

(1979) 08 CAL CK 0004
In the Calcutta High Court
Case No : C.R. No. 4689 (W) of 1979

Debabrata Basu and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 10-08-1979

Acts Referred:

Constitution of India, 1950 — Article 138, 14, 19, 19(1)(g), 226

Income Tax Act, 1961 — Section 17, 28, 37

West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979 —
Section 10, 11, 12, 13, 14

Citation : 84 CWN 90

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : Arun Kumar Dutt, R.C. Deb, P.K. Sengupta, Debi Prosad Pal, S. Bhunia R.N. Bajpai, Bimal Dutt, Bhudeo Bhattacharjee, Parthasarathi Sengupta, Lalit Maity, J.C. Saha, A. Lahiri, Ajit Kumar Mukherjee, Probir Kumar Samanta, Alope Kumar Ghosh, Ramendra Nath Mukherjee and Dipti Bhattacharjee, for the Appellant; Somnath Chattejee, R.N. Bajoria and S.N. Dutt, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In these several writ applications under Article 226 of the Constitution, which I have taken up for consideration together, the legal practitioners or advocates who are entitled to practice in the High Court at Calcutta, have challenged the validity, legality as well as the propriety of the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979, being West Bengal Act VI of 1979, which was passed by the West Bengal Legislature and received the assent of the Governor and was published in the Calcutta Gazette on the 31st March, 1979. The Act in question is hereinafter referred to as the said Act. As I have mentioned before, the applications are by legal practitioners who are advocates entitled "to practise" in the High Court. As common questions of law are involved in these application's and as there is hardly any scope of any dispute as to facts, I have taken up for consideration all these applications together. I had the pleasure of the arguments of Shri Arun Kumar Dutt, Shri S. R. Banerjee, Shri P. K. Sengupta, Shri Swadesh Bhusan

Bhunja, Shri Biswanath Baijpayee, Dr. Debi Prasad Pal, and Shri B.C. Dutt appearing on behalf of the different" petitioners in these several writ applications. The Bar Council of India sought for and obtained my leave to intervene in these applications and I had the assistance of Shri R.C. Deb appearing, for the Bar Council of India. On behalf of the State Shri Somnath Chatteerjee and Shri R.N. Bajoria made their submissions. As I have indicated before, the legality, validity and the propriety of the impugned legislation have been assailed in these applications, to what extent. I can go into the question of the propriety of the said legislation I shall consider at the appropriate time. As I said before, the petitioners are the legal practitioners who are entitled to practise in the High Court. Some of them have very recently been enrolled and joined the profession Some of them however, have been in practice for a considerable time. There are some in rather unfortunate state of affairs, as we are aware that many in the legal profession, are in rather difficult financial conditions and even to the extent of receiving monthly monetary assistances from either the Bar Council of India or from other charitable or voluntary organisations. They all come within the purview of the impugned legislation. The Act in question, as I have mentioned before, was passed by the West Bengal State Legislature. Before I deal with the several contentions urged in support of these applications it would be appropriate to refer to certain provisions of the Act in question and the relevant Rules and Notifications. The preamble to the Act states that the Act was an Act to provide for the levy and collection of tax on professions, trades, callings and employments for raising additional resources for the benefit of the State and for matters connected therewith or incidental thereto. The preamble further recites that whereas it was thought expedient to provide for the levy and collection of tax on professions, trades, callings and employments for raising additional resources for the benefit of the State and for matters connected therewith or incidental thereto, the Act in question was being enacted. In one of the writ petitions reference has been made to the objects of introducing the said Act. It has been stated that the said object was to provide additional employment benefits as well as to meet the situation arising out of the recent floods in West Bengal. I refer to this fact because one of the contentions, which I shall presently note, has been urged in these applications on this point. The Act extends to the whole of West Bengal and has come into force on and from the 1st April, 1979. Section 2 of the said Act provides definitions. It may be appropriate to refer to clauses (c), (f), (g) (h) & (j) of Section 2. The said clauses are as follows:-

(c) "employer", in relation to an employee earning any salary or wages on regular basis under hire, means the person or the officer who is responsible for disbursement of such salary or wages, and includes the head of the office or any establishment as well as the manager or agent of the employer;

(f) "person" means any person who is engaged in any profession, trade, calling or, employment in West Bengal, and includes a Hindu undivided family, firm, company corporation Or other corporate body, any society, club or association, so

engaged but does not include any person who earns wages on a casual basis;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "prescribed authority" means the authority that may be appointed by the State Government by notification for the any of the purposes of this Act;

(j) "salary" or "wage" includes pay, dearness allowance and all other remunerations received by any person on regular basis, whether payable in cash or in kind, and also includes perquisites, and profits in lieu of salary, as defined in action 17 of the Income Tax Act, 1961;

2. Section 3 is relevant and important and provides as follows:-

3. (1) Subject to the provisions of article 276 of the Constitution of India, there shall be levied and collected a tax on professions, trades, callings and employments, in accordance with the provisions of this Act.

(2) Every person engaged in any professions trade callings or employment and falling under one or the other of the classes mentioned in the second column of the Schedule shall be liable to pay to the State Government tax at the rate mentioned against the class of such persons in the third column of the said Schedule:

Provided that entry 19 in the Schedule shall apply only to such classes of persons as may be specified by the State Government by notification from time to time.

3. Section 4 imposes upon the employers the obligation to deduct and pay tax on behalf of the employees. I am not directly concerned with the provisions of Section 4 though in case of certain professionals namely technical and professional consultant or ever firm of advocates on record the section may be in operation, it is not necessary for considering the contentions urged in these applications to refer in detail to the said provisions. Section 5 deals with the registration and enrolment and sub-section (2) of Section 5 imposes upon every person liable to pay tax under the Act (other than a person earning salary or wages, in respect of whom the taxes are paid by the employer), shall obtain a certificate of enrolment from the prescribed authority in the prescribed manner. Sub-section (4) imposes liability Upon persons for enrolment and registration and is in the following terms:-

(4) Every employer or person required to obtain a certificate of registration or enrolment shall, within ninety days from the date of coming into force of this Act, or if he was not engaged in any profession, trade, calling or employment on that date, within ninety days of his becoming liable to pay tax, or, in respect of any person referred to in subsection (2) or sub-section (3) within ninety days of his becoming liable to pay tax at a rate higher or lower than the one mentioned in his certificate of enrolment, apply for a certificate of registration or enrolment, or a revised certificate of enrolment, as the case may be, to the prescribed authority in the prescribed form, and the prescribed authority shall after making

such enquiry as may be necessary within thirty days of the receipt of the application, grant him such certificate, if the application is in order. The application, if it is not in order, shall be rejected."

Sub-section (5) of Section 5 provides that the prescribed authority shall mention in every certificate of registration or enrolment the amount of tax payable by the holder according to the Schedule, and the date by which it should be paid and such certificate should serve as a notice of demand for the purposes of section 10.

Sub-section (6) and (7) are also relevant and are in the following terms:

(6) Where an employer or a person liable to registration or enrolment willfully fails to apply for such certificate within the required time as provided for in sub-section (4) the prescribed authority may, after giving him a reasonable opportunity of being heard, impose upon him a penalty not exceeding rupees twenty for each day of delay in case of an employer and not exceeding rupees five for each day of delay in the case of others.

(7) Where an employer or a person liable to registration or enrolment has deliberately given false information in any application submitted under this Section, the prescribed authority may, after giving him a reasonable opportunity of being heard, impose upon him a penalty not exceeding rupees one thousand.

4. Section 6 deals with the return by the employers and deals with the consequences of failure to comply with certain provisions of the Act. Section 7 deals with the assessment of employers and provides the procedure and also with the consequences of non-compliance with certain provisions of the Act. Section 8 of the Act deals with the payment of tax and is in the following terms:-

8. (1) The tax payable under this Act shall be paid in the prescribed manner.

(2) the amount of tax due from enrolled persons for each year as specified in their certificate of enrolment shall be paid-

(a) in respect of a person who stands enrolled before the commencement of a year or is enrolled on or before the 31st day of August of a year,

Before the 30th day of September of that year.

(b) in respect of a person who is enrolled after the 31st Pay of August of a year.

within one month of the date of enrolment.

Section 9 of the Act deals with the consequences of failure to deduct or to pay taxes and so far as the present applications are concerned by sub-section (1) of Section 9 it is stipulated that if an enrolled person fails to pay tax as required by or under the Act he shall be liable to pay interest at the rate in the manner laid down in sub-section (1) and sub-section (2) of section 3 provides for payment of simple interest at two per centum of the amount of tax due for each month or part thereof for the period for which the tax remains unpaid. Section 10 deals

with the penalty and is in the following terms :-

10. If an enrolled person or a registered employer fails without reasonable cause, to make payment of any amount of tax within the time or date specified in the notice of demand, the prescribed authority, may, after giving him a reasonable opportunity of being heard, impose upon him a penalty not exceeding fifty per centum of the amount of tax due.

5. Section 11 stipulates for recovery of tax and Provides that all arrears of tax, penalty, interest and fees under the Act should be recoverable as arrears of land revenue. Section 12 enjoins the State Government to appoint authorities for the purpose of implementation and enforcement of the Act. Section 13 deals with the collecting agents where the tax could be collected or paid. Section 14 deals with appeals and revision and rectification of mistakes and is in the following terms:

14. (1) Subject to such rules as may be made by the State Government any person aggrieved by any order made under sections 5, 6, 7, 9 and 10 or by" an authority not being an appellate authority, under sub-section (4) of this section may, in the prescribed manner, appeal to the authority prescribed.

(2) The appellate authority shall dispose of the appeal in the prescribed manner.

(3) Any authority under this Act may, of its own motion or on an application made in this behalf, by order rectify any mistake apparent on the face of the record.

(4) Any order passed by an appellate authority under sub-section (2) or sub-section (3) may be revised by such authority as may be prescribed.

6. Section 15 deals with accounts maintained by the employer and Section 16 deals with the special mode of recovery including the mode of recovery through garnishee proceeding. Section 17 together with the, marginal (sic) is important and provides as follows.

Production and inspection of accounts and documents and search of premises.

17. Any authority under this Act may inspect and search any premises where any profession, trade, calling or employment liable to taxation under this Act is carried on or is suspected to be carried on, may cause production and examination of books, registers, accounts or documents relating thereto, and may seize such books, registers, accounts or document as may be necessary:

Provided that if such authority removes from such premises any book, register, account or document, it shall give to the person in charge of the-place, a receipt describing the book, register, account or document, so removed by it and retain the same only for so long as may be necessary for the purposes of examination thereof or for prosecution.

Section 18 deals with the refund and Section 19 deals with the penalty and is in the following terms:-

19. Any person or employer who, without reasonable cause, fails to comply with any of the provisions of this Act or the rules made thereunder shall be punishable with fine which may extend to five thousand rupees, and where the offence is a continuing one, with a further fine which may extend to fifty rupees for every day during which the offence continues.

