(2010) 08 MP CK 0102

In the Madhya Pradesh High Court

Case No : Writ Petition No. 10148 of 2009

Tata Sky Limited APPELLANT

Vs

State of M.P. and Others RESPONDENT

Date of Decision : 20-08-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3(1)
Constitution of India, 1950 — Article 14, 19, 246, 246(1), 246(3)
Finance Act, 2001 — Section 65(105)(zk)
Madhya Pradesh Entertainments Duty and Advertisements Tax Act, 1936 — Section 2, 2(1a1), 2(a), 2(aaa), 2(b)
Prasar Bharati (broadcasting Corporation Of India) Act, 1990 — Section 2
Telegraph Act, 1885 — Section 3(1AA), 4
Wealth Tax Act, 1957 — Section 7, 7(1), 9, 9(2)

Citation : (2012) 53 VST 30

Hon'ble Judges : S.C. Sinho, J;Arun Mishra, J

Bench : Division Bench

Advocate : H.S. Shrivastava and Kishore Shrivastava, s, D.K. Singh, R.K. Asati, Shashank Verma, Abhijeet Shrivastava, S.S. Chauhan, Pankaj Bhagat and Rahul Diwakar, for the Appellant; V.K. Thankha, with P.K. Kaurav, Deputy Advocate-General and Rishabh Sancheti, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.—The petitioners have challenged the imposition of entertainment tax on direct to home (in short, "DTH") services under the provisions of the Madhya Pradesh Entertainments Duty and Advertisement Tax Act, 1936 (hereinafter referred to as "M.P. Act of 1936"). The petitioners have mainly assailed the imposition on the ground that the State of Madhya Pradesh does not have any authority of law to impose entertainment tax on DTH services in absence of any specific provision under the M.P. Act of 1936. Even otherwise the State of Madhya Pradesh does not have any authority to impose entertainment tax on DTH broadcasting services provided in entry 92C of List I of the Seventh Schedule to the Constitution of India. The facts are being referred to from Writ

Petition No. 10148 of 2009 (Tata Sky Limited v. State of M.P.). The petitioner/ Tata Sky Limited is a service provider and the services are being taxed by the Central Government under the provisions of the Finance Act, 1994 and 2001 as amended time to time. The guidelines for obtaining licence for providing DTH broadcasting services in India referred to DTH distribution of multichannel programme in Ku band by using a satellite system by providing television signals direct to the subscriber''s premises without passing through an intermediary such as cable operator. The Government of India grants licence to provide DTH services u/s 4 of the Indian Telegraph Act, 1885 and the Indian Wireless Act, 1933. The DTH service is an important medium for information dissemination. It facilitates dissemination of news, current affairs, sports events, educational programme and the programme relating to public health, employment opportunities, consumer awareness, etc., in addition to catering to the recreational needs. The DTH platform has the capacity to carry more channels. The DTH broadcasting services are not purely recreational in nature and cannot be compared with cinema theatre or video game parlour. The DTH licence has been granted to the petitioner by the Government of India for a period often years. Annual fee equivalent to 10 percent of its gross revenue has also been paid. In addition, the petitioner has to pay royalty for spectrum use as prescribed by the Wireless Planning and Coordination Authority (in short "WPCA"). The broadcasting falls within the domain of the legislative competence of the Government of India under entry 92C of List I of the Seventh Schedule to the Constitution. Under article 268A of the Constitution of India, taxes on services shall be charged by the Government of India and such taxes shall be collected and appropriated by the Government of India and the States. The State cannot by terming a service as "entertainment" levy tax under entry 62 of List II of the Seventh Schedule to the Constitution. The broadcasting is also defined in clause (c) of section 2 of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 and also includes programme selection, scheduling or presentation of sound or visual matter on radio or television channel, i.e., in India for public listening or viewing as the case may be. Service tax is a value added tax, which in turn is a destination based consumption tax in the sense that it is on commercial activity and is not a charge on the business but on the consumer. Similarly, the entertainment tax is also on consumer. Thus, the field is being occupied by the Union and the State by defining entertainment so as to include DTH cannot tax DTH broadcasting services.

2. It is further submitted by the petitioner that the predominant element in the licence given to the petitioner u/s 4 of the Indian Telegraph Act, 1885 is one of "service" and not of "entertainment". The service and entertainment part are not discernible because it is the composite whole. The State would not have any power to separate agreement of "entertainment" from the agreement to render service and impose entertainment tax on it. There is no specific charges mentioned under the M.P. Act of 1936, hence, no tax can be imposed.

3. Reliance has been placed by the petitioner on a decision of the High Court of

Patna in Sky Vision T.V. Vs. State of Bihar and Others, which has been affirmed by the apex court in SLP by a reasoned order. The provisions of Bihar Act and the Madhya Pradesh Act of 1936 are pari materia. The High Court of Uttrakhand in Dish T.V. India Limited and Another etc. Vs. State of Uttarakhand and Others, (Writ Petition (M/S) No. 2562 of 2007) has also quashed the levy of entertainment duty on DTH services without there being specific provision in the U.P. Entertainment & Betting Duty Act, 1979. The said decision was affirmed by a Division Bench in letters patent appeal and by the apex court in special leave petition. In other States like Maharashtra, Karnataka, Uttrakhand and Delhi, specific amendments have been made by the State Legislature to cover the DTH services under the Entertainment Tax Act. There is no specific amendment made in the M.P. Act of 1936 to levy entertainment duty on DTH services and the action is ultra vires of the Act.

