Before Adarsh Kumar Goel & Ajay Kumar Mittal, JJ.

M/S SHUBH TIMB STEELS LIMITED,—*Petitioner*

versus

UNION OF INDIA AND ANOTHER,—*Respondents*

C.W.P. No. 11597 of 2010

22nd November, 2010

Constitution of India, 1950—Art. 226—Finance Act, 1994—Ss. 65(90a) & 65(105)(zzzz)—A public Ltd. Company letting out commercial property to business entities—Providing of service to any person by renting of property for business—Levy of service tax—Whether covered by Entry 49 List II—Held, no—Aspect of service element in renting transaction—An independent aspect covered under Entry 92C read with Entry 97 of List I— Levy of service tax retrospectively—Whether Legislature has power to make a law validating levy of tax retrospectively—Held, yes—Petition dismissed.

Held, that we are unable to hold that service tax on service of renting of property is exclusively covered by Entry 49 List II. Entry 49 of List II relates to tax on land and building and not any activity relating thereto. Income tax on income from property, wealth tax on capital value of assets including land and building and gift tax on gift of land and building have been upheld. It cannot be held that renting of property did not involve any service as service could only be in relation to property and not by renting of property. Renting of property for commercial purposes is certainly a service and has value for the service receiver. Moreover, the aspect of service element in renting transaction is certainly an independent aspect covered under Entry 92C read with Entry 97 of List I. In any case, subject matter of impugned levy being outside the scope of entry 49 of List II, power of Union Legislature is undoubted. Question whether levy will be harsh being in addition to income tax and property tax is not a matter for this Court once there is legislative competence for the levy. Even if it is held that transaction of transfer of right in immovable property did not involve value addition, the provision cannot be held to be void in absence of encroachment on List II.

(Para 22)

Jagmohan Bansal, Advocate, *for the petitioner.*

HPS Ghuman, Senior Standing Counsel, *for Union of India.*

ADARSH KUMAR, GOEL, J.

(1) This petition seeks declaration of provisions of Section 65 (90a) and Section 65 (105) (*zzzz*) of the Finance Act, 1994 as ultravires the Constitution.

(2) Case set out in the petition is that the petitioner is a public limited company and owner of commercial immoveable property at Parwanoo, district Solan in the State of Himachal Pradesh. It has let out the said property to business entities. It is receiving rent @ Rs. 1,75,000 per month as per agreement Annexure P-1. The transaction of lease is subject to levy of stamp duty under the Indian Stamp Act, 1899 and is governed by Transfer of Property Act, 1882. The subject matter of property and leasing are covered by field assigned to State legislature and, thus, outside the purview of the General Legislature.

(3) In reply filed on behalf of the Union of India, stand taken is that renting of property was different from sale of goods or transfer of property or conveyance. The transaction is not covered by tax on sale of goods. Providing of service with respect to property was covered by service tax. Other similar transactions of service in relation to property were service of Mandap Keepers (Section 65(105)(m), Pandal Shamiana (Section 65(105) (zzw), Convention Service (Section 65 (105) (zc), Right to use properties for business purposes under business support service [Section 65(105) (zzzq]. The levy was not covered under Entry 18 not being tax on land or building but only on service element. The tax was connected with land or building but was not on land or building. The levy was also not covered under Entry 45 being not land revenue nor by Entry 49 which contemplated direct tax. Service tax was on consideration received for allowing use of the premises. Under Article 246(1), Parliament had exclusive power to make laws in respect of matters covered under List I including residue entry. As regards retrospectivity, it has been stated that the amendment was clarificatory. The levy was already provided even under unamended provisions. The object of the amendment was to overcome the judgment of Delhi High Court against which appeal was pending before the Hon'ble

Supreme Court. Judgment of Delhi High Court having not become final, the service providers were required to collect tax even if the same could not be collected on account of the said judgment.

(4) We have heard learned counsel appearing in this petition as well as learned counsel for the petitioners in connected petitions and perused the record.

(5) Question for consideration is whether levy of service tax on providing of service to any person by any other person by renting of immovable property for business was covered by Entry 49 List II exclusively and not covered by Entry 92C or 97 of List I and thus, was outside the purview of the Central legislature. Further question is as to validity of levy being made retrospectively operative from 1st June, 2007.

(6) Contentions raised on behalf of the petitioners are as follows :–

(i) Subject matter of levy of service tax on providing service of renting of property was covered by Entry 49 List II and not by Entry 92C or 97 of List I. In any case, retrospectivity of the levy was beyond legislative competence. Reliance has been placed on judgment of Delhi High Court in ***Home solution*** and judgment of Hon'ble the Supreme Court in **Ajay Kumar Mukherjee** *versus* **Local Board of Barpeta, (1)**

(ii) Transfer of property without any value addition by way of service could not be covered by the levy of service tax.