7. Section 20 deals with the offences by the Companies, Section 21 deals with the power to transfer proceedings, Section 22 deals with the compounding of offences, Section 23 deals with the power to enforce attendance and Section 24 provides for bar to other proceeding in respect of proceedings taken under the Act. Section 25 deals with the power to make rules for carrying out the purposes- of the Act. Section 26 deals with the power of the State Government to grant exemptions and is in the following terms:

26. (1) Nothing contained in this Act shall apply to the members" of the armed forces of the Union serving in any part of the West Bengal.

(2) The State Government may, by notification, exempt from the levy tax under this Act any class or persons, if it considers necessary so to do in the public interest.

8. u/s 3 the Schedule provides the rate for taxes and the Schedule deals with 18 specified classes of persons who are intended to be covered by the said Schedule. In view of the arguments advanced in some of these writ applications, though I am concerned with Item 2 it is appropriate to. set out both Item 1 and Item 2 of the said Schedule which are as follows:

Sl. Class of persons No.

Rate of tax.

I. 2.

3

I. Salary and Wage earners, such persons whose monthly salaries or wages are?

(i) Rs. 500 or less

Nil.

(ii) Rs. 501 or more, but less than Rs. 751.

Its. 2 per month

(iii) Rs. 751 or more but less than Rs. 1001.

"Rs. 4 per month

(iv) Rs. 1001 or more, but less than Rs. 1251.

Rs. 6 per month

(v) Rs. 1251 or more, but less than Rs. 1501

Rs. 10 per month

(vi) Rs. 1501 or more, but less than Rs. 2001.

Rs. 15 per month

(vii) Rs. 2001 and above

Rs. 250 per month

2. (a) Legal practitioners including Solicitors and notaries public;

(b) Medical practitioners including medical consultants and Dentists;

(c) Technical and professional consultants including Architects, Engineers, Chartered Accountants, Actuaries, Management Consultants and Tax Consultants;

(d) Chief Agents, Principal Agents, Special Agents, Insurance Agents and Surveyors or Loss Assessors registered or licensed under the Insurance Act, 1938 (4 of 1938) Where the standing in the profession of any of the persons mentioned above is-

(i) less than two years Rs.

Rs. 50 per annum

(ii) two years or more but less than five years

Rs. 100 per annum

(iii) five years or more

Rs. 150 per annum

Provided that in case of a person of the above category who is liable to pay income tax the rate of tax under this Act shall be Rs. 200 per annum.

9. The other items provide for different classes namely, members of associations recognised under the Forward Contracts Regulation Act, 1952 and a flat rate of tax is intended for them. Similarly, members of Stock Exchanges and also remisiers recognised by Stock exchange, Estate agents, Directors Bookmakers dealers, Occupiers of factories, employers of shops and establishments, owners or lessees of petrol stations and service stations, licensed foreign liquor vendors, proprietors of cinema houses, holders of permits for transport vehicles, licensed money lenders, individuals and institutions conducting chit funds, co-operative societies, banking companies, other companies, firms and different rates at fixed quantum for these groups or losses have been indicated. Item 19 deals with persons other than those mentioned in the preceding entries who are engaged in any professions, trades, callings or employments and in respect of whom a notification is issued u/s of the Act and the rate would be as indicated in the said notification not exceeding Rs. 250 per annum. It is, further, provided that

notwithstanding anything contained in the Schedule, where a person is covered by more than one entry in the Schedule, the highest rate of tax specified on any one of these shall be applicable in this case and as I read it he would not be liable to pay on two different heads. Pursuant to the rule making power on 31st of March, 1979 certain rules have been framed dealing with certain authorities and dealing with the manner of granting certificate and enrolment and amendment and cancellation thereof as also filing of returns and payment of taxes, about refund, collecting agents, about the procedure for appeal revision and rectification of mistakes, about service of returns and these also specify certain forms for the application for registration and enrolment. It may not be inappropriate to set out the application for a certificate of enrolment or amendment of certificate of enrolment which is as follows:-

FORM II

(See rules 4(1) |6 & 2)

Application for a Certificate of Enrolment |Amendment of Certificate of Enrolment.

(Please type or use Block Letters only) (Prescribed authority)

To.....

.....

I hereby "apply for a Certificate of Enrolment revision of Certificate of Enrolment under the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979 (West Bengal Act VI of 1979) as per particulars given below:

Name of the applicant:

Profession] Trade |Calling| Employment: Address:

Pin Code District:

Date of commencement of profession | Trade | Calling | Employment

Period of standing in the profession:

Annual turnover of all sales | purchases: Average number of workers during the year 19 to 19 in the factory:

Average number of employees during the year 19 to 19 employed in the establishment:

Permanent income tax Account No:

Number of taxis, three-wheeler goods vehicles, trucks and buses for which permits under the Motor Vehicles Act, 1939 are held.

If Co-operative Society the profession, trade or calling in which it is engaged, and whether it is a State-legal or district-level Society:

If an employee of any diplomatic or consular office or trade commissioner of any foreign country, the name and address of the employer and the monthly salary or wage earned in respect of employment:

If simultaneously engaged in employment of more than one employer, the names and addresses of all such employers and the monthly salary received from each of them:

(Names and addresses of other places of work if any, in the State of West Bengal)

Total number of other places of work:

If registered under the Bengal Finance (Sales Tax) Act, 1941| West Bengal Sales Tax Act, 1954 | Central Sales Tax Act, 1956 the numbers of Registration Certificates held Under :-

The Bengal Finance (Sales Tax) Act, 1941-Registration Certificate No.

The Central Sales Tax Act, 1956-Registration Certificate No :

The West Bengal Sales Tax Act, 1954-

Registration Certificate No:

(Please fill in this part in case the application is for amendment of. a Certificate of Enrolment)

No. of Certificate of enrolment:

Grounds on which amendment is sought:

The above statements are true to the best of my knowledge and belief.

Date.....

Signature..... Status.....

Acknowledgement

(Particulars of name and address to be filled in by the applicant)

Received an application for a Certificate of Enrolment | amendment of Certificate of Enrolment in Form II from-

Name of the applicant:

Full postal address:

Date.....

Signature of Receiving Officer.

10. It also provides for a certificate of enrolment and other notices and it also deals with the notice of assessment in case of failure or mistake. Certain prescribed authorities have also been indicated by notification issued on the 17th

April, 1979. It is not necessary for my present purpose to deal with the said notification in detail.

In this connection it may not however, be inappropriate to refer to Form IIA in the rules under Rule 4 which provides for certificate of enrolment. The said Form is as under:

FORM IIA

(See rule 4(4).

CERTIFICATE OF ENROLMENT No.

This is to certify that.....engaged in the profession|trade|calling known as|employment* "with.....located at.....is a.....,owns|operates*.

.....and has been enrolled under the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979 (West Bengal Act VI of 1979).

The holder of this certificate has additional places of work at the following addressed:

.....

.....

The holder of this certificate shall pay the tax at the rate of Rs.per annum on or before the 30th September of every year | on or before*.....in the manner prescribed in rule 15 of the West Bengal State Tax on Professions, Trades, Callings and Employments Rules, 1979.

Seal

Place.....

Signature.....

Designation.....

*Strike out whichever is not applicable."

As I have indicated before, several contentions were urged in support of these applications. In my opinion the following questions of law require consideration in dealing with these contentions:

1. Has the State Legislature power to pass the impugned legislation?

(a) Under which Entry does the impugned legislation fall ? Does it fall under Entry 60 of List II of the 7th Schedule as contended by the respondent Government, read with Entry 64 of the said List : or, does the impugned legislation in its pith and substance come within Entry

78 of List I of the 7th Schedule read with Entries 23 and 26 of the List III?

(b) In those circumstances was the parliament only competent to pass the legislation of this type, if at all?

2. Was the assent of the president in the facts and in the circumstances of the case, necessary and not having obtained such assessment is the impugned legislation valid ?

3. Do the provisions dealing with the imposition of penalty and charging of interest in case of default or delay in payment of the taxes or non-compliance with the provisions of the Act transgress the limit imposed by clause (2) of Article 276 of the Constitution: or are these provisions incidental to the powers granted under Entry 60, List II to the State Legislature ?

4. In view of the provisions of clause "(2) of Article 276 and in view of the provisions of the Calcutta Municipal Act, 1951, was the State Legislature competent to impose this tax ? Has the State Legislature exhausted its power in view of the limitation indicated in clause (2) of Article 276 of the Constitution and also in view of the provisions of the Calcutta Municipal Act, 1951 ?

5. In view of the objects indicated in the objects for the introduction of the Act, is the imposition in the nature of cess and as such not being an existing one at the time of the introduction of the Constitution, has the State Legislature because of Article 277 of the Constitution read with Articles 246, 247 and 248 power to pass the impugned legislation?

6. Are the provisions of Section 3 of the said Act read with the Schedule, ultra vires the Constitution because these provisions treat unequals as equals in view of the different rates provided between those who are in Item I and those who are in Item 2 of the Schedule to the Act ?

7. The State Legislature having recognised the capacity to pay as a relevant factor, has it rationally applied that test in imposing the burden upon the different persons who come within the purview of Item 2 of the Schedule to the Act ?

8. Are the provisions of the Act violative of Article 14 of the Constitution in view-interse differentiation between the members of Item 2.?

9. Was the State Legislature competent to take into consideration income not necessarily connected with or arising out of or accruing from either trade profession, calling or employment in imposing the tax on profession, trade and calling and thereby extending the base of its imposition in view of the provisions of Article 276 of the Constitution ?

10. Do the provisions for imposition of penalty and payment of interest indicated in the sections 5, 9, 10 and 19 of the Act amount to unreasonable restrictions on carrying on of the profession and as such violative of Article 19(1)(g) of the constitution ?

11. Are the provisions of Section 19 of the Act bad?

12. Are the provisions of Section 10 of the said Act bad?

13. Does Section 26 amount to excessive delegation of essential legislative functions ?

14. In view of the nature of the burden, do the burdens imposed by the legislation amount to disabling the professional classes in discharging their professional duties?

15. Is the Act bad being violative of Article 14 as it has failed to take into consideration the relevant factors namely, the capacity to pay, and other conditions of professional people?

16. Is the Act bad because no machinery has been provided for assessment?

17. Is the concept of standing a vague, one and as such bad and uncertain in imposing the tax burden on the said basis?

18. Whether the provisions of Section 3 read with the Schedule bad as the same are vague and lead to scope for arbitrary impositions ?

