

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.**

**WRIT PETITION NO.2238 OF 2010
WITH
CHAMBER SUMMONS NO.128 OF 2011
AND**

WRIT PETITION NOS.2151/07, 411/08, 1319, 1399, 1400, 1424,1453, 1454, 1474, 1509, 1594, 1653, 1676, 1729, 1735,1772, 1781, 1826, 1827, 2030,2031, 2108, 2140, 2188, 2217, 2225, 2226, 2292, 2388, 2592, 2594, 2673 OF 2010, 210, 641, 777, 778, 1041 OF 2011, 1651, 1761, 2228 OF 2010, 751 OF 2011, 2227, 2543, 2141, 1475, 1476, 1477, 1478 OF 2010 & 613/11 AND APPELLATE SIDE WRIT PETITION NOS. 2417,4632, 4655, 4656, 6150 of 2011, 6775, 7910, 8737, 8747, 9213,9214 & 9861 OF 2010.

WP 2238/10 WITH CHSW 123/11:

Retailers Association of India (RAI).	...Petitioner.
Vs.	
Union of India & Ors.	...Respondents.

....

with

WP 2151/07 :

Bentley Properties Pvt. Ltd. & Anr.	...Petitioners.
Vs.	
Union of India & Ors.	...Respondents.

....

with

WP 411/08 :

M/s.Osaka Synthetics Pvt.Ltd. & Ors.	...Petitioners.
Vs.	
Union of India & Ors.	...Respondents.

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with

WP 1319/10 :

M/s.Reliance Mediaworks Ltd.	...Petitioner.
Vs.	

Union of India & Ors. ...Respondents.

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with

WP 1399/10 :

Cinemax India Limited & Anr.

...Petitioners.

Vs.

Union of India & Ors.

...Respondents.

....

with

WP 1400/10 :

Chaphalkar Brothers & Anr.

...Petitioners.

Vs.

Union of India & Ors.

...Respondents.

....

with

WP 1424/10 :

AND Designs India Ltd.

...Petitioner.

Vs.

Union of India & Ors.

...Respondents.

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with

WP 1453/10 :

Fame India Limited & Anr.

...Petitioners.

Vs.

Union of India & Ors.

...Respondents.

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with

WP 1454/10 :

Metro Shoes Limited & Anr.

...Petitioners.

Vs.

Union of India & Ors.

...Respondents.

....

with

WP 1474/2010

Shoppers Stop Limited.

..Petitioner.

versus

Union of India and 19 ors.

..Respondents.

with

WP 1509/2010 Infiniti Retail Limited versus Union of India and 52 ors	..Petitioner. ..Respondents.
with WP 1594/2010 M/s. K.G. Enterprises versus Union of India and 3 ors.	..Petitioner. ..Respondents.
with WP 1653/2010 Inox Leisure Limited and anr versus Union of India and 34 ors	..Petitioners. ..Respondents.
with WP 1676/2010 VS Retails Pvt. Ltd. and anr. versus Union of India	..Petitioners. ..Respondent.
with WP 1729/2010 Kotak Mahindra Old Mutual Life Insurance Ltd. versus Union of India and ors	..Petitioner. ..Respondents.
with WP 1735/2010 M/s.Kotak Mahindra Bank Ltd. versus Union of India and ors.	..Petitioner. ..Respondents.
with WP 1772/2010 Lifestyle International	

Pvt. Ltd. and 3 ors.

versus

Union of India

..Petitioners.

..Respondents.

with

WP 1781/2010

M/s. Canbara Constructions Pvt. Ltd.

versus

Union of India and 2 ors.

..Petitioner.

..Respondents.

with

WP 1826/2010

Devyani International Ltd.

versus

Union of India

..Petitioner

..Respondent.

with

WP 1827/2010

Barista Coffee Company Limited

versus

Union of India

..Petitioner.

..Respondent.

with

WP 2030/2010

Spa Lifesyle Pvt. Ltd. and ors.

versus

Union of India and 7 ors.

..Petitioners.

..Respondents.

with

WP 2031/2010

Spa Lifestyle Pvt. Ltd. and ors.

versus

Union of India and ors.

..Petitioners.

..Respondents.

with

WP 2108/2010

Dass Electric Trading Co.

Pvt. Ltd. and anr.

versus

..Petitioners.

Union of India and 11 ors. ..Respondents.

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with
WP 2140/2010
Welspun Retail Ltd. and ors. ..Petitioners.
versus
Union of India and ors. ..Respondents.

with
WP 2188/2010
Crown Inn Pvt. Ltd. and 3 Ors. ..Petitioners.
versus
Union of India and 17 ors. ..Respondents.

with
WP 2217/2010
Bagzone Lifestyle Pvt. Ltd. ..Petitioners.
versus
Union of India and 29 ors. ..Respondents.

with
WP 2225/2010
Planet Retail Holdings Limited ..Petitioner.
versus
Union of India and 15 ors ..Respondents.

with
WP 2226/2010
Quest Retail Private Limited ..Petitioner.
versus
Union of India and 13 ors ..Respondents.

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with
WP 2292/2010
M/s. Diageo India Pvt. Ltd. ..Petitioner.
versus
Union of India and 3 ors. ..Respondents.

with
WP 2388/2010

Dealwell Consultants Pvt.
Ltd. and anr.

..Petitioners.

versus

Union of India and 8 ors.

..Respondents.

with

WP 2592/2010

M/s. Pfizer Limited

..Petitioner.

versus

Union of India and 6 ors.

..Respondents.

with

WP 2594/2010

Paramount Usrgimed Ltd. and anr.

..Petitioners.

versus

Union of India and 13 ors

..Respondents.

with

WP 2673/2010

Genesis Colors Private
Limited and 2 ors.

..Petitioners.

versus

Union of India and 19 ors

..Respondents.

with

WP 210/2011

Provogue (India) Limited

..Petitioner.

versus

Union of India and Others

..Respondents.

with

WP 641/2011

Aditya Birla Financial
Services Pvt. Ltd.

..Petitioner.

versus

Union of India and Others

..Respondents.

with

WP 777/2011

Tangent Furniture Pvt. Ltd.

versus

Union of India and Others

..Petitioners.

..Respondents.

with

WP 778/2011

Vaman International Pvt. Ltd.

versus

Union of India and Others

..Petitioner.

..Respondents.

with

WP 1041/2011

DB Realty Limited

versus

Union of India and Others

..Petitioner.

..Respondents.

with

WP 1651/2010

PJL Clothing (India) Ltd.

versus

Union of India and Others

..Petitioner.

..Respondents.

with

WP 1761/2010

Major Brands (India) Pvt. Ltd.

versus

Union of India and Others

..Petitioner.

..Respondents.

with

WP 2228/2010

Samsonite South Asia Pvt. Ltd.

versus

Union of India and Others

..Petitioner.

..Respondents.

with

WP 751/2011

Bharat Business Channel Limited

..Petitioners.

versus
Union of India and Others ..Respondents.

with
WP 2227/2010
Samtain Sales Private Limited ..Petitioner.
versus
Union of India and Others ..Respondents.

with
WP 2543/2010
M/s. Aditya Birla Nuvo Limited ..Petitioner.
versus
Union of India and Others ..Respondents.

with
WP 2141/2010
Mahindra Retail Private Limited ..Petitioner.
versus
Union of India and Others ..Respondents.

with
WP 1475/2010
Timezone Entertainment Pvt. Ltd. ..Petitioner.
versus
Union of India and Others ..Respondents.

with
WP 1476/2010
Hypercity Retail (India) Limited ..Petitioner.
versus
Union of India and Others ..Respondents.

with
WP 1477/2010
Trent Limited and anr. ..Petitioners.
versus
Union of India and Others ..Respondents.

with
WP 1478/2010
Trent Hypermarket Limited
versus
Union of India and Others

..Petitioner.

..Respondents.

with
WP 613/2011 (Not on Board)
M/s.Pooja Deep Industries.
versus
Union of India & Ors.

...Petitioner.

...Respondents.