(7) On the other hand, submission on behalf of Union of India is that scope of Entry 49 List II was limited to direct tax on the property and not on any activity in relation to property. In any case, Entry 49 List II had to be read subject to Entries 92C and 97 of List I. Reliance has been placed, *inter alia*, on judgments of apex Court in **Union of India** *versus* **Shri Harbhajan Singh Dhillon, (2) Tamil Nadu Kalyana Mandapam Assn.** *versus* **Union of India, (3)** and **All India Federation of Tax Practitioners and others** *versus* **Union of India and others, (4).** It was also submitted

(1) AIR 1965 S.C. 156
(2) 1971 (2) S.C.C. 790
(3) 2004 (5) S.C.C. 632
(4) (2007) 7 S.C.C. 527

that judgment of Delhi High Court did not involve the issue of validity of the levy and only involved question of validity of notification and circular to recover service tax from the lessors of property on the proceeds of renting out of property. After the said judgment, by way of amendment, instead of service in relation to renting of immovable property, the legislature has substituted expression of providing service "of renting of immoveable property." After the amendment, renting of immoveable property itself was a service covered by the definition of taxable service. Levy of tax on property did not exclude levy of tax on service in relation to property. A tax on one aspect of subject matter did not exclude tax on another aspect of the same subject matter. In view of this settled legal position, there was no conflict in tax covered by Entry 49 List II and tax covered by Entry 92C of List I.

(8) Service tax is chargeable under the provisions of Finance Act, 1994. Section 66 provides for levy of service tax on *taxable service* as defined under Section 65(105) read with the definition of such services under different clauses of Section 65. In the present case, the taxable service is covered by Section 65(105) (zzzz) which refers to service provided "by renting of immoveable property". The expression "renting of immoveable property" is defined under Section 65(90a) as including renting etc. for use in the course of furtherance of business. The precise definitions are :–

> "65(105)'taxable service' means any service provided or to be provided—
>
> xx xx xxx xxxx
>
> (*zzzz*)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 furtherance of, business or commerce."
>
> Explanation :
>
> xx xx xx xx xx
>
> 65(90a). 'renting of immovable property' includes renting, letting, leasing, licensing or other similar arrangement of immovable property for use in the course of 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;

Explanation—for the purpose of this clause, 'for use in the course or furtherance of business or commerce' includes use of immovable property as factories, office, buildings, warehouses, theatres, exhibition halls and multiple-use buildings."

(9) Prior to its amendment by Finance Act, 2010, with effect from 1st June, 2007, the definition of "taxable service" incorporated.—*vide* Finance Act, 2007 was as under :–

"65(105) 'taxable service' means any service provided or to be provided—

(a) to (zzzy) xxx

(*zzzz*) to any person, by any person in relation to renting of immovable property for use in the course or furtherance of business or commerce."

(10) Contention on behalf of the petitioners is that in pith and substance, renting of a building was a transaction in respect of land and buildings covered by Entries 18, 45 and 49 of List II in respect of which exclusive jurisdiction to legislate under Article 246(3) was vested in the State Legislature. Leasing was transfer of rights and not a service and was, thus, not covered under Entry 92C of List I. It amounted to conveyance attracting stamp duty. The Delhi High Court upheld the plea of service providers.—*vide* judgment dated 18th April, 2009 in **Home Solution Retail India Limited** *versus* **Union of India and others, (5).** It was held that service tax was tax on value addition by service provider. As per words "in relation to", service was to be provided in relation to renting of property and the property by itself could not be regarded as service. Renting of property did not involve any value addition. It was accordingly held that notification dated 22nd May, 2007 and circular dated 4th January, 2008 providing for service tax on renting of property *per se* was ultravires the scheme of levy of service tax. By way of amendment, even renting of immovable property itself was covered by the definition of "taxable service" instead of service

(5) (2009) 22 V.S.T. 508

"in relation to renting of property". The amendment was made retrospective which amounted to tax service provider and not service recipient as service provider could not recover the service rendered from the recipient of the service for the period prior to the amendment.

(11) Issue of interpretation of taxing entries under the Constitution of India including the aspect theory have been gone into in our recent judgment dated 25th October, 2010 in CWP No. 10992 of 2010 (***Tata Sky Limited*** *versus* ***State of Punjab and another***) in the context of contention of validity of entertainment duty by State Legislature with reference to Entry 62 of List II as being in conflict with Entry 92C of List I. The discussion in the said judgment to the following effect will obviate repetition of discussion on the issue involved herein :—

"Settled law on interpretation of scope of taxing entries

9. Before proceeding further, we may notice the settled legal position. Constitutional scheme of distribution of legislative powers between Union and the State legislatures under Article 246 of the Constitution is well known. While Parliament has exclusive power to legislate with respect to matters in List I, the State legislatures have exclusive power to make laws for matters in List II subject to exclusive power of the Parliament to legislate with respect to matters in List I. Both Parliament and State legislatures have concurrent power of legislation with respect to matters in List III subject to Central legislation prevailing in case of repugnancy.

10. Principle of *Federal Supremacy* can be invoked only if there is irreconcilable conflict in entries in Union and State lists. If two entries can be reconciled by harmonious construction or by applying principle of *pith and substance,* there is no occasion to apply the principle of *federal supremacy.* Concept of *repugnancy* under Article 254 relating to List III is different from repugnancy arising due to overlapping in List I and List II in which case principle of pith and substance is applied to determine legislative competence. Entries in the lists are not powers of legislation but fields of legislation. Taxation is distinct

matter for legislative competence. Power to tax cannot be deduced from general entry. There is no overlapping in taxing power. Entries 82 to 92C and 97 of List I and Entries 45 to 63 of List II deal with taxes. There is no entry relating to tax in List III.