11. Before I actually consider these contentions it is necessary to refer to the relevant provisions of the Constitution. In this connection it is first necessary to refer to Article 246, 247 and 248 of the Constitution. Under clause (3) of Article 246 the State Legislature, subject to clauses (1) and (2) of the said Article, has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the 7th Schedule. Similarly, under clause (1) to Article 246 the parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the 7th Schedule. Clause (2) of the said Article deals with the concurrent list which empowers both the State Legislatures and the Parliament to make laws. Sub-clause (4) of Article 246 enables the Parliament to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Article 248 gives the Parliament the residuary powers of legislation. In this connection it may also be appropriate to refer to Clause (28) of Article 366 which deals with the definition and that Clause provides as follows:

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly.

Article 276 of the Constitution deals with taxes on profession, trades, callings and employments. Great deal of controversy centers round the construction and the scope of this Article. It would be appropriate to set out the said Article. The said Article provides as follows:

Taxes on professions, trades, callings and employment. 276. (1) Notwithstanding anything in Article 246, no law of the Legislature, of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority "wherein in

respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceeds two hundred and fifty rupees per annum.

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified State, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make law with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

Article 277 stipulates that any taxes, duties cesses or fees which immediately before the commencement of the Constitution were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees were mentioned in the Union List shall continue to be levied and to be applied to the same purposes until provisions to the contrary is made by Parliament by law. I may incidentally mention that in this connection in view of the objects of the Act it was urged before me by Shri Bhunia that apart from the existing cesses no other power was there to impose any new cess and according to him in view of the objects of the Act, though the Act has been described as an Act designed to raise tax, it is in essence a cess and as such was beyond the competence of the State Legislature. It is now necessary to refer to the different entries in the 7th Schedule of the Constitution with which I am directly concerned.

Entry 60 of List II, being the State List, provides as follows:

Taxes on professions, trades, callings and employments.

Entry 64 of the said list provides for offences against laws with respect to any of the matters in this list. Entry 77 of List I deals with Constitution, organisation, jurisdiction and powers of the Supreme Court, including contempt of such Court, and the fees taken therein persons entitled to practise before the Supreme Court. Entry 78 of the said list deals with constitution and organisation including vacations of the High Courts except provisions as to officers and servants of High

Courts; persons entitled to practise before the High Courts. Entry 23 of List III. which is in concurrent List, deals with social security and social insurance; employment and unemployment and entry 26 deals with legal, medical and other professions.

12. As I have mentioned hereinbefore, one of the main contentions urged in support of these applications, was that inasmuch as the Act in question, the provisions of which I have set out hereinbefore, deals with the advocates, who are entitled to practise in the High Courts and imposes certain conditions which have effects on their carrying on the practice or their professions, the impugned legislation is a matter which can only come within the purview of Entry 78 of List I, because it concerns, according to the learned Advocate for the petitioners, "persons entitled to practise before the High Courts". He further submitted that the legal, medical and other professions, do come within the purview of Entry 26 of the concurrent list but inasmuch as those of the legal professions who are entitled to practise before the High Courts come within the purview of Entry 78, the harmonious way of construction of those two entries, according to him, therefore must be to read Entry 26 as excluding those members of legal professions who are not entitled to practise before the High Courts from the purview of Entry 60 of List II of the 7th Schedule. He, further, submitted that the Entry 60 of List II of the seventh Schedule, being the general entry, deals with the taxes on professions, trades callings and employments, it must be so construed in order to be in harmony with Entry 78 of List I as to exclude taxes on persons entitled to practise before the High Courts. In this connection reliance was placed on the observations of the Supreme Court in the case of O.N. Mohindroo Vs. The Bar Council of Delhi and Others, . There, the Supreme Court observed that it was a well recognised rule of construction that the Courts while construing entries must assume that the distribution of the legislative powers in the three lists of the Seventh Schedule could not have been intended to be in conflict with one another. The general power ought not to be so construed as to make a nullity of a particular power conferred by the same instrument and operating in the same field, when by reading the former in a more restricted sense, an effect could be given to the latter in its ordinary and natural meaning. It was, therefore, right to consider whether a fair reconciliation could not be effected by giving to the language of an entry in one list the meaning which if less wide then it might in other context bear, was yet one that could properly be given to it and equally the language of another entry in another list, a meaning which it could properly bear. If there was a seeming conflict between one entry in one list and another entry in another list, an attempt shall always be made to see whether the two entries could be harmonised to avoid such a conflict of jurisdiction. There, the Supreme Court was considering the Advocates Act, 1961, and the Supreme Court held that entries 77 & 78 in List I, apart from dealing with constitution and organisation of the Supreme Court and the High Court also dealt with the persons entitled to practice before the Supreme Court and the High Courts. This part of the two entries showed that to the extent that the

persons entitled to Practice before the Supreme Court and the High Courts were concerned, the power to legislate in regard to them was carved out from the general power relating to professions in Entry 26 in List III and was made the exclusive field for Parliament. Barring those entitled to practise in the Supreme Court and the High Courts, the power to legislate with respect to the rest of the practitioners would still be retained under entry 26 of List III. Though the Advocates Act related to the Practitioners, in pith and substance it was an enactment which concerned itself with the qualifications, enrolment, right to practise and discipline of the Advocates. As provided by the Act, once a person was enrolled by any one of the State Bar Councils, he became entitled to practise in all Courts including the Supreme Court. The Act created one common Bar, all its members being of one class, viz. advocates. Since all those, who had been enrolled, had right to practise in the Supreme Court and the High Courts, the Act was a piece of legislation which dealt with the persons entitled to practise before the Supreme Court and the High Courts. Therefore, the Act must be held to fall within entry 77 and entry 78 of List I. As the power of legislation relating to those entitled to practise in the Supreme Court and the High Courts was carved out from the general power to legislate" in relation to legal and other professions in Entry 26 of list III, it was an error to say that the Act was a composite legislation partly falling under Entries 77 and 78 of list I and partly under entry 26 of list III. In this view, the right of appeal to the Supreme Court, with which the Supreme Court was concerned in that case, u/s 38 of the Advocates Act, 1961 created a jurisdiction and power in relation to matter falling under entries 7 and 78 of the Union List and the Act would, therefore, fall under clause (1) and not clause (2) of Article 138. It could not be said that section 33 of Act would fall under article 138(2) and was invalid on account of its having been enacted without a special agreement with the State Government.

13. The other aspect with which the Supreme Court was concerned in that case was the actual provision of the Act, with which I am not concerned in this case. But it is important to remember that the/Supreme Court in that case was dealing with the Advocates Act, 1961, and the Supreme Court held that in its pith and substance that Act was an enactment which concerned itself with the qualifications, enrolment, right to practise and discipline of the advocates and in that Act the right in the Pith and substance fell within the ambit of entries 77 and 78 of list I which dealt with the persons entitled to practise before the Supreme Court and the High Courts. But the Supreme Court also reiterated that the harmonious construction of the different entries should be made and each entry must receive its natural and full meaning and when legislation falls for consideration the legislation must be considered in its pith and substance and then to determine whether it falls under a particular entry or not. It may not be inappropriate to bear in mind that as early as in 1947 in the case of Profulla Kumar v. Bank of Commerce, AIR (1947) P.C. 60-74. I.A. 23 dealing with the Government of India Act, 1936 the Judicial Committee observed that it was not possible to make a clear cut distinction between the powers of the Federal and

the Provincial Legislatures. These were bound to overlap and where these did the question to be considered, was, what was the pith and substance of the impugned enactment, in which list is its true nature and character to be found. The question is not has one enactment tres passed into another list more or less but is the trespass be it more or less such to show that the pith and substance of the impugned Act is not a provincial but a Federal one. (underlined by me). That seems to me to be the true test. See in this connection the observations of the Supreme Court in the case of Second G.T. Officer v. D.H. Hazarath, AIR (1970) S. C. 999. I reiterated some of these principles in the case of Balaram Ojha Vs. Star Trading and Investment Ltd., . In the decision in the case of The Bar Council of Uttar Pradesh Vs. The State of U.P. and Another, , the Supreme Court had to consider this aspect of the matter. There, the Supreme Court dealing with the Stamp Act, 1899 held that the power to legislate in regard to persons entitled to practise before the Supreme Court and the High Courts was altogether excluded from Entry 26 of list III and was made the exclusive field for Parliament. The parliament had the exclusive power under entries 77 and 78 in list I to prescribe, inter alia, the qualifications and condition, on the fulfillment of which the person would be entitled to practise before the Supreme Court or the High Courts. Any fee, which might be payable by such persons before they could claim to be entitled to practise would fall under entry 96 of that list. Entry 44 of list II enabled legislation with regard to this levy but the rates of the stamp duty would be prescribed by the Parliament only with regard to instruments falling with entry 96 of list I and by the State Legislature under entry 63 of List II. It was. therefore, held that although the Advocates Act, 1961 related to legal practitioners, in its pith and substance, it was an enactment dealing with the qualifications, enrolment and right to practise as also the discipline of the Advocates. But the fee of Rs. 250.]—which an advocate had to pay under the provisions of section 24(f) of the Act was covered, according to the Supreme Court, by entry 96 in list I which expressly related to fees in respect of any of the matters in that list. The stamp duty which was payable, on the certificate of enrolment, pertained to the domain of taxation and it was hardly possible, according to the Supreme Court, to regard it as a condition which could be prescribed for enrolment under entries in List I. The imposition of such a duty fell, in its pith and substance, under Entry 44 of list III and rates prescribed would come under entry 63 of list II. In those circumstances, the Supreme Court held the U.P. State Legislature was competent to legislate and impose stamp duty, on the certificates of enrolment, u/s 22 of the Advocates Act, 1961 to be issued by the State Bar Council) of U.P.

