
(2012) 03 RAJ CK 0031

In the Rajasthan High Court

Case No : Civil Miscellaneous Writ Petition No"s. 16660 of 2011 and Others

Purshottam Das Malpani

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-03-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 245, 246, 246(1), 246(3)
Finance Act, 2010 — Section 65, 65(105), 65(105)(zzzz), 65(90a), 66

Citation : (2012) 36 STT 167 : (2012) 52 VST 409

Hon'ble Judges : Arun Mishra, C.J.;Narendra Kumar Jain, J

Bench : Division Bench

Advocate : Sameer Jain, Vaibhav Kasliwal, Gunjan Pathak, Vijay Choudhary, Prokul Khurana, Atul Saxena, Rajendra Salecha and Prateek Kasliwal, for the Appellant; Anil Mehta, D.S. Punia, Ajay Sukhla, Amit Surolia and Sushil Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, CJ.

1. Since common questions of law and facts are involved in these writ applications, they are being decided by this common order. The facts are being noted from D.B. Civil Writ Petition No. 16660/2011 Purshottam Das Malpani v. Union of India. The petitioner has questioned the levy of service tax which is being realized by the Union of India under the provisions of Section 65(105) (zzzz), 65(90a) read with section 77 of the Finance Act, 2010 (hereinafter referred to as "the Act of 2010") and prayed to declare that the said provisions are illegal, arbitrary and ultra vires the Constitution and that renting of "immovable property is not a service; prayer has also been made to declare the notification no. 23/2007, ST dated 22.5.2007 as amended to be illegal, arbitrary and ultra vires the Finance Act, 1994 (hereinafter referred to as "the Act of 1994"); prayer has further been made to declare the circular dated 26.2.2010 qua renting of immovable property as illegal and ultra vires the Act of 1994 and

Constitution of India; prayer has also been made to quash the circular dated 20.9.2011.

2. It is averred in the petition that the petitioner is engaged in renting/leasing warehouses and storage space for agro and other products. The Act of 1994 was introduced by the Union of India under which service tax on few commodities was levied and by the year 2007, more than 106 taxable services were brought in the net of service tax which was in the nature of indirect tax. Vide Act of 2010 read with notification no. 23/2007 ST dated 22.5.2007, levy of service tax was introduced on renting of property service by virtue of clause 65(105)(zzzz) read with section 65(90a) defining taxable service w.e.f. 1.6.2.2007. The petitioner was allotted service tax registration on 22.10.2011 in ST-2.

3. It is further averred in the petition that tax on renting of immovable property was challenged in various High Courts through out India. In Home Solution Retail India Ltd. Vs. Union of India (UOI) and Others, the Division Bench of Delhi High Court has struck down the levy being unconstitutional and ultra vires the provisions of the Act of 1994 on the ground that no value addition was involved in the transaction of renting out of the immovable property. Against the DB decision of the Delhi High Court, SLP was preferred before the Supreme Court and" it was admitted, but no interim stay was granted.

4. It is further averred that in the Finance Bill, 2010 by virtue of para 76, validation law was introduced whereby the verdict of any court, pronouncement was declared to be redundant and the levy was held to be constitutionally valid with retrospective effect w.e.f. 1.6.2007. The provisions of Finance Bill were enacted on 8th May, 2010 and the clause 77 of the Act of 2010 brought into force the validation laws pertaining to renting of immovable property to be valid and applicable with retrospective effect. The petitioner has submitted that no tax can be collected without authority of law as per Article 265 of the Constitution of India. The Union of India has no power to levy the service tax on renting of the immovable property. It was also submitted that tax cannot be imposed except by authority of law under Article 265 of the Constitution. Entry 92C of Union List, Seventh Schedule, which was inserted by 88th Amendment Act, 2003, deals with taxes on services; Entry 54 of the State List, Seventh schedule deals with taxes on sale or purchase of goods and Entry 49 of State List deals with taxes on lands and buildings. Thus, it was not within the power of the Union of India to levy service tax on land and building as it is a State subject. The circular dated 26.2.2010 has been issued to collect the tax on renting of immovable property by virtue of validation law i.e. Para 76 of the Finance Bill.

5. It was submitted that the provisions of Section 65(105)(zzzz), 65(90a) of the Act of 2010, notification dated 22.5.2007 and clause 77 of the Act of 2010 are ultra vires the Constitution of India, particularly Articles 245, 246, 265 read with Entry 54 of the State List of seventh schedule. No service element is involved in renting out immovable property and there is no value addition, thus, service tax cannot be levied by virtue of clause 77 of the Act of 2010 as the very nature of

tax will become direct in nature and the tax will be confiscatory and coercive on the petitioner and assessee. It cannot be imposed with retrospective effect. Reliance has been placed on the definition of "service" as provided in the Consumer Protection Act, 1986.

