
(2002) 01 KL CK 0055
In the High Court Of Kerala
Case No : O.P. No. 22920/98C

All Kerala Chartered Accountants Association APPELLANT
Vs
Union of India (UOI) RESPONDENT

Date of Decision : 31-01-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 246, 246(1)

Citation : (2002) 176 CTR 268 : (2002) 1 ILR (Ker) 547 : (2002) 258 ITR 679

Hon'ble Judges : M. Ramachandran, J; B.N. Srikrishna, J

Bench : Division Bench

Advocate : Mathai M. Paikaday, K.B. Ganesh and Joe Joseph, for the Appellant; V.I. Gopalan, Addl. Solicitor General and P.S. Sreedharan Pillai, C.G.S.C., for the Respondent

Judgement

B.N. Srikrishna, C.J.—This Writ Petition under Article 226 of the Constitution of India impugns the constitutional validity of Service Tax levied under the Finance Act, 1998 (2 of 1998) on taxable service rendered by practising Chartered Accountants.

2. The petitioner is an Association of Chartered Accountants in Kerala registered under the Travancore Cochin Charitable Societies Act, which impugns the service tax levied on its members by reason of Sections 64 to 96 of the Finance Act, 1994, (32 of 1994), as amended by Finance Act, 1998 (2 of 1998).

Background of the levy :

As an off-shot of the recommendations of the Dr. Raja Chelliah Committee in 1990, for the first time, in the Union Budget for 1994-95, a levy of service tax on service relating to three categories, ie., stock brokers, general insurers and telephone services was imposed. The Raja Chelliah Committee had observed that indirect tax at the Central level should be broadly neutral in relation to production and consumption of goods and should, in course of time, cover commodities and services. It felt that the country should move towards full-

fledged Value Added Tax (V.A.T.) in due course covering services and commodities. It was envisaged that as the central excise on commodities would get gradually transformed into a value added tax at the manufacturing level, service tax will get woven into the system. The Committee, therefore, recommended charging of tax on service as such advertising, insurance, share broking, telecom, etc. to begin with. The purpose of Service Tax is to broaden the tax base, augment revenue and enhance participation of citizens in the economic development of the nation. It was estimated that as much as 40% of the G.D.P. was in the service sector had remained unexploited and out of the tax net. Finance Act 2 of 1996 extended the scope of the levy of service tax by covering the services of advertising agencies, courier agencies and pager services. In the Finance Act, 1997, the net was widened further by extending the service tax to twelve more services, viz., Man Power Recruitment Agency, Consulting Engineer, Custom House Agent, Steamer Agent, Mandap Keeper, Air Travel Agent, Clearing and Forwarding Agent, Rent-a-cab Operators, Tour Operators, Goods Transport Operators, Outdoor Caterers and Pandal or Shamiana Contractors. In the Finance Act 2 of 1998, twelve more services, viz., Architects, Interior Decorators, Management Consultants, Real Estate Agents, Practising Chartered Accountants, Practising Cost Accountants, Market Research Agencies, Underwriters and Mechanised Slaughter Houses were included in the tax net. At the same time, these services, namely, Outdoor Caterers, Pandal or Shamiana Contractors and Goods Transport Operators were deleted. The Finance Act, 1999 did not extend the scope of levy of service tax to any new category of services. Even in the Union Budget 2000-01, the Finance Minister declared that no change would be required at present as an expert group has been set-up to go into all aspects of the matter, review the experience so far and make a report and advise the Finance Ministry. An expert group under the Chairmanship of Dr. M. Govinda Rao is seized of the issue and examining its ramification in great details.

Legal provisions of the levy :

3. To understand the contentions urged at the Bar, it would be necessary to look at some of the provisions of the Finance Act. Chapter V of the Finance Act, 1994, as amended by the Finance Act of 1998, deals with the subject of "Service Tax". Section 65(31) defines the expression "practising Chartered Accountant" as under:

"practising Chartered Accountant means a person who is a member of the Institute of Chartered Accountants of India and is holding a certificate of practice granted under the provisions of the Chartered Accountants Act, 1949 (38 of 1949) and includes any concern engaged in rendering services in the field of Chartered Accountancy".

The expression "taxable service", in relation to Chartered Accountants, is defined in Section 65(48)(s) as under:

"taxable service means any service provided, (s) to a client, by a practising Chartered Accountant in his professional capacity; in any manner;"

Section 66 is the charging section and provides that, from a stipulated date, service tax at the rate of 5% of the value of taxable service would be charged on the taxable service provided. Section 67 indicates the manner of valuation of taxable services. Clause (r) of Section 67 provides that in relation to the service provided by a practising Chartered Accountant to a client, the value of taxable service shall be the gross amount received by such accountant from the client for services rendered in professional capacity in any manner. Section 68 makes it obligatory on every person providing taxable service to pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed. Originally, when introduced in Finance Act, 1994, the service tax had to be collected by the provider and paid to the Central Government, much in the same manner as tax deducted at source. In the Finance Act of 1998, the levy is on the service provider himself, and he is no longer treated as a collection agent, so to say. Section 69, requires every service provider liable to pay service tax to register with the appropriate authority, Superintendent of Central Excise. Section 70 provides for rendering of periodical returns. Sections 71, 72, 73 and 74 provide for the procedure for assessment and rectification of assessment; Section 75 deals with interest for delayed payment; Sections 75A, 76, 77, 78, 79 and 80 provide for penalties; Section 81 fixes the liability for offences by companies; Section 82 deals with power to search premises. Section 83 is of importance to us and provides as under:

"83. Application of certain provisions of Act 1 of 1994.- The provisions of the following sections of the Central Excise Act, 1944 (1 of 1944) as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:

9C, 9D, 11, 11B, 11BB, 12A, 12B, 12C, 12D, 12E, 14, 15, 35F to 35O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D and 40".

The importance of this section is that Section 12B of the Central Excise Act, 1944 is made applicable to service tax as it would apply in relation to duty of Excise. Section 12B of the Central Excise Act, reads as under:

"12B. Presumption that incidence of duty has been passed on to the buyer.- Every person who has paid the duty of Excise on any goods under this Act shall, unless the contrary is provided by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

The direct legal consequence of application of Section 12B of the Central Excise Act, 1944 to service tax is that there is a presumption that the service has been passed on to the customer who is the beneficiary of the service, and that is the reason why the service tax is levied on the service provider himself. It is open to the service provider to pass on the tax to the beneficiary of the service and reimburse himself. In other words, by reason of the statutory presumption, the

service provider does not pay the tax and the tax falls on the service receiver.