4. It is also submitted that no tax can be imposed by inference or assumption in absence of express provision. There is no specific provision under the M.P. Act of 1936. Thus, the tax cannot be levied by assumption or by necessary inference. There is no room for any intendment. There is no equity about tax. The notification dated May 5, 2008 had been issued in administrative capacity. In absence of any specific charging section, the said notification dated May 5, 2008 is without any authority of law.

5. The petitioner has also submitted that the predominant element and intention in the licence granted to a DTH operator u/s 4 of the Indian Telegraph Act, 1885 is one of "service" and not of "entertainment". The integrity of licence cannot be broken into pieces. Subscription payment made by the subscriber is towards the availment of "broadcasting service" and not for "admission to entertainment". There is no mechanism provided under the M.P. Act of 1936 to discern the entertainment element.

6. Without prejudice, it is submitted that in case entertainment tax is levied on "admission to entertainment", the Central Government would be deprived of any tax whatsoever under the Finance Act, 1994. In case of conflict/overlapping between the entries, the Union power shall prevail by virtue of articles 246(1) and 246(3) of the Constitution of India. The "aspect theory" will not be applicable in such a situation.

7. On behalf of the respondents, the return filed in Writ Petition No. 9899 of 2009 has been adopted. The invention of television has been made to change the concept of public entertainment and the people sitting at home can enjoy the entertainment. The M.P. Act 1936 was extended to the entire Madhya Pradesh by M.P. Taxation Law Extension Act, 1937. Under entry 62 of List II of the Seventh Schedule to the Constitution of India, the State is fully empowered to levy tax on luxuries including tax on amusement, gambling, betting. The entry 31 of the List I of the Seventh Schedule to the Constitution covers the field of post and telegraph.

8. There is no dispute to the constitutional provisions. "Telegraph" has been defined u/s 3(1AA) of the Indian Telegraph Act, 1885. The term "broadcasting" has been defined in clause (c) of section 2 of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990. It is not disputed that the DTH services are within the control of the Central Government and the service tax is payable which is the subject-matter mentioned at entry 92C of List I of the Seventh Schedule to the Constitution.

9. It is further submitted by the respondents that the DTH services are amenable to entertainment duty under the M.P. Act of 1936. "Admission to entertainment" as defined in section 2(a) of the M.P. Act of 1936 covers admission to any place in which entertainment is held. Section 2(b) defines the term "entertainment". The DTH is Clearly entertainment within the purview of the A.P. Act of 1936 where various packages for the customers are provided by the DTH operators at different prices. The M.P. Act of 1936 was amended time to time. In exercise of the power u/s 3(1) of the M.P. Act of 1936, the Government has issued a notification dated May 5, 2008. The provisions of the M.P. Act of 1936 are applicable to the DTH services. The DTH services providers are subjected to levy of entertainment duty irrespective of levy of service tax in all other States. Prayer has been made by the respondents to dismiss the writ petitions.

10. Shri H.S. Shrivastava and Shri Kishore Shrivastava, senior counsel, Shri D. K. Singh, Shri R. K. Asati, Shashank Verma, Shri Abhijeet Shrivastava, Shri S.S. Chauhan, Shri Pankaj Bhagat, Shri Rahul Diwakar, learned counsel appearing for the petitioners, have submitted that in absence of any specific provision under the M.P. Act of 1936 to tax DTH services, the action is beyond authority of law.

11. Reliance has been placed by the counsel appearing for the petitioners on a decision of the High Court of Patna in Sky Vision T.V. Vs. State of Bihar and Others, and a decision of the High Court of Uttarakhand in Dish T.V. India Limited and Another etc. Vs. State of Uttarakhand and Others, to submit that the specific amendments have not been made to cover DTH services by specifically mentioning the DTH services under the M.P. Act of 1936. Intention of Legislature is clear that the DTH services are not to be taxed. The provisions of the Bihar Act and U.P. Act are pari materia with the M.P. Act of 1936 and no tax can be imposed by inference or assumption in absence of express provision.

12. Reliance has also been placed by the counsel for the petitioners on a decision of the Supreme Court in The State of West Bengal Vs. Kesoram Industries Ltd. and Others, o submit that no tax can be imposed by issuance of notification dated May 5, 2008 in the administrative capacity.