14. On behalf of the petitioners, Mr. Bhunia, sought to urge that the stamp duty was essentially an imposition of tax and therefore the Parliament, in any event, had the right to impose that tax. According to Mr. Bhunia whether it did, under entry 96 or entries 77 or 78 was not a matter of much importance. I am, however, unable to accept this argument. In order to find out whether a particular legislation falls within an item of one particular entry or not, we must

find out the pith and substance of the legislation in question and, then, examine the different entries in the different lists and find out if that particular legislation falls under any particular entry in the list. Whether it falls within any of the items of list I or under any of the items of other lists is not a matter of importance in construing the powers under the lists. Now, here in the instant case, as I have mentioned before, the entry dealing with persons entitled to practise before the High Courts, is the general entry. But there is a specific entry, viz., taxes on professions, trades, callings and employments. The right to practise, discipline or the qualifications and other requirements for enabling the persons to practise are different from the taxes which the carrying on of the practise or the carrying on of the profession entail and when a specific entry has been provided dealing with the taxes on profession, in my opinion, it would not be proper to read, if the impugned legislation in fact is in its essence a tax on profession to construe it to be coming within the purview of either entry 77 or entry 78 of list I; it should in my opinion, fall within the purview of entry 60 of list II. It is well settled that both in the notions of public finance and in the Constitutional law and in the scheme of our Constitutional enumeration of powers, powers to tax have been treated separately from other power. Therefore, when a specific provision of taxation has been given to an entry under a particular entry in my opinion, it would not be proper to read entry 60 in such a restricted manner as to exclude this tax on profession excluding the taxes on persons entitled to practise before the High Court. As the Supreme Court has reiterated in the first mentioned case, referred to hereinbefore, we must construe the entries harmoniously and at the same time we must give to each entry its natural and full meaning and in my opinion, bearing, the above principle, in mind if the impugned tax in question, in its pith and substance essentially be a tax on profession, then: it cannot come within the purview of entry 78 but would fall within entry 60 of list II of the seventh schedule. These two decisions were really the main decisions on which the petitioners relied on this aspect of the matter. I must also refer to some other decisions to which my attention was drawn from the Bar. Reliance in this connection was placed on the decisions reported in *In Re: The Special Courts Bill, 1978*, (*In re : Special Courts Bill. 1978*), and in the cases of *The Kerala State Electricity Board v. Indian Aluminium Co.*, AIR 1978 SC 1031, and *Hargovind Pant Vs. Dr. Raghukul Tilak and Others*, . It was also urged by Shri Bhunia relying on the decision in the case of *Maneka Gandhi v. Union of India*, AIR 1973 SC 597 that the direct as well as the inevitable effect of an impugned legislation must be construed to find out the true effect of that legislation. I do not think this proposition as a proposition of law can be disputed; but as I have mentioned before, the taxation has been treated as a separate subject in the scheme of distribution of powers enumerated in our Constitution. Therefore, when a legislation is a legislation dealing with tax, in its pith and substance, then if there is an entry dealing with that tax, it must be construed. unless otherwise warranted, to fall within that entry. Reliance was also placed on the decision in the case of *C.P. Officer v. K.P. Abdulla*, AIR 1931 SC 792; and on the decision in the case of *M.R. Balaji v. The State of Mysore*. AIR 1963 SC 649 in aid of the

proposition that if the legislation is really a colourable legislation, then of course the true nature of the legislation must be found out. It is also, in my opinion, as a proposition of law cannot be disputed. But the question is whether the impugned legislation in its pith and substance a legislation dealing with the taxes or not. Sri Bhunia also drew my attention to the decision reported in Hargovind Pant Vs. Dr. Raghukul Tilak and Others, in aid of the proposition that certain office, namely, the office of a Governor does not come within the purview of employment. But I am not concerned in these applications with that question and therefore, it is not necessary in my opinion to deal with the said decision.

15. The next aspect which requires consideration in this connection, is, whether in view of Article 276, which I have set out before, the said legislature was competent to pass the impugned legislation. Now, on this aspect three different points were emphasized. First, it was urged that in item 2 of the Schedule to the Act in so far as it has brought within its purview those who are income tax payees or assesseees under the Income "Tax Act to be taxed irrespective of their standing, section 3 read with the schedule really amounts to a tax on income. To highlight this argument it was suggested that if a professional man who comes within item 2 of the schedule to the Act has no income from the profession but still is an income tax assessee or income tax payee because of his income from other sources then really the tax is not a tax on profession but tax on income which, it was contended, the legislature was not competent to legislate. Now, in my opinion, this argument proceeds upon a misconception. Article 276 permits taxes on professions, trades, callings and employments. The taxes must be on the professions, trades, callings and employments. But the measure of taxes or the liability for tax can be calculated on the basis of the. capacity or on the basis of the income from other sources. It does not, then, become a tax on income accruing or arising out of profession. The tax is tax on carrying on of the profession. But in measuring the liability or in imposing the burden of liability the income accruing or arising from profession or even outside the profession can be taken into consideration, as I shall presently notice from other aspect of the matter. Therefore, the only limitation under article 276 or, this aspect is that the same should not be a tax on income accruing or arising out of the professions, trades, callings or employments. But if it is a tax for carrying on the professions, trades, callings and employments then simply because its liability is measured by the income according or arising out of or outside the profession it cannot be said to be a tax on income accruing or arising out of professions, trades, callings and employments or on income. The other aspect of the matter on which stress was laid on behalf of the petitioners was that under Article 276 clause (2) there was Imitation of Rs. 250|-. I have set out. the said clause hereinbefore. In this connection it was urged that u/s 218 of the Calcutta Municipal Act, 1951 the State Legislature has imposed a tax itself on the carrying on of the trade or profession. Therefore, this power has been exhausted because for certain level of income, the tax imposed under the Calcutta Municipal Act, 1951 is Rs. 250|- u/s 218. Therefore, the State Legislature has no power to impose further tax. It was

stressed before me that under Bengal Municipal Act, 1923, through the right to tax was given to the municipalities by the State legislature, it was actually imposed by the municipality. Therefore, it was not an imposition by the State. In this connection the history of the tax on professions was stressed by placing reliance on the observations of the Supreme Court in the case of B.N. Bhandar vs. Dhamangoan, AIR 1966 SC 249, 257. It was urged that originally section 142A had to be enacted by the British Parliament under the Government of India Act, 1935, to put a limitation on the local bodies on raising the taxes. The difficulty in accepting this argument, to my mind, is in the language used under clause (2) of Article 276. This article states, "The total amount payable to the State or to any one Municipality, district board, local board or other local authority in the State should not exceed Rs. 250/- per annum". Therefore, the limitation is that the total amounts payable to either to the State or bodies mentioned in clause (2) by any one person should not exceed Rs. 250/-. That is the clear meaning of the expressions used under clause (2) of article 276. This view is again, in my opinion, fortified by the observations of the Supreme Court in the decision in the case of MR. KAMTA PRASAD AGGARWAL ETC. Vs. EXECUTIVE OFFICER, BALLABGARH and Another, . It was, however, urged that the context in which the Supreme Court had to make those observations was different and, therefore, the said observations may not be apposite in the instant case. It was also stressed before me that u/s 28 of the Maharashtra State Tax on Professions, Trades, Callings and Employments Act, 1975, the power of the Local bodies to impose tax had been withdrawn and it was submitted that this was a legislative recognition that the limitation was on all bodies taken together. That, as I said, is unwarranted by the expressions used under clause (2) of Article 276 of the Constitution. In order to accept this situation not only I have to read the expression "or" as "and" but I have also to ignore the significant expression "payable to". Such a construction, in my opinion, is not possible where the legislature has clearly expressed its intention. It is true that the context in which the Supreme Court gave its decision in the case of MR. KAMTA PRASAD AGGARWAL ETC. Vs. EXECUTIVE OFFICER, BALLABGARH and Another, was different, yet, it has to be borne in mind that this specific contention was urged before the Supreme Court and it may not be inappropriate to refer to the observations of the Supreme Court appearing at pages 686 and 687 of the report-

11. The provisions in Article 276(2) were contended by counsel for the appellants to indicate that the total of taxes imposed on professions, trades, callings and employments by the State, Municipality or any other authority should not exceed Rs. 250/- per annum-. It was said that the words "total amount by way of taxes" shall not exceed Rs. 250/-. That is totally misreading the Article. It cannot be denied that the State Legislature has power to impose taxes. The words in article 276 that the total amount payable to the-State or to any one Municipality, District Board, Local Board or other local authority cannot mean that the word "or" as used in a conjunctive sense as a substitute for the word "and". The word "or" is used in a disjunctive sense. The proviso to Article 276(2) not only

supports that construction but also makes the provision clear. In the proviso to Article 276(2) it is mentioned that if before the Commencement of the Constitution any State or any municipal board or authority had imposed a tax exceeding the limit of Rs. 250/- such tax may continue. Therefore, when the proviso speaks of any state or any such municipality it indicates that both can tax separately to the limit imposed by the Article.

12. Again, the language of Article 276(2) shows that the Constitution uses the words "any one person" in juxtaposition with any one municipality, district board, local board or other authority. The provisions are clear in their effect that the word "or" occurring between the words "the State" and the words "to any one municipality" cannot be read as the word "and" in a conjunctive sense.

13. The words "the total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other authority" mean that tax of and up to the sum of Rs. 250/- can be imposed by any one of the authorities mentioned. If the Constitution wanted the total taxes to be imposed by the State and other authorities to be Rs. 250/- the Constitution would have said that the total amount payable in respect of any one person by way of tax on professions, trades, callings and other employments shall not exceed Rs. 250/- per annum whether imposed by the State, Municipality, district board, Local board or other local authority. Further, if the total of the taxes be a sum of Rs. 250/- as contended for by counsel for the appellants it will remain that if a person is paying professional tax of Rs. 150/- to the State, the local authority can impose on him a similar tax up to the sum of Rs. 100/-. That may lead to the consequences. One is that one of the authorities will have to tax persons with lower income while those with higher income will escape any payment of tax. The other is that if one authority will impose a tax of the balance sum left after considering the amount imposed by the State all the authorities may not impose taxes. That will be entirely a wrong construction. The High Court was right in reaching the conclusion that the State as well as the authorities mentioned in Article 276 of the Constitution can each impose tax upto a limit of Rs. 250/-. One and the same person may be engaged in more than one of the items suggested in Article 276, namely, professions, trades, callings and employments. Such imposition of tax on more than one item in respect of one and the same person cannot be anything but taxes. The word "total" relates to an authority levying various taxes and not to all authorities put together.

16. Shri Dhunia, however, drew my attention to the fact that in view of section 37 of the income tax Act, 1961, these amounts would be deductible from the income tax which is a central revenue. He stressed the point that if all the local authorities including the Municipality, Panchayat and Others tax up-to its maximum limit of Rs. 250/- then all these amounts will have to be deducted from the income tax of a professional man which he will be liable to pay. To that extent there will be denudation of the central revenue. He urged before me that what he submitted was to be the basic feature of the Indian Constitution as co-

operative federation and therefore, the State powers should not be so construed as to be able to denude the central revenue. He sought support for these submissions in the history of the Indian Constitution as presented in Granville Austin's *The Indian Constitution Cornerstone of a Nation*, Chapter VIII at page 187 and onwards. He also relied very heavily on the observations of Chief Justice Marshall in the case of *McCulloch v. Maryland*, 4 Wheat on 316 L. Ed. 579 (1819) where the Chief Justice has stressed the need of bearing in mind the interconnection between the Central and the State Legislation and the Chief Justice has stressed that the differences that which always exists, and always must exist, between the section of the whole on a part, and the action of a part on the whole between the laws of a Government declared to be supreme, and those of a Government which, when in opposition of, those laws, is not supreme. The Chief Justice has also stressed that the power to tax involve the power to destroy and the power to destroy may often defeat and render useless the power to create and it was a plain repugnance, in conferring on one Government a power to control the constitutional measures of another, which other with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. Taxation, it was said, does not necessarily and unavoidably destroy; but to carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all Government. But these observations of the Chief Justice has to be borne in mind in the context in which the same were made. There the context was the right of the State to tax the instruments of a central Government. Now, in this connection it is important to bear in mind the background of the Indian Constitution and the background of the American Constitution.

