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Service Tax on AC Bar Restaurants & Hotels is Unconstitutional – Kerala HC

The Hon'ble Kerala High Court has held that the levy of Service Tax on AC Bar Restaurants and Hotels providing short term accommodation as Unconstitutional and beyond the Legislative Competence of the Parliament.

The Finance Act, 2011 inserted "Restaurant service" and "short-term accommodation service" within the ambit of taxable service w.e.f. May 1, 2011, the relevant extract of which is as under:

Section 65(105)(zzzv) of Chapter V of the Finance Act, 1994 ("the Finance Act") pertaining to AC Bar Restaurants as under:

> *"Any Service Provided or to be provided to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises;"*

Section 65(105)(zzzzw) of the Finance Act pertaining to Short term accommodation service as under:

> *"Any Service provided or to be provided to any person by a hotel, inn, guest house, club or campsite, by whatever name called, for providing of accommodation for a continuous period of less than three months;"*

The constitutional validity of the aforesaid amendment as made by the Finance Act, 2011 was challenged before the Hon'ble Kerala High Court by "the Kerala Classified Hotels and Resorts Association" **vide WP(C) 14045 of 2011** and other Hotels and Restaurants contenting that the aforesaid levy by the Central Government transgress upon the subject matter falling under Entry 54 *(Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I)* and Entry 62 *(Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling)* respectively of the List II (State List) of the Seventh Schedule of the Constitution and therefore beyond the legislative competence of the Parliament.

The Hon'ble High Court at the time of admission had granted stay against any coercive steps for recovery of service tax or against any proceedings for imposing penalty for a period of 2 months, which was later extended until further orders.

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The matter was finally heard by the Honourable High Court and has pronounced the judgment on July 3, 2013 allowing the writ petitions and held:-

- It is declared that Sub Clause (zzzzv) and (zzzzw) to Clause 105 of section 65 of the Finance Act 1994 as amended by the Finance Act 2011 is beyond the legislative competence of the Parliament as the clauses are covered by Entry 54 and Entry 62 respectively of List II of Seventh Schedule.

- That, if any payments have been made by the petitioners on the basis of the impugned clauses, they are entitled to seek refund of the same.

Food for Thought:

This judgement of the Hon'ble Kerala High Court is valid even post Negative list regime of Service tax and will open up new debate & litigation across the Country on the following points:-

- Whether application of this judgement can travel beyond territorial jurisdiction of the High Court?

- Whether the Govt. is going to accept this judgment in right spirit to extend the benefits to the Trade and Commerce?

Goods and Services Tax (GST) is going to resolve all these double taxation issues. Let's pray for early GST in the Country.

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