11. Every tax may be levied on an object or on an event of taxation. Subject of tax is distinct from incidence of taxation. Tax on property has been described as direct tax and tax on taxable event in respect of property is described as indirect tax. The distinction is based on difference in impact. While considering any particular levy, mere description of the subject matter of tax is not conclusive.

12. Subjects of tax which fall in power of a particular legislature in one aspect and purpose may fall within the legislative power of the another in other aspect and purpose. Such overlapping is not considered to be overlapping in law as the same transaction may involve two or more events in different aspects. Overlapping does not detract from distinctness of the aspects. The aspect theory, however, cannot be applied to justify encroachment in legislative fields.

13. Some of the leading judgments on the subject are **M/s Hochst Pharmaceuticals Ltd. and another** *versus* **State of Bihar and others AIR 1983 SC 1019, Godfrey Phillips India Ltd. and another** *versus* **State of U.P. and others (2005) 2 SCC 515, Bharat Sanchar Nigam Ltd. and another** *versus* **Union of India and others (2006) 3 SCC 1** and ***State of W.B. versus Kesoram Industries Ltd., (2004) 10 SCC 201.***

14. We may extract observations from ***Kesoram Industries :***

> "**31.** Article 245 of the Constitution is the fountain source of legislative power. It provides—subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. The legislative field between Parliament

and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the "Concurrent List". Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the "State List". Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the 'residuary power vesting in Parliament. The principles have been succinctly summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in **Hoechst Pharmaceuticals Ltd.** *versus* **State of Bihar,** (1983) 4 SCC 45. They are :

(1) The various entries in the three lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. *There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.*

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List

II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) *Taxation is considered to be a distinct matter for purposes of legislative competence.* There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. *The power to tax cannot be deduced from a general legislative entry as an ancillary power.*

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest-possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. *A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.*

(5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such

a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, *still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.*

(emphasis supplied)

43. In **Ralla Ram** *versus* **Province of East Punjab, AIR 1949 FC 81** the Federal Court made it clear that every effort should be made as far as possible to reconcile the seeming conflict between the provisions of the Provincial legislation and the Federal legislation. Unless the court forms an opinion that the extent of the alleged invasion by

a Provincial Legislature into the field of the Federal Legislature is so great as would justify the view that in pith and substance the impugned tax is a tax within the domain of the Federal Legislature, the levy of tax would not be liable to the struck down. The test laid down in *Sir Byramjee Jeejeebhoy case, AIR 1940 Bom 65* by the Full Bench of the Bombay High Court was approved.

44. In **Asstt. Commr. of Urban Land Tax** *versus* **Buckingham and Carnatic Co. Ltd.** *(1969) 2 SCC 55* for the purpose of attracting the applicability of Entry 49 in List II, so as to cover the impugned levy of tax on lands and buildings, the Constitution Bench laid down twin tests, namely : *(i)* that such tax is directly imposed on lands and buildings, and *(ii)* that it bears a definite relation to it. Once these tests were satisfied, it was open for the State Legislature, for the purpose of levying tax, to adopt the annual value or the capital value of the lands and buildings for determining the incidence of tax. Merely, on account of such methodology having been adopted, the State Legislature cannot be accused of having encroached upon Entry 86, 87 or 88 of List I. Entry 86 in List I proceeds on the principle of aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land, was held to be *intra vires* the powers of the State Legislature and not trenching upon Entry 86 in List I. So is the view taken by another Constitution Bench in **Shri Prithvi Cotton Mills Ltd.** *versus* **Broach Borough Municipality** *(1969) 2 SCC 283* where the submission that the levy was not a rate on lands and buildings as appropriately understood but rather a tax on capital value, was discarded.

45. R.R. Engg. Co. ***versus*** **Zila Parishad, Bareilly,** *(1980) 3 SCC 330* is a case of circumstances and property tax levied on the basis of income which the assessee receives from his profession, trade, calling or property. The plea that the tax was a tax on income was discarded. The test propounded by the Constitution Bench is that an excessive levy on circumstances may tend to blur the distinction between a tax on income and a tax on circumstances. Income will then cease to be a measure or yardstick of the tax and will become the very subject-matter of the tax. Restraint in this behalf is a prudent prescription for the local authorities to follow. The Constitution Bench observed that it was only a matter of convenience that income was adopted as a yardstick or measure for assessing the tax and the evolvement of such mechanism was not conclusive on the nature of tax.

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50.....The Constitution is an organic living document. Its outlook and expression as perceived and expressed by the interpreters of the Constitution must be dynamic and keep pace with the changing times. Though the basics and fundamentals of the Constitution remain unalterable, the interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favour of the weaker or the one who is more needy. Several taxes are collected by the Centre and allocation of revenue is made to States from time to time. The Centre consuming the lion's share of revenue has attracted a good amount of criticism at the hands of the States and financial experts. The interpretation of entries can afford to strike a balance, or at least try to remove imbalance, so far as it can. Any conscious whittling down of the powers of the State can be guarded against by the courts.

"Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle — the outcome of our own historical process and a recognition of the ground realities." (SCC p. 217, para 276)

Quoting from Setalvad, M.C. *Tagore Law Lectures, "Union and State Relations under the Indian Constitution"* (Eastern Law House, Calcutta, 1974), Jeevan Reddy, J. observed : (SCC p. 217, para 276)

"It is enough to note that our Constitution has certainly a bias towards Centre vis-a-vis the States..... It is equally necessary to emphasise that courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation."