6. A reply to the writ petition has been filed in D.B. Civil writ Petition No. 9908/2010, which has been adopted in all cases by the learned counsel appearing on behalf of the respondents Union of India and ors. It was contended that Section 65(105)(zzzz) of the Act of 1994 covers any service provided or to be provided to any person, by any other person in relation to renting of immovable property for use in the course of furtherance of business or commerce. Section 65(90a) clarifies that "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangement of immovable property for use in the course of furtherance of business or commerce. The provisions cover the substantive activities of renting in addition to all other ancillary services which can be related to taxable service. The service tax on renting of immovable property was imposed w.e.f. 1.6.2007 and as per international classification code (UNCP), renting of premises was specially categorized as service. The wording used in executive instructions cannot override the legal text appearing in the Act or subordinate legislation. Various High Courts have upheld the validity of the aforesaid provisions. The intention to tax renting itself was clear by the circulars issued after imposition of tax. However, in the case of Home Solution Retail India Ltd. (supra), the Division Bench of Delhi High Court observed that service tax is a value added tax; it is a tax on the value addition provided by some service provider; renting of immovable property for use in the course or furtherance of business or commerce by itself does not entail any value addition and therefore, cannot be regarded as a service. After the DB judgment of the Delhi High Court, many tenants had stopped paying service tax due to which landlords had come in a very difficult situation; Government has issued circular dated 15.7.2009 clarifying that service tax is payable on renting of immovable property and thereafter, Finance Bill, 2010 was introduced and by virtue of para 76, validation law was introduced whereby the verdict of any court, pronouncement was declared to be redundant and the levy was held to be constitutionally valid. The Finance Bill, 2010 has made an amendment in the definition of the taxable service "Renting of immovable property" [section 65(105)(zzzz)] to provide that the activity of "renting" itself is a taxable service. This change was given effect to with retrospective effect from 1.6.2007. It is open to the legislature to clarify or validate a law retrospectively. Union of India has competence to levy service tax.

7. The learned counsel appearing on behalf of the petitioners have submitted that there is no value addition while renting out the immovable property, as such service tax could not have been levied; union of India has no power or authority to levy the service tax on land and building; it is in fact a service tax levied on land and building which is exclusively within the domain of the State Government under State List II Entry 49 of Seventh Schedule of Constitution of India. It was

not open to the legislature to enact deeming fiction of renting out immovable property being service when it was not so, that too with retrospective effect; that would have the effect of making a direct tax instead of indirect tax; it would not be possible for the landlord to realize the service tax from the lessee. Reliance has been placed on Articles 245, 246 and 265 read with entry 54 of the State List of seventh schedule of the constitution of India; Apex Court has not granted any stay against the DB decision of the Delhi High Court in Home Solution Retail India Ltd. (supra); no element of service is involved in renting out the immovable property and thus, the impugned provisions be declared ultra vires the Constitution.

8. The learned counsel appearing on, behalf of the respondents have submitted that renting out the immovable property is service and there is value addition; the DB decision of the Delhi High Court in Home Solution Retail India Ltd. (supra) has been overruled by the Larger Bench of the Delhi High Court itself in the case of Home Solutions Retails (India) Ltd. v. Union of India (2011) 33 STT 95 /13 taxmann.com 188 alongwith various other writ petitions; service is not tax on building or land which is subject matter of State List II under Entry 49 Seventh Schedule of the Constitution of India; with abundant caution, validation has been made; impugned provisions cannot in any manner be said to be illegal or ultra vires the Constitution; service tax has been levied within authority of law; entries have to be considered as wide as possible; various High Courts have upheld the validity of the impugned provisions. Hence, no case for interference is made out. Reliance has been placed on the decisions of Delhi High Court in Home Solutions Retails (India) Ltd (supra); Bombay High Court in Retailers Association of India (RAI) Vs. Union of India (UOI) and Others, ; Punjab and Haryana High Court in Shubh Timb Steeb Ltd. v. Union of India (2010) 29 STT 479 and Orissa High Court in Utkal Builders Ltd. v. Union of India (2011) 12 taxmann.com 390.

9. The provisions of Section 65(90a) prior to amendment made by the Act of 2010 are quoted below:-

Section 65(90a) "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include-

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

Explanation No. 1- For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple use buildings;

Explanation No. 2- For the removal of doubts, it is hereby declared that for the

purposes of this clause, "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;

10. The provisions of section 65(90a) as stood prior to amendment by the Act of 2010 define that "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include renting of immovable property by a religious body or to a religious body and renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject of field, other than a commercial training or coaching centre. The definition remains the same after coming into force of Act of 2010.

11. The provisions of Sections 66 & 65(105)(zzzz) prior to amendment made by the Act of 2010 are quoted below:-

Section 66-Charge of Service Tax-

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (zzzz).... of clause (105) of Section 65 and collected in such manner as may be prescribed.

Section 65(105) "taxable service" means any service provided or to be provided- (zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1-For the purposes of this sub-clause, "immovable property" includes:-

- (i) building and part of a building, and the land appurtenant thereto;
- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto; and
- (iv) in case of a building located in a complex or an industrial estate, but does not include-

All common areas and facilities relating thereto within such complex or estate, but does not include-

- (a) vacant land solely under for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports circus, entertainment and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2- For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce.

12. The provisions of Sections 66 & 65(105)(zzzz) as amended by the Act of 2010 are quoted below:-

Section 66-Charge of Service Tax-

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses.... (zzzz).....of Clause (105) of Section 65 and collected in such manner as may be prescribed.

Section 65(105) "taxable service" means any service provided or to be provided- ... (zzzz) to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or furtherance of business or commerce.

Explanation /-For the purposes of this sub-clause, "immovable property" includes:-

- (i) building and part of a building, and the land appurtenant thereto;
- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto; and
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,
- (v) Vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;

But does not include-

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and buildings used for the

purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2- For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purpose shall be deemed to be immovable property for use in the course or furtherance of business or commerce.