The Indian Constitution unlike the American Constitution is not a Constitution of cession of powers by the States to the Centre. When the American War of Independence was fought the States themselves retained their complete right and asserted at the Convention-framing Constitution, their right to retain absolute sovereignty in certain matters except in the enumerated matters given to the centre. In India, however, we have a different history-history of a central organisation gradually disintegrating and in the very book upon which Sri Bhunia has relied reference may be made to the history of evolution as appearing from pages 188 where the devolution of authorities from the Government of India Act, 1919 to the Government of India Act, 1935 have been stressed. India seemed to have evolved the list system which is the system whereby each unit has been given enumerated powers and within the domain of the enumerated powers each unit is sovereign except that the residuary power not given or coming within the purview of the enumerated power comes within the residuary power of the centre. Keeping that in view I am unable to accept this contention that the limitation applies to taxes imposed by all the bodies taken together. On the proposition whether a particular imposition is really tax or fee demands upon the nature of the imposition and not on the nomenclature used reliance has placed by Dr. Pal at the decision in the case of *Sarat Ch. Ghatak v. Corporation of*

Calcutta, AIR (1959) Cal. P. 36, 41 and *Metram v. Chairman R. Municipality* 59 CWN 872, 877 to 878 of the report: I Will accept that position that the impositions u/s 218 of the Calcutta Municipal Act, 1951 are taxes and not fees but that does not alter the above view.

17. This point from a different angle was stressed by arguing that there has been an exhaustion of power by the State Legislature in passing the Calcutta Municipal Act, 1951. I am unable to accept this contention. The power to tax is in sovereign body either in the Parliament or in the State Legislatures. The power to tax cannot be either with the local body or with the Municipality. The power must be derived from the Parliament or the State Legislatures. In this case clause (2) of Article 276 does not put any limitation on the power legislating on the total amount but only puts a limitation as to imposition of tax of Rs. 250/- payable to the different bodies mentioned in the said clause. Therefore, it is not possible to read that limitation, as contended for on behalf of the petitioners. The fact that the Maharashtra Legislature in its wisdom thought it fit to withdraw the power of the local bodies by section 28 of their Act may an indication of their wisdom or their awareness of the need of the people but is not relevant in considering the legality of the impugned legislation or the amplitude of the powers of the legislature with which I am concerned.

18. While under Article 276, it is also necessary to consider another aspect of the matter, viz., whether the penalty and interest which have been sought to be provided for by the impugned, legislation can exceed the limit. On this the main argument has been that penalty or interest, in any event, is necessarily an additional taxation and, therefore, the limitation applies to this imposition. For this reliance was placed on the observation of the Supreme Court in the case of *Commission of Income Tax, Andhra Pradesh v. Bhikaji Dadabhai Co.*, 42 ITR 123, 128 where it was held that the penalty was additional tax in the context that the penalty proceedings were part of the assessment proceedings. This observation of the Supreme Court and the circumstances under which this observation was made were subsequently examined in several decisions in the case of *Nawn Estates Pvt. Ltd. v. Commissioner of income tax, West Bengal* 1 and Calcutta 106 ITR 384, a decision to which I was a party, in the case of *Commission of Income Tax v. Anwar Ali* 76 ITR 696 wherein the Supreme Court analysed the context in which the previous observation was made, in the case of *Hindustan Steel Ltd., v. State of Orissa*, 83 ITR 26, in the case of *E.K. Varghese v. Income Tax Officer* 96 ITR 572, in the case of *Vishnu Sugar Mills Ltd. Vs. Commissioner of Income Tax (Central)*, and in the case of *Soma Sundarams (Private) Ltd. Vs. Commissioner of Income Tax, Karnataka*, . It is true that in none of these decisions, neither in the first decision referred to on behalf of the petitioners nor in others decisions, the actual nature of the penalty fell for consideration, what was considered was whether the penalty proceedings could be said to form a part of assessment proceedings or whether the proceedings for recovery of penalty could be said to be, same proceedings as for recovery of taxed amount or whether the limitation applicable for taking recovery of taxes would be applicable to such proceedings.

19. But the problem in my opinion, can be analysed from the point of view of the principle. Taxes are attracted on happenings of certain events which sometimes are called taxable events, like sale of goods, import of goods, export of goods, or possession of wealth or making of gifts, earning of income or, as in this case, carrying on of professions, trades or callings or employment. But, neither penalty nor interest could be imposed on any of these contingencies. These can only be imposed on a further fact, that is to say, either failure, deliberate or otherwise, to comply with the provisions of the Act or delay in making any payment required to be made under the Act. Therefore, the cause of action or the event which attracts penalty or interest and taxes are separate and different in their essential nature: Therefore, tax cannot be considered to be the something as penalty. It only for the infraction of the provisions of the Act that penalty provision is attracted or delay in payment, interest can only be liable to be paid. If it is analysed from that point of view and specially in the light of clause (26) of Article 366 of the Constitution which defines the expression tax, in my opinion, there is no doubt that penalty the interest contemplated by different provisions cannot be considered as additional taxes which come within the limitation provided by clause (2) of Article 276 of the Constitution.

20. On behalf of the respondent, it was urged that these could come within the purview of implied power. Reliance in this connection was placed in the case of *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, , in the case of *Munshi Ram and Others Vs. Municipal Committee, Chheharta*, , in the case of *Avinder Singh and Others Vs. State of Punjab and Others*, , in the case of *Sushil Chander Anand Vs. State of U.P. and Others*, and also in the case of *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi* AIR 1978 SC 851, 885 in paragraph 84 to 90. Mr. Bhunia learned advocate appearing on behalf of one of the petitioners, in his argument, stressed that the theory of implied power could not be applied in construing the Constitutional provisions which might be applicable in construing the statutory provisions. If this is really question of construction of power, statutory or constitutional, it should be so construed as to make the power or the provision meaningful and effective and the concept of implied power follows from the requirement of making the "provision effective. Therefore, when a taxing power is given, if that taxing power is so read as not to imply to provide power to enforce compliance with the exercise of the power, then the power would really be nugatory and a dead letter/ Therefore, this theory or concept of implied power, being not applicable to construe the Constitutional provision cannot in my opinion, be accepted. In this connection, it would be appropriate to refer to the observations of the Supreme Court in the case of *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, where at page 885 the Supreme Court referred to Black's Law Dictionary and there the proposition has been put as follows:

Implied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must

therefore be presumed to have been within the intention of the Constitutional of legislative grant." (p. 1334 Black's Legal Dictionary 4th Edition).

21. It is abundantly clear, from the aforesaid observations that the power can also be implied in construing the Constitutional provisions. The principle is that all powers which are necessary to carry into the effect, these powers should be presumed to have been with the grant either of the Statute or of the Constitution. This principle has received the assent of the Supreme Court in the aforesaid decision referred to hereinbefore. Therefore, the argument advanced against the implied power, in my opinion, cannot be accepted. Apart from that under Entry 64 of List II of the Seventh Schedule, there is a specific provision for the State legislature to deal with the offences against the laws in respect of any of the matters in that list. In that view of the matter, in my opinion, this contention on behalf of the petitioners, cannot be accepted. In this connection reliance may be placed on the observations of the Supreme Court in the case of Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, . In support of his contentions that some of the provisions of the impugned Act, namely, the provisions relating to penalty, interest, etc. the powers given were excessive, Mr. Deb appearing for the Bar Council of India, drew my attention to certain observations in case of R.V. Barnsley v. MBC (1976) 3 All England Law Reports where at page 456 of the report Lord Denning, MR, observed inter alia as follows:

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Now, there are old cases which show that the court can interfere by certiorari if a punishment is altogether excessive and out of proportion to the occasion. In one case the Commissioner of Seven imposed on excessive fine : and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable see R.V. Northumberland Compensation Appeal Tribunal, ex parte Shaw. So in this case if Mr. Hook did misbehave, I should have thought the right thing would have been to take him before the justices under the bye laws, when some small fine might have been inflicted. It is quite wrong that the corporation should inflict on him the grave penalty of depriving him of his livelihood. That is a far more serious penalty than anything the justices could inflict. He is a man of good character, and ought not to be penalised thus. On ground alone, apart from the others, the decision of the corporation cannot stand. It is said to be an administrative decision; but even so, the court has jurisdiction quash it.

Certiorari will lie to quash not only judicial decision, but also administrative decisions.

22. In my opinion, the aforesaid observations and the said decision are not quite opposite in determining the controversy before me, because I am not concerned in these applications with the question as to whether there has in fact been excessive use of power by any of the authorities, but, whether the power granted to the authorities by the different provisions of the impugned Act violate the constitutional provisions. Whether in a particular case such power given are excessively used and in what circumstances the Court would in case of such

excessive user of power would intervene in my opinion, is a different question.

23. As I have mentioned before, one of the arguments was that there was no machinery provided for assessment and without the machinery for assessment the provisions of the Act were bad. Reliance was placed in this connection on the observations of the Court in the case of Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, . This reliance was made upon the mis-conception that there is no machinery. In my opinion, there is the machinery of self-assessment as I indicated before. I have set out hereinbefore the procedure and form for application for enrolment and the form of certificate of enrolment. The position is this that if a man of a particular standing makes an application for enrolment on the basis of his own calculation, then he is given certificate for enrolment and in. the certificate of enrolment itself, the amount of tax payable by him is indicated. If anything is found incorrect or false or not true, then provisions have been made for rectification, correction and also for taking other steps. But that must be taken after giving the persons concerned due opportunity; as contemplated by the Act. Therefore, I am unable to accept this contention that there is no machinery provided for imposition of the taxes.