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In a nutshell

129. The relevant principles culled out from the preceding discussion are summarised as under :

(1) In the scheme of the lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.

(2) Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in fact but there would be no overlapping in law. The subject-matter of two taxes by

reference to the two lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task ; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevent factor out of many for throwing light on determining the general character of the tax.

(5) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under :

One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping ?

Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation ? and

Three —Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored ?

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as *quid pro quo but* without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading *in juxtaposition* shows that the declaration by Parliament must be for the "control of industries" in Entry 52 and "for regulation of mines or for mineral development" in Entry 54. Such control, regulation or development must be "expedient in the public interst". Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming the subject-matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations

imposable and permissible. A tax or fee levied by the State with the object of augmenting its finances and in reasonable limits does not *ipso facto* trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by the State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

(9) The heads of taxation are clearly enumerated in Entries 83 to 92-B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the filed of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of List II, can also not be levied by the Union though as stated in Entry 50 itself the Union may impose limitations on the power of the State and such limitations, if any, imposed by Parliament by law relating to mineral development to that extent shall circumscribe the States' power to legislate. Power to tax mineral rights is with the States ; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional."

The Aspect Theory

15. Aspect theory has been subject matter of several decisions. In **Federation of Hotel & Restaurant Assn. of India** *versus* **Union of India,** (1989) 3 SCC 634, the levy considered was expenditure tax under Central law with reference to the contention that the same was in substance tax on luxury under Entry 62 of List II. Stand of the Central Government was that expenditure aspect was different from luxury aspect and expenditure aspect could be held to be excluded from the luxury aspect. The plea was upheld. It was observed :—

"**26**..... Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist ; and, in order to prevent such a result the two provisions must be read together. and the language of one interpreted, and, where necessary modified by that of the other.

27. The Judicial Committee in **Prafulla Kumar Mukherjee** *versus* **Bank of Commerce,** AIR 1947 PC 60, referred to with approval the following observations of Sir Maurice Gwyer 'C.J.' in Subrahmanyan Chettiar case 4 ;

"It must inevitable happen from time to time that legislation. though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the

impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that."

28. This necessitates as an "essential of federal Government the role of an impartial body, independent of general and regional Governments", to decide upon the meaning of division of powers. The court is this body.

29. The position in the present case assumes a slightly different complexion. It is not any part of the petitioners' case that "expenditure tax" is one of the taxes within the States' power or that it is a forbidden field for the Union Parliament. On the contrary, it is not disputed that a law imposing "expenditure tax"is well within the legislative competence of Union Parliament under Article 248 read with Entry 97 of List I. But the specific contention is that the particular impost under the impugned law, having regard to its nature and incidents, is really not an "expenditure tax" at all as it does not accord with the economists' notion of such a tax. That is one limb of the argument. The other is that the law is, in pith and substance, really one imposing a tax on luxuries or on the price paid for the sale of goods. The crucial questions, therefore, are whether the economists' concept of such a tax qualifies and conditions the legislative power and, more importantly, whether "expenditure" laid out on what may be assumed to be "luxuries" or on the purchase of goods admits of being isolated and identified as a distinct aspect susceptible of recognition as a distinct field of tax legislation.

30. In Lefroy's **Canada's Federal System** the learned Author referring to the "aspects of legislation" under Sections 91 and 92 of the Canadian Constitution i.e. British North America Act, 1867 observes that "one of the most interesting and important principles which have been evloved by judical decisions in connection with the distribution of legislative power is that subjects which in one aspect and for one purpose fall within the

power of a particular legislature may in another aspect and for another purpose fall within another legislative power". Learned Author says :

> "..... that by 'aspect' must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

In **Union Colliery Co. of British Columbia** *versus* **Bryden, 1899 AC 580,** Lord Haldane said :

> "It is remarkable the way this Board has reconciled the provisions of Section 91 and Section 92, by recognising that the subjects which fall within Section 91 in one aspect, may, under another aspect, fall under Section 92."

31. Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way ; but that is not the same thing as the law being on the latter subject. There might be overlapping ; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in **Governor-General-in-Council** *versus* **Province of Madras, AIR 1945 PC 98** in the context of concepts of Duties of Excise and Tax on Sale of Goods said :

> ".... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale....."

32. Referring to the "aspect" doctrine Laskin's **Canadian Constitutional Law** states :

> "The 'aspect' doctine bears some resemblance to those just noted but, unlike them, deals not with what the 'matter' is but with what it 'comes within'..... (p. 115)
>
> ..... it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its 'matter'), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use purposed to be made of it determines what it is. (p. 116)
>
> ".... I pause to comment on certain correlations of operative incompatibility and the 'aspect' doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a 'matter' bring it within a class of subjects....." (p. 117).

16. By way of instance of different aspects of the same matter, illustration was also given of tax on property under the State law and tax on income under the Central law :

> **"38.** Indeed, as an instance of different aspects of the same matter, being the topic of legislation under different legislative powers, reference may be made to the annual letting value of a property in the occupation of a person for his own residence being, in one aspect, the measure for levy of property tax under State law and in another aspect constitute the notional or presumed income for the purpose of income tax.