4. Learned counsel Sri. Paikeday, on behalf of the petitioners, contended that the Parliament has no legislative competence to enact a law relating to service tax, nor to levy service tax as done under the Finance Act. He urged that service tax is in "pith and substance" a tax on the practice of a "profession, trade, calling and employment" relatable to Entry 60 in List II (State List) of Schedule VII of the Constitution, and, therefore, beyond the competence of Parliament. Alternatively, it is contended that, relating the service tax to the gross charges collected by the practising Chartered Accountants would amount to double taxation on the income earned by the Chartered Accountants, and, therefore, unconstitutional.

Legislative Competence of Parliament :

5. The legislative competence of Parliament is determined by Article 246 read with Article 248 and List I of the Seventh Schedule. By reason of Article 246(1), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I (Union List) of Schedule VII. By reason of Article 248, Parliament has also been invested with residuary powers and has exclusive power to make any law in respect of any matter not enumerated in the Concurrent List or State List, including imposition of a tax not mentioned in either of those Lists. It is now settled law that when it comes to the question of determining the legislative competence of Parliament, it is unnecessary to search for entries in List I (Union List) or List III (Concurrent List), and the exercise need be limited to ensuring that Parliament has not encroached upon a subject relatable in pith and substance to an entry in List II (State List). In other words, any legislation with regard to subjects enumerated in the State List is excluded from Parliament's competence; everything else is included in Parliament's competence.

6. The Constitutional Bench of the Supreme Court in *Union of India v. Harbhajan Singh Dhillon*, (1972) 83 ITR 582 (SC) , evolved a test for testing the legislative competence of Parliament to enact a particular statute. It is held therein that, one must look at the several entries in List II to find out (applying the well-known principles in this behalf) whether the said statute is relatable to any of those entries. If the statute does not relate to any of the entries in List II, no further inquiry is necessary. It must be held that Parliament is competent to enact that statute whether by virtue of the entries in List I and List III or by virtue of Article 248 read with Entry 97 of List I. This view was reiterated in *Attorney General for India and Others Vs. Amratlal Prajivandas and Others*, , Mr. Paikeday contends that in the first place, the entries in List II of 7th Schedule to the Constitution must be liberally interpreted. If so liberally interpreted, applying the pith and substance doctrine, it would be clear that, though styled as "Service Tax", in reality it is an exercise of legislation relatable to Entry 60 of List II of Schedule VII which reads: "Taxes on professions, trades, callings and employments". Thus, the subject of service tax is beyond the legislative

competence of Parliament.

7. In *Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City*, , the Supreme Court held that the rules which apply to the interpretation of other statutes apply equally to the interpretation of a constitutional enactment subject to this reservation that their application is of necessity conditioned by the subject-matter of the enactment itself. Reiterating the observation of Gwyer, C.J., in AIR 1941 16 (Federal Court) at P. 25 the Supreme Court said, "none of the items in Lists is to be read in a narrow and restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

8. In *Indian Aluminium Co. etc. etc. Vs. State of Kerala and others*, , the view in *Navinchandra's* case (*supra*) was reiterated and it was held that the words in the Lists of Schedule VII should be read in their ordinary, natural and grammatical meaning, subject to the rider that in construing the words in a constitutional enactment conferring legislative power, the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude.

9. Placing reliance on these two Judgments, the learned Counsel for the petitioner contends that the widest liberal construction must be put on the words in Entry 60 of List II in the Schedule VII to the Constitution. The entry uses the words "taxes on professions, trades, callings and employments". This would include tax on profession and professional service also. The Service Tax levied by the Finance Act, 1998 is nothing but a tax on the professional services rendered by practising Chartered Accountants, and, therefore, relatable only to Entry 60 of List II in the Schedule VII. Consequently, it is beyond the legislative competence of Parliament. So goes the submission of Sri. Paikeday.

10. The above contention is met by the learned Additional Solicitor General with equal emphasis. He does not dispute that interpreting a Constitutional entry must be a liberal process and widest amplitude must be given while interpreting a Constitutional entry which empowers legislation. It is his submission that the expression "taxes on professions, trades, callings and employments" mentioned in Entry 60 of List II contemplates a tax levied for the privilege of being engaged in the profession, like that of a practising Chartered Accountant. Entry 60 of List II does not empower a State Legislature to tax the value of the services relatable to the services rendered by calling on the professions, trades, callings and employments. The learned Additional Solicitor General highlighted that in interpreting a fiscal statute levying a tax, the first thing to look for is the taxable event or the event on the happening of which the tax becomes leviable. The "taxable event" for service tax is the service rendered in the profession and not the fact of belonging to the profession or the income derived therefrom. This, in the submission of the learned Additional Solicitor General, is the crucial difference between a tax levied for being in the profession and the tax levied on the value of the services rendered in the profession.

11. The decision of the Supreme Court in *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, is illustrative and supportive of the arguments of the learned Additional Solicitor General. In that case, a tax levied by a Cantonment Board on the lessee of a cinema theatre on each show of the film exhibited was challenged on the ground that the provincial legislature had exclusive power to make law with respect to "taxes on luxuries including taxes on entertainments, amusements, etc." under Item 50 of List II of Schedule VII of the Government of India Act, 1935. The contention was that the entry permitted permission of law on persons who receive or enjoy the luxuries or the entertainments or the amusements and, therefore, no law "made with respect to matters covered by this entry can impose a tax on persons who provide the luxuries, entertainments or amusements. In other words, the levy was to fall on the receiver and enjoyer of the amusement, entertainment etc. and not on the provider of it. The decision in *Navinchandra Mafatlal's case* (supra) was relied upon. The Supreme Court, while agreeing that Constitutional entries empowering legislation must be liberally interpreted, held that the entry contemplates a law with respect to these matters (luxuries, entertainments or amusements) as objects and a law which imposes tax on the act of entertaining is within the entry, whether it falls on the giver or the receiver of that entertainment. It also rejected the contention that the imposition of the tax was for the privilege of carrying on any trade or calling and held, "it is a tax imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show, there is no tax". It observed, "a lawyer has to pay tax or fee to take out a license irrespective of whether or not he actually practises. That tax is a tax for the privilege of having the right to exercise the profession. If and when the person taking out the license chooses to do so".

12. Entry 60 of List II must also be interpreted in the light of Article 276 of the Constitution. Article 276 was specifically enacted to validate a law made by the legislature of a State relating to tax in respect of profession, trade, calling or employment, and to immunize it against challenge on the score of being a law relating to tax on income, a subject in the exclusive purview of the Central Government. Clause (2) of Article 276, however, imposed a ceiling of Rs. 2,500 per annum on such tax.