24. Then, as I have said, so far the power of imposition of penalty and interest is concerned, it will come within Entry 64 of List II, as I have indicated before. But, so far as the power u/s 17, which I have set out hereinbefore, is concerned, it gives authority to inspect and search the premises where a profession, trade or calling or employment liable to tax is carried on. The power to seize such books and documents under this provision in opinion, does not provide for usual safeguard for searching or inspection or seizure of the books and documents in question. It does not also provide for recording the reasons nor does it provide for compliance with the relevant provisions of the Code of Criminal Procedure nor does it provide that reasons should be communicated and sanction should be obtained from any appropriate authority or what should be the ground upon which these searches or seizure can be conducted. This become all the more necessary because in case of professional people documents of the clients are also very often kept in those places and those documents apart from any question of privilege are entitled to certain amount of professional confidence and on and therefore without proper safeguards, this provision appears to me to be quite naked and arbitrary power violative of Article 19 of the Constitution and no professional man, neither legal, nor medical nor chartered accountant will be able to carry on the profession properly because professional people are required to maintain, and keep such records, in that fashion and if the power given under this provision is availed of then there is scope for it being abused or misused. In this connection reliance may also be placed in support of my views on the observations of the Supreme Court in the case of Commissioner of Commercial Taxes, Board of Revenue, Madras v. State of Kerala, AIR 1988 SC 59, 60 and reference may also be made to the observations of the Court at paragraph 17 of the judgment. As I have mentioned before, there is no safeguard either in the form of recording of the reasons or in the form similar to the protection

necessary u/s 165 of the Old Criminal Procedure Code or the corresponding provision of the new Criminal Procedure Code and in view of the peculiar nature of the documents normally kept within the professional people, as I have indicated before for the purpose of the Act. the power seems to me to be naked and arbitrary and there is chance of, its being misused. Mr. Chatterjee, learned advocate appearing on behalf of the respondent, relied on the decision in the case of Badri Prasad and Others, etc. Vs. Collector of Central Excise and Others, etc., and my attention was drawn to the observations in paragraph 25 of the decision. There, the Supreme Court was dealing with Gold Control Act, 1968 wherein the authorities under that Act were authorised to search the premises. But, the Supreme Court was cautious enough to indicate the purpose of checking the smuggling of gold and it enjoined the officers to perform their duties to enforce the Gold Control Act. If detailed reasons were recorded, there was the chance of the purpose of the same being defeated. That was an-extreme situation in the context of a peculiar legislation. But, in the context of the present legislation, just for realisation of tax from the professional people, who come within the purview of the Act, upto the limit of Rs. 250/- and in view of the nature of the documents that the professional people often have in their residences and in their places of work, in my opinion, this analogy of the power to search, on the analogy of the power under Gold Control Act, 1968 cannot be applied and for that reasons, I am of the opinion that the ratio of the aforesaid decision of the Supreme Court, on which reliance was placed, in support, on behalf of the respondent could not be availed of. There is, however no question of double jeopardy. But for the reasons indicated before I am of the opinion that Section 17 of the Act in its present form is bad and unconstitutional.

25. The next aspect of the matter which requires serious consideration and upon which a good deal of argument was advanced, before me was that the Act was vague and uncertain. Section 3 read with the Schedule makes the Act vague, it was submitted.. Now as I have indicated before, Section 3 of the Act read with Section 2 (f) speaks of persons who are liable, as those who are engaged either in trade, professions calling or employments. But, in computing their tax liabilities, the concept of standing for professional people has been introduced. It was urged before me, that the concept of "standing" is vague and uncertain. Mr. Arun Kr. Dutta, learned advocate appearing on behalf of some of the petitioners, draw my attention to the different meanings given in the Oxford Dictionary as well as Websters" Dictionary as to the meaning of "standing". Different meanings have been given in the dictionaries as to the expression "standing". According to one, it connotes "length of service experience or residence", according to another "status in society, profession or the like", according to yet another "position as to determine by seniority" and further according to another "that which withstands or is continuing" and another also give the meaning "continuing without diminution or change". It was urged, if an expression specially in a taxing provision, is capable of such different connotations, the expression becomes vague and uncertain and therefore such a provision also

may lead to scope of arbitrary exercise of power and therefore it should be struck down. Reliance was also placed on the observations of the Supreme Court in the case of K.A. Abbas Vs. The Union of India (UOI) and Another, and my attention was drawn to the observations of the Court at page 491 of the report. It is well settled and cannot be disputed that if an expression is vague and is not capable of being made certain, if properly read then that expression should not be permitted to be in the statute and specially in a fiscal one because there will be a scope for arbitrary exercise of power. But, in the last mentioned case, it has also been emphasised by the Supreme Court that there should be an endeavour by the Court to find out, if possible a probable meaning of the expression used by the legislature and the approach should not be to defeat the purpose of the legislation but rather to find out the intention of the expression used. If, however by no reasonable means that meaning can be found out then and then only such expression may be considered to be vague or uncertain and, as such unenforceable in fiscal provision. Now, in the instant case as I have mentioned, different meanings have been given to the expression "standing" in the dictionaries, both legal as well as others as I have indicated before. But, in my opinion in the context of Section 3 read with item (2) of Schedule and in the background of Section 2 (f), the only meaning the expression "standing" can convey is the length of continuous engagement in the profession. That is the only reasonable meaning or construction possible of the expression "standing" and, if such construction or meaning, which is a possible meaning is given to that expression then the expression "standing" does not become vague. If that is so, in my opinion it would be improper for the Court to strike down that expression as vague and make the law unenforceable on that ground.

26. In this connection, I must also observe that Mr. Dutt appearing before me on behalf of some of the petitioners argued that the Act in question was for raising additional resources for the benefit of the State and "matters connected therewith or incidental thereto" and he referred to several sections including the sections dealing with penalty, interest, and Section 19 relating to search and seizure and other matters. He urged that in construing the constitutional provisions, the expression "incidental thereto" must be read in contradistinction to the expression "in respect of" and he further emphasised that Clause (3) of Article 246 gave the State Legislature power to legislate in respect of matters mentioned, in List II. Therefore, should not be so construed as to cover the power or the authority to legislate "in respect of matters incidental thereto. In support of this proposition Mr. Dutta drew my attention to the observations of Anstey Wynes in the "Executive Legislature and Judicial Powers in Australia" and referred to 3rd Edition pages 486-487 where the learned author has dealt extensively with the meaning of the expression "incidental thereto". Now the difficulties in accepting this contention in my opinion are many. Firstly as I have indicated before, under Entry 64 of List II, the power to legislate in respect of offence against laws enumerated in the List has been given to the State Legislature. Therefore, these are in respect of these powers and, so, no question

of invoking "incidental power thereto" arises. Secondly, it appears to me, as I have mentioned above, that these powers are necessary for the enforcement of the taxing provisions otherwise the taxing provisions may become dead letter and, as I have indicated before, the concept of implied power in the sense power which is necessary to make the express grant effective must be read even in a Constitutional provision. If that is the position and even if it was possible to accept the contention that the expression "in respect of" was used there in contradiction to the expression "incidental thereto", in my opinion a contention which is not necessary for me to decide for the purpose of this application, that contention would not be of any assistance in determining the controversy in the present case before me. Mr. Dutta, however drew my attention to the preamble to the Act where the legislature has said that it was enacting the provision in respect of matters for raising additional revenue as well as for matters incidental thereto. That expression in the preamble is not conclusive for me to determine whether these powers are in respect of the powers under Entry 60 or those other powers are implied powers or are powers under Entry 64 of List II. In that view of the matter, I am unable to accept this contention urged on behalf of the petitioners.

27. A good deal of argument was also made before me on the scope of proviso and how the proviso should be construed. Reliance in this connection was placed on the observations of the Supreme Court in the case of Commissioner of Commercial Taxes, Board of Revenue, Madras v. State of Kerala, AIR 1968 SC 59, 63 paragraph 11 and also in the case of M. Karunanidhi Vs. Union of India and Another, . This argument was made on the question as to the meaning that would be given to the proviso to item (2) of Schedule of the Act whereby those who are liable to pay income tax have been placed in a different category. It is true that sometimes the role of proviso is to carve out something from the original provision but whether it is so or not will depend in the context and on the placement of the proviso. In this case, in my opinion, there is no difficulty in construing the proviso in the light I have indicated before.

28. Next /argument, is on the question of Article 14 of the Constitution. As I have mentioned before, the argument was that in this case the equals have been treated unequally and Dr. Pal appearing on behalf of some of the petitioners has extensively argued that those, who are the members of the legal profession they have been subjected to pay larger scale of taxes than those who are employees in item No. 1 of the schedule. It has also been urged that inter se between the members included in item 2, a differentiation has been made, without any rational basis. Reliance was placed on the decision of mine in the case of State Bank of India v. State of West Bengal, 1979(1) CLJ 363. There, I was dealing with the question whether five storied buildings, which were considered to be multistoried building could be taxed at a flat rate irrespective of their location, their yield, their potentiality of enjoyment, their age or conditions and other relevant facts, relevant for valuation of land and building upon which tax on land and buildings were required to be based, the relevant factor to consider being

the value or the capacity of the object which was to bear the burden of taxation. In than context I also considered that the distinction solely on the ground of the user was not sufficient to differentiate. I, therefore, held that the Court was concerned with a very narrow question viz. whether the likes have been treated alike, that is to say, when you treat all in the same level, thereby you make some unequal. I, further, held that in such a situation lack of classification or even lack of sub-division might create inequality and was violative of Article 14 of the Constitution but I cautioned myself by saying that whether in a particular situation the particular legislation had that effect or not would depend upon the particular situation of the particular legislation with which the Court was concerned. In this connection, I also reviewed the relevant decisions placed before me in that context and I mention the well known theory that in order to tax something it was not necessary to tax everything nor in order to tax something it was necessary to tax them equally. The legislature in that matter had wide choice and freedom. I reiterated, in that decision, upon whom the burden of tax should fall, was a matter of legislative wisdom and also upon which the Court was incompetent to enquire. I further reiterated that the valuation might not, in all cases, be the sole test and in a particular case, the valuation might be irrelevant specially in the context of new cities and new towns. I reiterated from the decisions of the Supreme Court that the, modern State in exercising its sovereign power of taxation had to deal with complex factors relating to the objects to be taxed, the quantum to be levied, the conditions subject to which the levy had to be made the surroundings and economic policies which the tax was designed to subserve and what not. From the judicial inspection tower, according to Mr. Justice Krishna Iyer of the Supreme Court, the Court might only search for arbitrary and irrational classification but the Court was only concerned with the un-constitutionality and not un wisdom of legislation. Now, in this context, I have to bear in mind that the total amount of tax limit is up-to Rs. 250|-. I have also to bear in mind that if it was that the tax could be only levied on the- basis of the income of the legal practitioners or the persons who come within the purview of item (2) of the schedule then that would have necessitated firstly an administrative machinery to determine the income of the persons concerned from the professions, trades, or calling that would have meant an administrative cost and expenditure and secondly, that would have also caused a good deal trouble and harassment to the persons who come within the purview of this Act. Now, these are the factors which have to be borne in mind. It is true that in some cases, the members in Item No. 2 have been treated differently from others in item 1 but there are different aspects on this. For an example, those who are in the highest slab in item (1) they bear greater burden than those who are in item no (2), while the highest burden in item no 1 is Rs. 250|- the highest burden in item No. 2 is Rs. 200|-. Then, there is the question of security of earning against the item No. 1 as there is also the chance of greater earning in item No. 2 in many cases. There is also the factor of eligibility of deduction of this item of tax for members in item No. 2 who are liable to pay income tax which is not available to members of item No. 1. Therefore, these are