17. In **All-India Federation of Tax Practitioners** *versus* **Union of India,** (2007) 7 SCC 527, challenge was to the levy of service tax on service rendered by practicing chartered accountants, cost accountants and architects by the Central Legislature and objection thereto was based on Entry 60 List II providing for power of State Legislature to tax professions, trades, callings and employment. Repelling the challenge, it was held that Entry 60 of List II did not include tax on services. Tax on profession was different from tax on professional service. It was observed :

"34. As stated above, Entry 60, List II refers to taxes on professions, etc. It is the tax on the individual person/firm or company. It is the tax on the status. A chartered accountant or a cost accountant obtains a licence or a privilege from the competent body to practise. On that privilege as such the State is competent to levy a tax under Entry 60. However, as stated above, Entry 60 is not a general entry. It cannot be read to include every activity undertaken by a chartered accountant/cost accountant/ architect for consideration. Service tax is a tax on each activity undertaken by a chartered accountant/cost accountant or an architect. The cost accountant/chartered accountant/architect charges his client for advice or for auditing of accounts. Similarly, a cost accountant charges his client for advice as well as doing the work of costing. For each transaction or contract, the chartered accountant/ cost accountant renders profession based services. The activity undertaken by the chartered accountant or the cost accountant or an architect has two aspects. From the point of view of the chartered accountant/cost accountant it is an activity undertaken by him based on his performance and skill. But from the point of view of his client, the chartered accountant/cost accountant is his service provider. It is a tax on "services". The activity undertaken by the chartered accountant or cost accountant is similar to saleable or marketable commodities produced

by the assessee and cleared by the assessee for home consumption under the Central Excise Act.

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43. As stated above, every entry in the Lists has to be given a schematic interpretation. As stated above, constitutional law is about concepts and principles. Some of these principles have evolved out of judicial decisions. The said test is also applicable to taxation laws. That is the reason why the entries in the Lists have been divided into two groups, one dealing with general subjects and other dealing with taxation. The entries dealing with taxation are distinct entries vis-a-vis the gengeral entries. It is for this reason that the doctrine of pith and substance has an important role to play while deciding the scope of each of the entries in the three Lists in the Seventh Schedule to the Constitution. This doctrine of pith and substance flows from the words in Article 246(1), quoted above, namely, "with respect to any of the matters enumerated in List I". The bottom line of the said doctrine is to look at the legislation as a whole and if it has a substantial connection with the entry, the matter may be taken to the legislation on the topic. That is why due weightage should be given to the words "with respect to" in Article 246 as it brings in the doctrine of "pith and substance" for understanding the scope of legislative powers.

44. Competence to legislate flows from Articles 245, 246 and the other articles in Part XI. A legislation like the Finance Act can be supported on the basis of a number of entries. In the present case, we are concerned with the constitutional status of the levy, namely, service tax. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of Parliament

and the State Legislatures are subject to constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to taxes on professions, trades, callings, etc. Therefore, Entry 60 of List II and Entries 92-C/97 of List I operate in different spheres.

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46. In *International Tourist Corpn. versus State of Haryana (1981) 2 SCC 318*, the appellants were transport operators. The State of Haryana levied a tax on passengers and goods under the Haryana Passengers and Goods Taxation Act, 1952. The appellants questioned the vires of Section 3(3) insofar as the levy of tax on passengers and carriage of goods by their vehicles plying along the national highways. It was urged on behalf of the appellants that there was nothing in the Constitution to prevent Parliament from combining its power to legislate with respect to any matters enumerated in Entries 1 to 96 of List I with its power to legislate under Entry 97 of list I and, if so, then the power to legislate with respect to tax on passengers and goods carried on national highways was within the exclusive legislative competence of Parliament and, therefore, Section 3(3) of the Haryana Passengers and Goods Taxation Act, 1952 was beyond the legislative competence of the State Legislature. This argument was rejected by the Division Bench of this Court, which took the view that before exclusive legislative competence can be claimed from Parliament by resort to Entry 97, List I, the legislative competence of the State

Legislature must be established. Entry 97 itself was specific. In that, a matter can be brought under that entry only if it is not enumerated in Lists II or III, and in the case of a tax, if it is not mentioned those Lists. We do not dispute the above proposition. That proposition is well settled. This Court is concerned with the application of the said principle in this case. In the present matter, as stated hereinabove, the State Legislature is empowered to levy tax on professions, trades, callings, etc., as such and, therefore, the word "services" cannot be read as synonymous to the word "profession" in Entry 60. Therefore, tax on services do not fall under Entry 60. List II. That, service tax would fall under Entry 92-C/Entry 97 of List I.

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48. In *T. N. Kalyana Mandapam Assn. versus Union of India, (2004) 5 SCC 632*, the Division Bench of this Court held that service tax is an indirect tax and is to be paid on all the services notified by the Government of India. It has been further held that the said tax is on "service" and not on the service provider. In para 58 it has been observed that under Article 246(1) of the Constitution, Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (the State List). In the said judgment, it has been held that service tax is made by Parliament under Entry 97 of List I. In our view, therefore, the point in issue in the present case is squarely covered by the judgment of this Court in *T. N. Kalyana Mandapam*. Of course, in the present case, we are not concerned with the services rendered by a mandap-keeper, who performs what is called as property based services. In this case, we are concerned with performance based services. However, both the categories fall within the ambit of the word "services".