13. The confusion arises because of not keeping in mind the distinction between the "taxable event" and the "measure of tax" contemplated under a taxing statute. The taxable event determines the true nature of the tax, while the measure of tax does not determine the nature of tax but the quantum of tax which can be levied and collected. The Supreme Court in *Ram Chander Darak Vs. Ganeshdas Rathi and Others*, said:

".....It has long been recognised that the measure employed for assessing tax must not be confused with the nature of the tax. In AIR 1949 81 (Federal Court), the Federal Court held that a tax on buildings u/s 3 of the Punjab Urban Immovable Property Tax Act, 1940 measured by a percentage of the annual

value of such buildings remained a tax on building under that Act even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income Tax Act. It was pointed out that although the same standard was adopted as a measure for the two levies, the levies remained separate and distinct imposts by virtue of their nature. In other words, the measure adopted should not be identified with the nature of the tax....."

The apparent conflict in interpreting the tax entries results from the fact that the tax has two elements, the person, thing or individual on which the tax is imposed (taxable event) and the amount of the tax. The quantum of tax may be measured in many ways, but a clear distinction between the subject matter of tax and the standard by which the quantum of tax is measured must be maintained in mind. Once the perspective is clear as to what is the subject of tax and the measure of the tax, much of the confusion from which the challenge has emanated will clear away.

14. In interpreting a taxing statute, the doctrine of "aspect legislation" must be kept in mind. In *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*, the tax was levied on chargeable expenditure incurred in the class of hotels wherein room charges were more than Rs. 400 per day per individual or more. Its constitutional validity was challenged on the ground that, in pith and substance, it was a tax on "luxuries" falling within Entry 62 of List II of the Seventh Schedule, or a tax on the consideration paid for the purchase of goods constituting an impost of the nature envisaged in Entry 54 of List II, and, therefore, outside the legislative competence of Parliament. The Constitutional Bench of the Supreme Court rejected the challenge, elaborating the theory of "aspects legislation". The Supreme Court observed: (vide paragraphs 30-32, 37, 38)

"30. In *Lefroy's Canada's Federal System*, the learned author referring to the "aspects of legislation" u/s 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 has been evolved by judicial 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 legislature 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 v. Bryden* (1899 AC 580, 587), Lord Haldane said:

"It is remarkably the way this Board has reconciled the provisions of Section 91

and Section 92, by recognizing that the subjects which fall within Section 91 in one aspect, may, under another aspect, fall u/s 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 AIR 1945 98 (Privy Council) 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 exercise, 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" doctrine bears some resemblance to those just noted but, unlike them, deals 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, fishscales, nailfile, etc., a description of it must mention everything but in characterising it the particular use proposed to be made of it determines what it is. (p. 116)

..... I Pause to comment 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)

37. It is trite law that the true nature and character of the legislation must be determined with reference to a question of the power of the legislature. The consequences and effects of the legislation are not the same thing as the legislative subject matter. It, is the true nature and character of the legislation and not its ultimate economic results that matters.

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."

15. The Supreme Court reiterated the above principles laid down in *Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan*, , while upholding the provisions of the State law levying a tax on passengers and goods under Entry 56 of List I. The Supreme Court had pointed out that, in pith and substance, the law did not levy a tax on income, but it levied a tax upon the passengers and goods in respect of passengers and goods transported in motor vehicles of the State, though the measure of the tax was furnished by the amount of fare and freight charged, it did not cease to be a tax on passengers and goods.

16. Mr. Paikedy, however, contends that Entry 60 in list II of Schedule VII to the Constitution is not to be interpreted in the manner that is suggested by the learned Additional Solicitor General. He contends that service tax is not a tax contemplated by or relatable to Entry 60 of List II as a tax thereunder is not merely a tax for entering and remaining in the profession, but must be a tax for practising a profession. He cited the Judgment of the Supreme Court in *C. Rajagopalachari Vs. Corporation of Madras*, . The appellant in that case held the office as the last Governor General of India and was entitled to certain pension under a Central Act. The appellant resided in the city of Madras and was drawing this pension. The Corporation of Madras demanded professional tax from him. The appellant contended that he was not actively in practise of any profession as he was a retired person. The Corporation was empowered by the relevant Constitutional provision merely to levy a tax on "profession or trade or calling or appointment", as the tax was on his income as a Professional, and he was a pensioner, it was beyond the legislative competence of the State. The Supreme Court accepted the contention of the appellant and held that the taxes specified in Entry 60 of List II are taxes on carrying on of a profession, trade etc. and would therefore apply only to a case of present employment. The mere fact that a person had previously been in a profession or carried on a trade etc., cannot justify a tax under the said Entry. The tax on the receipt of pension or on the income from investments is in truth and substance a tax on income. At the same time, when the tax was levied, the pensioner was in no employment, but was only in receipt of income though for past services in an employment. Hence, the levy was held to be constitutionally invalid. Section 142-A(1) of the Government of India Act, 1935 (which corresponds to Article 176(1)) was relied upon by the Corporation of Madras". The Supreme Court rejected the argument by holding that that section would assist the State only if the tax imposed were one on a profession, trade, calling, or employment, and in that event the section provided that such a tax shall not be deemed to be a tax on income, but where the tax imposed is one not on a profession etc., at all, it did not mean that the State might levy a tax on income and call it profession tax. In our view, the Judgment of the Supreme Court in *C. Rajagopalachari Vs. Corporation of Madras*, is clearly

distinguishable. The appellant, Sri, Rajagopalachari had ceased to be practising professional and, presumably, the licence to practice a profession had been surrendered or cancelled. Thus, he was no longer in profession. The attempt of the Corporation to tax the receipt of pension relatable to his past employment or profession was obviously not connected with the privilege of being in the, profession, actively or passively. Hence, the levy was held to be unrelatable to Entry 60 in List II of Schedule VII. In our view, this judgment does not advance the argument of Mr. Paikeday.

17. The learned counsel then referred to the decision in *Barendra Prasad Ray and Others Vs. Income Tax Officer, "A" Ward, Foreign Section and Others*, for support. This judgment turns on the expression "business connection" used in Income Tax, Act, 1961. Reiterating the observation of Rowlatt, J, in *Christopher Barker & Sons v. Commissioner of Inland Revenue*, (1919) 2 KB 222 , "All professions are businesses; but all businesses are not professions,....." and summarising, the Supreme Court said:

"The word "business" is one of widest import and it means an activity carried on continuously and systematically by a person by the application on his labour or skill with a view to earning an income. We are of the view that in the context in which the expression "business connection" is used in Section 9(1) of the Act, there is no warrant for giving a restricted meaning to it excluding "professional connections" from its scope."