13. It was further submitted by the counsel for the petitioners that the DTH services are covered by entry 92C of List I of the Seventh Schedule, therefore, the State has no authority to impose tax on DTH services. The predominant element and intention in licence granted to a DTH operator u/s 4 of the Indian Telegraph Act, 1885 is one of "service" and not of "entertainment". Subscription

payment made by the subscriber is towards availment of "broadcasting service" and not for "admission to entertainment". Service tax at the rate of 10.36 percent is paid on the subscription amount received from the subscriber for availment of DTH services. Nothing is paid towards'' "admission to entertainment". The service and entertainment part are indivisible. The State has no competence to levy entertainment tax when the Union has brought the same within the ambit of service tax.

14. It was also submitted by counsel for the petitioners that the entertainment element in the said composite activity transaction to be taxed must be discernible by the authority of law. There is no mechanism provided under the M.P. Act of 1936 to discern the charges towards provision/delivery of service and the provision of entertainment. Service is composite and indivisible. If it is construed that subscribers are making payment towards "admission to entertainment" then entire payment so made by the subscribers has to be appropriated towards payment for "admission to entertainment" for the purpose of levy of entertainment tax and that when nothing would survive or remain of the said consideration for levy of service tax, in such a situation, the Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994. The power of Union has to prevail by virtue of articles 246(1) and 246(3) of the Constitution of India. The "aspect theory" will not be applicable to the transaction enabling the State to levy sales tax on the same transaction in respect of which the Government of India levies service tax. Reliance has been placed by the counsel for the petitioners on the decisions of the Supreme Court in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, and Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, and the other decisions to be referred later on.

15. It has also been submitted by the counsel for the petitioners that the ingredients necessary for imposition of tax are not available under the M.P. Act of 1936. Thus, imposition of tax is bad in law. The DTH services have not been specifically included whereas, there is inclusion of cable TV, etc. Thus, applying the principles of ejusdem generis, the interpretation is that the DTH services are out of purview of. M.P. Act of 1936.

16. Shri V.K. Thankha, senior counsel, Shri P. K. Kaurav, Deputy Advocate-General and Shri Rishabh Sancheti, counsel appearing for respondents, have submitted that there is difference between M.P. Act of 1936, Bihar Entertainment Tax Act, 1948 and U.P. Entertainment & Betting Duty Act, 1979.

17. It was also submitted by the counsel for the respondents that from a reading of section 2(b), 2(d)(iii), 2(d)(iv) and section 3 of the M.P. Act of 1936, it is clear that the DTH services are covered within the ambit of "entertainment". The word "entertainment" has been used in wide sense. The M.P. Act of 1936 provides "for machinery for computation of tax and operation of the charging provision cannot be affected by machinery provision. The charge or incidence of tax is different from realisation of it. Not providing any pro forma for declaring particulars under

the Explanation would neither make it vague nor unworkable for want of any machinery provision. Even if no rules have been framed, the provisions under the M.P. Act of 1936 cannot be declared unconstitutional. The rule of ejusdem generis is not applicable. The various sub-sections of section 2 of the M.P. Act of 1936 defining cable television, VCR and VCP cannot be termed as constituting one category or class thereby restricting application of sections 2(c), 2(d)(iii) and (iv) of the M.P. Act of 1936 only to the cable television, VCR and VCP. in view of section 2(d) by Amending Act No. 6 of 1999 read with Explanations I and II and the amendment of section 3 by Act No. 9 of 2003, the word "cinema" has been substituted as "entertainment". Every proprietor of entertainment has to make payment of entertainment duty. The State has legislative competence to enact the M.P. Act of 1936 under entry 62 of List II of the Seventh Schedule to the Constitution. There is no violation of any power of the Union of India. The Union is levying a service tax on broadcasting. Element of "entertainment" is different from "broadcasting" and hence, tax events are wholly different and distinctly identifiable.

18. Reliance has also been placed by the counsel for the respondents on "aspect theory" on a decision of the Supreme Court in Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, There is no overlapping in law; pith and substance of both cannot be considered to be the same.

19. It was further contended by the counsel for respondents that "entertainment" and "service" are not mutually exclusive as "goods" and "service". The submission that tax is being levied twice on the same amount is wholly bereft of legal force. There is no bar to double taxation. The essential ingredients are available for imposition of tax under the M.P. Act of 1936 hence, levy of entertainment tax cannot be said to be ultra vires or entrenching upon the power of the Union.

20. First we consider the submission whether there is no specific charge in M.P. Act of 1936 hence, the State Government has no power to levy entertainment tax.

21. Section 2(b) of the M.P. Act of 1936 defines "entertainment" thus:

''Entertainment'' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment.

22. The definition of "entertainment" in section 2(b) of the M.P. Act of 1936 is inclusive. The word "entertainment" has been used in wide sense. The "entertainment" includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment.