13. Prior to amendment, the "taxable service" means any service provided or to be provided to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce. After amendment, it has been provided that "taxable service" means any service provided or to be provided to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or furtherance of business or commerce. Thus, by the amendment, renting of immovable property or any other service in relation to such renting has been included in taxable service.

14. The question which arises for consideration is whether there is any element of service involved in renting out immovable property and whether there is any value addition.

15. It is apparent that service tax is a levy on the event of service. The concept of service tax is an economic concept and its scope is being widened. Service tax is in the form of value added tax. The concepts of activity and the service provider and service recipient are of significance, in our opinion, when certain premises are rented out, there is element of service tax involved in it.

16. In Black's Law Dictionary, the term "service" has been defined to be an act of doing something useful for a person or a company for a fee. As per Chamber's English Dictionary, "service" means - the condition or occupation of a servant or of one who serves; work; the act or mode of serving.

17. While renting out the immovable property service is done to the service recipient; there can be property based service and performance based service which can be included within the ken of amended provisions of Section 65(105) (zzzz) of the Act of 2010.

18. The concept of service and value addition has been dealt with by the Full Bench of the Delhi High Court in the case of Home Solutions Retails (India) Ltd. (supra) and it has been laid down thus:-

64. It is contended that when a property is leased or rented, the element of service is absolutely absent. In this context, the concept of rent has to be appositely understood. A rent is basically a reward paid for the use of the land. The tenant or the occupant pays the same to use the premises. In the economic concept, rent can be categorized into two heads, namely, contract rent and economic rent. Contract rent fundamentally refers to the total amount of money paid for use of the land and economic rent is a part of the total payment which is

made for the use of land and it is estimated on many a ground. The economic rent can be contract rent minus interest on the capital invested. To give an example, a tenant pays Rs. 20,000/- per year as contract rent but the interest on capital invested is Rs. 3,000/- per year. Thus, the remaining amount, that is, Rs. 17,000/-(Rs. 20,000.00 - Rs. 3,000.00) is paid for the use of the land.

65. The concept of economic rent can also represent an amount which a factor can earn in its next best alternative use. To give an example, a piece of land yields in a particular use Rs. 5,000 in a year. If it is transferred to its next best use, it can earn a better income. At one point of time, the Theory of Rent was propagated by David Ricardo. According to the Ricardian theory, rent has differential surplus and the same arises due to certain facets relating to fertility, productivity, extensive cultivation, quality, etc. Ricardo fundamentally considered rent as a surplus accruing to superior land over inferior land called "marginal land". It also depended upon shifting of population. Be it noted, the rent varies depending upon advantages. To give an example, two decades back, a market is established in zone "A", thereafter, a railway station starts in another zone called "B". The cost of a particular item on being transported from zone "A" to outside the city will cost more than the articles transported from zone "B". Compared to zones "A" and "B", if there are other zones which are farther away like zones "C" and "D", they will be less advantageous. Thus, the lands or buildings located in zones "A" and "B" would be more advantageous. The value difference comes into play because of transport charges. The surplus arises because of the location and availability of facilities. Appreciated in this context, economic rent is a surplus which arises on account of natural differential advantages and can be treated as "service". That apart, scarcity of premises, the pressure of demand and the increase of population are also contributory factors. Consequently, any land or building situated in a particular place does possess certain inherent qualities which distinguishes it from land or building at other places. The factors which really weigh are location, accessibility, goodwill, construction quality and other advantages. A land or building in one area may fetch more rent than in another area. When a particular building is rented or leased or given under arrangement for commercial or business purposes, many factors are taken into consideration. Every building or premises cannot be utilized for commercial or business purposes, when a particular building or premises has the "effect potentiality" to be let out on rent for the said purpose an element of service is involved in the immovable property and that tantamounts to value addition which would come within the component of service tax. To further clarify, an element of service arises because a person who intends to avail the property on rent wishes to use it for a specific purpose. The value of the building gets accentuated because of scarcity of land or building, goodwill, accessibility and similar ancillary advantages which constitute value addition.

66. The modern economic theory of rent also has a nexus with demand and supply. In this analysis, rental is hiked because supply of land is scarce in relation to its demand. This economic concept is called "scarcity theory of rent".

This includes the facet of competition and quality. According to the modern theory, rent is not peculiar to land alone but arises in the case of many a factor which earn over and above the transfer earnings. There is a distinction between "actual earnings" and "transfer earnings". According to the modern analysis of rent, it is not peculiar to land alone and the concept of transfer earning is more attracted towards the building depending upon its use. As an economic concept, it has been developed that rent qua building or premises or, for that matter, land has a nexus, an inseparable one, with the potentiality of its use in a competitive market. The economic growth has an effect on rent. In this regard, modern economists have evolved certain methods, namely, technical progress in methods of production, development in means of transportation and population growth, we have referred to these concepts only to highlight that the legislature has not imposed tax on mere letting but associated it with business or commercial use. Thus, it comes within the concept of activity and the value addition is inherent. It is worth noting that the language employed in the dictionary clause and the charging section, that is, "commercial use for business purposes" have their own significance. In Black's law dictionary, "commercial" has been defined as "relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce". In R.M. Investment and trading Co. Pvt. Ltd. Vs. Boeing Co. and another, , while dealing with the expression "commercial" it has been opined that the expression "commercial" should be construed broadly having regard to the manifold activities which are integral part of international trade today.

