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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 3398/2010 & CM 6827/2010

HOME SOLUTIONS RETAILS
LTD.

Through

..... Petitioner

Mr. Harish N. Salve, Mr. Neeraj
Kishan Kaul and Mr. S. Ganesh,
Senior Advocates with Mr. Rishi
Aggarwala, Mr. Amit Naik,
Mr. Nikhil Rohtagi and
Mr. Harshwardhan, Advocates

versus

UNION OF INDIA & ORS.

Through

..... Respondents

Mr. A.S. Chandiok, ASG with
Mr. H.C. Bhatia, Ms. Vibha Dhawan,
Mr. G.S. Parwanda, Mr. Bhagat
Singh, Advocates for R-1.

Mr. Mukesh Anand with Mr. R.C.S.
Bhadoria and Mr. Shailesh Tiwari,
Advocates for R-2 and 4.

WITH

W.P.(C) Nos. 7605/2010 & CM 19776/2010, 3398/2010 & CM
6827/2010, 3746/2010 & CM 7483/2010, 3750/2010 & CM
7486/2010, 3782/2010 & CM 7590/2010, 3783/2010 & CM
7593/2010, 3809/2010 & CM 7648/2010, 3837/2010 & CM
7716/2010, 3838/2010 & CM 7719/2010, 3856/2010 & CM
7751/2010, 3867/2010 & CM 7765/2010, 3868/2010 & CM
7767/2010, 3869/2010 & CM 7769/2010, 3881/2010 & CM
7789/2010, 3886/2010 & CM 7797/2010, 3936/2010 & CM
7880/2010, 4010/2010 & CM 7980/2010, 4025/2010 & CM
8001/2010, 4026/2010 & CMs 8003/2010 & 12696/2010, 4028/2010
& CM 8004/2010, 4050/2010 & CM 8063/2010, 4054/2010 & CM
8069/2010, 4079/2010 & CM 8101/2010, 4081/2010 & CM 8103,

4086/2010 & CM 8112/2010, 4087/2010 & CM 8114/2010,
 4091/2010 & CM 8123/2010, 4092/2010 & CM 8126/2010,
 4098/2010 & CM 8142/2010, 4115/2010 & CM 8176/2010,
 4132/2010 & CM 8216/2010, 4139/2010 & CM 8226/2010,
 4144/2010 & CM 8233/2010, 4214/2010 & CM 8367/2010,
 4216/2010 & CM 8372/2010, 4274/2010 & CM 8475/2010,
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 9021/2010, 4616/2010 & CM 9142/2010, 4650/2010 & CM
 9208/2010, 4757/2010 & CM 9435/2010, 4787/2010 & CM
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 10109/2010, 5137/2010 & CM 10125/2010, 5138/2010 & CM
 10128/2010, 5145/2010 & CM 10157/2010, 5159/2010 & CM
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13347/2010, 6750/2010 & CM 13359/2010, 6785/2010 & CM
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13619/2010, 6883/2010 & CM 13621/2010, 7032/2010 & CM
13959/2010, 7075/2010 & 14039/2010, 7106/2010 & CM
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20619/2010, 8005/2010 & CM 20664/2010, 8069/2010, 8087/2010 &
CM 20850/2010, 8088/2010 & CM 20852/2010, 8099/2010 & CM
20866/2010, 8124/2010 & CM 20947/2010

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96, 144, 155 and 156.

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Mr. Rajeev Kumar, Advocate in	Item Nos. 80 to 84, 84

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Mr. Ajit Warriar with Mr. Tarun Dua, Advocates in	Item No. 147
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Mrs. Amita Gupta with
Mr. Parveen Kumar, Advocates in Item No. 162

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for Customs, Central, Excise,
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Advocates for R-8 in

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Mr. Sumesh Dhawan with
Ms. Vatsala Kak, Advocates in

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156 for R-15.