We fail to see how this Judgment helps the petitioner, since it puts a meaning to be given to a particular statute for a particular purpose.

18. The decision in *Central Bureau of Investigation Vs. v.C. Shukla and Others*, , though cited, has no application. The word "business" is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with to earning an income. The question therein was whether certain "books of accounts" were kept in the course of business for the purpose of admissibility u/s 34 of the Evidence Act, 1872. This Judgment too address a question with which we are not concerned. The learned counsel referred to the decisions in *State of Punjab and Another Vs. Prem Sukhdas and Others*, , *Munshi Ram and Others Vs. Municipal Committee, Chheharta*, , and *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, , and contended that these judgments hold that the expression "business" and "profession" are interchangeable, though the term business has larger amplitude. In our view, these Judgments are not helpful in resolving the questions raised to us.

19. The decision in *Kisan Supdu Ingale Vs. Bhusawal Borough Municipality, Bhusawal and Another*, , particularly the observations of the Division Bench of the Bombay High Court in para 2 were relied upon. This is ah authority for the proposition that "service" would be covered by the expression "employment" used in Entry 60 of List II. The contention of the learned counsel for the

petitioner is that if service is equivalent to employment, then tax on service would be relatable to Entry 60 in List II of Schedule VII and therefore, constitutionally beyond the legislative competence of Parliament. We have already pointed out that under "Aspect Legislation", it is open to different legislatures to legislate with regard to different aspects of the same subject matter. Even assuming that "service" is contemplated by term "employment" in Entry 60 in List II, it only means that the aspect of entering into service would be within the taxing competence of State Legislature and nothing beyond that.

20. The Judgment of the Supreme Court in *Shivananjundappa and Ors: v. State of Karnataka* 1963 Supp. (1) SCC 617, was relied upon to show that classification under Article 14 would be permissible if the classification for the purpose of levy of profession tax on lawyers practising within the Bangalore Urban Agglomeration differently from those practising within the municipal limits of District Headquarters, and also classification based on length of standing in the profession was upheld. True it was. The judgment renders no help to us.

21. Learned counsel for the petitioners contended that the residuary power of the Parliament is the last resort and must not be relied upon if, in pith and substance, the legislation under scrutiny can be related to any entry enumerated in the three lists. In our view, the contention has no substance. It is not an independent contention at all. The real issue is: "Is Parliament barred from entering the field because of an enumerated entry in List II, to which, in pith and substance, the impugned legislation is relatable?" If the answer is yes, the Parliament has no competence to legislate on service tax; if the answer is no, there is nothing which prevents Parliament enacting the law under Article 258 or under Entry 82 or 97 of List I.

22. Applying the law laid down by the Supreme Court in the Judgments referred to above, we are of the view that the Service Tax levied on practising Chartered Accountants cannot be said to relate, in pith and substance, to entry 60 in List II of Schedule VIII to the Constitution, keeping in mind the "aspects legislation" theory. The practice of profession of Chartered Accountants involves the giving of service as a professional and earning of income as professional, apart from being registered as a professional under some applicable law. Each one of these aspects is capable of being identified by the Legislature as a subject of taxation. Upon the privilege of belonging to a profession, tax may be levied by the State Legislature in exercise of its power arising from Entry 60 in List II of Schedule VII (State List). On the income arising from the practice of profession, Parliament is competent to tax it by reason of a law made in exercise of its powers relatable to Entry 82 in List I (Union List). The value of the service rendered by a professional practising the profession is not the subject matter of "Tax on Profession", within the meaning of Entry 60 in State List, as held by the Supreme Court in *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, . The tax on profession is really a tax on the privilege of being engaged in a profession and not with regard to any other aspect of the profession. The aspect

of value of service rendered in the profession is not related to any entry in List II. Consequently, it is perfectly permissible for the Parliament to legislate for a tax thereupon. The contention of Mr. Paikeday, must therefore, fail.

23. Mr. Paikeday, then contended that tax on profession, trade, calling and * employments, within the meaning of Entry 60 in List II, can only fall upon a person, not merely because of entry into the profession, but also his rendering services in the profession. He would have us read the words in Entry 60 of List II ejusdem generis: He contends that to profession, trade, calling or employment, there is one thing in common, i.e., service, which is most of the time paid for. Thus, according to Mr. Paikeday, placing a liberal interpretation on Entry 60 of List II, it would include a tax on service and the income consequent from such service. Hence, he submits that there is no scope for exercise of residuary powers either under Article 248 or relatable to Entry 97 of List I of. Schedule VII.

24. It is not possible to accept this contention. This contention, arises, because of not keeping in mind the "aspect doctrine" which the Supreme Court, borrowing from Canadian Authorities, had approvingly postulated back in the decision of Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, . Once the "aspects theory" is kept in mind, the contention fails. As a matter of fact, Mr. Paikeday unconsciously made submissions on the aspects theory, without articulating its logical consequence. To summarise his contentions, and to put them in a legal matrix: "profession, trade, calling and employment" have the aspect of entry, aspect of income and the aspect of service. Each aspect can be the subject matter of a fiscal statute depending on the power of the Legislature under the distribution of. powers under the Constitutional Scheme. The aspect of entry into profession/trade/calling/employment may be taxed by a tax relatable to Entry 60; the aspect of income by Parliament under Entry 82 of List I. The last aspect, viz., service, or the value of rendering the service, does not form the subject matter of a suitable entry. Hence, it is taxable by Parliament, in exercise of its residuary power under Article 248, read with Entry 97 of List I. We are therefore, unable to accept the contention.

25. Relying on the Judgment of the Supreme Court in International Tourist Corporation and Others Vs. State of Haryana and Others, , the learned counsel for the petitioners contends that, if the courts put too broad an interpretation on the residuary powers of the Parliament, so as to retrench upon and whittle away the legislative powers of the State, it would be eroding the Federal Structure of the Constitution itself. It is contended that in a Federal Constitution like ours, where there is a division of legislative subjects, with the residuary power vested in the Parliament, such residuary power cannot be so expansively interpreted as to affect and jeopardise the very federal principle. It is therefore 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. The Judgment of the Bench of nine Judges in S.R. Bommai and others Vs. Union of

India and others etc. etc., , is pressed into service to establish that ours, is a Federal Constitution.