two classes and others in other classes in different items of schedule cannot be treated as alike, as indeed, though the Article 276 permits taxes on professions trades, callings or employments, it is not necessary even to bring them all within the net work of one taxation. For the purpose of computation, different sources of income under the Indian Income Tax Act, 1961 are treated differently. The deductions which are allowed to professional men are not allowed to other, certain deductions which are allowed to employees are not allowed to others, certain deductions from income which is allowed to one category are not allowed in others. Therefore, it cannot be said that simply because they are liable to bear the burden for one purpose, they all belong to one class, as such. In my opinion in the matter of taxation they belong to different classes. As indeed the Act itself and the power to tax itself indicate that they are different classes. Then it was said that between the members of the Class 2 of the schedule inter se there has been differentiation without rational basis. Now, those who have to pay income tax have been treated on one basis and those who do not pay income tax have been treated on another basis. On behalf of the Bar Council of India Shree R.C. Deb stressed the point that by making the income not necessarily from the professions as one of the criterion the Legislature was trying to transgress or extend the base which, according to him, the Legislature was not competent to do. He submitted, that the tax being a tax on profession the Legislature was not competent to extend the base by measuring in some cases may be from income from other sources or from non-professional "sources or from non-professional receipts. I am however unable to accept this contention. The taxable event is and remains to be the carrying on of the profession or the trade or the calling or the employment. But in measuring the liability if the Legislature takes the capacity of the person and the fact that a person is liable to pay income tax may be a measure of his capacity to pay tax, it is not extending the base of taxation. It is only making the burden more equitable which the Legislature might. This argument again, in my opinion, is contrary to some of the arguments advanced in this case, because it was urged that capacity to pay in respect of tax on income is a relevant factor and that capacity to pay has been completely ignored. Dr. Pal relied very strongly on the observations of the Supreme Court in the case of B.K. Bhandar v. Dhamangoan Municipality, AIR 1966 SC 249, 257 (paragraph 20), which, he submitted, is an authority for the proposition that tax on professions, callings, trades and employments is tax on income. Now reading in, its proper context I do not think that decision is an authority for the proposition that tax on profession trades, callings or employments is a tax on income as such. It is a tax on carrying on of the professions, trades, callings and employments. But capacity to pay is a relevant factor, relevant in measuring in all taxing system and in sharing the burden of taxation. The capacity may not be of the individual, capacity may be of the property, capacity may be of the thing taxed, but there must be a measure and unless it is measured in that capacity it becomes inequitable. Reliance" in this connection may be placed on the observations of the Supreme Court in the case of Comm. H.R.E. v. L.T. Swamar AIR 1954 SC 282, 295, where Mr. Justice B.K. Mukherji, as the Chief Justice then

was, observed that in imposition of tax, the quantum depends generally upon the taxpayer's capacity to pay. It is significant to note how carefully the observation was made it generally depends upon the capacity to pay not that there is any legal or constitutional obligation on the part of the State to make it depend upon the capacity to pay. As I read it the Ld. judge merely said that the capacity to pay of the taxpayer or the capacity of the object taxed to bear the burden is a relevant factor which the legislatures in their prudence must bear and do often bear in mind. Reliance was also placed on the observations in the decision in the case of U.S. Oil Co. v. Tamluk Municipality AIR 1956 Cal 397, 398 and on the decision in the case of Seth Sukhlall Chandanmull v. A.C. Jain AIR 1959 Cal 444, 445. These aspects were again gone into by the Bombay High Court in Civil Application No. 2626/76 Vasant. S/o Abaji Mandeka v. State of Maharashtra where the Maharashtra State Tax on Professions, Trades, Callings and Employments Act, 1975 came up for consideration. Now, there are more or less similar provisions in both the Acts except some significant differences which I shall presently notice. Section 28 of the Act, as I have, mentioned earlier, deleted the power of the other local bodies and Panchayats to tax on profession. Of course no contention was raised on this aspect of the matter in the aforesaid decision. The Schedule to the said Act also dealt with different classes and more or less were of the similar provisions and it may not be inappropriate to set them out which are as follows:-

SCHEDULE I

(See Section 3) Schedule of "rates of tax on professions, trades, callings and employments.

Serial Class of persons.

No.

Rate of tax.

1.

Salary and Wage earners. Such persons whose monthly salaries or wages are:?

(i) less than Rs. 400

Nil

(ii) Rs. 400 or more, but less than Rs. 500

Rs. 2 per month

(iii) Rs. 500 or more, but less than Rs. 600

Rs. 4 per month

(iv) Rs. 600 or more but less than Rs. 800

Rs. 6 per month

(v) Rs. 800 or more, but less than Rs. 1000

Rs. 8 per month

(vi) Rs. 1000 or more, but less than Rs. 1,200

Rs. 11 per month

(vii) Rs. 1,200 or more, but less than Rs. 1,500

Rs. 15 per month

(viii) Rs. 1,500 or more

Rs. 20 per month

2. (a) Legal practioners inducing Solicitors and notaries public;

(b) Medical practioners including Medical consultants, and Dentists;

(c) Technical and Professional Consultants, including Architects, Engineers, R.C.C., Consultants, Plumbers, Tax Consultants, Chartered Accountants, Actuaries and Management Consultants;

(d) Chief Agents, Principal Agents, Special Agents, Insurance Agents and Surveyors or Loss Assessors registered or licensed under the Insurance Act, 1938 (IV of 1938).

Where the standing in the profession of any of the persons mentioned above:-

(i) less than two years..

Nil

(ii) two years or more, but less than five years

Rs. 150 per annum

(iii) five years or more..

Rs. 250 per annum

(B) In any other area in the State is:-

(i) less than two years..

Nil

(ii) two years or more,

but less than five years

Rs. 50 par annum

(iii) five years or more, but less than ten years...

Rs. 150 per annum

(iv) ten years or more..

Rs. 250 per annum

There is difference between the salary earners with the members of the items 1 and 2. There, as I said, the highest limit is Rs. 250|- per annum irrespective of the fact whether one was capable of paying income tax or not. The only distinction is whether one was within a Corporation area or not. But there of course the members who are of standing less than two years are exempted from paying tax. The matter originally came up for hearing before a Bench consisting of Mr. Justice Deshpande and Mr. Justice Pendse. Mr. Justice Deshpande upheld the validity of the Act. The Learned Judge was of the view that the capacity to pay was not a relevant factor and income need not be the basis to pay the tax. A person attracted the liability to pay tax by mere carrying on of the profession. The learned Judge also, took into consideration that limit was only Rs. 250|- per month. Administrative inconvenience in making sub-classification and making sub-division was also considered by his Lordship Mr. Justice Pendse, however, was unable to accept this argument. According to his Lordship there was discrimination on between the two classes and the capacity to pay, which was a relevant factor, had been completely ignored and, therefore, unequals had been treated as equals and so the Act was violative of the equality clause. The matter thereafter went before Mr. Justice Desai and his Lordship agreed with Mr. Justice Deshpande. I was taken through the judgment in detail. The Calcutta cases which I have referred to here-in-before and the other cases which I have also mentioned in my decision the multistoried building case were also referred therein. Mr. Justice Deshpande, if I may say so with respect, observed that the tax was not on the income but on the carrying on of the profession, calling and employment and the importance of earning being the ultimate object of the profession and tax being paid out of it could not make any difference; the taxable event that attracted the liability was not earning but joining and carrying of the profession. The learned Judge observed that the person attracted the liability to tax by the very fact of his joining or carrying on with the profession, the learned Judge was also unable to accept the position that the ability to pay was an indispensable ingredient for the imposition of tax. Mr. Justice Pendse took a contrary view as I have indicated before. According to the said learned Judge ability to pay was a relevant factor and persons of the same ability having not been treated equally there was violation of Article 14 of the Constitution. He also accepted the submission that standing had no reference to income and as such standing could not be the basis of differentiation of liability. As I have mentioned before there being difference of opinion between the two learned Judges the case was referred to a learned Third Judge and Mr. Justice Desai agreed with Mr. Justice Deshpande and held that ability to pay as such was not a relevant factor. The learned Judge observed that it was not the question before the Court as to whether it was desirable that the levy of the tax should be related to the capacity of the assessee to pay but whether there was any legal obligation on the State to provide for such co-relation. The Id. Judge came to the conclusion that there was

no such obligation to co-relate having regard to the various factors mentioned in the judgment and therefore in not making the tax co-related to capacity to pay by itself was not conclusive of the violation of Article 14. But as I have indicated before, in my opinion that different taxes may be attracted on different contingencies or on the happenings of different taxable events. The instant legislation is a tax on carrying on of the profession. It is not co-related to either earning or capacity to pay. But though the taxable event is carrying on of the profession or trade or calling or of engagement in employment if the capacity to pay is wholly ignored by the legislature, then, in my opinion it might lead to an unjust and inequitable taxation which would make it liable to attack on the ground of violation of Article 14 of the Constitution. But by what yardstick or by what measure that capacity to pay should be valued or estimated in a particular contingency is a matter within the legislative wisdom, taking into consideration the administrative costs, the troubles, expenses and hazards caused to the affected taxpayers, and in some cases as in this the total amount that could be realised, and if it" is not demonstrated that the legislature has completely ignored that factor of capacity to pay and provided no yardstick on determining that factor a different situation might arise. But in the instant case for professional people the highest quantum of tax is Rs. 200|-. That is a relevant factor. The scope and differentiation is very limited therefore. Those who are income tax assessees, be in income from profession or from income from other sources, are certainly in a better position to bear the burden of taxation more than the others that is another relevant factor which the legislature has taken into consideration. Thirdly, normally leaving aside the exceptional and the unfortunate cases with the increase of numbers of years or the period of engagement in profession upto a limit one might expect that the income or the capacity would increase or at least it could be said that if one so expects one is not acting unreasonably. That is another relevant factor. Now, all these relevant factors have been taken into consideration whether some other method could have produced a better result is irrelevant on this aspect of the matter. In so far as the majority of the Judges of the Bombay High Court held that rapacity to pay is not a relevant factor at all, I respectfully cannot fully assent to this view. In my opinion, capacity to pay is a relevant factor. But in what measure, by what mode that capacity to pay should be considered in a particular legislation is a matter for legislative wisdom and decision. Here the very fact that those who are income tax assesses have been made to pay or bear a greater burden or pay more tax is an indication that the capacity to pay has been taken into consideration. The fact that standing may not always be the measure of the capacity to earn, is of course a possible argument. But if the legislature has chosen in the context of the quantum of the total tax to be paid by a particular person, the comparative advantages and disadvantages and of the administrative expenses and hazards to judge the capacity to pay by the period of standing as a measure of judging the capacity to pay. the propriety of the decision, is not, in my opinion, a matter open to judicial scrutiny. In what measure the legislature will translate or distribute its burden is a matter for legislative wisdom There are of course cases

where hardships would be caused. But as was addressed that a legislation or a legislature is not concerned with the freaks or the exceptional cases. Even in case of income tax where a graded rate of taxation is intended to make the burden equal, there even sometimes it so happens that a person who comes within the taxable limit with greater social or family commitments have to bear the greater burden than the others who are more fortunate than him. But that is a factor which legislature cannot help. Perhaps a progressive legislation may but if it does not become violative of Article 14 of the Constitution, it may be unwise but it cannot be said to be illegal. Equally a gift by a multimillionaire attracts the same liability as a gift by a man of Rs. 50,000|-. There the gift tax rate is the same. The consequences may be disastrous in one case, the consequences may be negligible in the other. But these are exceptions or those are matters which no legislation can ever take into account in making the burden equitable In this case, as I have indicated the hazards to which the lawyers would have exposed if it was made dependent on their income, the hazard that would have caused to the lawyers or the members of the profession to satisfy the authority as to what was their income would itself be a deterrent in my opinion to make the income the sole ground or basis of taxation. But, as I said, I do not accept wholly that the capacity to pay is not a relevant factor but in what way that relevant factor would be taken cognizance of is a matter of legislative wisdom, and here the legislation having chosen one method in the context, I cannot hold that this choice is irregular or having no nexus with the object.