67. In Stroud's judicial dictionary (5th Edition), the term "commercial" is defined as traffic, trade or merchandize in buying and selling of goods.

68. When premises is taken for commercial purpose, it is basically to subserve the cause of facilitating commerce, business and promoting the same. Therefore, there can be no trace of doubt that an element of value addition is involved and once there is a value addition, there is an element of service.

69. In view of our aforesaid analysis, we are disposed to think that the imposition of service tax u/s 65(105)(zzzz) read with Section 66 is not a tax on land and building which is under Entry 49 of List H. What is being taxed is an activity, and the activity denotes the letting or leasing with purpose, and the purpose is fundamentally for commercial or business purpose and its furtherance. The concept has to be read in conjunction. As we have explained that service tax is associated with value addition as evolved by the judgments of the Apex Court, the submission that the base of the said decisions cannot be taken away by a statutory amendment need not be adverted to. Once there is a value addition and the element of service is involved, in conceptual essentiality, service tax gets attracted and the impost gets out of the purview of Entry 49 of List II of the Seventh Schedule of the Constitution and falls under the residuary entry, that is, Entry 97 of List I.

70. In view of our conclusion, the decision in the first Home Solution case does

not lay down the law correctly inasmuch as in the said decision, it has been categorically laid down that, even if a building/land is let out for commercial or business purposes, there is no value addition. Being of this view, we overrule the said decision.

19. The Full Bench of the Delhi High Court thus laid down that the provisions of Section 65(105)(zzzz) and Section 66 of the Finance Act, 1994 and as amended by the Finance Act 2010 are intra vires the Constitution of India; the decision rendered by the Division Bench in the case of Home Solution Retail India Ltd. (supra) does not lay down the correct law as there was value addition when the premises are let out for use in the course of or furtherance of business or commerce and it was accordingly, overruled; and the challenge to the amendment giving it retrospective effect was unsustainable and accordingly, the same repelled and the retrospective amendment was declared as constitutionally valid.

20. The High Court of Bombay in the case of Retailers Association, of India (supra) has upheld the constitutional validity of imposition of service tax under sub-clause (zzzz) of clause (105) of Section 65 read with section 66 of the Finance Act of 1994 as amended holding that the legislative basis that has been adopted by Parliament in subjecting taxable services involved in the renting of property to the charge of service tax cannot be questioned. The assumption by a legislature body that an element of service is involved in the renting of immovable property is certainly not an assumption which can be regarded by the court as being so manifestly absurd or perverse as to lead to an inference that Parliament had treated as a service, an item which in no rational sense could be regarded as involving service. The Bombay High Court further held that the legislature in enacting a law is entitled, to provide for a deeming fiction. Only limitation on exercise of power is that by a deeming fiction, Legislature cannot transgress upon a constitutional restriction or a field of legislation that is reserved for another legislature. Levy of tax on a taxable service provided or to be provided to any person, by any other person, by renting of immovable property is based on a considered determination by Parliament that such transactions do in fact involve an element of service, validity of legislation does not depend upon a determination of fact by Court that a service is provided in transaction which is brought to tax. For a law which does not fall within List II of Seventh Schedule would in any event fall within legislative competence of Parliament under its residuary power. A legislative hypothesis contained in parliamentary legislation cannot be questioned on ground that assumption of fact is in error. Parliament has the plenary power to enact legislation on fields which are set out in List I and List III of Seventh Schedule. Plenary power of Parliament to legislate can extend to enacting legislation both with prospective and retrospective effect, subject to mandate of Article 14 of Constitution. Intent of Parliament was specifically to bring renting of immovable property within fold of taxable services when used in course or furtherance of business or commerce. Expression in relation to renting of immovable property was broad enough to

include both renting of immovable property as well as services in relation to renting of immovable property. Object of amendment, brought about with retrospective effect, was to expressly bring the legislative provision in conformity with original parliamentary intent.

21. The High Court of Punjab and Haryana at Chandigarh in the case of Shubh Timb Steels Ltd. (supra) has also upheld the constitutional validity of the provisions of Section 65(90a) and 65 (105)(zzzz) of the Finance Act, 1994 holding that renting of property for commercial purposes is certainly a service and has value for the service receiver. The Punjab and Haryana High Court further held that service tax on service of renting of property was not exclusively covered by Entry 49 List II. Entry 49 of List II relates to tax on land and building and not any activity relating thereto. Income tax on income from property, wealth-tax on capital value of assets including land and building and gift tax on gift of land and building have been held upheld. It cannot be held that renting of property did not involve any service as service could only be in relation to property and not by renting of property. Renting of property for commercial purposes is certainly a service and has value for the service receiver. Moreover, the aspect of service element in renting transaction is certainly an independent aspect covered under Entry 92 C read with Entry 97 of List I. In any case, subject-matter of impugned levy being outside the scope of Entry 49 of List II, power of Union Legislature is undoubted. Question whether levy will be harsh being in addition to income tax and property tax is not a matter for this Court once there is legislative competence for the levy. Even if it is held that transaction of transfer of right in immovable property did not involve value addition, the provision cannot be held to be void in absence of encroachment on List II.