26. There is no difficulty in accepting the principle that because under the scheme of our Constitution greater power is conferred upon the Centre vis-a-vis the States, it does not mean that States are mere appendages of the centre. Within the spheres allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. The Supreme Court was pleased to observe in *Bommai* (supra):

"Federation envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The State is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its boundaries alterable by a law made by the Parliament. Neither the relatable importance of the legislative entries in Schedule VII, Lists I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution are unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The status qua the Constitution is federal in structure and independent in the exercise of legislative and executive power."

It is necessary to keep in mind the context in which these observations were made. *Bommai* was a case where the powers of the President under Article 356 were sought to be used for dismissing a democratically elected Government in the State, for the sole reason that the State was controlled by a party other than the party in power at the Centre. The decision is not really helpful in interpreting the constitutional entries in Schedule VII.

27. The decision in *Union of India v. Harbhajan Singh Dhillon*, (1972) 83 ITR 582 (SC) also was relied on by the Counsel for the petitioners. The following observations in para 94 are emphasised.

"94. The expression "any matter not enumerated in the Concurrent List or State List" in Article 248 must mean, in the context of Clause (1) of Article 246, which gives Parliament exclusive power in respect of matters in List I, any matter other than those enumerated in any of the three lists. Obviously, the residuary power given to Parliament on matters in List I already conferred under Clause (1) of Article 246, so that a attempt to distinguish the words "any matter" in Article 248 and "any other matter" in Entry 97 in List I is a distinction without difference. There had to be difference in language in the two provisions in the context of the content of Entry 97 as that entry speaks about matters other than those enumerated before in List I and those enumerated in the other Lists. Notwithstanding the fact that the residuary power has been vested in the Central Legislature under Article 248 and its consequence translated in Entry 97 in List I,

there can be no gainsaying that the idea was to assign such residuary power over matters which at the time of framing the three Lists could not be thought of or contemplated. This is clear from the fact as pointed out by counsel, that the Lists contain as may be 209 matters which are couched in careful and elaborate words with inclusive with excluding language in the case of some, which has made the Constitution, to use the words of Gwyer, C.J. in 1939 FCR 18 = AIR 1939 1 (Federal Court)), "unique among federal Constitution in the length and detail of its legislative lists". In the layout of such elaborately worded matters in the Lists and in the context of Article 246(1), the residuary power contained in Article 248 and Entry 97, List I must be construed as meaning power in respect of matters not enumerated in any of the three Lists. Such a residuary power cannot, therefore, be ordinarily claimed in respect of a matter already dealt with under an Article or an entry in any one of the three Lists."

There is no difficulty in applying this principle. In fact, Dhillon's case was considered and reiterated in the Federation of Hotels and Restaurants Association (*supra*). The principle, merely, is that the residuary power does not arise if there is an enumerated entry. It is nobody's case that there is an enumerated entry in any of the Lists in the 7th Schedule relating to "Service Tax".

28. In *Goodricke Group Ltd. and Others Vs. State of W.B. and Others*, the legislative competence to impose a cess on a tea estate at prescribed rate for each kilogram of green tea leaves produced in such estate was challenged. The question was, whether it amounted to a tax on land measured by yield, by quantum of tea leaves produced in the tea estate, and hence, covered by Entry 49 of List II of Schedule VII, or whether it was a levy on the produce of the land itself. The Supreme Court upheld the levy as legitimately relating to Entry 49 of List II and within the competence of State Legislature and not beyond its competence as falling under Entry 52 of List I of 7th Schedule. The Supreme Court noticed the Judgment in *Sir Byramjee Jeejeebhoy, Kt. Vs. The Province of Bombay*, which was affirmed by the Federal Court in AIR 1949 81 (Federal Court) . In *Ralla Ram's case*, the question was whether the tax imposed by the Punjab Urban Immovable Properties Act, 1940 was within the legislative competence of the provincial legislature or whether it was in truth and substance a tax upon the income of the person owning the property. The tax was levied on the basis of annual letting value of the buildings and lands. The annual letting value was to be ascertained by estimating the gross annual rent at which such land or building with its appurtenances and any furniture that may be let for use or enjoyment with such building might reasonably be expected to fetch from year to year. The Federal Court exhaustively dealt with several English and Indian decisions on the subject and evolved the following principles:

"The principles deducible from these pronouncements are- (1) that where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial Legislature, we must try to ascertain the pith and substance or the true nature and character of the conflicting provisions, and (2) that, before an

Act is declared ultra vires, these should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid."

The decisions in *V. Pattabhiraman v. Assistant Commissioner, Urban Land Tax*, AIR 1971 Mad 61, *Ajoy Kumar Mukherjee v. Local Board of Barpeta* AIR 1956 SC 1561, *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, , *The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc.*, , and the Judgment of Maurice Gwyer, C.J. in AIR 1941 47 (Federal Court) , were noticed and approved by the Supreme Court. It also reiterated by distinction made between the Subject of a tax and the Measure of a Levy articulated by the Federation of Hotel & Restaurant Association (supra).

29. It was pointed out in *Governor General* in AIR 1945 98 (Privy Council) , that although the excise duty and a tax on a sale of goods was leviable at the same time when the manufactured article leaves the factory of the manufacturer, "the two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sale, may, as is there pointed out, in one sense overlap. But, in law there is no overlapping. The taxes are separate and distinct imports. 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 exercisable article leaves the factory or workshop for the first time on the occasion of its sale". In our view, this observation of the Supreme Court leave no room for doubt in interpreting Entry 60 of List II of Schedule VII as already held in *Western India Theatres Ltd.* (supra).

30. The decided case hold that Entry 60 is to be interpreted as empowering the State legislature to impose a levy on the privilege of practising a profession. The other aspects of the profession are not touched by Entry 60. Hence, also, the contention of Mr. Paikeday, as to the incompetence of Parliament to enact the levy of service tax must fail.

31. The next contention urged by the learned counsel for the petitioner is based on the provisions of Chartered Accountants" Act, 1949. This Act is intended to regulate the profession of Chartered Accountants and for that purpose to establish an Institute of Chartered Accountants. Section 2(b) of this Act defines the expression "Chartered Accountant" as a person who is a member of the Institute established u/s 3 of the Act. Section 6 provides that no member of the Institute shall be entitled to practise, whether in India or elsewhere, unless he has obtained from the Council a certificate of practice and that every such member shall pay such annual fee for his certificate as may be prescribed on the prescribed dates u/s 65(31) of the Finance Act, 1998, the definition of "practising Chartered Accountant" means a person who is a member of the Institute of Chartered Accountants of India and is holding a certificate of practice granted under the provisions of the Chartered Accountants Act, 1949 (38 of 1949) and includes any concern engaged in rendering services in the field of Chartered Accountancy.

