

## IN-DEPTH ANALYSIS OF IMPORTANT ISSUES ARISING OUT OF LATEST HON'BLE DHC JUDGMENT ON COMMERCIAL RENTING

### 1.0 An overview of Significant Events leading to Issue of Present Pronouncement

01.06.2007	'Renting of Immovable property services' have been brought under the purview of service tax with effect from 01.06.2007 with a view to tax the activity of renting of immovable property for use in the course or furtherance of business or commerce.
18.04.2009	Hon'ble High court of Delhi in the case of <b>M/s Home Solution Retail India Ltd. &amp; Others vs. UOI and Ors, 2010-TIOL-341-HC-DEL-ST</b> held that renting <i>per se</i> cannot be regarded as service. Hence, no service tax could be levied on the activity of renting <i>per se</i> .
08.05.2010	Finance Act, 2010 was enacted on 08.05.2010. As a result changes proposed by the Union Budget, 2010 in respect of enlargement of scope of "Renting of Immovable Property Services" become the part of Finance Act, 2010 and applicable from the date to be notified in the notification issued in this respect after the enactment of Finance Act 2010.
18.05.2010	Assessees filed the writ Petition before the Hon'ble Delhi High Court challenging the constitutional validity of the retrospective amendment. In this regard Hon'ble High court of Delhi once again granted stay to Home Solution Retail (I) Ltd from payment of service tax on renting of immovable property (2010 (19) S.T.R. 3 (Del.))
01.07.2010	Notification No. 24/2010 dated 22.06.2010 was issued to notify the date of amendment in the definition of "Renting of Immovable Property Services" with effect from 01.07.2010. The amendment has been given retrospective effect from 01.06.2007.
14.12.2010	The Hon'ble High Court held that interim order (stay) passed on earlier occasions i.e. Stay order dated 18.05.2010 shall remain in force. (2011 (21) S.T.R. 109 (Del.))
10.01.2011	Hon'ble Apex Court passed an interim order to the effect that stay order dated 18.05.2010 granted to M/s Home Solutions by the Hon'ble Delhi High Court shall be nullified.

	<i>Case is still pending before the Supreme Court for final hearing and yet to be disposed off.</i>
04.02.2011	Hon'ble Apex Court has passed an order to the effect that the High Court of Delhi will hear and dispose of the entire writ petitions as expeditiously as possible. Further, the Supreme Court has ordered that the interim order which was passed by the Supreme Court on 10.1.2011 would continue to operate till the disposal of the writ petitions in Delhi High Court.
23.09.2011	Hon'ble High court of Delhi in the case of <b>M/s Home Solution Retail India Ltd. &amp; Others vs. UOI and Ors-2011-TIOL_610-HC-DEL-ST-LB</b> has upheld the constitutional validity of retrospective amendment by Finance Act, 2010 in definition of taxable service of commercial renting.

## **2.0 Highlights of present judgment i.e. M/s Home Solution Retail India Ltd. & Others vs. UOI and Ors-2011-TIOL\_610-HC-DEL-ST-LB**

**2.1** In the above-mentioned case it has, **inter alia**, been held that the provisions, namely, Section 65(105)(zzzz) & Section 66 of the Finance Act, 1994 and as amended by the Finance Act, 2010, are intra vires the Constitution of India. The challenge to the amendment giving it retrospective effect is unsustainable and, accordingly, the same stands repelled and the retrospective amendment is declared as constitutionally valid. Further, the following observations of the judgment [as given in **Paragraph 65**] are noteworthy:

**2.2** **“Every building or premises cannot be utilized for commercial or business purposes. When a particular building or premises has the “effect potentiality” to be let out on rent for the said purpose, an element of service is involved in the immovable property and that tantamounts to value addition which would come within the component of service tax. To further clarify, an element of service arises because a person who intends to avail the property on rent**

**wishes to use it for a specific purpose.”**

**2.3** Likewise following observations of **Paragraph no. 69** are also worth highlighting:

**“What is being taxed is an activity, and the activity denotes the letting or leasing with a purpose and the purpose is fundamentally for commercial or business purpose and its furtherance. The concept has to be read in conjunction....Once there is a value addition and the element of service is involved, in conceptual essentiality, service tax gets attracted and the impost gets out of the purview of Entry 49 of List II of the Seventh Schedule of the Constitution and falls under the residuary entry, that is, Entry 97 of List I.”**

### **3.0 Broad List of Issues arising out of above judgment**

**3.1** From which effective date various assesseees are required to deposit Service Tax?

**3.2** Whether interest too is required to be deposited on above amount of Service Tax? If answer to first part of this question is affirmative, then from which date interest is required to be deposited and at what rate(s)?