22. The Orissa High Court in the case of Utkal Builders Ltd. (supra) has also upheld the constitutional validity of provisions of Section 65(90a) read with section 65(105)(zzzz) of the Finance Act, 1994 as amended by Finance Act, 2007, 2008 and 2010. It was held that the nature of the transaction made by the petitioner with its tenant clearly amounted to renting of an immovable property for the purpose of business or commerce and was therefore, clearly covered by Section 65(90a) of the Finance Act, 1994 and "service tax" was clearly leviable thereon, it was further held that amendment was clearly clarificatory in nature and Parliament certainly possesses the necessary legislative competence to declare the said amendment to be retrospective in operation and there was no error or lack of competence in such legislation. The Orissa High Court held thus:

8. On reading of the judgment of the Delhi High Court in the case of Home Solution Retail India Ltd (supra), it is clear there from that the Hon'ble Delhi High Court has not taken into consideration the scope and ambit of section 65(90-a) of the Finance Act relating to "renting of immovable property.

We are of the considered view that since "renting of immovable property" itself is clearly covered by section 65(90-a) of the Act which include "renting, lending,

leasing, licensing or other similar arrangements of immovable property for use in the course or Furtherance of business or commerce. Therefore, it appears that though Section 65(90a) has been mentioned to in the aforesaid judgment, yet its impact and the scope and ambit of the said provision has not been discussed and the entire focus of the Hon"ble Delhi High Court seems to have been made to the amendment of Section 66(105)(zzzz) by the Finance Act. It is a well settled principles of law that, if a judgment proceeds without taking note of or ignoring relevant provision of law, the said judgment cannot be held to have correctly decided the case.

9. Apart from the above, the Hon"ble Supreme Court in the case of Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and Others, has clearly held that, the service rendered by "Mandap" can be termed as "property based services", This judgment has been affirmed by a latter judgment of the Hon"ble Supreme Court presided over by Justice S.H. Kapadia (as His Lordship the then was) in the case of All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, .

10. In the present case, we are clearly of the view that the nature of the transaction made by the petitioner with its tenant clearly amounts to renting of an immovable property for the purpose of business or commerce and is, therefore, clearly covered by Section 65(90-a) of the Finance Act, 1994 and "service tax" is clearly leviable thereon. Although challenge in the present case has been made to the Amendment Act of 2010 to section 66(105) (zzzz), we find no justification to entertain the present writ application since we are also of the view that the amendment is clearly clarificatory in nature and Parliament certainly possesses the necessary legislative competence to declare the said amendment to be retrospective in operation and, therefore, we do not find any error or lack of competence in such legislation.

23. Cinemax India Ltd. v. Union of India (2011) 12 taxmann.com 492 the High Court of Gujarat has upheld the constitutional validity of sub clause (zzzz) of clause (105) of Section 65 of Finance Act, 1994 as amended by Section 75(5)(h) and Section 76 of the Finance Act, 2010 holding that in case of renting of immovable property, if service recipient uses it in the course of or furtherance of business or commerce, it can safely be stated that the service provider has rendered service, enabling the service recipient in value addition. Thus, if renting of immovable property is made in the course of or for furtherance of business or commerce, value addition is made by service provider in favour of service recipient. Such activity undertaken by the service provider for value addition in the course of or for furtherance of business or commerce, i.e. to carry on activity or business or commerce of the service recipient amounts to rendition of service and will fall within the meaning of definition of "service tax".

24. The Madhya Pradesh High Court in Entertainment World Developers Ltd. v. Union of India (2012) 19 taxmann.com 134 has also upheld the imposition of "service tax" on renting of immovable property.

25. In our opinion, when property based service is provided to the occupant by landlord for commercial use for business purposes, there is value addition. Occupation by lessee is service provided to him and it is useful to lessee as such it is a service. Commercial use of property for business purposes enhances value of property. In renting out immovable property for commercial use for business purpose, element of service is involved and there is value addition also in various ways by such transaction. Consequently, submission raised by the learned counsel for the petitioners cannot be accepted.

26. The learned counsel for the petitioners has relied upon the definition of "service" contained in the Consumer Protection Act. The said definition cannot be applied to the Finance Act and thus, it has no application 1 to the present case.

27. Coming to the question of retrospectivity, as we have found that there is element of service involved in renting out the immovable property and value addition is also there in such transaction, very decision of the Division Bench of Delhi High Court has been wiped off by the subsequent Full Bench decision of Delhi High Court in the case of Home Solutions Retails (India) Ltd. (supra), besides that provisions of Validation Law clarifies the provisions, it is permissible for the legislature to do so to make the validation law with retrospective effect.

28. Full Bench of Delhi High Court in Home Solutions Retails (India) Ltd. (supra) has observed that it is well settled in law that it is open to the legislature to pass a legislation retrospectively and remove the base on which a judgment is delivered. The said view has been stated in *Bakhtawar Trust v. M.D. Narayan* (2003) 5 SCC 289.

29. In *State of Himachal Pradesh Vs. Narain Singh*, it has been held that it would be permissible for the legislature to remove a defect in earlier legislation and the defect can be removed both retrospectively and prospectively by legislative action and the previous actions can be validated. Parliament, it is well settled, has the plenary power to enact legislation on the fields which are set out in List I and List III of the Seventh Schedule. The plenary power of Parliament to legislate can extend to enacting legislation both with prospective and with retrospective effect. That however, is subject to the mandate of Article 14 of the Constitution, it is also well settled that competent legislature can always clarify or validate a law retrospectively. It cannot be held to be harsh or arbitrary, object of validating law is to rectify the defect in phraseology or lacuna and to effectuate and to carry out the object for which earlier law was enacted. The object of the amendment brought about with retrospective effect was to expressly bring the legislative provision in conformity with the original parliamentary intent. The amendment was clearly clarificatory in nature and Parliament certainly possesses the necessary legislative competence to declare the said amendment to be retrospective in operation. Thus, challenge to the legislation on the ground that it is retrospective has no substance.

