Renting of Immoveable Property Service

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In this article paper writers look at the service tax implications of renting of immoveable property. There have been a lot of disputes with Central taxes being demanded even though immoveable property is state subject, leading to challenges in Courts of law and subsequent amendments in the law. Now it is clear that it is payable. The government is collecting around Rs.7000 Crores+ per annum from this service alone.

Background

The category of renting of immovable property service was introduced under service tax in the year 2007 effective 01.06.2007and was madeapplicable to immovable property for use in business or commerce".

Though the validity of levy of service tax on renting of immoveable property was questioned and Delhi High Court in the first Home Solutions Retail case held that service tax is not leviable on 'renting of immovable property', but on services in relation to 'renting of immovable property'. An appeal against Delhi High Court (2011-TIOL-610-HC-DEL-ST-LB) was filed before Supreme Court and matter is pending before Hon'ble Supreme Court, the interim order in 2011-TIOL-103-SC-ST makes it clear that there would be stay of recovery [not stay of proceeding] and further it is not applicable for service tax becoming due from 1st of October 2011.

From the above, it is clear that even though the matter is presently sub- judice there seems to be a view that liability would need to be discharged. Until the Supreme Court view on the same is clear; the revenue would be in a position to demand the same.

Renting of immoveable property under Negative List based taxation

The term renting defined in section 65B(41) is as follows- (41) "renting" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an

immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property; As can be seen that renting is defined in inclusive basis to include a leasing or other like arrangements in respect of immovable property.

The **negative list** has an entry namely services by way of renting of residential dwelling for use as a residence. This entry covers only **residential dwelling when it is for use as a residence.**

There is an exemption at Entry no. 19 of Notification 25/2012-ST dated 20.06.2012 which exempts: "*Services by a hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purposes, having declared tariff of a unit of accommodation below one thousand rupees per day or equivalent.*"

Certain Common Issues

Till recently there was uncertainty about levy, and many landlords had not been paying service tax. In addition there are some areas of confusion with regards to renting of immoveable property service discussed below.

Rentals towards fit outs and water/electricity charges

The fit out such as furniture [movable property] could be given along with the premises by landlord. The term sale includes "*transfer of the right use goods for the any purpose for cash, deferred payment or other valuable consideration*". VAT applies on the revenue towards movable fit-outs. It is a settled position of law that no service tax applicable if transaction is sale of goods and the definition of sale includes transfer of right to use goods. The service definition excludes the deemed sale of nature of transfer of right to use goods, given along with possession and control. There cannot be a service tax on the same transaction.

Also water, electricity charges could be collected by landlord. As per Section 66B read with Section 67, service tax is levied on the gross amount charged for the taxable services. These two elements i.e. water and electricity are construed to be goods and the definition of **service specifically excludes transfer of title to goods by way of sale or gift or in any other manner.** Such revenues could get excluded from the scope of service definition. Further also one of the entries in the negative list specifically excludes **'Trading of Goods'**. A view is possible that the water and electricity supply could get excluded from the definition of service or get covered under that negative entry as long as it is collected separately.

There have been a number of Tribunal matters including in ICC Realty India Private Limited & others vs C.C.Ex.ST- Pune III [2013 TIOL 1751(CESTAT-Mum)]where it was held that electricity was goods chargeable to duty under the Central Excise Tariff Act, 1986 as well as MVAT Act, 2002 [albeit at Nil rate] and hence supply of electricity was sale of goods and not provision of service.

Taxability of Jointly Owned property [Co-Owners]

Service tax is leviable on the value of taxable services provided by one person for another for a consideration. In other words, the levy is attracted on every person who is providing taxable services. As per section 68(1), every person providing taxable services is liable to pay service tax subject to small service provider exemption.

Small service provider exemption exempts from service tax the taxable services provided of the value of Rs 10 Lakhs pa, provided previous year value of taxable services is less than Rs 10 Lakhs. On perusal of the said notification, we find that the said notification talks about the aggregate value of the taxable services rendered, which should be considered for the purpose of exemption. If taxable services comes to less than Rs 10 Lakhs for each service provider, then exempted from payment of service tax.

If the rental agreement is specifically indicating that each of the co-owners are renting out the property to tenant. Also each of the co-owners received separate cheques for rent from tenant. In such scenario, each co-owner is individually considered as a provider of service, and each such service provider is eligible to small service provider exemption of Rs 10 Lakhs. As the aggregate value fails to exceed threshold limit for each co-owner service provider, service tax is not payable by them.

Also, in the numerous cases the Hon'ble CESTAT has held that benefit of SSP exemption has to be given to every owner of the property in a separate manner including in recent decision in Dutsons Builders & Estates Pvt Ltd VsC.C.Ex, Cus. & ST, Visakhapatnam-I (2014-TIOL-1930-CESTAT-BANG) where citing ManjuChampaklalBafna: 2013 (31) S.T.R. 511 (Tri.-Ahmed.) waiver of pre-deposit and stay granted where there were co-owners of the property.