29. In this connection reliance may be placed on the observations of the Supreme Court in the case of *Khandige Sham Bhat and Others Vs. The Agricultural Income Tax Officer, ; Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam*, and in the case of *Avinder Singh and Others Vs. State of Punjab and Others*, where Mr. Justice Krishna Iyer has reiterated the limits of judicial scrutiny to the methods of taxation. Even though many decisions have considered this aspect, in my opinion it may not be unprofitable to refer to the observations of the Supreme Court in the case of *Ram Krishna Dalmia. v. Justice Tendolkar*, AIR 1958 SC 538 where the Chief Justice, inter alia, laid down the following tests of principles in determining this question:-

(i) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(ii) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(iii) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

The above principles will have to be constantly borne in mind by the Court when

it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws. It is also instructive to bear in mind the case of *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, , there the Supreme Court reiterated that it has normally to be presumed that the Legislature understands the need of the people and the relevant factors in deciding any question of discrimination.

30. Mr. Bajpai, appearing on behalf of some of the petitioners drew my attention to the relevant provisions of the Advocates Act, 1961 and the rules framed under the Act as to the duties and obligations of the advocates and pointed out that in some cases the liability to pay this tax may act as a deterrent to many. That possibility is there. But I do not think if the amount and the measures that have been provided in the impugned leg are considered it can be construed to be an Act disabling the professionals from the beginning. After all it is unfortunately true that a professional man has to incur in the beginning of his profession certain expenses which very often he cannot meet from his own professional income.

Mr. Bhunia as well as Mr. Dutt and others drew my attention to many cases of hardships specially having regard to the members of the community who are not joining the profession in the present day world of ours. But that brings me to the last aspect which I indicated before that the Act was challenged on the ground of the propriety of the legislation. I indicated that I shall mention about the propriety later on. But on this aspect the scope of judicial scrutiny is very limited. I can do no better than really to forewarn myself by the observations made in a Treatise on the Constitutional Limitations, by Cooley 1972 Edition, appearing at pages 230 to 235. In this connection I may, however, refer to the observations of the learned author appearing at page 164, which is as follows:

Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions or because it is supposed to violate the natural, social, Or political rights of the citizen, unless it can be shown is prohibited or such rights guaranteed or protected by the constitution. It is true there are some reported cases in which judges have been understood to intimate a doctrine different from what is here asserted but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient enunciation of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the constitution had imposed no restraint.

31. In order to substantiate the argument about impropriety of the Legislature many examples were cited before me as to how in some cases the provisions of

this Act would cause terrible hardships to the professional people and would in effect disenable many of them to carry on the profession. I am afraid again this is a matter which is beyond my jurisdiction as has been said by high authority that the power of taxing the people and the property is essential for every Government. The only security against the abuse of this power has to be found in the structure of the Government itself. In imposing tax the Legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. Shree B.C. Dutta appearing on behalf of some of the petitioners tried to argue before me that Article 276, Clause (1) in so far as it stipulates that Taxes on Profession, Trade, Calling and Employment should not be invalid on the ground that these relate to tax on income, he submitted that this provision of Article 276 was illegal. Now, I am afraid it is not open to me to embark on the validity of the Constitution. I can certainly examine the validity of a statute in the light of the Constitution, but I cannot examine the validity of the Constitution itself.

1. In the view I have taken I am unable to accept the contention that West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979 being West Bengal Act VI of 1979 is beyond the Legislative competence of the West Bengal Legislature. I hold that the said impugned legislation in its pith and substance and in its essential features falls within Entry 60 of List II of the 7th Schedule of the Constitution. I am, therefore, of the opinion that in view of Clause (3) of Article 246 of the Constitution the State Legislature has exclusive power to make the said law. No question of the assent of the President arises.

2. So far as Section 19 of the impugned legislation the said provision comes within the purview of Entry 64. of List II of the 7th Schedule of the Constitution, but the penalty contemplated by Section 19 of the Act can only be imposed and enforced in accordance with the law of Criminal Procedure and by taking appropriate action in accordance with the law in appropriate Court. The authorities under the said Act have no jurisdiction to impose such penalty.

3. I further hold that Section 17 of the impugned Act as it stands to-day is ultra vires as it amounts to unreasonable restriction on the right to carry on trade, profession, calling or occupation and is violative of Article 19(1) (g) as well as Article 14 because the said provisions contain arbitrary powers. This declaration, however, would not prevent the competent legislature to enact any provision for the inspection and search of any premises in connection with the proceedings under the Act providing for necessary safeguard specially having regard to the documents which professional people like the Doctors, Chartered Accountants and Lawyers keep in their possession or in their chambers or in their residences, for the discharge of their duties.

4. I, further hold that the Act is not bad because there is no machinery for assessment. I am, of the opinion, that the Act postulates the scheme of self-assessment, that is to say, a person who is a professional man with whose position I am concerned in these writ applications will file an application for

enrolment according to his appraisal and pay the tax calculated on the basis indicated in Item 2 of Schedule I of the Act as contemplated by sub-section (5) of Section 5 read with section 10 of the Act. If there is any mistake or false statement then proceedings and actions as contemplated by Sections 5 and 10 of the impugned Act can be taken, but in such proceedings the onus will be on the department or the appropriate authorities to establish that the assessee or the person concerned has violated the provision of law or has deliberately or falsely made any statement or under-statement, as the case may be.

5. I further hold that the expression "standing" is not vague in the context in which it is used and I construe the said expression as meaning "standing in engagement in the profession, that is to say, continuous involvement in the professional work or participation in the profession. Therefore, if a person after joining the profession leaves the profession for some other avocation or for some other personal reason and after break rejoins the profession, then his standing would be computed only by taking into cognizance the period that he is actually being involved or engaged in the profession, trade, calling and employment. The position would be clear if the three examples cited by Dr. Pal are examined in the above light. These three examples were as follows:

(a) If a person joins the profession and practises for one year and thereafter he leaves the profession for five years and either is employed outside West Bengal. Thereafter he joins the profession again. What will be his standing.

(b) A person joins the profession for one year and takes up the judicial service and retires. After 25 years of service, he joins the profession again. What will be his standing.

(c) A lady Advocate joins the profession and continues for one year; thereafter she gets married and leaves the profession for five years. She thereafter joins the profession. What will be her standing.

To the above three questions my answers would be-

(a) When he rejoins he will be of one year's standing;

(b) When he rejoins he will be of one year's standing; and (c) When she rejoins she will be of one year's standing.

6. I further hold that Item 2 of the Schedule to the Act is not violative of Article 14 of the Constitution. By the said provision neither equals have been treated as unequals or unequals have been treated as equals.

7. I further hold that Section 3 of the Act read with the Schedule to the Act is a tax on carrying on of the profession and not a tax on income either from profession or from any other sources. In measuring the liability the income of the assessee or in other words, the capacity of the assessee to pay has been taken into consideration and that does not violate any provisions of the Constitution nor does it infringe Article 276 of the Constitution.

8. I further hold that there is no question of any discrimination between different groups covered by the different Items in the said Schedule as they belong to distinct classes and cannot for the purpose of imposing the tax in question be considered to belong to the same class.

9. I further hold that the limitation of the amount indicated under Clause (2) of Article 276 of the Constitution has not been violated in this case., because the tax has been imposed by the Calcutta Municipal Act, 1951, or by the other local bodies; and the limitation is only upon the payability to the different bodies mentioned in Clause (2) of Article. 276 of the Constitution There is no question of exhaustion of the power of the State Legislature in this case.

10. I hold that the penalties contemplated by Sections 5 (6), 5 (7), 10 and 19 of the Act and the interest contemplated by Section 9(3) are not additional taxes and, therefore, no question of the said limitation of Article 276, Clause (2) would apply to those Items. These are incidental powers of taxation.

11. I am of the opinion that Section 26 of the Act is not bad for exeessive delegation of Legislative functions without guidelines. Public interest in the background of the provisions of the Act is sufficient indication of the guide lines.

12. Though the Act is valid, the legal and other professions do contain many members whose financial capacities in the present day context of inflation and other factors are not often sufficient to discharge their obligations. Having regard to the peculiar situation of the middle-class people and lower middle class people, who are joining the legal profession and in order to encourage all classes joining the professional classes, I would recommend, if i may, the State Legislature to consider providing with certain other guidelines, namely, the power to exempt persons in appropriate, cases on financial grounds or because of illness or of age. That would make the legislation far more beneficial than it is today and perhaps would better subserve this purpose. It is also advisable if the Government can consider exempting those professionals who are not at all income tax assesseees before two years standing in their professions from payment of tax, at least for one or two years so that they can adjust their positions.

With the aforesaid direction observations the Rules are discharged where the Rules were issued and the applications are also dismissed.

There will be no stay of operation of this order but the moneys" realised from the petitioners would not be appropriated in the meantime and they will be kept in a separate account for a period of three months.

Mr. Somnath Chatterjee, appearing on behalf of the respondent, states that an officer of the department will be available at the office of the Bar Association, Bar Library and Incorporated Law Society once every week to supply forms and to get enrolment in order to assist them to comply with the previsions of the Act.

Though the allegations made in the petition are not admitted, the applications for

joining in the applications are allowed. In Item Nos. 15 and 18 the Bar Council of India is given leave to intervene and in item No. 20 Shri Dilip Sett and Shri Dipak Choudhury are given leave to intervene.

This judgment will also govern (1) Jiban Krishna Das and Ors. (2) Satyananda Gupta and Ors. (3) Usha Datta and Ors. (4) Mukul Prokash Banerjee and Ors., (5) C.R. 5946(W)|79 (6) Dilip Kr. Sett and Ors. (7) Ranjit Kumar Banerjee and Ors. (8) Durgesh Chandra Mandal and Ors. and (9) Smt. Sipra Mukherjee.