APPELLATE SIDE WRIT PETITIONS

with
WP 6743/2010
RTC Restaurants (India) Ltd.
versus
Union of India and Others

..Petitioner.

..Respondents.

with
WP 6775/2010
Niit Limited
versus
Union of India and Others

..Petitioner.

..Respondents.

with
WP 7910/2010
Bata India Limited
versus
Union of India and Others

..Petitioner.

..Respondents.

with
WP 8737/2010
Hardcastle Restaurants Private
Limited and anr.
versus
Union of India and Others

..Petitioners.

..Respondents.

with
WP 8747/2010
Fabindia Overseas Pvt. Ltd. and anr. ..Petitioners.
versus
Union of India and Others ..Respondents.

with
WP 9213/2010
Cinemax India Limited and anr. ..Petitioners.
versus
Union of India and Others ..Respondents.

with
WP 9214/2010
Inox Leisure Limited and anr. ..Petitioners.
versus
Union of India and Others ..Respondents.

with
WP 9861/2010
Niit Technologies Limited ..Petitioner.
versus
Union of India and Others ..Respondents.

with
WP 2417/2011
Barbeque Nation Hospitality Limited ..Petitioner.
versus
Union of India and Others ..Respondents.

with
WP 4632/2011
Piramal Healthcare Limited ...Petitioner.
versus
The Union of India and ors. ...Respondents

with

WP 4655/2011

Abbott Truecare Pharma Pvt. Ltd.

...Petitioner

versus

The Union of India and Ors.

...Respondents.

with

WP 4656/2011

Abbott Healthcare Pvt.Limited.

...Petitioner.

versus

The Union of India and Ors.

...Respondents.

with

WP 6150/2011

Piramal Life Sciences Ltd.

...Petitioner.

versus

The Union of India and Ors.

...Respondents.

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Mr.Aspi Chinoy, Senior Advocate with Mr.Vineet Naik, Mr.Ameet Naik, Mr.Vatsal Shah, Mr.Lavin C.Hirani and Mr.Vaibhav M.Bhure i/b. Naik Naik & Company for the Petitioner in WP 2238/10.

Mr.D.J.Khambata, Additional Solicitor General, with Mr.Arif Doctor, Mr.Aashish Agarwal, Mr.Gautam Ankhad, Mr.Aditya Mehta, Mr.Rohan Cama, Ms.Naira Variava, Mr.Vikram Deshmukh and Mr.Afroz Shah i/b. Mr.Pardeshi for Union of India in all matters.

Mr.Suresh S.Pakale for the Director General of Service Tax & Central Excise Department in all matters.

Mr.R.V.Desai, Senior Advocate with Mr.R.B.Pardeshi for the Commissioner of Service Tax in all matter.

Ms.Faiza Dhanani i/b. Dhruve Liladhar & Co. for the Applicant in Chsw 128/11.

Mr.Vijay A.Sonpal, A Panel Counsel for the State of Maharashtra in WPs 1640/10, 7910/10, 2417/11, 6775/10 & 9861/10.

Mr.J.J.Bhatt, Senior Advocate with Mr.Ameet B.Naik, Mr.Vatsal Shah, Mr.Lavin Hirani and Mr.Vaibhav M.Bhure i/b. Naik Naik & Co. for the Petitioners in WPs 1509, 1676, 1772, 2030, 2031, 2108, 2188, 1651, 1761, 1424, 1453 and 1454 of 2010 and for Respondent No.7 in WP 530/09 and Respondent No.20 in WP 1474/10.

Mr.Navroz Seervai, Senior Advocate with Mr.Ajay Fernandes and Mr.Ranjit Raghunath i/b. Malvi Ranchhoddas & Co. for the Petitioner in WP 2151/07.

Mr.Janak Dwarkadas, Senior Advocate with Ms.Hemlata Jain, Mr.Zal Andhyarujina, Mr.Kunal Vajani, Mr.Ankit Virmani i/b. M/s.Wadia Ghandy & Co. for the Petitioners in WPs 1474, 1475 & 1476 of 2010.

Mr.Sharan Jagtiani with Mr.Kunal Vajani, Mr.Ankit Virmani i/b.Wadia Ghandy & Co. for the Petitioners in WPs 1477 & 1478 of 2010.

Mr.V.Sridharan with Mr.Prakash Shah, Mr.Bharat Raichandani i/b.PDS Legal for the Petitioners in WPs 1640, 7910 of 2010, WP 2417/11, WP 6775/10 & WP 9861/10.

Mr.Vikram Nankani with Mr.Sushanth Murthy, Mr.Nitya Bagaria and Mr.Monish Panda i/b. Mr.M.R.Baya for the Petitioners in WPs 1781, 1735, 1729, 1319, 2292, 2592 of 2010 and WP 641/11.

Mr.Cyrus Bharucha with Mr.Bruno Castellino i/b.M.Mulla Associates for the Petitioner in WP 2388/10.

Mr.Hiren Mehta for the Petitioner in WP 2141/10.

Mr.Jitendra Jain with Mr.Suresh Kumar in WP 2225, 2226 & 2217 of 2010.

Mr.Jaydeep Deo with Mr.Parag Vyas for the Petitioner in WP 2673/10.

Mr.Prakash Shah with Mr.Mihir Deshmukh i/b.PDS Legal in WPs 4632, 4655, 4656 & 6150 of 2011 and for Respondent No.10 in WP 1424/10, Respondent No.23 in WP 1454/10, Respondent No. 18 in WP 1474/10, Respondent No.7 in WP 2030/10, Respondent No.7 in WP 2217/10, Respondent No.11 in WP 2225/10, Respondent No.6 in WP 2226/10, Respondent No.8 in WP 2388, 2673, 1651 & 8747 of 2010.

Mr.Nivit Srivastava for the Petitioners in WPs 777, 778 of 2011 and for Respondent No.17 in WP 1453/10 and for the Petitioner in WP 613 of 2011 (not on board).

Mr.Devesh Juvekar with Mr.H.K.Sudhakara i/b. Khaitan & Co. for the Petitioners in WPs 1399, 1400, 1453, 1454, 1653 of 2010 A.S. WPs 8737, 8747, 9213 & 9214 of 2010 and for Respondent No.13 in WPs 1453 & 1454 of 2010.

Mr.M.I.Sethna, Senior Advocate with Mr.Jitendra B.Mishra for the Respondents in WP 2151/07 & WP 411/08.

Mr.Haribhau Deshinge i/b.Mr.Nitin Jamdar for Respondent No.17 in WP 1399/10, Respondent No.19 in WP 1454/10, Respondent No.21 in WP 1827/10, Respondent No.15 in WP 1518/10 and Respondent No.6 in WP 1475/10.

Mr.Chirag Balsara with Ms.Kirtida Chandarana and Mr.Nikhil Pai i/b. Mahernosh Humranwala for Respondent No.11 in WP 1424/10, Respondent No.6 in WP 1453/10, Respondent No.12 in WP 1454/10, Respondent No.14 in WP 1474/10, Respondent No. 10 in WP 1826/10, Respondent No.7 in WP 1827/10, Respondent No.34 in WP 2140/10, Respondent No.18 in WP 2217/10, Respondent Nos.13 and 16 in WP 2225/10, Respondent No.13 in WP 2226/10, Respondent No.7 in WP 2388/10, Respondent No.11 in WP 2594/10, Respondent No.7 in WP 2673/10, Respondent No. 6 in WP 1651/10, Respondent No.20 in WP 1761/10, Respondent No.7 in WP 2228/10, Respondent No.5 in WP 1476/10, Respondent No.5 in ASWP 6743/10 and Respondent No.29 in WP 8737/10.

Mr.Bhavik Manek i/b. Wadia Ghandhy & Co. for Respondent No.12 in WP 1509/10, Respondent No.9 in WP 1676/10 and Respondent No.17 in WP 2217/10.

Mr.P.Kumar Jain i/b. Prakash Punjabi & Co. for Respondent No.41 in WP 1509/10, Respondent No.25 in WP 1827/10, Respondent No.12 in WP 2594/10 and Respondent No.13 in ASWP 8747/10.