Service tax on lease premium

If initially an agreement to lease the land to eligible applicants on payment of premium is entered into subject to construction of commercial buildings on the land and once the construction is completed, a lease agreement is entered into on payment of lease rental. When

the vacant land is given on lease or licence for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce, there is a possibility that service tax could be demanded on the said activity under renting of immovable property. But whether premium is liable?

As per definition of renting in Section 65B(41) includes **letting, leasing**, licensing **or other similar arrangements in respect of immovable property**; The expressions "other similar arrangements" used are expressions of width and amplitude. It would include not only the actual leasing or renting but also any other activity in relation to such leasing/renting. Therefore, the agreement to lease which is entered into prior to the actual leasing and which is in relation to the lease undertaken subsequently subject to construction of building, etc. could also come within the purview of service tax levy. Therefore, the distinction sought to be made in respect of amounts collected as a premium may not matter and the levy would apply, in both the situations.

In the view of paper writers, service tax cannot be charged on the premium or salami paid by the lessee to the lessor for transfer of interest in the property from the lessor to the lessee as this amount is not for continued enjoyment of the property leased. Since the levy of service tax is on renting of immovable property& not on transfer of interest in property from lessor to lessee, service tax would be chargeable only on the rent whether it is charged periodically or at a time in advance.

There were contradicting decisions on service tax applicability on lease premium with one set of decisions holding it is liable and another set saying it is not liable to service tax.Now there appears to be some emerging clarity. In CIDCO vs CST, Mumbai II 2014-TIOL-1858-HC-MUM-ST held that the service tax is leviable on the quantum of lease and not on the lease premium. The point covered in favour of the assessee. Pre deposit of Rs. 20 Crore ordered by Tribunal on Agency of the State, waived. Similarly order set aside and matter remanded in Greater Noida Industrial Development Authority vs CCE 2014-TIOL-1741-CESTAT-DEL.

Applicability of Service Tax on Service Apartments.

The apartments could be given on rental basis for few days or for longer periods to working men/women or students who could stay in same dwelling for a longer period. The negative list entry exempts the residential dwelling for use as residence. It does not include a hotel, motel, inn, guest house, camp site, house boat, or like places for temporary stay.

Therefore the intention seems to be covering such places where there is some sort of permanence.

Even if the dwelling could be used as a house, apartment etc for regular stay, it could be covered in this entry. It is not specifically set out in the negative list based taxation what would be considered as short stay or long stay. We could look for guidance into earlier service tax law, where the taxable service of providing an accommodation for a continuous period of less than 3 months was liable to service tax. Applying it to understand the position under negative list taxation, wherever the accommodation is provided for less than 3 months could be liable to service tax. However they maybe outside the purview if the Tariff is less than Rs. 1000/- per day. For a period of stay longer than 3 months covered in negative list entry, may not be leviable to service tax.

Eligibility to Cenvat Credit

Due to mis-information there was great resistance on part of landlords who were paying service tax to avail credits related to rentals. There was circular No. 98/1/2008-S.T under earlier law, where it had artificially restricted cenvat credit of service tax related to renting of immoveable property. Therefore credit not availed by majority of the owners of property. The circular was not in line with law and non est to that extent and credit was actually available.

As per present Cenvat credit Rules, the provider of output service can avail all eligible credits. At the same time, there is specific restriction on availing certain specified credits on inputs and input services namely:

The input definition excludes “any goods” used for construction or execution of works contract of a building or a civil structure or a part thereof or laying of foundation or making of structures for support of capital goods except for the provision of service portion in the execution of a works contact or construction service and such credits would not be available.

The input service definition excludes the following(a) Service portion in the execution of a works contract and construction of a complex, building, civil structure or a part thereof, including complex or building intended for sale to a buyer, wholly or partly, to extent used for

- Construction or execution of works contract of a building or a civil structure or a part thereof or
- Laying of foundation or making of structures for support of capital goods. However these credits would be eligible if such services are for provision of specified services mentioned above, ie service portion in works contract.

CENVAT credit on the inputs/capital goods used in the creation of immovable property was held to be admissible as per spate of decisions. So far as credit on input services used in the construction of immovable property given on rent is concerned, such credit was also held eligible in number of decisions.

Recently in M/s Laxmi Enterprise Vs CCE & ST 2014-TIOL-2042-CESTAT-AHM it was held that CENVAT Credit on inputs, input services with respect to services used in construction of immovable property which is subject to service tax under renting of immovable property eligible.

It needs to be noted such favourable decisions are under old law, and there is a possibility that specific restriction in inputs and input services definition could be used to restrict construction credits used for building or a civil structure or laying of foundation or making of structures for support of capital goods such as tanks, as on date.