23. Section 2(d) of the M.P. Act of 1936 defines "payment for admission". The definition is inclusive. Section 2(d) was initially substituted by M.P. Act No. 3 of 1991. Clause (iv) was added in section 2(d). Now section 2(d) reads as under:

2(d). ''Payment for admission'' includes--

(i) any payment for seats or other accommodation in any form in a place of entertainment;

(ii) any payment for a programme or synopsis of an entertainment;

(iii) any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance, such person would not get;

(iv) any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment, whether for a specific period or on a continuous basis;

(v) any payment, by whatever name called for any purpose whatever, connected with an entertainment, which a person is required to make in any form as a condition of attending, or continuing to attend the entertainment, either in addition to the payment, if any, for admission to the entertainment or without any such payment for admission;

(vi) any payment, made by a person, who having been admitted to one part of the place of entertainment is subsequently admitted to another part thereof, for admission to which a payment involving tax or more tax is required;

Explanation I.--Any subscription raised or donation collected in connection with an entertainment in any form shall be deemed to be payment for admission.

Explanation II.--Where entertainment is provided as part of any service by any person, whether forming an integral part of such service or otherwise the charges received by such person for providing the service shall be deemed to include charges for providing entertainment or access to entertainment also.

24. u/s 2(d)(iii) of the M.P. Act of 1936, the "payment for admission" includes any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing or enjoyment of entertainment, which without the aid of such instrument or contrivance, such person would not get. Section 2(d)(iv) provides that any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment whether for a specific period or on a continuous basis, is "payment for admission", Explanation I to section 2(d) also makes it clear that any subscription raised or donation collected in connection with an entertainment in any form shall be deemed to be "payment for admission". Explanation II to section 2(d) provides that where entertainment is provided as part of any service by any person, whether forming an integral part of such service or otherwise the charges received by such person for providing the service shall be deemed to

include charges for providing entertainment or access to entertainment also.

25. Section 3(1(a) was substituted by M.P. Act No. 34 of 1983. The Act has been amended in the year 1991 section 3 has been further amended by Act No. 6 of 1999. Section 3 has further been amended by Act No. 9 of 2003. The word "cinema" has been substituted by the word "entertainment". Amended section 3 is quoted below:

3. Entertainment duty payable by proprietor of an entertainment.--(1) Every proprietor of an entertainment other than proprietor of an entertainment by video, cassette recorder (hereinafter referred to as VCR) or video cassette player (hereinafter referred to as VCP) or cable operator shall, in respect of entertainment, pay to the State Government a duty at the rate as prescribed by the State Government not exceeding seventy five percentum thereof:

Provided that no duty shall be payable in respect of any payment for admission to an entertainment not exceeding fifty paisa except when such payment is for admission to a cinematograph exhibition of permanent structure:

Provided further that where cinematographic exhibitions are carried out in cinema hall, no "duty shall be levied on an amount not exceeding two rupees per ticket as may be determined by the State Government on the basis of payment for admission for providing facilities to persons admitted in the cinema hall:

Provided also, that the details of facilities provided for the spectators and the amount expended thereon shall be presented by the proprietor of the cinema hall to the Collector in such manner as may be prescribed and if the Collector is not satisfied with the facilities provided, he may recover the duty in respect of the amount allowed for facilities also from the proprietor of the cinema.

26. Amended section 3(1) also provides that every proprietor of an entertainment other than proprietor of an entertainment by video cassette recorder or video cassette player or cable operator shall, in respect of entertainment, pay to the State Government a duty at the rate as prescribed by the State Government not exceeding seventy five percentum thereof. The substitution of word cinema by entertainment is of significance, impact of it cannot be ignored. In our opinion, a fair reading of the definition of "entertainment" and "payment for admission" read with section 3 makes it clear that the services provided by the DTH are liable for entertainment tax.

27. It has been submitted that the DTH is a "broadcasting" service and its dominant purpose is "broadcasting" and not "entertainment". In our opinion, "entertainment" has been used in wide sense under the M.P. Act of 1936 so as to include within its ambit entertainment of any kind. The broadcaster may also provide for entertainment.

28. The apex court has considered the meaning of word "entertainment" in GEETA ENTERPRISES and Others Vs. STATE OF UTTAR PRADESH and Others, . The concept of "entertainment" which their Lordships considered has been

discussed thus:

4. The crux of the matter is as to whether or not the show, the details of which have been described above falls within the four corners of the expression ''entertainment''. Sub-section (3) of section 2 of the Act may be extracted thus:

''Entertainment'' includes any exhibitional, performance, amusement, game or sport to which persons are admitted for payment.

29. The correct meaning and import of the word "entertainment" has been considered by their Lordships thus:

6. Before explaining the section we would like to ascertain the correct meaning and import of the word ''entertainment'' (which is neither a scientific nor a technical term) as used in the popular sense or as understood in common parlance. This was held by this court in the case of Porritts and Spencer (Asia) Ltd. Vs. State of Haryana, . In Stroud''s Judicial Dictionary (Fourth Edition, volume 2, page 916) the word ''entertainment'' has been defined thus:

''Entertainment...for a public or special occasion''...is an entertainment in the sense of a gathering of persons for entertainment.

''Entertainment'' (Small Lotteries and Gaming Act, 1956 (clause 45, section 4(1)) included a tombola drive alone without accompanying festivities.

The monologue or patter of a comedian, even if delivered at an entertainment provided by an institution whose activities are partly educational, was held to be a ''variety entertainment'' within the meaning of the section.