Mr.Mandar M.Goswami for Respondent Nos.1 to 4 in WP 1826/10.

Mr.R.Ashokan with Mr.S.D.Bhosale for Respondent Nos.4 & 5 in WP 2108/10.

Mr.Shishir Joshi i/b. Ms.Priti S.Joshi for Respondent No.14 in WP 2140/10 and Respondent No.7 in ASWP 8747/10.

Mr.Kiran Gandhi with Ms.Shyamali Gadre i/b. Little & Co. for Respondent No.6 in WP 2188/10.

Ms.Sukhada Wagle i/b.Hariani & Co. for Respondent No.9

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**CORAM : DR.D.Y.CHANDRACHUD AND
ANOOP V. MOHTA, JJ.**

August 4, 2011.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

Service tax on renting:

In 1994, Parliament legislated to provide for the imposition of a service tax. Section 65 of the Finance Act of 1994 defined taxable services, among other things. Section 66 provided for the charge of service tax on taxable services. Section 67 dealt

with the valuation of taxable services for charging service tax. Section 68 provided for the payment of service tax. Section 66 stipulated that there shall be levied a tax at the rate of 12% “of the value of taxable services” referred to in clause (105) of Section 65. Among the taxable services is the taxable service in sub-clause (zzzz), to which the constitutional challenge in these proceedings relates. Sub-clause (zzzz) was initially inserted by the Finance Act of 2007 with effect from 1 June 2007. Taxable service was defined to mean “any 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 expression “renting of immovable property” was defined in clause (90)(a) of Section 65 as follows :

“(90a) “renting of immovable property” includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include-

(i) renting of immovable property by a religious body or to a religious body; or

(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre;”

2. A notification was issued on 22 May 2007 which was followed by a circular dated 4 January 2008 of the Ministry of Finance in the Union Government. The legality of the notification and of the circular was questioned in proceedings before the Delhi High Court in which it was contended that as a result of an erroneous interpretation of the provisions of Section 65(105)(zzzz) and of Section 65(90)(a), service tax was sought to be levied on the **renting** of immovable property as opposed to the levy of service tax on a service provided “**in relation to renting** of immovable property”. This issue was decided by a Division Bench of the Delhi High Court in **Home Solution Retail India Ltd. vs. Union of India**¹ on 18 April 2009. A Division Bench of the Delhi High Court held that service tax was a value added tax and there was no value addition which could be discerned from the renting of immovable property for use in the course or furtherance of business. The view of the Delhi High Court was that Section 65(105)(zzzz) did not in terms entail that the renting out of immovable property for use in the course or furtherance of business

¹ 2009 DLT 722 (DB)

or commerce would constitute a taxable service and be exigible to service tax. The notification and the circular issued by the Union Government were consequently held to be *ultra vires* the Act and were set aside to the extent that they authorised the levy of service tax on renting of immovable property. The Delhi High Court did not decide the constitutional challenge for, in the course of the concluding paragraph of the judgment, the Division Bench noted that it was not examining the plea in challenge to the legislative competence of Parliament in the context of Entry 49 of List II of the Seventh Schedule to the Constitution.

3. Following the decision of the Delhi High Court, the Finance Act, 2010 substituted the provisions of sub-clause (zzzz) with effect from 1 June 2007. As amended, the provision now stipulates that the expression taxable service means any service provided or to be provided:

“To any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course or for furtherance of, business or commerce.”

The challenge in this batch of Petitions before the Court is to the

constitutional validity of the imposition of a service tax under sub-clause (zzzz) of clause (105) of Section 65 read with Section 66 of the Finance Act of 1994 as amended.

Submissions:

4. The submissions which have been urged before the Court by Counsel appearing on behalf of the Petitioners raise three areas of challenge : (i) The imposition of a service tax on an activity involving renting of immovable property, it is urged, is substantively *ultra vires* the charging section. The submission proceeds on the basis that the essence of a service tax is the rendering of a service or a value addition and in the case of renting of immovable property, no service is involved; (ii) The legislative competence of Parliament is questioned on the ground that the tax is on renting of immovable property which, according to the Petitioners, would fall within the legislative competence of the States under Entry 49 of List II of the Seventh Schedule to the Constitution; (iii) The levy of a service tax on renting of immovable property with retrospective effect from 1 June 2007 has been questioned.

The four service tax decisions of the Supreme Court:

5. Before we deal with the submissions which have been urged on behalf of the Petitioners, it would be necessary to trace briefly the evolution of judicial thought on the issue of the imposition of service tax. A reference would have to be made to four decisions of the Supreme Court in which the controversy was analysed.

6. In **Tamil Nadu Kalyana Mandapam Association vs. Union of India**,² the Supreme Court considered in appeal, a challenge to the imposition of a service tax upon Kalyana Mandapams and Mandap Keepers which had been held to be *intra vires* the Constitution by the Madras High Court. Taxable service in Section 65(41) had been defined to mean in sub clause (p) a service provided to a client by a mandap-keeper in relation to the use of a mandap in any manner including the facilities provided to the client in relation to such use and to include services rendered as a caterer. The Supreme Court held that service tax was imposed

2 (2004) 5 SCC 632

by Parliament in pursuance of its residuary powers under Entry 97 of List I read with Article 246. The Supreme Court held that the tax was not a tax on land within the meaning of Entry 49 List II since to constitute a tax on land, “it must be a tax directly on land and a tax on income from land cannot come within the purview of the said entry”. The Supreme Court laid down that since there was no specific entry in List II or List III of the Seventh Schedule, the question of Parliament lacking legislative competence would not arise. The Court noted that the mere fact that service tax was levied as a percentage of gross charges for catering would not alter the legislative competence of Parliament, for it is well settled that the measure of taxation cannot affect the nature of taxation. The Supreme Court ruled that the competence of Parliament to enact the legislation would not depend upon whether, as a matter of fact, any service was made available by a Mandap Keeper. Moreover, as the Supreme Court noted, the tax could not be struck down on the ground of a lack of legislative competence on an enquiry as to whether the definition accorded with a layman’s perspective of what is meant by a service. So long as the Act did not transgress a specific restriction contained in the Constitution the legislative

competence of Parliament could not be questioned on the ground that a particular kind of service as legislated upon did not conform to the common understanding of the word “service”.

7. The decision in **Tamil Nadu Mandapam** was followed by a subsequent judgment in **Gujarat Ambuja Cement Ltd. vs. Union of India**.³ The decision in **Gujarat Ambuja** once again reiterated that the legislation enacted by Parliament for the imposition of a service tax is traceable to the residuary powers of Parliament under Entry 97 of List I. In **Gujarat Ambuja**, the Court ruled that since service tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, there was no substance in the contention that in pith and substance the Act fell within the exclusive legislative power of the State under Entry 56 of List II.

8. The third decision of the Supreme Court to which a reference would be necessary is the decision in **All India Federation of Tax Practitioners vs. Union of India**.⁴ By that

³ AIR 2005 SC 3020

⁴ (2007) 7 SCC 527

decision, the Supreme Court reiterated the principle that the imposition of a service tax falls within the purview of the legislative competence of Parliament under Entry 97 of List I. The Supreme Court noted in the course of the judgment that a service tax is a tax on value addition by rendition of services and that with the enactment of the Finance Act of 1994, the Central Government derived this authority from residuary Entry 97 of the Union List for levying a tax on services. The Supreme Court held that the service tax was not a profession tax within the meaning of Entry 60 of List II, because the tax was levied on a service provided and was not a tax on the status of a profession.

9. In **Association of Leasing and Financial Service Companies vs. Union of India**,⁵ the Supreme Court noted that on three previous occasions, the Court had upheld the levy of service tax under Entry 97 of List I as against challenges to the competence of Parliament based on entries in List II. The Supreme Court held that the taxable event under the legislation is the rendition of service and the tax is not on material or sale. The Court upheld the

5 (2011) 2 SCC 352

validity of the levy of a service tax on the value of taxable services referred to in Section 65(105)(zm), being services rendered to any person by a banking company or a financial institution, including a Non-Banking Financial Company or any other body corporate or commercial concern in relation to banking and other financial services.