49. In *Gujarat Ambuja Cements Ltd. versus Union of India, (2005) 4 SCC 214*, it was held that service tax is not a tax on goods or on passengers but it was on the transportation itself and, therefore, it fall under residuary power of Parliament under Entry 97 of the Seventh Schedule to the Constitution. It was further held that service tax is not a levy on passengers or goods but on the event of service in connection with the carriage of goods and, therefore, it was not possible to hold that the Act was in pith and substance within the State's exclusive powers under Entry 56 of List II. It was held that service tax came within Entry 97 of List I. In the present case, as stated above, we are concerned with Entry 60 of List II. As stated above, service tax is on performance based services itself. It is on professional advice, tax planning, auditing, costing, etc. On each of the exercise undertaken tax becomes payable. Therefore, the above judgment has no application."

(12) In the light of above discussion, we may now consider the rival contentions in the present case.

(13) By way of Finance Act, 1994, concept of service tax was introduced. The said tax is destination based consumption tax being not a charge on business but on consumer and is leviable on service provided. It is, thus, value added tax. The services may be property based or performance based.

(14) As per scheme under the Constitution discussed above, subject of tax falling in power of a particular legislature in one aspect may fall within legislative power of another in other aspect. Such overlapping is unavoidable. Same transaction may involve two or more events in different aspects. There is distinction between general subjects of legislation and taxation. The entries have to receive liberal construction. If there is any overlapping, doctrine of pith and substance is to be applied and the Court has to look at the substance of the matter. List I has priority over List II though predominance of List I does not prevent State Legislature from dealing matters under List II.

(15) Entry 49 List II has been subject matter of various judgments and interpretation given about scope thereof is that it covers tax directly on lands and buildings. Annual value or capital value on land and buildings can be made the basis for determining such tax. Income from property can be taxed under Entry 82 List I. Wealth tax can be levied on capital value of land and building and such tax will fall under Entry 86 read with Entry 97 of List I and not Entry 49 of List II. Tax on capital value of land and building was different from tax on land and building.

(16) In **H.S. Dhillon,** following extract from earlier judgment in **Sudhir Chand Nawa** *versus* **Wealth Tax Officer, (6)** was quoted on the scope of Entry 86 List I and Entry 49 List II :—

> "The tax which is imposed by Entry 86; List I of the Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on capital value of the assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee; it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of assets, but the general liability of the assessee to pay his debts and to discharge his lawful obligations, have to be taken into account ... 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. By legislation in exercise of powers under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and

(6) AIR 1969 S.C. 59

buildings for determining tax liability will not, in our Judgment, make the fields of legislation under the two entries overlapping."

(17) Apart from the above, following observations in **Assistant Commissioner of Urban Land Tax** *versus* **The Buckingham and Carnatic Company. Limited, (7)** were alsio noticed :—

"The basis of taxation under the two entries is quite distinct. As regards Entry 86 of list I the basis of the taxation is the capital value of the assets. It is not a tax directly on the capital value of assest of individuals, and companies on the valuation date. The tax is not imposed on the components of the assest of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account.... But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is 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. By legislation in exercise of powers under Entry 86, List I, tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II, the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for dcrermining tax liability will not make the fields of legislation under the two entries overlapping. The *two taxes are entirely different in their basic concept and fell on different subject-matters.* " (Emphasis supplied).

(7) (1969) 2 S.C.C. 55

Reference was also made to following observations in **Gift Tax Officer Versus D. N. Nazareth, (8)**

> " 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."

It was thereafter concluded :—

> "74. The requisites of a tax under Entry 49, List II, may be summarised thus :
>
> (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.
>
> 75. In short, the tax under Entry 49, List II, is not a personal tax but a tax on property."

(18) Reference may also be made to the following principles of interpretation in the context of Canadian Constitution referred in the said judgement :—

> "In determining the validity of a Dominion Act, the first question to be determined is, whether the Act falls within any of the classes of subjects, enumerated in Section 92, and assigned exclusively to the Legislatures of the provinces. If it does, then the further question will arise, whether the subject of the Act does not also fall within one of the enumerated classes of subjects in Section 91, and so does not still belong to the Dominion Parliament. But if the Act does nor fall within any of the classes of subjects in Section 91, no further question will remain."

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(8) (1970) 1 S.C.C. 749

(19) In **Tamil Nadu Kalyan Mandapam Assn.,** validity of tax on use of Mandap was considered and plea that the said levy will be hit by Entries 49,54 or 60 of List II was repelled after referring to judgements in **Shri Prithvi Cotton Mills Limited and another** *versus* **Broach Borough Municipality and others, (9) Ralla Ram** *versus* **The Province of East Punjab, (10) The Government of AP and another** *versus* **Hindustan Machine Tools Limited (11),** with the following observations :—

> "40. With regard to the first aspect, it is submitted that in order 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. This was affirmed by a Seven-Judge Bench of this Court in **India Cement Limited. and Ors.** *versus* **State of Tamil Nadu and Ors.,** (1990) 1 SCC 12 para 22 relying upon several judgments of this Court including **S. C. Nawn** *versus* **W.T.O., Calcutta,** (1969) 1 SCR 108; **Asstt. Commissioner of Urban Land Tax** *versus* **Buckingham and Carnatic Co. Ltd.** (1970) 1 SCR 268 at 278; **Second Gift-tax Officer** *versus* **D. H. Nazareth,** (1971) 1 SCR 195; **Union of India** *versus* **H.S. Dhillon,** (1971) 2 SCC 779 at 792; **Bhagwan Dass Jain** *versus* **Union of India,** (1981) 2 SCR 808 and **Western India Theatres Ltd.** *versus* **Cantonment Board, Poona Cantonment,** (1959) Supp 2 SCR 63 at 69. The proposition has been followed in several judgments of this Court."