Similarly in Words and Phrases, judicially Defined (Volume 2, pages 206-207) the word ''entertainment'' has been defined thus:

Entertainment is something connected with the enjoyment of refreshment-rooms, tables, and the like. It is something beyond refreshment; it is the accommodation provided, whether that includes a musical or other amusement or not.

Similarly in Words and Phrases (Permanent Edition; Volume 14A, page 353) ''entertainment'' has been defined thus:

An entertainment is a source or means of amusement; a diverting performance, especially a public performance, as a concert, drama, or the like.

''Entertainment'' denotes that which serves for amusement, and ''amusement'' is defined as a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports, or music.

Likewise, in Reader''s Digest Family Word Finder at page 264, ''entertainment'' has been defined thus:

Entertainment--amusement, diversion, distraction, recreation, fun, play, good time, pastime, novelty, pleasure, enjoyment, satisfaction.

In Webster''s Third New International Dictionary the word ''entertainment'' has been defined at page 757 thus:

''entertainment''--the act of diverting, amusing or causing someone''s time to pass agreeably.

Something that diverts, amuses, or occupies the attention agreeably.

A public performance designed to divert or amuse. Similarly in the Concise English Dictionary by Hayward and Sparkes the word ''entertainment'' has been defined thus:

the art of entertaining, amusing or diverting, the pleasure afforded to the mind by anything interesting, amusement, other performance intended to amuse.

30. The apex court in GEETA ENTERPRISES and Others Vs. STATE OF UTTAR PRADESH and Others, also considered the question that even if admission fee is not paid by the viewer seeing the video, the operator of the video has to pay 50 paisa per 30 second for playing game, etc., and it can be paid by interested spectator.

31. In The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others, the question came up for consideration before their Lordships whether the respondents, as a cable operator, for the purpose of levy and collection of tax under sub-section (4a) of section 4A of the West Bengal Entertainment-cum-Amusement Tax Act, 1982 (6 of 1982) have direct and close nexus with the entertainments made available to the viewer through their cable television network. Their Lordships held that the performance, film or programmes shown to the viewers through the cable television network come within the meaning of entertainment and, therefore, within the legislative competence of the State Legislature under entry 62 of List II of the Seventh Schedule to the Constitution. The apex court has further observed that under entry 62 of List II of the Seventh Schedule to the Constitution, a tax may be imposed not only on the person spending on entertainment but also on the act of a person entertaining or the subject of entertainment. Such tax may be levied on the person offering or providing entertainment or the person enjoying it. The respondents being cable operator engaged in the business of receiving broadcast signals and then instantaneously sending or transmitting such visual or audio-visual signals by coaxial cable to the subscriber home through their various franchisees. The act of respondents is of offering "entertainment" to the subscribers and/or viewers. A cable operator is "exhibitor" and also a provider of "entertainment" hence, he can be asked to pay tax on the "entertainment" under entry 62 of List II of the Seventh Schedule to the Constitution. The tax is intra vires. The validity of the State Act is beyond question. The amount received by the respondents is for transmitting signals or exhibition of any performance in other words providing "entertainment". The apex court in The State of West

Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others, has held thus (pages 173-177 in 140 STC):

37. In our view, the respondents as a cable operator, for the purpose of levy and collection of tax under sub-section (4a) of section 4A of the Act have direct and close nexus with the entertainments made available to the viewer through their cable television network. The performance, film or programmes shown to the viewers through the cable television network come within the meaning of entertainments and therefore within the legislative competence of the State Legislature under entry 62 of List II of the Seventh Schedule to the Constitution of India to make law for the levy and collection of tax on such entertainments.

38. A tax under entry 62 of List II of the Seventh Schedule to the Constitution of India may be imposed not only on the person spending on entertainment but also on the act of a person entertaining, or the subject of entertainment. It is well-settled by this Court that such tax may be levied on the person offering or providing entertainment or the person enjoying it. The respondents admittedly engaged in the business of receiving broadcast signals and the instantaneously sending or transmitting such visual or audio visual signals by coaxial cable, to subscribers'' homes through their various franchise. It has been made possible for the individual subscribers to choose the desired channels on their individual T. V. sets because of cable television technology of the respondents and of sending the visual or audio visual signals to sub-cable operators, and instantly re-transmitting such signals to individual subscribers for entertaining them through their franchise. The respondents'' act is, no doubt, an act of offering entertainment to the subscribers and/or viewers. The respondent is very much directly and closely involved in the act of offering or providing entertainment to subscribers who are on his record. For the fact of offering or providing entertainment to the subscribers and/or viewers, the respondents receive charges, which are realised or collected by their franchisee from the ultimate subscribers. Their franchisee, called as sub-cable operator under the said 1982 Act, having no independent role to offer or provide entertainments to the subscribers inasmuch as franchisees have to depend entirely on the respondents communication network and this communication network of the respondents consists of receiving and sending visual images and audio and other information for preparation of the subscribers and/or viewers, without the communication network sendee of the respondents, no entertainments can be offered or provided to the subscribers and/or viewers.