**3.3** Whether Penalty is also required to be deposited on above amount of Service Tax?

**3.4** By which date service tax, interest [if any], and penalty [if any] are required to be deposited?

**3.5** How issue of filing or revision of Service Tax Returns will be dealt?

The above broad issues have been discussed in seriatim in the following paragraphs:

### **3.1 Issue of Effective Date for Depositing Service Tax**

Finance Act, 2010 has substituted [amended] Section 65(105) (zzzz) with retrospective effect from 01-06-2007. The aforementioned amendment has been held as constitutionally valid in the present judgment. As a consequence, service tax is required to be deposited by all categories of relevant assessee with effect from 01.06.2007 itself.

### **3.2 Issue of Effective Date for Depositing Interest on late deposit of Service Tax**

**3.2.1** Before addressing this issue in the current context, it is essential to have a look at observations made in some leading cases. Firstly, in case of **Star India Pvt. Ltd v. CCE, (2005) 7 SCC 203** it has been held that *it is well established that while it is permissible for the Legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively. The following observations of the Apex Court as given in **Para 8** of the judgment are relevant:*

“The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect.”

**3.2.2** Secondly, in **Pratibha Processors V Union of India AIR 1997 SC 138** it has been observed by the Hon'ble Apex Court that interest is compensatory in character and is imposed on an assessee, who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty which is penal in character.

**3.2.3** On the basis of the above judgments it can be inferred, in the present context, that although retrospective amendment [substitution] of section 65(105) (zzzz) was made with effect from 01.06.2007, liability to pay interest will get attracted on with effect from 01.07.2010 onwards. Besides, it is worth pointing out that in none of the stay-orders on renting issue, any relaxation from payment of interest has been granted.

Accordingly, **as per our opinion** various kinds of assesses are required to pay interest for the period as indicated in the following succinct table:

<b>Status of Service Provider</b>	<b>Mode of making payment</b>	<b>Relevant Period for depositing interest</b>
Any person other than an individual or proprietary firm or partnership firm	On-line payment	From 07-08-2010 to Date of making payment of arrears of service tax.
Any person other than an individual or proprietary firm or partnership firm	Any mode other than on-line payment for instance by cash, cheque, credit card etc.	From 06-08-2010 to Date of making payment of arrears of service tax.
An individual or proprietary firm or partnership firm	On-line payment	From 07-10-2010 to Date of making payment of arrears of service tax.
An individual or proprietary firm or partnership firm	Any mode other than on-line payment for instance by cash, cheque, credit card etc.	From 06-10-2010 to Date of making of payment of arrears of service tax.

### **RATE OF INTEREST**

<b>Relevant Period</b>	<b>Kinds of Assesseees</b>	<b>Rate of Interest p.a.</b>
From 06-08-2010/07-08-2010/06-10-2010/07-1-2010 to 31-03-2011	All kinds of service tax assessee	13%
From 01-4-2011 to date of actual deposit of Service Tax	Assesseees who fall within the purview of the term "Small Scale Sector"*.	15%
	All assesseees other than those who fall within the purview of the term "Small Scale Sector"*	18%

\* The aforementioned term “**Small Scale Sector**” means a service provider whose value of taxable services does not exceed Rs. 60 lakh during any of the years covered by the notice or during the last financial year.

### **3.3 Issue of Depositing Penalty**

**3.3.1** As far as issue of depositing penalty is concerned, the present judgment itself has not categorically specified any penalty to be deposited by the assesseees. Rather, it has left this sensitive issue at the discretion of the government. It will be worthwhile to quote the following relevant extract of **Paragraph 73** of the pronouncement:

**“On the question of penalty due to non-payment of tax, it is open to the government to examine whether any waiver or exemption can be granted.”**

**3.3.2** There has been no official communication so far from the Department side on the issue of Penalty. Under these circumstances assesseees are advised to deposit above-mentioned arrears of Service Tax along with outstanding interest. Thereafter, the assesseees should inform the Department [in a letter form as no specific format has been prescribed] in terms of Section 73(3) of the Act about the foregoing deposit of Service Tax and interest in order to avoid the possibility of issuance of any demand-cum-show cause notice by the department. Thus, to put it briefly, the assesseees need not pay any penalty. Subsequently, if any demand-cum-show-cause notice is issued by the Department, the assesseee can take plea of ‘**reasonable cause**’ [under section 80 of the Act] on the strength of first pronouncement of Delhi High Court in the case of **Home Solution Retail India Ltd. V Union of India [2009] 20 STT 129** or any other plausible reason looking into facts of a particular case. For instance, if there was bona fide belief that High Court had

granted stay, penalty is not leviable-**Scorpion Security Ltd. V CST(2007) 11 STT 280 (CESTAT)**. Similarly, if was dispute about constitutional validity on the service and tax was being challenged, imposition of penalty is not justified- **Runanubhandh Mangal Karyalaya V CCE (2008) 17 STT 329 (CESTAT) and CCE V Ruchi Soya Industries (2009) 19 STT 237 (CESTAT)**