10. Now, in the backdrop of these decisions it is necessary for the Court to address the constitutional challenge in these petitions.

Legislative Competence :

11. The constitutional challenge to the legislative competence of Parliament is premised on the submission that the tax which has been imposed on a taxable service which is defined to mean renting of immovable property is a tax on lands and buildings within the meaning of Entry 49 of List II of the Seventh Schedule. The contention of the Petitioners is that all four judgments of the Supreme Court to which a reference has been made earlier, did not deal with a situation where the legislation

would fall within the purview of a specific entry in List II. The submission before the Court is that (i) Article 246 of the Constitution empowers the State legislature to make laws “with respect to any of the matters enumerated in List II”; (ii) In consequence, the power of the State Legislature is not only to make laws imposing taxes on lands and buildings, but to enact legislation with respect to taxes on lands and buildings; (iii) Entry 49 of List II must receive the broadest possible interpretation and amplitude; (iv) Especially when read in the context of Entry 97 of List I, the width and ambit of Entry 49 of List II cannot be curtailed with reference to the residuary power of Parliament; and (v) A tax whether levied on the basis of rent, annual value, or capital value would constitute a tax on lands having regard to the ambit of Entry 49 of List II. A tax based on leasing of a land and computed by rental value cannot be rested on Entry 97 of List I because it is in substance, a tax on a transaction of letting of land and Entry 49 of List II would preclude a levy by Parliament of a service tax on letting.

12. The legislative power of Parliament and of the State

Legislature to enact legislation is contained in Article 245 of the Constitution. Parliament has, by Article 246(1), exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. This power of Parliament is prefaced by an overriding non-obstante provision. Similarly, under Article 246(3) the power of the Legislature of a State is, subject to clause (1) of Article 246 (and clause (2) which deals with the concurrent power in List III) to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule. In determining as to whether a legislation enacted by Parliament transgresses upon a field falling within the exclusive legislative power of the State, the test which is to be applied is whether the law falls within the ambit and purview of a legislative entry in List II of the Seventh Schedule. If the answer to that question is in the negative, the legislative competence of Parliament cannot be in question. If the subject on which Parliament has enacted legislation is found, upon determining its true nature and character not to fall within the purview of a field reserved to the States, Parliament would have legislative competence in any event under Entry 97 of List I read with Article 248. The essential question that falls for

determination in the present case is as to whether the levy of a service tax on a taxable service which Parliament defined to be the renting of immovable property falls within the exclusive province of the State Legislatures under Entry 49 of List II. The scope and ambit of Entry 49 of List II has fallen for interpretation in several judgments of the Supreme Court to which it would now be necessary to turn.

Taxes on lands and buildings :

13. In **Ralla Ram vs. The Province of East Punjab**,⁶ the issue before the Federal Court was whether the provisions of the Punjab Urban Immovable Property Tax Act, 1940, fell beyond the legislative competence of the provincial legislatures. Section 3 of the Act provided a charge of an annual tax on buildings and lands situated in the rating areas as stipulated in the Schedule at a particular rate. The annual value of the land or building was to be ascertained by estimating the gross annual rent at which land or building may be let for use or employment or which such building might reasonably be expected to let from year to year. The

6 AIR 1949 FC 81

contention of the Appellant was that the Act should be held to be a tax on income which was outside the authorised field of the provincial legislature since the basis of the tax was the annual value of property. The Federal Court held that merely because the Income Tax Act adopted annual value as the standard for determining income, it would not necessarily follow that if the same standard were to be employed as a measure for any other tax, that tax also became a tax on income. Annual value, in other words, was a measure of the tax. **Ralla Ram's** case is an authority for the proposition that it is the essential nature of the tax and not the nature of the machinery which must be looked at in determining the validity of the impost.

14. A Constitution Bench of the Supreme Court in **Sudhir Chandra vs. Wealth Tax Officer**,⁷ dealt with a challenge to the constitutional validity of the Wealth Tax Act of 1957. The legislation was questioned on the ground that it transgressed upon a field reserved to the State Legislature under Entry 49 of List II. While explaining the scope of Entry 49, the Supreme Court held as

7 AIR 1969 SC 59

follows:

“But the legislative authority of Parliament is not determined by visualizing the possibility of exceptional cases of taxes under two different heads operating similarly on taxpayers. Again **entry 49, List II of the Seventh Schedule contemplates the levy of tax on lands and buildings or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it.** Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee.” (emphasis supplied).

15. Another Constitution Bench of the Supreme Court in **Second Gift Tax Officer, Mangalore vs. D.H.Hazareth**,⁸ considered the constitutional validity of the Gift Tax Act, 1958. The Constitution Bench held that the Act was within the legislative competence of Parliament under Entry 97 of the Union List read with Article 248 of the Constitution. The Supreme Court ruled that “unless a tax is specifically mentioned, it cannot be imposed except by Parliament in the exercise of its residuary powers”. The Court ruled that however wide a taxing entry in the State List may be, it would still not authorise a tax which is not expressly mentioned. If

8 AIR 1970 SC 999

the pith and substance of the law did not fall within the purview of Entry 49 of the State List, Parliament, it was held, would undoubtedly possess that power under Article 248 and Entry 97 of the Union List. While holding that the Gift Tax Act, 1958 was not a tax on lands and buildings, the Constitution Bench came to the conclusion that Entry 49 postulates a tax resting upon the general ownership of lands and buildings and a tax which is imposed directly upon lands and buildings :

“The pith and substance of Gift Tax Act is to place the tax on the gift of property which may include land and buildings. It is not a tax imposed directly upon lands and buildings but is a tax upon the value of the total gifts made in an year which is above the exempted limit. There is no tax upon lands or buildings as units of taxation. Indeed the lands and buildings are valued to find out the total amount of the gift and what is taxed is the gift. The value of the lands and buildings is only the measure of the value of the gift. A gift-tax is thus not a tax on lands and buildings as such which is a tax resting upon general ownership of lands and buildings but is a levy upon a particular use, which is transmission of title by gift. The two are not the same thing and the incidence of the tax is not the same. Since Entry 49 of the State List contemplates a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament. There being no other entry which covers a gift tax, the residuary powers of Parliament could be exercised to enact a law.” (emphasis supplied).

16. This principle was reiterated subsequently in a judgment of the Constitution Bench in **D.G.Gose & Co. vs. State of Kerala**.⁹ The Constitution Bench held that a tax on buildings is “a direct tax on the assessee’s buildings as such, and is not a personal tax without reference to any particular property”. If the State Legislature was competent to levy a tax on buildings, it was open to it to decide how best to levy it. If the tax was to be annual, one of the modes of levying tax would be the annual value of the building. Equally, if the State Legislature decided to impose a non-recurring tax on buildings, the measure of the tax could be capital value of the building computed on the basis of the capital cost of construction, the market value or on the basis of the rent multiplied by a factor which the legislature may determine.

17. Finally, on this aspect of the case, it would be necessary to advert to the judgment of seven Judges of the Supreme Court in **India Cement Ltd. vs. State of Tamil Nadu**.¹⁰ The Supreme Court in the course of its judgment noted that “there is a clear distinction between tax directly on land and tax on income arising from land”.

9 (1980) 2 SCC 410

10 AIR 1990 SC 85

The principle that a tax on lands and buildings would not comprehend within its purview a tax on income arising from land or building was earlier enunciated in a judgment of two Learned Judges of the Supreme Court in **Bhagwan Dass Jain vs. Union of India**.¹¹ The Supreme Court held there that the tax levied under the Income Tax Act, 1961 on income “though computed in an artificial way from house property” was levied on the income and not house property and therefore, did not fall within the purview of Entry 49 of List II.