....

42. It is thus clear that the cable operator-respondent No. 1 is the exhibitor in this case and also the provider of the entertainment to the customer. Hence, he alone can be asked to pay the tax on the entertainment that has resulted from this exhibition. This provision, therefore, does not cross the bounds of entry No. 62-of List II of the Seventh Schedule to the Constitution and is intra vires. Providing a cable link up to the viewers end is the only role of sub-cable operator.

It is, therefore, inconceivable that despite putting forth the ready entertainment in the form of signal on the cable line, the cable operator cannot be said to be providing the entertainment within the meaning of entry 62 of List II of the Seventh Schedule to the Constitution. So long as the State Act remains within the ambit of entry 62 of List II and is not offending the provisions of article 286 of the Constitution or the laws made thereunder, the State Act validity is beyond question. Thus, respondent No. 1 who is engaged in receiving and providing TV signals to individual cable operators is liable to pay tax under clause (ii) of sub-section (4a) of section 4A of the Act. From the definition of ''communication network'' given in the agreement between the cable operator and sub-cable operator (termed as franchisee in the agreement), it will be clear that the service rendered by respondent No. 1 is not restricted only to receiving signals but also extends to sending visual images and audio and other information by means of telecommunication network for presentation to members of public. In the present case, respondent No. 1 sends visual images and audio signals for presentation to the individual subscribers at various homes through their feeder line, i.e., coaxial cable or any other device used for transmitting audio and visual signals in terms of clause 2 of the said agreement. The franchisee has access to the signals provided by respondent No. 1. Therefore, it cannot be disputed that, the price or prices received or receivable by respondent No. 1 is the amount received or receivable by him for transmitting the signal for exhibition of any performance, film or any other programme telecast and the aggregate of such prices or amounts is the gross receipt of respondent No. 1 in relation to any month or part thereof.

43. Who will be considered the giver, of the entertainment--the cable operator or the sub-cable operator?

....

46. In this context, it is important to refer to the case of Express Hotels Private Ltd. Vs. State of Gujarat and Another, in which the Constitution Bench had dealt elaborately with The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment, . In the said case, with reference to entry 50 in Schedule VII of the Government of India Act, 1935, which is identical to entry 62, contention, was raised that levy with respect to luxuries, entertainments or amusements can be made on person''s receiving such luxuries or entertainment and that there can be no levy of tax on those who are givers or providers of such luxuries, entertainments, etc. While rejecting such a contention that it is only the receivers who can be taxed and not the giver, the learned judges observed that there can be no reason to ''differentiate between the giver and the receiver of entertainments and amusements and both may with equal propriety be made amenable to tax.

32. Thus, in our opinion, in the definition of "entertainment" u/s 2(b) of the M.P. Act of 1936, the "entertainment" provided by DTH services is also covered and tax on it can be realised from the service provider.

33. It is submitted by counsel for the petitioners that the High Court of Patna in Sky Vision T.V. Vs. State of Bihar and Others, , has laid down that the entertainment tax cannot be levied on a cable operator in absence of specific charging section and relevant specific entry for cable services and the provisions of the M.P. Act and Bihar Act are similar. In Sky Vision T.V. Vs. State of Bihar and Others, it has also been held that no tax shall be levied or collected by the authority except by law. In this context, the law means an Act of Legislature and cannot comprise an executive order or a rule without expressing statutory authority. Thus, an executive order, executive instruction or custom, cannot justify an imposition.

34. We find that the M.P. Act and Bihar Act cannot be said to be pari materia. Under the M.P. Act of 1936, amendment has been made in section 2(d) by adding clause (iv) and besides that clause (iii) also does not exist in the Bihar Act. Section 2(d)(iii) defines "payment for admission" to include any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing or enjoyment of entertainment, which without the aid of such instrument or contrivance, such person would not get. The payment made for DTH services and for set top box enables a person to get a normal or better view or hearing or enjoyment of entertainment, which without the aid of such instrument of contrivance, such person would not get. Thus, DTH services are covered, under the M.P. Act of 1936 and there was absence of such a provision in the Bihar Act.

35. Section 2(d)(iv) of the M.P. Act, 1936, which has been inserted by way of Amending Act No. 6 of 1999 provides that any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called for providing access to and entertainment, whether for a, specific period or on a continuous basis is "payment for admission". Thus, the payment- made by way of contribution or subscription or installation and connection charges or any other charges for providing access to any entertainment is also covered under "payment for admission" and DTH services, in our opinion, clearly provide "entertainment" and comes within the definition of sections 2(b) and 2(d) and amended section 3 which provides every proprietor of an "entertainment" has to make the payment of "entertainment" duty. The word "cinema" which was used earlier has been substituted by the word "entertainment" by Amending Act No. 9 of 2003.

36. The decision in the case of Sky Vision T.V. Vs. State of Bihar and Others, , is distinguishable and in our opinion under the M.P. Act of 1936, the "entertainment" provided by the DTH service provider is clearly covered within the purview of its provisions.