32. The contention is that the Chartered Accountants Act, 1949, which is intended to govern the practice of Chartered Accountants, itself make a difference between a person who is merely a member of the Institute, as suggested by the definition of "Chartered Accountants" u/s 2(b) and a "practising Chartered Accountant" who requires a certificate of practice u/s 6 of the said Act. Hence, it is contended that, at least as far as Chartered Accountants are concerned, there is a difference made by law, between the privileges of being a member of the Institute of Chartered Accountants and practising the profession of Chartered Accountants. Consequently, it is submitted that while interpreting Entry 60 in List II of Schedule VII, as far as Chartered Accountants are concerned, the distinction made by the Supreme Court in *Western India Theatres Ltd. 's case (supra)*" no longer holds good. Hence, it is urged that the proposition that a tax relating to Entry 60 in List II would be only on the privilege of entering and being a member of the profession does not hold good in the case of practising Chartered Accountants, who are not only required to be members of the Institute of the Chartered Accountants, but are also required to hold a certificate of practice as provided in Section 6(1) of the said Act. In our view, this argument has no substance. Whatever be the definition of the expressions, "Chartered Accountant" and "practising Chartered Accountant" for the purpose of Chartered Accountants Act, when it comes to the expression "practising Chartered Accountant" for the purpose of Finance Act, we must apply the definition as given in the Finance Act itself. It is a basic canon of interpretation that each statute defines the expressions used in it and that definition should not be used for interpreting any other statute unless in any other cognate statute there is no definition, and the extrapolation would be justified. It is not possible to say that the Finance Act, which deals with a fiscal subject and the Chartered Accountants Act, 1949 are cognate statutes; nor can we borrow the definition in one for use in the other. Hence, we are of the view that while dealing with the levy of service tax, the definition of practising Chartered Accountants as given in Section 65(31) in Chapter V of the Finance Act, 1998 alone would be determinative. Once we keep this in mind, the contention fails.

Violation of Article 14 :

33. It is next contended that the levy is discriminative and hit by Article 14. Elaborating the contention, the learned counsel urged that there are several persons practising different professions. There is no rationale or reason why several other professionals are kept out of the tax net, and only certain professionals like practising Chartered Accountants, practising Cost Accountants etc. are subjected to levy of service tax. In order that a classification under a statute does not violate Article 14, it is necessary that the classification should be based on intelligible differentia, having a rational nexus with the objective sought to be achieved by the statute. That there is no intelligible, differentia on which some professionals are in the tax net, while some are left out. Hence, the levy of service tax is discriminative and hit by Article 14.

34. It is an established principle that, vis-a-vis a taxing statute Article 14 of the Constitution has limited role to play. Though taxing laws are not really outside Article 14, having regard to the diverse economic criteria that go into the formulation of a fiscal policy, legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less vigour. In examining the allegations of hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A Legislature does not have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory. The decided cases show that legislature is permitted to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. Elaborating this principle, the Supreme Court in Federation of Hotel & Restaurant Association of India (supra) observed:

"47. But with all this latitude certain irreducible desiderata of equality shall govern classifications for differential treatment in taxation laws as well. The classification must be rationale and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the nexus with the object sought to be achieved by the law. The State, in the exercise of its governmental power, has, of necessity, to make laws operating differently in relation to different groups or classes of persons to attain certain ends and must, therefore possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience.

48. Classification based on differences in the value of articles or the economic superiority of the persons of incidence are well recognised. A reasonable classification is one which includes all who are similarly situated and none who are not. In order to ascertain whether persons are similarly placed, one must look beyond the classification and to the purposes of the law".

35. In Jaipur Hosiery Mills (P) Ltd., Jaipur Vs. The State of Rajasthan and Others, , while upholding a classification made on the basis of value of sold garments, the Supreme Court pointed out that the Statute is not open to attack on the mere ground that it taxes some persons or objects and not others.

36. In The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, at page 677-78, Mathew, J. quoting Justice Frankfurter in Morey v. Found 254 U.S. 457 at 472, the Supreme Court says:

"Statutes are directed to less than universal situations. Law reflects distinction that exist in fact or at least appear to exist in the Judgment of legislators - those

who have the responsibility for making law fit fact. Legislation is essential empiric. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation. To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic".

And concluded (SCC p. 678, para 67)

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint, if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability".

37. In *G.K. Krishnan v. State of Tamil Nadu*, Mathew, J. referred with approval to the following observations of the Supreme Court of U.S.A. in *G.K. Krishnan and Others Vs. State of Tamil Nadu and Others*, at 389 para 38:

"Thus we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favour of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause".

38. *Ift Income Tax Officer, Shillong and Others Vs. R. Takin Roy Rymbai and Others*, at pp. 922-923, para 27, the Supreme Court held:

"Given legislative competence, the Legislature has ample freedom to select and classify persons, districts, goods, properties, incomes and objects which it would tax, and which it would not tax-So long as the classification made within this wide and flexible range by a taxing statute does not transgress the fundamental principles underlying the doctrine of equality, it is not vulnerable on the ground of discrimination merely because it taxes or exempts from tax some incomes or objects and not others. Nor the mere fact that a tax falls more heavily on some in the same category, is by itself a ground to render the law invalid. It is only when within the range of its selection, the law operates unequally and cannot be justified on the basis of a valid classification, that there would be a violation of Article 14."

The above propositions have been reiterated by the Supreme Court in Federation of Hotel and Restaurant Association of India (*supra*, at pp. 660-661). Thus, the argument that Article 14 is infringed by imposing service tax on some practising professionals and leaving out others, cannot be accepted.