18. These judgments of the Supreme Court clearly indicate that the settled principle of law is that a tax on lands and buildings is a tax on the general ownership of lands and buildings. In order that a tax must fall under Entry 49 of List II, the tax must be one directly on lands and buildings. A tax which is levied on the income which is received from lands or buildings is not a tax on lands or buildings. A tax levied on an activity or service rendered on or in connection with lands and buildings does not fall within the description of a tax on lands and buildings.

11 AIR 1981 SC 907

19. But, the submission which has been urged on behalf of the Petitioners is that a tax on land within the meaning of Entry 49 of List II can take into account the use to which the land is put. The service tax imposed by Parliament on renting of immovable property, it was urged, takes account of the user of the land or building. Hence, the argument postulates that this is a tax which the State legislatures could conceivably impose under Entry 49 of List II. In order to buttress this submission, a reference was made to a judgment of the Supreme Court in **Ajoy Kumar Mukherjee vs. Local Board of Barpeta**.¹² In that case, a tax was imposed under Section 62 of the Assam Local Self-Government Act, 1953. Section 62(1) stipulated that the local Board may order that no land shall be used as a market otherwise than under a licence to be granted by the Board. Under sub-section (2) which was the charging provision, it was stipulated that on the issue of an order under sub-section (1), the Board may grant a licence for the use of any land as a market and impose an annual tax thereon. While upholding the validity of the tax, the Supreme Court noted that the tax was,

12 AIR 1965 SC 1561

in substance, a tax on the land but the charge only arises on land which was used for a market. This is evident from the following observations in the judgment :

“It seems to us on a close reading of sub-section (2) that when that sub-section speaks of “annual tax thereon”, the tax is on the land but the charge arises only when the land is used for a market. This will also be clear from the subsequent provisions of Section 62 which show that the tax is on land though its imposition depends upon user of the land as a market. Sub-section (3) shows that as soon as sub-section (1) and (2) are complied with, the local board shall make an order that the owner of any land used as a market shall take out the licence. Thus the tax is on the land and it is the owner of the land who has to take out the licence for its use as a market. The form of the tax i.e. its being an annual tax as contrasted to a tax for each day on which the market is held also shows that in essence the tax is on land and not on the market held thereon. Further the tax is not imposed on any transactions in the market by persons who come there for business which again shows that it is an impost on land and not on the market i.e. on the business therein. Then sub-section (5) provides that the tax shall be paid by the owner of any land used as a market which again shows that it is on the land that the tax is levied, though the charge arises when it is used as a market.” (emphasis supplied).

The Supreme Court held that the tax in that case was a tax on land though its incidence depended upon the use of the land as a market. **Ajoy Kumar Mukherjee’s** case, therefore, is clearly an

authority for the proposition that in order to be a tax on land, the charge under the legislation must be on the land as a unit. The decision of the Supreme Court in **Goodricke Group Ltd. vs. State of W.B.**,¹³ dealt with a challenge to the validity of a cess imposed under the West Bengal Rural Employment and Production Act, 1976. Section 4(1) levied the cess on all immovable properties on which a road or public work cess is assessed or liable to be assessed. By an Amending Act of 1981, the rural employment cess was to be levied in respect of land other than tea estates at a stipulated rate of development value and in respect of a tea estate at a rate prescribed on the despatches from the tea estate. In **Buxa Dooars Tea Co. Ltd. vs. State of W.B.**,¹⁴ a Bench of two Learned Judges had come to the conclusion that the measure of the tax, namely, despatches of tea did not bear a reasonable nexus to the character of the levy. Upon the invalidation of the levy, the Act was amended so as to stipulate that rural employment cess shall be levied annually on a tea estate at a stipulated rate based on the production of tea leaves. The levy was challenged in **Goodricke** on the ground that it was not a tax on lands and buildings. The

¹³ 1995 Supp (1) SCC 707

¹⁴ (1989) 3 SCC 211

Supreme Court held that the subject matter of the tax and the levy was land. The entire land covered in the tea estate was treated as a separate category of land as a unit for the purposes of the levy of tax. Merely because a tax on lands or buildings is imposed with reference to the income or yield of lands or buildings, it would not cease to be a tax on lands or buildings. The income or yield would only constitute a measure of the tax and would not alter the nature or character of the levy. The cess was calculated on the basis of the yield but that, ruled the Supreme Court, was only a measure of the tax. The tax continued to be a tax upon the land which was classified as a separate category and as a separate unit for the purposes of levy and the assessment of the cess quantified on the basis of the quantum of produce of the tea estate. The tax in **Goodricke** was, therefore, clearly a tax on land as a unit, the measure of tax being the yield of the land.

The residuary power of Parliament to legislate :

20. The decision of Seven Judges of the Supreme Court in **Union of India vs. H.S.Dhillon**¹⁵ is significant both in the context

15 AIR 1972 SC 1061

of the ambit of the residuary powers under Entry 97 of List I as well as in defining the ambit of the legislative entry contained in Entry 49 of List II. The decision in **Dhillon's** case arose out of a judgment of the High Court of Punjab and Haryana which had held that the amended provisions of the Wealth Tax Act, 1957 were *ultra vires* the Constitution of India in so far as they included the capital value of agricultural land for the purposes of computing net wealth. Chief Justice Sikri, who delivered the judgment for the majority, laid down the principle that when the legislative competence of Parliament to enact a law is questioned, the only question that arises for consideration is as to whether the law is with respect to a matter or tax which is within an entry in List II. If the answer to that is in the negative, no question has to be asked about List I because Parliament would in any event have the power to make laws with respect to the matter or tax in exercise of its residuary powers to legislate:

“Be that as it may, we have the three lists and a residuary power and therefore it seems to us that in this context; if a Central Act is challenged, as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises.”

Chief Justice Sikri adverted to the judgment of the Supreme Court in **Assistant Commissioner of Urban Land Tax vs. Buckingham & Carnatic Co. Ltd.**,¹⁶ in which it was held that a tax on lands and buildings is one which is directly imposed on lands and buildings and bears a definite relation to it. Similarly, there was a reference to the decision in **Hazareth's** case (supra) which ruled that Entry 49 of the State List contemplates a tax directly levied by reason of the general ownership of lands and buildings and would not include a gift tax as levied by Parliament. The ambit of the expression "tax on lands and buildings" under Entry 49 of List II was summarised thus in the judgment in **Dhillon** :

"(1) It must be a tax on units, that is lands and buildings separately as units.

(2) The Tax cannot be a tax on totality, i.e. it is not a composite tax on the value of all lands and buildings.

(3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns or occupies it or two or more persons own or occupy it."

The Court held that a tax under Entry 49 of List II is not a personal

16 AIR 1970 SC 169

tax, but a tax on property. Significantly the Court held that the residuary power is as much a power as the power conferred under Article 246 of the Constitution in respect of a specified item.

21. In **Sat Pal & Co. vs. Lt. Governor of Delhi**,¹⁷ a Bench of two Learned Judges of the Supreme Court held that the scope and ambit of Entry 97 ought not to be whittled down or circumscribed by a process of interpretation and in that context observed as follows :

“Complex modern governmental administration in a federal set up providing distribution of legislative powers coupled with power of judicial review may raise such situations that a subject of legislation may not squarely fall in any specific entry in List I or III. Simultaneously on correct appraisal it may not be covered by any entry in List II though apparently or on a superficial view it may be covered by an entry in List II. In such a situation Parliament would have power to legislate on the subject in exercise of residuary power under Entry 97, List I and it would not be proper to unduly circumscribe, corrode or whittle down this power by saying that subject of legislation was present to the mind of the framers of the Constitution because apparently it falls in one of the entries in List II and thereby deny power to legislate under Entry 97. The history of freedom struggle demonstrates in unequivocal terms the importance of residuary power of legislation being conferred on Parliament. Therefore, the scope and ambit of Entry 97 need not be whittled down or circumscribed by a process

17 AIR 1979 SC 1550

of interpretation. In any case majority decision in Dhillon's case is neither overruled nor departed from in Kesavananda's case. Accordingly, once the power of Parliament to legislate on a topic is not expressly taken away by any constitutional provision, it remains intact under Entry 97 of List I."