### **3.4 Time limit for depositing arrears of Service Tax & outstanding Interest**

**3.4.1** On this vital issue, it is firstly clarified that the present ruling has not specified any time limit for depositing arrears of Service Tax and outstanding interest. However, it is needless to emphasize, that the amount to be deposited on account of foregoing Service Tax and Interest will be quite substantial in majority of the cases. Thus, the assesseees must be given some **reasonable time** for arranging large sums of money. Even practically speaking, consequent upon the pronouncement of present ruling, in all likelihood, the landlords will firstly take the help of professionals such as Chartered Accountants, Advocates for computation of arrears of Service Tax and outstanding interest to be demanded from their respective tenants. Thereafter, they will get in touch with their respective tenants regarding demand of aforementioned Service Tax & Interest. Keeping in mind the financial implications of said demand, Tenants should be allowed 'reasonable time' for arranging and paying the required sums.

**3.4.2** Thus, in view of both legal and practical considerations, it is advised that arrears of Service Tax [from 01-06-2007 to 30-09-2011] and outstanding interest [from 01-07-2010 to 30-09-2011] should be deposited latest by 05-11-2011/06-11-2011 depending upon the non-electronic/electronic mode of payment respectively. **Failure to pay aforementioned amounts by foregoing dates will attract penalty under section 76 of the Act.**

Incidentally, Service Tax for the month of October 2011 should be latest by 05-11-2011/06-11-2011, as usual.

### 3.5 Issue of Filing/Revision of Service Tax Returns

The various permutations and combinations in this respect have been exhibited in the following table:

<b>Relevant Situation</b>	<b>Practical Solution</b>
<p>Where a Service Provider (exclusively engaged in providing Renting of Immovable Property Services] has not filed Service Tax Returns from 01-06-2007 to 31-03-2011. The said service provider has taken a stay from Hon'ble Delhi High Court.</p>	<p>The Service Provider should file separate Service Tax Returns for this block of period with additional fee/late fee/Penalty of Rs. 2,000/- each in respect of each such return.</p> <p>It is worth highlighting that maximum penalty/late fee/additional fee has been increased from Rs. 2,000/- to Rs. 20,000/- w.e.f. 08-04-2011 by Finance Act, 2011. However, <b>according to our opinion</b> if service tax returns pertaining to a period prior to 07-04-2011 are filed on or after 08-04-2011, maximum penalty of Rs. 2,000/- is payable. Our aforementioned opinion is based on the principle that penalty is imposable on the basis of law operating on the date on which the wrongful act is committed. Any subsequent change in law can not be applied to past</p>

	<p>offences. The said principle has been upheld in following cases:-</p> <p>(i) P.V. Mohammad Barmay Sons V Director of Enforcement-1992(61) E.L.T. 337 (S.C.)</p> <p>(ii) Athivinayagar Wires V CCE- 1999 (106) ELT 529 (Tri.-Chennai)</p> <p>(iii) Hi-Tech. Steel Industries- 2007(211)ELT 511(Tri.-Chennai)</p> <p>It is also advisable to fill up separate challans for payment of arrears of service tax and interest for each half year.</p> <p>Besides, he should inform the concerned superintendent of Central Excise [in terms of Section 73(3) on a plain piece of paper] by giving details of deposit of Service Tax and Interest. He should attach the relevant challan evidencing payment of arrears of Service Tax &amp; outstanding Interest.</p>
<p>Where a Service Provider (exclusively engaged in providing Renting of Immovable Property Services ] has filed Service Tax Returns from 01-06-2007 to 31-03-2011 but has not paid Service Tax owing to stay obtained from relevant Hon'ble Court.</p>	<p>According to provisions of Rule 7B of Service Tax Rules, 1994, an assess may submit a Revised Return within a period of ninety days from the date of submission of the [original]return under Rule 7. Since aforementioned period of ninety days has expired in respect of each sub-period of six months between 01-06-2007 to 31-03-</p>

	<p>2011, the assessee can not revise his Service Tax Return in terms of foregoing Rule 7B. However, as mentioned in the preceding case, assessee must inform the concerned Superintendent of Central Excise in accordance with provisions of Section 73(3) of the Act.</p>
<p>What about Service Tax Return for the period 01-04-2011 to 30-09-2011</p>	<p>Since the present pronouncement has been delivered on 23-09-2011 and last date for filing Service Tax Return for the period 01-04-2011 to 30-09-2011 has not yet expired, all Service Tax assessees providing Renting Services can file their Service Tax Returns in the usual manner latest by 25-10-2011 without any additional fee/late fee leviable under section 70 read with Rule 7C of Service Tax Rules, 1994.</p>
<p>Where a service provider has rented out his several properties. Some of his tenants have paid Service Tax which has been duly deposited to the credit of Central Government. The Service Provider has filed his service tax returns for the period 01-06-2007 to 31-03-2011 in respect of services provided to these tenants. On the contrary, some of his tenants</p>	<p>After collecting arrears of Service Tax and outstanding interest from the concerned tenants, the service provider should deposit the same to the credit of Central Government. Thereafter, he should inform Superintendent of Central Excise in terms of Section 73(3) of the Act. As mentioned above, he can not revise his returns because of expiry of stipulated period of ninety days.</p>