39. A refinement in the argument is injected by pointing out that originally as enacted by the Finance Act, 1998, the levy fell on all "practising Chartered Accountants" as defined under the Act. A memorandum was submitted to the Union Finance Minister OR behalf of: Central Council of Indian Chartered Accountants" Institute on 9th September, 1998 (Vide Ext. P1) requesting for withdrawing the levy of service tax. Pursuant thereto, or otherwise, there was rethinking in the Finance Ministry and Notification No. 59/98- Service Tax, dated 16th October, 1998 was issued by the Central Government in the following terms:

".....the Central Government being satisfied that it is necessary in public interest so to do, hereby exempts the taxable services provided by a practising chartered accountant, a practising company Secretary or a practising cost accountant, in his professional capacity to a client, other than the taxable services relating to;

(i) accounting and auditing; Or

(ii) cost accounting and cost auditing; or

(iii) secretarial auditing; or

(iv) verification of declarations in prescribed forms of compliances for obtaining a certificate of commencement of business or commencement of other business u/s 149 of the Companies Act, 1956 (1 of 1956); or

(v) signing of the annual return of listed companies u/s 161 of the Companies Act, 1956(1 of 1956);or

(vi) certification that requirements of Schedule XIII to the Companies Act, 1956 (1 of 1956) have been complied with as regards statutory guidelines for appointment of managerial personnel and payment of managerial remuneration to them without the approval of the Central Government u/s 26D and Schedule XIII, of the Companies Act, 1956 (1 of 1956); or

(vii) certification of documents to be filed by companies with the Registrar of Companies under the Companies Act, 1956(1 of 1956);or

(viii) certification in Form I that the whole of the amount remaining unpaid or unclaimed for a period of three years from the date of transfer to the special account under Sub-section (1) and Sub-section (2) of Section 205 A of the Companies Act, 1956 (1 of 1956) has been transferred to the General Revenue Account of the Central Government under the Companies Unpaid Dividend (Transfer to General Revenue Account of the Central Government) Rules, 1978;or

(ix) certificate of documents under the Exports and Imports Policy (1997-2002) of the Government of India; or

(x) certification for exchange control purposes which a practising Chartered Accountant can issue as documentary evidence in support of certain applications under the Foreign Exchange Regulation Act, 1973 (46 of 1973); or

(xi) certification in respect of valuation of instruments or assets as per Rule 8a(7) of the Wealth Tax Rules, 1957, from the whole of service tax leviable thereon".

40. The Council of the Chartered Accountants of India has passed a resolution u/s 2(2)(iv) of the Chartered Accountants Act, 1949 which has allowed the Chartered Accountants in practice to render the following services: .

"(i) Financial management planning and financial policy determination,

(ii) Capital structure planning and advice regarding raising finance,

(iii) Working capital management,

(iv) Preparing project reports and feasibility studies.

(v) Preparing cash budget, cash flow statements, profitability statements, statements of sources and application of funds etc.

(vi) Budgeting including capital budgets and revenue budgets.

(vii) Inventory management, material handling and storage.

(viii) Market research and demand studies.

(ix) Price fixation and other management decision making.

(x) Management accounting systems, cost control and value analysis.

(xi) Control methods and management information and reporting.

(xii) Personnel recruitment and selection.

(xiii) Setting up executive incentive plans, wage incentive plans etc.

(xiv) Management and operational audits.

(xv) Valuation of shares and business and advice regarding amalgamation, merger and acquisition.

(xvi) Business policy, corporate planning, organisation development, growth and diversification.

(xvii) Organisation structure and behaviour, development of human resources including design and conduct of training programmes, work study, job-description, job evaluation and evaluation of work loads.

(xviii) Systems analysis and design, and computer related services including selection of hardware and development of software in all areas of services which can otherwise be rendered by a Chartered Accountant in practice and also to

carry out any other professional services relating to EDP.

(xix) Acting as advisor or consultant to an issue, including such matters as:

(a) Drafting of prospectus and memorandum containing salient features of prospectus. Drafting and filing of listing agreement and completing formalities with Stock Exchanges, Registrar of Companies and S.E.B.I.

(b) Preparation of publicity budget, advice regarding arrangements for selection of (i) ad-media, (ii) centres for holding conferences of brokers, investors, etc., (iii) bankers to issue, (iv) collection centres, (v) brokers to issue, (vi) underwriters and the underwriting agreement, distribution of publicity and issue material including application form, prospectus and brochure and deciding on the quantum of issue materials (in doing so, the relevant provisions of the Code of Ethics-must be kept in mind).

(c) Advice regarding selection of various agencies connected with issue namely Registrars to issue, printers and advertising agencies.

(d) Advice on the post issue activities, eg., follow up steps which include listing of instruments and despatch of certificates and refunds, with the various agencies connected with the work,

Explanation.- For removal of doubts, it is hereby clarified that the activities of brokering, underwriting and portfolio management are not permitted.

(xx) Investment counselling in respect of securities (as defined in the Securities Contracts (Regulation) Act, 1956) and other financial instruments. (In doing so, the relevant provisions of the Code of Ethics must be kept in mind).

(xxi) Acting as registrar to an issue and for transfer of shares/other securities. (In doing so, the relevant provisions of the Code of Ethics just be kept in mind).

(xxii) Quality audit.

(xxiii) Environment audit,

(xxiv) Energy audit".

41. In addition, general permission has been granted for Chartered Accountants to engage in certain other categories of service. The contention is that as a consequence of the notification, dated 16th October 1998, only eleven categories of services rendered by practising Chartered Accountants fall outside the taxing net. This is an artificial distinction made for which there is no rational basis. This is not free from the vice of arbitrariness and irrational classification not based upon any differentia related to any object sought to be achieved by the Statute. Hence, it is contended that levy is hit by Article 14.

42. As rightly urged by the learned Additional Solicitor General, it is not obligatory on Parliament to tax all professions. As far as levy on practising Chartered Accountants is concerned, those who fall within the definition are

treated uniformly. Because some categories are given exemption (may be for the time being) by reason of exercise of power to exempt vested in the Government,, it does not mean that they are not covered by the statute. In effect, the power to exempt can arise only in a situation where the liability under the statute exists, but is pro-tem exempted from implementation. As pointed out by the Supreme Court in *Kasinka Trading and another, etc. etc. Vs. Union of India and another, ,* the power to grant exemption from payment of duty would flow from the fiscal statute itself. The power to exempt includes the power to modify or withdraw the same. The liability to pay the tax arises when the taxable event occurs. The exemption notification issued under the appropriate provision of the taxing statute merely has the effect of suspending the collection of tax for the time being. It does not render the subject of levy immune from the levy or remove the tax liability as such. It merely suspends the levy, wholly or partially, and subject to such other conditions. It has to be kept in mind that tax on services is a new attempt made by Parliament and its efficacy can be determined after considerable time of trial and error. If, in the final analysis, the levy is to be paid by the public at large, being passed on to them or at least presumed to be passed on to them u/s 12B of the Central Excise Act, 1944, the machinery to be evolved for collection of levy would depend on the experience and the wisdom gathered from experience. Crudities and inequities of the provisions do not render the statute arbitrary, irrational or constitutionally invalid. The Supreme Court of USA in *Secretary of Agriculture v. Central Roig Refining Co., (1949) 338 U.S. 604*, observed: "this Court is not a tribunal for relief for crudities and inequities of complicated experimental economic legislation". The Supreme Court in *Hoechst Pharmaceuticals Ltd. v. State of Bihar AIR 1949 SC 1019*, echoed similar sentiment:

"On question of economic regulations and related matters, the court must defer to the legislative Judgment. When the power to tax exists, the extent of burden is a matter for discretion of the law makers. It is not the function of the court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied."

