As in the case of the service of dry cleaning, the expression "in relation to dry cleaning" also has reference to the very service of dry cleaning. On the other hand, the service referred to in Section 65(105)(v), which refers to a service provided by a real estate agent "in relation to real estate", does not, obviously, include the subject matter as a service. This is so because real estate by itself cannot by any stretch of imagination be regarded as a service. Going back to the structured sentence, i.e.- service provided or to be provided to "A" by "B" in relation to "C", it is obvious that "C" can either be a service (such as dry cleaning, hair dressing, etc.) or not a service by itself, such as real estate. The expression "in relation to" would, therefore, have different meanings depending on whether "C" is a service or is not a service. If "C" is a service, then the expression "in relation to" means the service "C" as well as any other service having connection with the service "C". Where "C" is not a service, the expression "in relation to" would have reference only to some service which has a connection with "C". But, this would not imply that "C" itself is a service.

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 exigible 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 alongwith the renting of immovable property, then it would fall within Section 65(105)(zzzz).

6. Relying upon the aforesaid paragraphs, it is submitted by Mr. Salve that in the said decision it has been clearly held by the Division Bench that the renting of the immovable property for use in course or furtherance of business or commerce by itself does not entail any value addition and, therefore, cannot be regarded as service. Mr. Salve would submit that when such a conclusion has been arrived at while interpreting the concept of service tax in respect of letting simplicitor, by amending the Act with regard to renting of immovable property by Finance Act, 2010 the situation cannot improve.

7. Mr. A.S. Chandiok, learned Additional Solicitor General of India has taken us to paragraphs 8 and 13 of the Home Solution (supra) and submitted that the said decision cannot be treated as a precedent which would be binding on this Division Bench inasmuch as the recording of a finding of that nature was not necessary for adjudication of the lis that was involved in the said case. In essence, the submission of Mr. Chandiok is that when a controversy does not arise in a case and a Bench makes certain observations, the same should not be treated as a binding precedent.

8. Though on a conceptual proposition the submission of Mr. Chandiok cannot be disregarded, yet if the judgment rendered in Home Solution (supra) is read in entirety and finding recorded therein is perused, there can be no scintilla of doubt that it has the binding effect on another Division Bench.

9. At this juncture, we have been apprised by Mr. A.S. Chandiok that the judgment in Home Solution (supra) has been assailed before the Apex Court and their Lordships have granted leave therein. Mr. Salve, learned senior counsel does not dispute the said position. Mr. Salve has also brought to our notice that in the said SLP, the Union of India in Ground Nos. 11 and 12 has basically challenged the said findings.

10. Be it noted, the interim order passed by this Court has been challenged by the Union of India in CC No. 16960/2010 Union of India and Ors. v. Home Solutions Retails India and Ors. before the Apex Court, wherein their Lordships have passed the following order:

Counsel appearing for the parties agree that they would make all efforts for getting the writ petition, pending in the High Court, disposed of on the next date and therefore, no order is required to be passed on this, for the present. We request the High Court to dispose of the writ petition itself since an interim order is passed, which according to the Petitioners, is creating prejudice to their interest. Re-notify in the second week of January, 2011.

11. In the course of hearing, learned Counsel for the parties fairly stated that they will bring it to the notice of their Lordships of the Apex Court and shall seek expeditious disposal of the SLP filed against the judgment rendered in Home Solution (supra).

12. In view of the aforesaid submissions raised at the bar, we are inclined to adjourn these matters.

13. Call on 25 January, 2011 for direction.

Interim order passed on earlier occasions shall remain in force.