37. In Sky Vision T.V. Vs. State of Bihar and Others, , interference was made mainly on the basis that the tax was sought to be imposed by executive action and it was not covered under the Act. A single Bench decision was affirmed by a Division Bench and by the apex court by dismissing the special leave petition.

The apex court declined to interfere in the matter on the ground that it is open to the State Government to amend the Act. Dismissal of SLP by a reasoned order is binding on this court as held by a Full Bench of this court in M.P. State Electricity Board Vs. Pandey Construction Co., but we have found that the provisions of the Bihar Act and M.P. Act are different hence, the decision of Sky Vision T.V. Vs. State of Bihar and Others, cannot be said to be applicable in the instant case.

38. It was also submitted on behalf of counsel for the petitioners that the High Court of Uttrakhand while considering the U.P. Act in Dish T.V. India Limited and Another etc. Vs. State of Uttarakhand and Others, has decided that without there being specific provision in the U.P. Act, the entertainment duty cannot be levied on DTH services. The said decision was affirmed by a Division Bench and the SLP was dismissed by a non-speaking order on July 16, 2009. Firstly, dismissal of SLP by a non-speaking order cannot make it a binding precedent as held by a Full Bench of this court in M.P. State Electricity Board Vs. Pandey Construction Co., in which various decisions of the apex court have been referred to.

39. Apart from that we find that there is difference between M.P. Act and U.P. Act and there is no such provision as of section 2(d)(iv) in the U.P. Act. In view of the aforesaid and otherwise also we are not able to persuade ourselves to follow-the aforesaid decision in Dish T.V. India Limited and Another etc. Vs. State of Uttarakhand and Others, besides the same is distinguishable also.

40. It was then submitted by the counsel for petitioners that several other States have mended the State Acts time to time like Maharashtra, Karnataka, Uttarakhand and Delhi so as to specifically cover the DTH services but in the Madhya Pradesh, no such specific amendment has been made.

41. In our opinion, the submission made by counsel for the petitioners cannot be accepted and "entertainment" tax can be imposed under sections 2(b), 2(d) read with section 3 of the M.P. Act of 1936 on DTH services. Thus, as the amendment made under the M.P. Act of 1936 covers "entertainment" provided by DTH services, the intendment of M, P. Act of 1936 is clear that it intends to levy tax on "entertainment". Thus, it is not necessary to insert specifically every time when "entertainment" is provided by some new device. The amendments effected in 1999 and 2003 are enough to cover "entertainment" provided by the DTH services.

42. It was also contended by counsel for the petitioners that no tax can be imposed by inference or assumption in absence of express provision. It was also submitted by them that section 3 of the M.P. Act does not mention DTH services hence, in absence of specific charging section, no tax can be imposed by inference or assumption as laid down by the apex court in The State of West Bengal Vs. Kesoram Industries Ltd. and Others, 201 in which the apex court has observed that taxing statutes cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything, which is not expressed. Before taxing any

person, it must be shown that he falls within the ambit of charging section by clear, words used in the section and if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject.

43. It was also submitted by the counsel for the petitioners that there is no room for any intendment and there is no equity about a tax. There is no presumption as to tax relying upon the principles of statutory interpretation by the honourable Shri Justice G. P. Singh (8th Edition page 635), there is no dispute, with the aforesaid proposition. There is specific charging section in the M.P. Act of 1936. "Entertainment" which has been defined in section 2(d) read with, amended section 3 covers within its ambit, beyond shadow of doubt, the "entertainment" provided by the DTH services.

44. Section 3 of the M.P. Act of 1936 uses the word "every proprietor of an entertainment" other than proprietor of an entertainment provided by the VCR, VCP or cable operator shall pay to the State Government a duty as prescribed. The DTH services, are covered in the opening phrase "every proprietor of an entertainment". It is also true that no tax can be imposed by issuance of a notification which is executive in nature. However, our opinion is based upon the provisions of the M.P. Act of 1936.

45. In Mathuram Agrawal Vs. State of Madhya Pradesh, , it has been laid down by the apex court that there is ambiguity in the provision as to any of the three components of tax law subject of tax; person who is liable to pay tax; and rate at which tax is to be paid. The M.P. Act of 1936 provides subject of tax and the person who is liable to pay tax and it also provides the rate at which such tax is to be paid as apparent from a conjoint reading of sections 2(b), 2(d) and amended section 3 of the M.P. Act of 1936.

46. Merely by the fact that the "entertainment" duty payable by a proprietor is separately provided in section 3A of the Act and an "entertainment" duty payable by the cable operator is defined in section 3B, it cannot be said that "entertainment" services provided by the DTH are not covered within the ambit of section 3 of the M.P. Act of 1936.

47. Method of levy provided u/s 4(1) of the M.P. Act of 1936. However, sub-section (2) of section 4 provides other modes also to be adopted for payment as provided in clauses (a) to (f) of sub-section (2) of section 4 of the M.P. Act of 1936.