In the decision in **Gujarat Ambuja Cement Ltd.** (supra), the Supreme Court, while determining the scope of the legislative entries contained in Entry 97 of List I and Entry 56 of List II held that although generally speaking a liberal interpretation must be given to a taxing entry, this would not bring within its purview, a tax on a subject matter which a fair reading of the entry does not cover. Consequently, it was held that if in substance, the statute is not referable to the field given to the States, the Court will not by any principle of interpretation allow the statute not covered by it to intrude upon this field.

22. The decision in **International Tourist Corporation vs. State of Haryana**,¹⁸ involved a situation where the State of Haryana had levied a tax on passengers and goods carried by motor vehicles. The constitutional validity of Section 3(3) of the

18(1981) 2 SCC 318

Punjab Passengers and Goods Taxation Act, 1952 was questioned in so far as it permitted the levy of a tax on passengers and goods carried by carriages plying along the national highways. The submission of the Appellants before the Supreme Court relying on the judgment in **Dhillon's** case was that there was nothing in the Constitution to prevent Parliament from legislating upon the subject and the power to legislate with respect to tax on passengers and goods carried on national highways would lie within the exclusive legislative competence of Parliament. While repelling that submission, the Supreme Court held thus:

“Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State legislature must be clearly established. Entry 97 itself is specific in that a matter can be brought under that Entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those Lists. In a Federal Constitution like ours where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislature. That might affect and jeopardise the very federal principle. The federal nature of the Constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle state autonomy must be rejected. ... It is, therefore, but proper that where the

competing entries are an entry in List II and Entry 97 of List I, the entry in the State List must be given a broad and plentiful interpretation.”

23. The legislative entries contained in the three lists of the Seventh Schedule to the Constitution must of necessity receive a broad and liberal construction. Parliament and the State legislatures have the power to make laws with respect to the matters enunciated in the Union and State lists under clauses 1 and 3 respectively of Article 246. The power conferred upon Parliament by Article 246(1) is notwithstanding anything contained in clauses 2 and 3. The power of the State legislature under Article 246(3) is subject to clauses 1 and 2. The Constitution is an organic document. While construing the conferment of legislative power and the fields of legislation which are carved out in the three lists of the Seventh Schedule, as a matter of first principle, there is no reason to curtail the scope and ambit of constitutional provisions by an artificial process of construction.¹⁹

At the same time the Court must of necessity decide as to whether

¹⁹In **Federation of Hotels & Restaurant Association of India vs. Union of India**, AIR 1990 SC 1637, a five judge bench of the Supreme Court has held that different aspects of the same transaction can be taxed where one aspect falls under Entry 97 of List-I and the other falls under List-II.

a topic of legislation is within the ordinary and natural connotation of the field that is set apart in a legislative entry. The judgment in **International Tourist Corporation** does not obviate such an exercise. **International Tourist Corporation** does not – as it could not have – lay down principles contrary to the earlier decisions. The residuary power postulates that a subject does not fall within List II or List III. But to decide that, it has to be determined whether that subject does fall within the natural and proper scope of an entry in List II or III. A subject which does not fall within any Entry in List II cannot be held to fall within that list on an artificial construction so as to invalidate a law enacted by Parliament. For instance, while the Court must give a broad and liberal interpretation to Entry 49 of List II, the interpretation to be placed on that entry must nevertheless be meaningful. In each case, the Court must have regard to the true nature and character of the levy in determining as to whether in pith and substance, the tax is a tax on land and buildings. If the essential nature of the levy is the imposition of a tax on land and buildings, it would fall within Entry 49 of List II. If on the other hand, the essential nature and character of the levy is not a tax on land and buildings, then the

exercise of interpretation would not bring within its purview a tax which is not one on land and buildings. The settled principles of constitutional interpretation must guide the Court in determining as to whether what has been imposed by Parliament in the present case is a tax on land and buildings. To an analysis of the essential character of the levy we now proceed.

The character of the levy

24. The charging provision, Section 66, imposes a tax on taxable services. The charging section refers to diverse sub clauses of Clause 105 of Section 65. The charge of tax is on a taxable service. Taxable services in turn are defined in Clause 105 of Section 65. Sub clause (zzzz) brings in within the purview of a taxable service a service provided or to be provided to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or for the furtherance of business or commerce. The expression “renting of immovable property” is defined by Clause (90a) of Section 65 so as to include renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or

furtherance of business or commerce. Clause (i), however, excludes renting of immovable property by a religious body or to a religious body and Clause (ii) excludes renting of immovable property to an educational body other than a commercial training or a coaching center. The essential nature and character of the levy is therefore that it constitutes a levy of a tax on taxable services. The tax is chargeable under Section 66 on the value of the taxable service. The value of a taxable service is defined by Section 67 to inter alia mean, in a case when a provision of service is for a consideration in money, the gross amount charged by the service provider for such service provided or to be provided by him. The measure of tax is the value of the taxable service, as provided in Section 67. The measure of a tax is not conclusive of the nature of the levy. Conceivably the same measure of taxation may be adopted by two fiscal enactments, each of which may be perfectly valid. For instance, the annual value or the rental value may provide the measure of tax for a tax on property which falls within Entry 49 of List II. The same measure of tax may be adopted as a measure in computing income for the levy of a tax on income under the relevant entry in List I. The charge of tax is not on lands

or buildings. The charge of tax is on a taxable service. The measure of tax is the gross amount charged by the service provider. The charge of tax is not on lands or buildings as a unit nor is the tax on lands or buildings. To be a tax on lands and buildings under Entry 49 of List II, the tax must be directly a tax on lands and buildings. That is not the true character of an impost on taxable services.

25. Counsel appearing on behalf of the Petitioners has placed reliance on the judgment of the Supreme Court in the **State of West Bengal v. Kesoram Industries Limited**²⁰ in support of the submission that the law in the present case is a law which imposes a tax on land and buildings. In paragraph 129 of the judgment the Supreme Court inter alia laid down the following principles :

“(6) “Land”, the term as occurring in Entry 49 of List II, has a wide, connotation. Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning of land itself. Different uses to which the land is subjected or is capable of being subjected provide the basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to

20 (2004) 10 SCC 201.

another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

(7) To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one of the well-known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.”

26. The decision in **Kesoram Industries**, while it emphasises that the expression “land” in Entry 49 of List II has a wide connotation, holds that in order to be a tax on land, the levy must have a direct and definite relationship with the land. However, a levy which has a direct and definite relationship with land may legitimately adopt one of the well-known modes for determining the value of land, for that constitutes the measure of the tax. The judgment in **Kesoram Industries** does not mark a departure from the ambit and content of Entry 49 of List II which has been laid down in the previous decisions of the Court including the judgments of the Constitution Bench in **Nawn’s Case** and in

Hazareth's Case or for that matter the decision of the Bench of Seven Learned Judges in **Dhillon's Case**. A tax on land and buildings within the meaning of Entry 49 of List II is a tax which is directly imposed on land or buildings. Such a tax is a tax which is on the general ownership of the land. The service tax that has been legislated upon by Parliament is not a tax on land. The true nature and character of the levy is not a tax on land or buildings. The charge of tax is a taxable service which Parliament regards as being rendered. The renting of immovable property is an activity which in the legislative wisdom of Parliament involves a conferment of service and it is in that legislative exercise that Parliament has proceeded to impose a levy of service tax. The measure of tax under Section 67 is the gross amount charged by the service provider for the service which is provided or which is to be provided by him. In the case of renting of immovable property, the measure is the rental. The measure of the tax does by no means indicate that the tax is a tax imposed on land or buildings.