30. Coming to the question raised by the learned counsel for the petitioners that

it is a tax on land and building, which was within the legislative competence of the State under Entry 49 of List II of the Seventh Schedule to the constitution, we are unable to agree with this submission. There are various aspects of same transaction, service tax cannot be said to be tax on land or building which is covered under Entry 49 of List II of seventh schedule to the Constitution. There are various aspects of such transaction of renting out immovable property. The issue of interpretation of taxing entries under the Constitution of India including the aspect theory has been considered by the Apex Court in various decisions. In *Federation of Hotels & Restaurant Association of India v. Union of India* (1989) 46 Taxman 47, the aspect theory has been considered thus:

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

27. AIR 1947 60 (Privy Council) , referred to with approval the following observations of Sir Maurice Gwyer "C.J." Subrahmanyam Chettiar case:

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its "pith and substance", or its "true nature and character", for the purpose of determining whether it is legislation with respect to matters in this list or in that.

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

29. The position in the present case assumes a slightly different complexion. It is not any part of the Petitioners' case that "expenditure tax" is one of the taxes within the States power or that it is a forbidden field for the union Parliament. On the contrary, it is not disputed that a law imposing "expenditure tax" is well within the legislative competence of Union Parliament under Article 248 read with Entry 97 of List I. But the specific contention is that the particular impost under the impugned law, having regard to its nature and incidents, is really not an "expenditure tax" at all as it does not accord with the economists' notion of such

a tax. That is one limb of the argument. The other is that the law is, in pith and substance, really one imposing a tax on luxuries or on the price paid for the sale of goods. The crucial questions, therefore, are whether the economists' concept of such a tax qualifies and conditions the legislative power and, more importantly, whether "expenditure" laid out on what may be assumed to be "luxuries" or on the purchase of goods admits of being isolated and identified as a distinct aspect susceptible of recognition as a distinct field of tax legislation.

30. In Lefroy's Canada's Federal System the learned Author referring to the "aspects of legislation" under sections 91 and 92 of the Canadian Constitution i.e. British North America Act, 1867 observes that "one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power". Learned Author says:

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

In Union Colliery Co. of British Columbia v. Bryden 1899 AC 580 587, Lord Haldane said:

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

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

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

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

The "aspect" doctrine bears some resemblance to those just noted but, unlike

them, deals not with what the "matter" is but with what it "comes within"., (p. 115

...it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its "master"), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fish scaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is. (p. 116)

...I pause to comment on certain correlations of operative incompatibility and the "aspect" doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a "matter" bring it, within a class of subjects (p. 117).

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

31. Thus, in the case of Federation of Hotel & Restaurant Association of India (supra) it was observed that subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. There might be overlapping, but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects.

32. In *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , the Apex Court has clarified that there can be an overlapping in fact, as the methodology or mechanism adopted for assessment and quantification can be similar for taxes relating to different fields of taxation, but there can be no overlapping in law i.e. even though the mechanism adopted for assessment is similar but the subject matter of two taxes by reference to the two lists can be different and therefore, two taxes cannot be said to be overlapping. The Apex Court relied upon the decisions in *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, and AIR 1945 98 (Privy Council) . The Apex Court in the case of *Kesoram Industries Ltd* (supra) has laid down thus:-

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

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

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

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the state law will be ultra vires and shall have to give way to the union law.

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

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

(5) Where the legislative, competence of the legislature of any State is

questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or in. If it does, no further question need be asked and Parliament's legislative competence must be upheld, where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions, incidental and superficial encroachments are to be disregarded.

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

43. In AIR 1949 81 (Federal Court) the Federal Court made it clear that every effort should be made as far as possible to reconcile the seeming conflict between the provisions of the Provincial legislation and the Federal legislation. Unless the court forms an opinion that the extent of the alleged invasion by a Provincial Legislature into the field of the Federal Legislature is so great as would justify the view that in pith and substance the impugned tax is a tax within the domain of the Federal Legislature, the levy of tax would not be liable to be struck down. The test laid down in *Sir Byramjee Jeejeebhoy, Kt. Vs. The Province of Bombay*, by the Full Bench of the Bombay High Court was approved.

44. In *The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc.*, for the purpose of attracting the applicability of Entry 49 in List II, so as to cover the impugned levy of tax on lands and buildings, the Constitution Bench laid down twin tests, namely: (i) that such tax is directly imposed on lands and buildings, and (ii) that it bears a definite relation to it. Once these tests were satisfied, it was open for the State Legislature, for the purpose of levying tax, to adopt the annual value or the capital value of the lands and buildings for determining the incidence of tax. Merely, on account of such methodology having been adopted, the state legislature cannot be accused of having encroached upon Entry 86, 87 or 88 of List I. Entry 86 in List I proceeds on the principle of aggregation and tax is

imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land, was held to be intra vires the powers of the State Legislature and not trenching upon Entry 86 in List I. So is the view taken by another Constitution Bench in *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, where the submission that the levy was not a rate on lands and buildings as appropriately understood but rather a tax on capital value, was discarded.