<p>have not paid Service Tax and consequently, Service Provider has not deposited service tax in respect of these properties.</p>			
<p>Where a service provider has collected service tax from his tenants but has not paid the same to the credit of Central Government. Moreover, he has filed any Service Tax Return for the relevant period.</p>	<p>Provisions of Section 73A will be attracted in this case. Section 73A provides that Service Tax collected from any person must be deposited forthwith with Central Government. The concerned Service Provider is, therefore, advised to deposit amount of Service Tax collected alongwith Interest. Besides, he should inform the jurisdictional Superintendent of Central Excise in terms of Section 73(3) of Act before issue of SCN in terms of Section73A (3).</p>		
<p>Consequent upon refusal of concerned tenants to pay Service Tax [charged in the relevant bills]; the landlord <b>has paid Service Tax from his own pocket.</b> However, said tenants have now agreed to pay the entire amount of outstanding Service Tax with interest.</p>	<p>The amount of Service Tax received now will be divided into two parts- Values of Taxable Services and Amount of Service Tax. In order to truly understand full ramifications of this situation, following <b>example</b> is given:</p> <table border="1" data-bbox="808 1482 1409 1873"> <tr> <td data-bbox="808 1482 1110 1873"> Value of Taxable Services provided during the prior period <b>say</b> from 01-04-2009 to 31-03-2011 </td> <td data-bbox="1110 1482 1409 1873"> Rs. 10,00,000 </td> </tr> </table>	Value of Taxable Services provided during the prior period <b>say</b> from 01-04-2009 to 31-03-2011	Rs. 10,00,000
Value of Taxable Services provided during the prior period <b>say</b> from 01-04-2009 to 31-03-2011	Rs. 10,00,000		

Service Tax @ 10.30%	Rs. 1,03,000
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Consequent upon the refusal of tenants to pay Service Tax [until pronouncement of final ruling on renting], the landlord deposited Service Tax from his own pocket as per provisions of **Section 67(2)** of Act i.e. treating the amount received as inclusive of Service Tax. Thus, Rs. 10,00,000 received must have been divided as under by the landlord:

Gross Amount Received	Value of Taxable Services	Amount of Service Tax
Rs. 10,00,000	9,06,618[Rs. 10,00,000 * 100/110.3]	93,382[Rs. 10,00,000 * 10.3/110.3]

Receipt of Rs. 1,03,000/- now will again be divided as under:

Gross Amount Received	Value of Taxable Services	Amount of Service Tax
Rs. 1,03,000	93,382[Rs. 1,03,000 * 100/110.3]	Rs. 9,618[Rs. 1,03,000 * 10.3/110.3]

A point worth appreciating here that is that service provider [landlord] will collect interest on the entire outstanding

	amount of Rs. 1,03,000/- from the tenants. However, he will deposit interest to the credit of Central Government only on outstanding amount of Rs. 9,618/- . The reason is that out of total liability of Rs. 1,03,000/-, he has already paid Service Tax of Rs. 93,382/- from his own pocket.
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#### **4.0 Conclusion & latest development [Stay on Recovery of arrears of Service Tax due on or before 30.09.2011]**

**4.1** It is earnestly expected that above in-depth analysis will prove useful in answering many queries of the relevant service providers. Moreover, **in our opinion** the issue of levy of Service Tax on Commercial Renting is more or less settled now because its constitutional validity has been upheld by following five Hon'ble High Courts of our country:

<b>Name of Hon'ble High Court</b>	<b>Name &amp; citation of Relevant Case</b>
Punjab & Haryana High Court	Shumb Timb steels Ltd Vs UOI - 2010(20) S.T.R. 737 (P & H )
Orissa High Court	Utkal Builders Ltd. Vs UOI - 2011(22) S.T.R. 257 (Ori.)

Mumbai High Court	Retailers Association of India & Ors Vs UOI & Ors - 2011-TIOL-523-HC-MUM-S.T.
Gujrat High Court	Cinemax India Ltd. Vs UOI - 2011-TIOL-535-HC-Ahm-S.T.
Delhi High Court	M/s Home Solution Retail India Ltd. & Others vs. UOI and Ors-2011-TIOL_610-HC-DEL-ST-LB