27. The decision of the Supreme Court in **Godfrey Phillips**

India Limited v. State of Utter Pradesh²¹ involved a challenge to State legislation imposing a tax on goods which was sought to be sustained as a tax on luxuries under Entry 62 of List II. The Supreme Court observed that the argument of the assesseees was that the tax leviable under Entry 62 of List II cannot be a tax on goods as that would not only allow the State to levy sales tax in contravention of Article 286, but would permit a trespass on the legislative field reserved to Parliament under Entries 83 and 84 of List I. The judgment in **Godfrey Phillips** lays down the principle that under Article 246 exclusive powers are conferred upon Parliament and upon State legislatures to legislate on a particular matter which includes the power to legislate with respect to that matter. As we have already noted earlier, Clauses (1) and (3) of Article 246 in particular confer powers on Parliament and the State legislatures to legislate with respect to the matters contained in List I and List II respectively. The Supreme Court noted that “where the entry describes an object of tax, all taxable events pertaining to the object are within that field of legislation unless the event is specifically provided for elsewhere under a different legislative

21 (2005) 2 SCC 515.

head.”²² Having observed as aforesaid, the Supreme Court took note of the fact that even when an entry speaks of a levy of a tax on goods, it does not include the right to impose taxes on taxable events which have been separately provided for under other taxation entries. Since there could be no overlapping in a field of taxation, a tax if specifically provided for under one legislative entry would effectively narrow down the field of taxation available under other related entries. Consequently, when considering the ambit of a specified or express power in relation to an unspecified or residuary power, it would be natural to impart a broader meaning to the former over the latter. Hence, the judgment in **Godfrey Phillips** postulates that entries elucidating objects of taxation must properly be construed to encompass all taxable events which fall within it unless a part of the field has expressly been carved out by a legislative entry in relation to another legislature. But the decision nonetheless requires the Court in each case to determine what is the appropriate or proper scope of the taxation entry in the first place. Once the ambit of that entry is determined, then all taxable events which fall within the scope of

²²(paragraph 49 at page 204)

the entry must be regarded as being subsumed within the entry. **Godfrey Philips** is, however, not a decision which elucidates the scope of Entry 49 of List II to the Seventh Schedule. The ambit of Entry 49 has been explained in several judgments of the Constitution Bench of the Supreme Court as well as in the judgment of the Bench consisting of Seven Judges in **Dhillon**. Since properly construed a tax which has been imposed by Parliament is not in essence and in its true character a tax on land and buildings, the tax cannot nonetheless be held as a tax within the meaning of Entry 49 of List II in spite of the true nature and character of the levy. The enactment by Parliament in the present case of service tax has been held by the Supreme Court to fall within the purview of Entry 97. That principle which has been enunciated in the four decisions of the Supreme Court specifically on the issue of service tax does not require to be revisited in relation to the imposition of service tax under Clause (zzzz) of Section 65 (105). The essential nature and character of the levy is one which is referable to the residuary power of Parliament under Article 248 of the Constitution read with Entry 97. Parliament, it may be noted, introduced Entry 92C into List I by the Constitution

(Eighty Eighth Amendment) Act 2003 to specifically deal with taxes on services. That provision has still not been enforced. In the circumstances, the true nature and character of the levy of service tax in the present case is a levy under the residuary power which has been conferred upon Parliament.

28. The submission, however, of the Petitioners is that there is no service involved in the letting of immovable property and consequently it was not open to Parliament to impose a service tax on the supposition that a taxable service is involved in the letting of immovable property. The submission cannot be accepted for more than one reason. As a matter of constitutional doctrine, Parliament when it legislates upon a matter is entitled to make an assessment of fact on the basis of which the legislation is designed and drafted. An underlying assessment of fact by Parliament on the basis of which a law has been enacted cannot be amenable to judicial review absent a case of manifest arbitrariness. That apart, it is equally well settled that the legislature in enacting a law is entitled to provide for a deeming fiction. The only limitation on the exercise of the power is that by a deeming fiction the legislature

cannot transgress upon a constitutional restriction or a field of legislation that is reserved to another legislature. In the present case, there is no constitutional restriction or a question of transgression into the legislative field that is carved out to the State legislatures, once the Court comes to the conclusion that the law in question is not a law with respect to any of the matters contained in the State List. Once the Court comes to the conclusion that the law is not a law with respect to the legislative entry of taxes on land and buildings, the field of the legislation would necessarily fall within List I and more particularly, the residuary entry of List I. The levy of tax on a taxable service provided or to be provided to any person, by any other person, by the renting of immovable property is based on a considered determination by Parliament that such transactions do in fact involve an element of service. The fact that the service which is provided may not, to the Petitioners, accord with what is commonly regarded as a service would not militate against the validity of the legislation. As the Supreme Court observed in **Tamil Nadu Kalyana Mandapam Association's case**, the legislative competence of Parliament does not depend upon

whether in fact any services are made available. The Supreme Court held that the levy of service tax on a particular kind of service cannot be struck down on the ground that it does not conform to a common understanding of the word 'service' as long it does not transgress a specific restriction contained in the Constitution. Hence, on this aspect of the matter, our conclusion is that the validity of the legislation does not depend upon a determination of fact by the Court that a service is provided in the transaction which is brought to tax. For a law which does not fall within List II of the Seventh Schedule would in any event fall within the legislative competence of Parliament under its residuary power.

29. In the affidavit in reply that has been filed in these proceedings it has been stated that renting of property is considered to add value to the activity of the person who has rented the property. When a person has a property at a particular location, he is able to charge a higher sum for the merchandise sold therefrom than he would be able to charge if he were to sell the same merchandise from a place which does not have a same

locational advantage. Renting of a property, it has been submitted, adds value to the activities of a person renting the property. Value addition, it has been submitted, does not necessarily mean that certain intrinsic changes must occur in what has been offered. For instance, some goods while passing through various stages of sale do not undergo any intrinsic change, but a value addition does take place and is accordingly taxed by the concerned authorities. The concept of a value addition tax has been developed to avoid a cascading effect in the taxation system. Services can be used either as input in the product at different stages or directly in the final product. In order to avoid a cascading effect, Cenvat Credit Rules have been framed. Rule 3(i)(ix) of the Cenvat Credit Rules 2004 contemplates the grant of Cenvat credit. In addition, it has been stated in the reply that under the General Agreement on Trading Services (GATS) the Central Product Classification inter alia contemplates that an element of service is involved in the renting of property.

30. We have adverted to the affidavit in reply in order to buttress the point that a legislative hypothesis contained in

parliamentary legislation cannot be questioned on the ground that the assumption of fact is in error. Parliament is entitled to make assessments of fact on the basis of which it legislates. Indeed, such assessments of fact are intrinsic to the very nature of the legislative exercise and the Court which exercises the power of judicial review particularly in fiscal matters would not be justified in re-examining the wisdom or the correctness of such an exercise by Parliament. The legislature in fiscal matters is entitled to a high degree of latitude in designing legislation and in formulating methodologies for the recoveries of fiscal exactions. Such an exercise cannot ordinarily be questioned as being beyond the powers of the enacting legislature.

31. In **Navnitlal C. Javeri vs. K.K. Sen, Appellate Assistant Commissioner of Income-tax**²³ a Constitution Bench of the Supreme Court considered a constitutional challenge to the provisions of Section 2(6A)(e) of the Income Tax Act, 1922 under which a loan which was received by a shareholder of a private company was treated as a dividend paid to him by the company.

²³AIR 1965 SC 1375.

The issue before the Supreme Court was whether the legislature in enacting the Section had exceeded the limits of the legislative field prescribed by Entry 82 of List I. Repelling the constitutional challenge the Supreme Court held as follows :

“If the legislature realises that the private controlled companies generally adopt the device of making advances or giving loans to their shareholders with the object of evading the payment of tax, it can step in to meet this mischief, and in that connection, it has created a fiction by which the amount ostensibly and nominally advanced to a shareholder as a loan is treated in reality for tax purposes as the payment of dividend to him. We have already explained how a small number of shareholders controlling a private company adopt this device. Having regard to the fact that the legislature was aware of such devices, would it not be competent to the legislature to devise a fiction for treating the ostensible loan as the receipt of dividend ? In our opinion, it would be difficult to hold that in making the fiction, the legislature has travelled beyond the legislative field assigned to it by entry 82 in List I.”