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

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

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

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

It is enough to note that our Constitution has certainly a bias towards Centre vis-

a-vis the States.... It is equally necessary to emphasise that courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation.

In a nutshell

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

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

(2) Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject-matter of two taxes by reference to the two lists is different. Simply because, the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

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

(4) Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of the Union having enacted laws by reference to Entries 52, 53 and 54 in List I. It is for the Union to legislate and impose limitations on the states' otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral-bearing lands) by reference to Entries 50 and 49 in List II and lay down the limitations on the States' power, if it chooses to do so, and also to define the extent and sweep of such limitations.

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

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

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

and

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

(6) "Land", the term as occurring in Entry 49 of List II, has a wide connotation. Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning of land itself. Different uses to which the land is subjected or is capable of being subjected provide the basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

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

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the state or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading in juxtaposition shows that the declaration by Parliament must be for the "control

of industries" in Entry 52 and "for regulation of mines or for mineral development" in Entry 54. Such control, regulation or development must be "expedient in the public interest". Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming the subject-matter of declaration to the state Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by the State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by the State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

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

33. All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, , tax on profession was held to be distinct from professional service. It was observed thus:

34. As stated above, Entry 60, List II refers to taxes on professions, etc. It is the tax on the individual person/firm or company, it is the tax on the status. A chartered accountant or a cost accountant obtains a licence or a privilege from the competent body to practise. On that privilege as such the State is competent

to levy a tax under Entry 60. However, as stated above, Entry 60 is not a general entry. It cannot be read to include every activity undertaken by a chartered accountant/cost accountant/ architect for consideration. Service tax is a tax on each activity undertaken by a chartered accountant/cost accountant or an architect. The cost accountant/chartered accountant/architect charges his client for advice or for auditing of accounts. Similarly, a cost accountant charges his client for advice as well as doing the work of costing. For each transaction or contract, the chartered accountant/cost accountant renders profession based services. The activity undertaken by the chartered accountant or the cost accountant or an architect has two aspects. From the point of view of the chartered accountant/cost accountant it is an activity undertaken by him based on his performance and skill. But from the point of view of his client, the chartered accountant/cost accountant is his service provider, it is a tax on "services". The activity undertaken by the chartered accountant or cost accountant is similar to saleable or marketable commodities produced by the Assessee and cleared by the Assessee for home consumption under the Central Excise Act.

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

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

"with respect to" in Article 246 as it brings in the doctrine of "pith and substance" for understanding the scope of legislative powers.

44. Competence to legislate flows from Articles 245, 246 and the other articles in Part XI. A legislation like the Finance Act can be supported on the basis of a number of entries. In the present case, we are concerned with the constitutional status of the levy, namely, service tax. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of parliament and the State Legislatures are subject to constitutional limitations. Tax laws are governed by Part XII and Part XIII Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to taxes on professions, trades, callings, etc. Therefore, Entry 60 of List II and Entries 92-C/97 of List I operate in different spheres.

46. In *International Tourist Corporation and Others Vs. State of Haryana and Others*, , the appellants were transport operators. The State of Haryana levied a tax on passengers and goods under the Haryana Passengers and Goods Taxation Act, 1952. The Appellants questioned the vires of Section 3(3) insofar as the levy of tax on passengers and carriage of goods by their vehicles plying along the national highways. It was urged on behalf of the Appellants that there was nothing in the Constitution to prevent Parliament from combining its power to legislate with respect to any matters enumerated in Entries 1 to 96 of List I with its power to legislate under Entry 97 of List I and, if so, then the power to legislate with respect to tax on passengers and goods carried on national highways was within the exclusive legislative competence of Parliament and, therefore, Section 3(3) of the Haryana Passengers and Goods Taxation Act, 1952 was beyond the legislative competence of the State Legislature. This argument was rejected by the Division Bench of this Court, which took the view that before exclusive legislative competence can be claimed for Parliament by resort to Entry 97, List I, the legislative competence of the State Legislature must be established. Entry 97 itself was specific. In that, a matter can be brought under that entry only if it is not enumerated in Lists II or in, and in the case of a tax, if it is not mentioned those Lists, we do not dispute the above proposition. That proposition is well settled. This court is concerned with the application of the said principle in this case. In the present matter, as stated hereinabove, the State Legislature is empowered to levy tax on professions, trades, callings, etc., as such and, therefore, the word "services" cannot be read as synonymous to the

word "profession" in Entry 60. Therefore, tax on services do not fall under Entry 60, List H. That, service tax would fall under Entry 92-C/Entry 97 of List-I.

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

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

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

(i) Meaning of "service tax"

22. As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of service industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy, with the enactment of the Finance Act, 1994, the central Government derived its authority from the residuary Entry 97 of the Union List for levying tax

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

35. In *Sudhir Chandra Nawn Vs. Wealth-tax Officer, Calcutta and Others*, , the Apex Court held that the power to levy tax on lands and buildings under Entry 49 List II does not trench upon the power conferred upon the Parliament by Entry 86, List I and therefore., the enactment of the Wealth Tax Act by the Parliament is not ultra vires. Considering the scope of Entry 86 List I and Entry 49 List II, the Apex Court observed thus:

3.....The tax which is imposed by Entry 86, List I of the seventh schedule is not directly a tax on lands and buildings. It is a tax imposed on capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of the Assessee; it is imposed on the total assets which the Assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of assets, but the general liability of the Assessee to pay his debts and to discharge his lawful obligations, have to be taken into account.....Again Entry 49 List II of the seventh schedule contemplates the levy of tax on lands and buildings, or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings, is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the Assessee. By legislation in exercise of powers under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our Judgment, make the fields of legislation under the two entries overlapping.