The contention of the learned counsel that the imposition of service tax on practising Chartered Accountants is hit by Article 14 of the Constitution has no substance and must therefore fail.

Violation of Article 19(1)(g) :

43. Finally it is argued that the levy of service tax is an infringement of the fundamental right to carry on a profession guaranteed under Article 19(1)(g) of the Constitution. This contention is the least impressive. The fundamental right guaranteed under Article 19(1)(g) is subject to reasonable restrictions as provided under Clause (6) of Article 19. That a taxing statute, if it is otherwise constitutional, does not impose an unreasonable restriction, is elementary.

Particularly in the present case, the levy of 5 per cent of the value of the taxable service is not so harsh, onerous or unreasonable that one can plead that the fundamental right under Article 19(1)(g) is violated. We might usefully quote observations of the Supreme Court in *Secretary to Government of Madras and another Vs. P.R. Sriramulu and another*, :

"15. As pointed out earlier with reference to the decisions of this Court, the State enjoys the widest latitude where measure of economic regulations are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria, adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue. It is settled law that in view of the inherent complexity of the fiscal adjustments, the courts give a large discretion to the Legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustment of an economic measure are available, the legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or there are better ways of adjusting the competing interests and the claims as the Legislature possesses the greatest freedom in such areas. It is also well settled that lack of perfection in a legislative measure does not necessarily imply its constitutionality as no economic measure has so far been discovered which is free from all discriminatory impact and that in such a complex area in which no foolproof device exists, the court should be slow in imposing strict and rigorous standard of scrutiny by reason of which all local fiscal schemes may be subjected to criticism under the Equal Protection Clause. Having regard to these settled principles the impugned Judgment of the High Court could not be sustained."

While dealing with the challenge to the Constitutional validity of an economic legislation, it would be useful to be mindful of the note of caution expressed by the Supreme Court in *R.K. Garg v. Union of India* AIR 1981 SC 2138:

* "laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislations dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved..... The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not

abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that extract wisdom and nice adoption of remedy are not always possible" and that "Judgment is largely a prophecy based on meagre and uninterrupted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method, and therefore, it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic Legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Roig Refining Co.* (338 US 604 (1949)), be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its Legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed; however great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the Legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the Legislature in dealing with economic issues".

The above observation were reiterated with approval by the Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, .

44. The words of wisdom of Khanna, J. in *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, , serve as a beacon light. The learned Judge says:

"In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the Government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience."

45. The Supreme Court in *State of U.P. and Another Vs. Kamla Palace*, , threw considerable light on dealing with the challenge to a fiscal statute as violative of Articles 14 and 19 of the Constitution, by saying:

"Art. 14 does not prohibit reasonable classification of persons, objects and transactions by the Legislature for the purpose of attaining specific ends. To satisfy the test of permissible classification, it must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the Legislature. (See *In Re: The Special Courts Bill, 1978*, , seven-Judge Bench; R.K.

Garg and Others Vs. Union of India (UOI) and Others, . It was further held in R.K. Garg case that laws relating to economic activities or those in the field of taxation enjoy a greater latitude than laws touching civil rights such as freedom of speech, religion, etc..... Such a legislation may not be struck down merely on account of crudities and inequities in as much as such legislations are designed to take of complex situation and complex problems which do not admit of solutions through any doctrinaire approach or straitjacket formulae."

46. The Counsel for the petitioners highlighted certain statements made in the counter affidavit filed on behalf of Union of India and adversely criticised them. In our view, as held by the Supreme Court in Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another, , the Court need not concern itself with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain a legislation. The deponents of the affidavits filed into Court may speak for the parties on Whose behalf they swear to the statements. , They do not speak for the Parliament. "No one may speak for the Parliament and Parliament is never before the Court". After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the Court will-do with reference to the language of the statute and other permissible aids. The executive Government may place before the Court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of Parliamentary intention by the executive Government or because their (Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the Legislature has itself said.

47. The learned Additional Solicitor General brought to our notice, the Judgment of the Bombay High Court in All India Federation of Tax Practitioners Vs. Union of India, wherein the Division Bench of the Bombay High Court considered the challenge to constitutional validity of the very same taxing statute in case of practising Chartered Accountants. The challenge was repelled on the ground that, in pith and substance, the levy is a tax on the service rendered by professional for remuneration. If the professional does not render any service, there will be no service tax. On the other hand, professional tax is a tax for the privilege of belonging to a profession or being a member of the profession. Such a tax is irrespective of the fact whether he does or does not render professional service for remuneration. The chargeable event in two statutes are wholly distinct and different. Service tax is totally different from levy of professional tax on

professionals by the State Legislature which is a one time tax unrelated to actual service rendered for remuneration. In the two cases, the fact that there may some overlapping is of no consequence and, in any event, it is justified by the aspects doctrine. We are in respectful agreement with the decision of the Division Bench of the Bombay High Court in All India Federation of Tax Practitioner's case.

48. The Judgment of the Gujarat High Court in the case of Consultancy Engineers in Special Civil Application Nos. 469 of 1999 and 7220 of 1999 (Judgment, dated 27th December, 2000) was cited before us. This Judgment also upholds the validity of the tax and takes the view that we are inclined to take. We are in respectful agreement with the views expressed therein. The Judgment of the Madras High Court in Writ Petition No. 8539 of 2000 and connected matters (Judgment, dated 30th April 2001, per V.S. Sirpurkar and A. Kulasekaran, JJ.) was also cited before us. We respectfully -agree with the view take by the Madras High Court, for upholding the Constitutional Validity of Service Tax, so faras the practising Chartered Accountants are concerned.

For the aforesaid reasons, we are of the considered view that there is no substance in this Writ Petition challenging the levy of service tax on the taxable service rendered by practising Chartered Accountants. The Writ Petition therefore fails, and is hereby dismissed, with no Order as to costs.