(20) In **All India Federation of Tax Practitioners,** plea against validity of service tax on services rendered by practicing professionals as being hit by Entry 60 of List II providing for tax on professionals was repelled. On concept of service tax, it was observed :—

> *'(i) Meaning of "service tax"*
>
> 22. As stated above, the source of the concept of service tax lies in economics. It is an economic conncept. It has evolved on account of service industry becoming a major contributor to the GDP

(9) (1969) 2 S.C.C. 283
(10) AIR 1949 F.C. 81
(11) (1975) 2 S.C.C. 274

of an economy, particularly knowledge-based economy. With the enactment of the Finance Act, 1994, the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268-A in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92-C was also introduced in the Union List for the levy of service tax. As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003. Further, it is important to note, that "service tax" is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client."

Distinguishing the service tax from professional tax, it was observed :—

"35. For each contract, tax is levied under the Finance Acts, 1994 and 1998. Tax cannot be levied under that Act without service being provided whereas a professional tax under Entry 60 is a tax on his status. It is the tax on the status of a cost accountant or a chartered accountant. As long as person/firm remains in the profession, he/it has to pay professional tax. That tax has nothing to do with the commercial activities which he undertakes for his client. Even if the chartered accountant has no work throughout the accounting year, still he has to pay professional tax. He has to pay the tax till he remains in the profession. This is the ambit and scape of Entry 60, List II which is a taxing entry. Therefore, Entry 60 contemplates tax on professions, as such. Entry 60, List II refers to "tax on employments".

Reference was also made to judgments in **C. Rajagopalachari** *versus* **Corporation of Madras, (12)** upholding income tax on pension under Entry 82 List I without affecting the scope of Entry 62 List II and in **Western India Theatres Limited** *versus* **Cantonment Board, (13)** upholding entertainment tax on exhibition of film as falling outside Entry 62 of List II and instead falling under the residue entry of List I. Reference was also made to **Guajrat Ambuja Cements Limited,** *versus* **Union of India (14)** upholding service tax on transportation services under the residue entry of List I which was outside Entry 56 of List II relating to tax on goods and passengers.

(21) In **India Cement Limited** *versus* **State of T.N. (15),** a bench of seven Hon'ble Judges considered the validity of tax on royalty on mining by the State legislature. Holding the levy to be outside the scope of Entry 49 List II, it was observed :—

> "22.....There is a clear distinction between tax directly on land and tax on income arising from land....
>
> 23. In Asstt. Commissioner of Urban Land Tax *versus* Buckingham and Carnatic Co. Ltd. (1969) 2 SCC 55 this Court reiterated the principles laid down in S.C. Nawn case, AIR 1969 SC 59, and held that Entry 49 of List II was confined to a tax that was directly on land as a unit. In **Second Gift Tax Officer. Mangalore** *versus* **D.H. Nazareth,** (1970) 1 SCC 749, it was held that a tax on the gift of land is not a tax imposed directly on land but only on a particular user, namely, the transfer of land by way of gift. In **Union of India** *versus* **H.S. Dhillon,** (1971) 2 SCC 779 this Court approved the principle laid down in S.C. Nawn case, AIR 1969 SC 59 as well as Nazareth case (1970) 1 SCC 749. In **Bhagwan Dass Jain** *versus* **Union of India** (1981) 2 SCC 135 this Court made a distinction between the levy on income from house property which would be an income tax, and the levy on house property itself which would

(12) AIR 1964 S.C. 1172
(13) AIR 1959 S.C. 582
(14) (2005) 4 S.C.C. 214
(15) (1990) 1 S.C.C. 12

be referable to Entry 49 List II. It is, therefore, not possible to accept Mr. Krishnamurthy Iyer's submission and that a cess on royalty cannot possibly be said to be a tax or an impost on land. Mr. Nariman is right that royalty which is indirectly connected with land, cannot be said to be a tax directly on land as a unit. In this connection, reference may be made to the differentiation made to the different types of taxes for instance, one being professional tax and entertainment tax. In the Western India Theatres Ltd. versus Cantonment Board, Poona Cantonment, AIR 1959 SC 582, it was held that an entertainment tax is dependent upon whether there would or would not be a show in a cinema house. If there is no show, there is no tax. It cannot be a tax on profession or calling. Professional tax does not depend on the exercise of one's profession but only concerns itself with the right to practice. It appears that in the instant case also no tax can be levied or is leviable under the impugned Act if no mining activities are carried on. Hence, it is manifest that it is not related to land as a unit which is the only method of valuation of land under Entry 49 of List II, but is relatable to minerals extracted. Royalty is payable on a proportion of the minerals extracted. It may be mentioned that the Act does not use dead rent as a basis on which land is to be valued. Hence, there cannot be any doubt that the impugned legislation in its pith and substance is a tax on royalty and not a tax on land."