36. In *The Second Gift Tax Officer, Mangalore etc. Vs. D.H. Nazareth etc.*, where competence of the Parliament to impose tax on gifts of coffee plantation, agricultural or paddy lands or buildings was challenged and the High Court allowed the writ petition holding that entry 49 of list II read with entry 18 of the

same list reserved the power to tax land and buildings to the State Legislature and Parliament could not use the residuary power conferred by entry 97 of List I and on appeal, the Apex Court held that it is not a tax imposed directly upon lands and buildings but is a tax upon the value of the total gifts made in a year which is above the exempted limit. There is no tax upon lands or buildings as units of taxation. Since entry 49 of the State List contemplates a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament. There being no other entry which covers a gift tax, the residuary powers of Parliament could be exercised to enact a law. The Apex Court allowed the appeals holding:-

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

37. In Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, , the Apex Court held that the tax under Entry 49, List II is not a personal tax but a tax on property.

38. In Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, , the principal question which arose for determination was in respect of the nature of the transaction by which mobile phone connections are enjoyed. The question was whether such connections constituted a sale or a service or both. If it was a sale then the states were legislatively competent to levy sales tax on the transaction under Entry 54, List II of the Seventh Schedule to the Constitution. If it was service then the Central Government alone had the legislative competence to levy service tax under Entry 97, List I and if the nature of the transaction partook of the character of both sale and service, then the moot question would be whether both the legislative authorities could levy their separate taxes together or only one of them. It was held that the subject transaction was a service and, thus, the Parliament had legislative competence to levy service tax under Entry 97, List I. In SCC para 88 of the said judgment, the Apex Court observed that: BSNL case (supra).

88. No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods.

39. In *Association of Leasing and Financial Service Companies Vs. Union of India (UOI) and Others*, the Apex Court held that the service tax imposed by Section 66 of the Finance Act, 1994 (as amended) on the value of taxable services referred to in Section 65(105)(zm) read with Section 65(12) of the said Act, insofar as it relates to financial leasing services including equipment leasing and hire-purchase was within the legislative competence of the Parliament under Entry 97, List I of the Seventh Schedule to the Constitution. The Apex Court held that a tax may be levied on an object or on the event of taxation. Service tax is tax on activity whereas sales tax is tax on sale of a thing or goods. Taxable event under service tax is each exercise/activity undertaken by service provider and it is imposed every time service is rendered to customer/client. Further, service tax is a value added tax. The Apex Court further held that interest or finance charges together with lease management fee/processing fee/documentation charges are consideration for services rendered and hence, they constitute value of taxable service on which service tax is payable. The Apex Court further laid down that service tax on leasing and hire purchase financing activities is neither on material nor on sale. It is on activity of financing/funding of equipment/asset within meaning of "financial leasing services" in section 65(12)(a)(i). Leasing and hire-purchase financing activities are facilities extended by non-banking financial companies (NBFCs) to customers that fall under "banking and other financial services" u/s 65(12) of Finance Act, 1994. Taxable event in leasing and hire-purchase financing activities is rendition of service but not sale and hence, such rendition of service is exigible to tax. Further, tax on services is different and distinct from tax on sale of goods under Sch. VII List II Entry 54 of Constitution. By enacting Art. 366(29A) of the Constitution, Parliament had not divested itself of the powers to impose service tax and hence, taxes on "services" is within legislative competence of Parliament under Article 248 read with Schedule VII List I Entry 97 of Constitution.

40. Thus, we are unable to accept the submission that Union of India has no authority or power to levy service tax on renting of immovable property. The imposition of service tax on renting of immovable property was within the legislative competence of the Parliament and it does not fall within the legislative competence of the State under entry 49 of List II of the Seventh Schedule to the Constitution. The submission is rejected.

41. It was also submitted relying upon the provisions of Articles 245, 246 and 265 of the Constitution that Union of India was not competent to impose service tax. Article 265 provides that no tax shall be levied or collected except by authority of law. Service tax is being collected by the Union of India under the

authority of law and it is not a case where tax is levied without authority of law. Article 246(3) deals with the power of the State legislature to make laws for the State or any part thereof. There is no encroachment made by the Union of India while levying service tax on renting of immovable property. Hence, the above submission is wholly untenable.

42. It has also been submitted on behalf of the petitioners-Krishi Upaj Mandi Samiti & Rajasthan State Industrial Development & Investment Corporation of India that being statutory authority, they are exempted from making the payment of service tax. We are not examining these questions as these aspects have to be raised before the concerned authorities and decision from them has to be obtained first. It is open to the petitioners to submit reply to the show cause notice before the concerned authorities and pray for exemption, if any. We are not deciding that question as it is not pertaining to the question of vires of impugned provisions, we leave the question of exemption to be first examined by the concerned authorities. For the reasons stated above, there is no merit in these writ petitions and the same are dismissed. The stay applications are also dismissed.