32. Finally, it may be noted that Counsel appearing on behalf of the Petitioners sought to place reliance on the judgments of the Supreme Court in **J.K. Industries v. Chief Inspector of Factories and Boilers**²⁴ and **Mathuram Agarwal v. State of Madhya Pradesh**.²⁵ The submission is that the levy of service tax on renting

24 (1996) 6 SCC 665

25 (1999) 8 SCC 667.

of immovable property under clause (zzzz) is *ultra vires* the charging provision. **J.K. Industries** involved the interpretation of the provisions inter alia of Section 2(n) of the Factories Act 1948. The Supreme Court held, that a proviso may, in certain cases, be an exception to a principal statutory provision though it cannot be inconsistent with what is expressed in the main provision. The Court held that if a proviso is so inconsistent, it would be *ultra vires* the main provision and would be struck down. Hence as a general rule, it would be proper to construe all the provisions of the statute together without making either of them redundant or otiose. **Mathuram Agarwal's** case dealt with Section 127 of the M.P. Municipalities Act 1961 which authorised the imposition inter alia of a tax payable by owners of houses, buildings or lands situated within the limits of a municipality with reference to the annual letting value. The rate of taxation was specified in a table appended to Section 127A. The rate at which the tax had to be levied commenced with property, the annual letting value of which exceeded Rs.1,800/- per annum and in such a case, the tax was to be levied at 6% of the annual letting value. No rate of tax was prescribed for a property, the annual letting value of which

was less than Rs.1,800/-. The proviso to sub section (2) of Section 127A, however, stipulated that if any such building or land was in the ownership of a person, who owns any other building or land in the same municipality, the annual letting value of such building or land, shall for the purposes of the Clause, be deemed to be the aggregate annual letting value of all buildings or land owned by him in the municipality. The Supreme Court held that the main provision which was the charging section, made no provision regarding the rate at which tax was to be paid in case the building or land in question had an annual letting value of less than Rs. 1,800/-. However, the proviso required the exempted property to be subjected to tax and for the purpose of valuing that property alone the value of the other properties was to be taken into consideration. In these circumstances, the proviso was held to be contrary to the charging section. Both these cases deal with provisos or exceptions to the main provision. This can have no application whatsoever to the present case where the very charge is imposed on the taxable services defined with reference to the diverse clauses of Section 65(105).

33. Therefore in our view, looked at from either stand point, the legislative basis that has been adopted by Parliament in subjecting taxable services involved in the renting of property to the charge of service tax cannot be questioned. The assumption by a legislative body that an element of service is involved in the renting of immovable property is certainly not an assumption which can be regarded by the Court as being so manifestly absurd or perverse as to lead to an inference that Parliament had treated as a service, an item which in no rational sense could be regarded as involving service. But more significantly, even if the Court were to proceed on the basis, suggested by the Petitioners that no element of service is involved, that would not make the legislation beyond the legislative competence of Parliament. So long as the legislation does not trench upon a field which has been reserved to the State legislatures, the only conclusion that can be drawn is that the law must be treated as valid and within the purview of the field set apart for Parliament. There is, it must be emphasised, no violation set up of any provision in Part III of the Constitution, (save and except on the issue of retrospectivity which would be considered subsequently).

Retrospectivity :

34. The challenge to the legislation on the ground that it is retrospective is lacking in substance. Parliament, it is well settled, has the plenary power to enact legislation on the fields which are set out in List I and List III of the Seventh Schedule. The plenary power of Parliament to legislate can extend to enacting legislation both with prospective and with retrospective effect. That however, is subject to the mandate of Article 14 of the Constitution.

35. The notes on clauses when the Finance Bill of 2007 was introduced in Parliament would indicate that the intent of Parliament was specifically to bring the renting of immovable property within the fold of taxable services when used in course or furtherance of business or commerce. As a matter of fact, Parliament had used language of width and amplitude in the original provision which adverted to a service provided or to be provided “in relation to renting of immovable property” for use in the course or furtherance of business or commerce. The expression “in relation to renting of immovable property” was broad enough to

include both the renting of immovable property as well as services in relation to the renting of immovable property. The Delhi High Court by its judgment in **Home Solution's** case struck down both a notification and a circular issued by the Union Ministry of Finance. (A Special leave Petition is pending against the judgment of the Delhi High Court in **Home Solution** before the Supreme Court). In this view of the matter, Parliament stepped in to substitute sub clause (zzzz) in its present form instead and in place of the earlier provision so as to provide for the renting of immovable property or any other service in relation to such renting. The provision was given retrospective effect so as to cure the deficiency which was found upon interpretation by the Delhi High Court. The notes on clauses accompanying the introduction of the Finance Bill of 2010 would indicate that the amendment has been brought about to validate the provision.

36. In the affidavit in reply that has been filed by the Union Government it has been stated that the earlier provisions were understood to permit the imposition of a service tax on the renting of premises per se and that an amount of Rs.938 Crores was

collected in financial year 2007-08 (the year when the tax was introduced). Amounts respectively of Rs.2574 Crores were collected in 2008-09 and Rs.1957 Crores in financial year 2009-10.

37. The object of the amendment, brought about with retrospective effect, is to expressly bring the legislative provision in conformity with the original parliamentary intent. The Supreme Court held in **Bakhtawar Trust v. M.D. Narayan**²⁶ that it is open to the legislature to alter the law retrospectively provided the alteration is made in such a manner that it would be no more possible for the Court to arrive at the same verdict. The purpose and object of validating legislation is to ensure a fundamental change of circumstances upon which the earlier judgment was founded. This may be done by re-enacting retrospectively a valid and legal taxing provision and then by a fiction making the tax already collected stand under the re-enacted law.²⁷ The

²⁶ (2003) 5 SCC 298.

²⁷ See **Shri P.C. Mills vs. Broach Municipality**, (1969) 2 SCC 283, ¶ 4 quoted in **Bhubaneshwar Singh and Bimla Devi Poddar vs. Union of India**, (1994) 6 SCC 77, ¶ 11: 'Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon Courts. The legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law.' See also, **Bakhtawar Trust vs. M.D. Narayan**, (2003) 5 SCC 298, ¶ 20-26, **State of Himachal Pradesh vs. Narain Singh**, (2009) 13 SCC 165, ¶ 26.

amendment in the present case passes muster on that test.

38. The constitutional validity of the provision has been upheld by the High Courts of Punjab & Haryana and Orissa in **Shubh Timb Steels Limited vs. Union of India**,²⁸ and **Utkal Builders Limited vs. Union of India**.²⁹

39. For the reasons which we have indicated herein above, we do not find any substance in the challenge raised before the Court. All the Petitions shall accordingly stand dismissed. Rule is accordingly discharged. There shall be no order as to costs.

40. Mr. Seervai, Counsel appearing on behalf of the Petitioners in Writ Petition 2151 of 2007 submitted that the Court should within the meaning of Article 132 of the Constitution, certify that the case involves a substantial question of law as to the

28 (2010) 236 CTR (P&H) 562

29 (2011) 186 ECR 74 (Orissa)

interpretation of the Constitution. We are not inclined to grant the prayer for the reason that the scope and ambit of Entry 49 of List II of the Seventh Schedule and of the residuary power of legislation of Parliament have been considered by several judgments of the Constitution Bench of the Supreme Court and this Court has followed the law as expounded therein. Hence, in our respectful view, the case does not involve a substantial question of law as to the interpretation of the Constitution.

41. On the conclusion of the judgment, Counsel appearing on behalf of the Petitioners has submitted before the Court that the interim orders which have held the field may be extended for a reasonable period so as to enable the Petitioners to seek recourse to their remedies in appeal. Having regard to the facts and circumstances, there shall be a direction that all interim orders shall continue to remain in operation for a period of four weeks from today with a view to enabling the Petitioners to seek recourse to the remedies in appeal.

42. In view of the dismissal of the Writ Petition, Chamber

Summons 128 of 2011 does not survive and is disposed of accordingly.

(Dr.D.Y.Chandrachud, J.)

(Anoop V. Mohta, J.)