(22) In view of above discussion, we are unable to hold that service tax on service of renting of property is exclusively covered by Entry 49 List II. As already observed,. Entry 49 of List II relates to tax on land and building and not any activity relating thereto. Income tax on income from property, wealth tax on capital value of assets including land and building and gift tax on gift of land and building have been upheld. It cannot held that renting of property did not involve any service as service could only be in relation to property and not by renting of property. Renting of property for commercial purposes is certainly a service and has value for the service receiver. Moreover, the aspect of service element in reating transaction is certainly an independent aspect covered under Entry 92C read with Entry 97 of List I. In any case, subject matter of impugned levy being outside

the scope of entry 49 of List II, power of Union Legislature is undoubted. Question whether levy will be harsh being in addition to income tax and property tax is not a matter for this Court once there is legislative competence for the levy. Even if it is held that transaction of transfer of right in immovable property did not involve value addition, the provision cannot be held to be void in absence of encroachment on List II.

(23) We now come to the aspect of retrospectivity. It is well settled that competent legislature can always clarify or validate a law retrospectively. It cannot be held to be harsh or arbitrary. Object of validating law is to rectify the defect in phrasecology or lacuna and to effectuate and to carry out the object for which earlier law was enacted.

(24) In **Shiv Dutt Rai Fatch Chand** *versus* **Union of India, (16)** it was observed :—

> "32. The next point to be considered is whether the imposition and collection of penalty with retrospective effect amounts to an imposition of an unreasonable restriction on the fundamental right of the petitioners to own property and to carry on business guranteed under Article 19(1) (f) and (g) of the Constitution. We have already indicated above the circumstances under which it became necessary to levy penalties with retrospective effect and to validate all the proceedings relating to levy of penalties and recovery thereof. The scope of the power of a legislature to make a law validating the levy of a tax or a duty retrospectively was considered by this court in **Chhotabhai Jethabhai Patel Co.** *versus* **Union of India, AIR 1962 SC 1006.** The court held that Parliament acting within its legislative field had the power and could by law both prospectively and retrospectively levy excise duty under the Central Excises and Salt Act, 1944 even where it was established that by reason of the retrospective effect being given to the law, the assessees were incapable of passing on the excise duty to the buyers. Afer considering certain American decisions, Ayyangar, J. Observed at SCR P 37 thus :
>
> "It would thus be seen that even under the constitution of the United States of America the unconstitutionality of a

(16) (1983) 3 S.C.C. 529

retrospective tax is rested on what has been termed the vague contours of the 5th Amendment'. Whereas under the Indian Constitution that grounds on which infraction, of the rights a property is to be tested not by the flexible rule of 'due process but on the more precise criteria set out in Article 19(5), mere retrospectivity in the imposition of the tax cannot per se render the Law unconstitutional on the ground of its infringing the right to hold property under Article 19(1) (f) or depriving the person of property under Article 31(1). If on the one hand, the tax enactment in question were beyond legislative competence of the Union or a State necessarily different considerations arise. Such unauthorised imposition would undoubtedly not be a reasonable restriction on the right to hold property besides being an unreasonable restraint on the carrying on of business, if the tax in question is one which is laid on a person in respect of this business activity."

(25) In **Tata Iron and Steel Company Limited** *versus* **The State of Bihar (17),** it was observed :—

"17. *Re point No. 5*: The argument on this point is that sales tax is an indirect tax on the consumer. The idea is that the seller will pass it on to his purchaser and collect it from them. If that is the nature of the sales tax then, urges the learned Attorney General, it cannot be imposed restrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that stage, be passed on to the purchaser. According to him the seller collects the sales tax from the purchaser on the occasion of the sale. Once that time goes past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales tax. In our judgment this argument is not sound. From the point of view of the economist and as an economic theory, sales tax may be an indirect tax on the consumers, but legally it need not be so. Under the 1947 Act the primary liability to pay the sales tax, so far as the State is concerned, is on the

(17) AIR 1958 S.C. 452

seller. Indeed before the amendment of the 1947 Act by the amending Act the sellers had no authority to collect the sales tax as such from the purchaser. The seller could undoubtedly have put up the price so as to include the sales tax, which he would have to pay but he could not realise any sales tax as such from the purchaser. That circumstance could not prevent the sales tax imposed on the seller to be any the less sales tax on the sole of goods. The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. This is further made clear by the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old custmoers even at the sacrifice of the sales tax. This also makes it clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller. The buyer is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. **See Love** *versus* **Norman Wright (Builders) Ltd. LR (1944) 1KB 484**. If that be the true view of sales tax then the Bihar Legislature acting within its own legislative field had the powers of a sovereign legislature and could make its law prospectively as well as retrospectively. We do not think that there is any substance in this contention either."

(26) In view of above, we do not find any ground to set aside giving of retrospective effect to the amendment from 1st June, 2007 on which date levy was initially provided.

(27) Accordingly, we do not find any merit in the writ petition and the same is dismissed.

R.N.R.

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