Mr. Sumit Bansal with Mr. Ateev
Mathur and Mr. Ajay Monga,
Advocates in

Item Nos. 36 for R-6 to 8, Item
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R-5 in

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Mr. Harpreet Singh, Advocate
for R-15 in

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Ms. Rupal Bhatia, Advocate
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Mr. Rajat Aneja with Ms. Shweta Singh and Mr. Sachin Sachdeva, Advocates for R-7 to 11, Mr. B.B. Gupta, Advocate For R-36, 51, 66, 89, 90	Item No. 47
Mr. Mahesh B. Chibber, Advocate for R-12 to 16 in	Item No. 51
Mr. A.K. Mehta with Mr. Anshul Arora, Advocates for R-54 in	Item No. 54
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Ms. Anjana Gosain with Ms. Kavery Dua, Advocates for R-1/UOI in	Item Nos. 60 & 72
Mr. Digvijay Rai, Advocate for AAI in	Item Nos. 60, 72, 148
Mrs. Murti Chaudhary with Mr. Sahil Chopra, Advocates for R-5 in	Item No. 61
Mr. A.S. Chandiok, ASG with Mr. Atul Nanda and Ms. Sugandha, Advocates for R-1/UOI.	Item Nos. 65, 77, 122, 125, 126, 149, 163, 165, 167
Mr. K.K. Aggarwal, Advocate in	Item Nos. 65, 106, 156.

Mr. Neeraj Chaudhari, CGSC with Mr. Akshay Chandra, Advocate for R-1/UOI in	Item Nos. 70, 89
Mr. Keshari K. Tiwari, Advocate for Mr. Anil K. Batra, Advocate for YMCA in	Item No. 70
Mr. A.S. Chandiok, ASG with Mr. Neeraj Chaudhari, Mr. Akshay Chandra, Mr. Moit Kumar Auluck and Mr. Khalid Arshad, Advocates for UOI.	Item Nos. 89, 134 to 137, 144
Mr. Rajiv Nanda with Ms. Rachna Saxena, Advocates for Deptt. of Finance, Mr. Debesh Panda with Mr. Vaibhav Chaudhary, Advocates for R-5, Mr. Manav, Advocate for Mr. Mandeep Singh, Advocate for R-6 in	Item No. 91
Mr. Sanjeev Ailawadi, Advocate for Ajay Enterprises Pvt. Ltd. in	Item No. 94
Mr. Amish Tandon, Advocate for R-36, 37, 38 in	Item No. 106
Mr. Rajiv Nanda with Ms. Rachna Saxena, Advocates for Deptt. of Finance in	Item No. 108
Ms. Praveena Guatam with Mr. L.P. Asthana, Advocates for R-5, Ms. Bhanita Patowary, Advocate for R-7, Mr. Dinesh Kumar Gupta with Mr. Vikas Mishra, Advocates for R-12 & 34, Mr. Ruchir Bhatia, Advocate	

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with Ms. Meenua Sharma,
Advocates for R-21, Mr. Sudhir
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Mr. Nirbhay Sharma, Advocate Item Nos. 142, 145
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for R-4 in

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Mr. Nitish Gupta for R-1/UOI,
Mr. Digvijay Rai, Advocate for
R-7, Ms. Manjula Baxla, Advocate
for R-13 & 14, Mr. Sahil Mongia
with Mr. Abhishake Sharma
and Mr. Sharad Baijal, Advocates
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Advocate for R-24-25, Mr. D.D.
Dayani, Advocate for R-28 & 29 in Item No. 156

Mr. Jatan Singh, CGSC for
R-1/UOI in Item No. 157

Mr. B.V. Niren, CGSC with
Mr. Aarumugam M., Advocate
for R-1/UOI in Item No. 169

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

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ORDER
14.12.2010

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.

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.

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. Vs. UOI & 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). ”

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.

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.

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.

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.

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 & Ors. Vs. Home Solutions Retails India & 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.”

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).

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

Call on 25th January, 2011 for direction.

Interim order passed on earlier occasions shall remain in force.

CHIEF JUSTICE

MANMOHAN, J

DECEMBER 14, 2010

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