48. The apex court in Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd., , has laid down that section 3(1) of the Central Excise Act, 1944 is a charging section which creates liability to pay excise duty on the goods produced or manufactured in India and the said sub-section clearly indicates the nature and character of the duty, namely, that it is a tax on production and manufacture of goods, while section 4 is in the nature of machinery provision and, therefore, anything said therein must be read so as to carry out the basic concept of excise duty.

49. In Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, Supp SCC 673, the apex court has laid down that charge and incidence of tax is different from realisation of it. The apex court has held thus (pages 656 and 658 in 94 STC):

3. The levy was described in substance to be purchase tax leviable under the Sales Tax Act. But it appears to have been prompted by the latter part of the section which identifies the person who shall be responsible for paying the tax. The section is in two parts--one, levying the tax and other fixing the person from whom it shall be realised. The latter is more a part of machinery provision. It cannot control the main or the substantive part of the section. The taxable event is the entry of goods in a local area of the State by a dealer in course of business and not its purchase. To characterise it as purchase tax is ignoring the nature of levy.

....

7. That goods were brought by the appellants who are dealers in course of business for consumption, use or sale therein, was not disputed. Nor it is disputed that they are liable to pay tax under the Sales Tax Act. If that be so, then there appears no escape from the conclusion that they are liable to pay entry tax under this section. The appellants claim to be dealers of sugar which is specified in Schedule II. The tax being on entry of goods the taxing event was complete once sugar was brought into the local area by a dealer in course of business for consumption, use or sale therein. This could not be diluted or negatived by subjecting it to another condition that such goods should have been liable to tax under the Sales Tax Act. That would be misreading of section 3. The charge or incidence of tax is different from realisation of it. A levy may be valid and good and yet it may remain ineffective if there is no machinery provision. But the provision for realisation of tax from the dealer who effects the entry of goods does not make it a condition for the levy of tax. Tax u/s 3 is on bringing of goods inside the local area by a dealer for consumption, use or sale therein irrespective of whether sales tax is payable on it or not. Therefore, sugar on which no sales tax is leviable because additional excise duty is payable would not be beyond the taxing net.

50. In State of West Bengal and Another Vs. Road Transport Association, Silguri and Another, , the apex court has laid down that not providing any proforma for declaring particular under the Explanation would neither make it vague not unworkable for want of any machinery provision. The apex court has held thus (pages 3 and 5 in 131 STC):

3. The Tribunal took the view that Explanation 1 to section 2(1a1) of the Act is valid but vague and that there is no machinery provision specifying the manner of disclosure and, therefore, suspended the operation of the said Explanation till a machinery for that purpose is provided; it was held that sub-sections (6) and (7) of section 4C of the "Act were invalid and unconstitutional and consequently,

sub-rule (4) of rule 48L was also invalid. The application of the respondents was thus allowed by the Tribunal by the order under challenge.

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8. A perusal of the definition clause and Explanation 1 shows that there is no ambiguity in them. The requirements of the Explanation are clear enough. Not providing any pro forma for declaring particulars under the Explanation would neither make it vague nor unworkable for want of any machinery provision. It cannot be disputed that a prescribed pro forma would have been appropriate but absence of a pro forma for making the required declaration would not warrant suspension of the said Explanation. We find no substance in the reasoning of the Tribunal and, therefore, set aside the finding of the Tribunal in regard to Explanation 1.

51. In Mahim Patram Private Ltd. Vs. Union of India (UOI) and Others, , the apex court has laid down that failure to make rules for valuation of a type of asset cannot therefore affect the vires of section 7. The apex court has held thus (pages 261 and 262 in 6 VST):

28. In SUDHIR CHANDRA NAWN Vs. WEALTH-TAX OFFICER, CALCUTTA, AND OTHERS. INTERVENERS : (1) STATE OF ASSAM; (2) STATE OF KERALA; AND (3) STATE OF UTTAR PRADESH., , this court rejected the contention that section 7(1) of the Wealth-tax Act was unconstitutional as no rules had been framed to value the asset for the purpose of the Act, stating:

The plea that section 7(1) of the Wealth-tax Act is ultra vires Parliament is also wholly without substance. That clause provides:

Subject to any rules made in this behalf, the value of any asset, other than cash, for the purposes of this Act, shall be estimated to be the price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date.

It was urged that no rules were framed in respect of the valuation of lands and buildings. But section 7 only directs that the valuation of any asset other than cash has to be made subject to the rules. It does not contemplate that there shall be rules before an asset can be valued. Failure to make rules for valuation of a type of asset cannot therefore affect the vires of section 7. It was also said that section 7(1) which requires that the asset shall be valued at the price which it would fetch if sold in the open market on the valuation date, was expropriator. This contention was not raised in the petition, and no ground is made out for holding that the rate at which wealth-tax is levied is expropriatory.

30. Section 9(2) of the Act is of wide amplitude. It confers powers on the officers of the State to make assessment or reassessment, which the officers of the State have, under the general sales tax laws, to carry on assessment under the 1956 Act, as if it is an assessment under the State Act. The expression ''as if is of some significance. The powers conferred and the procedures laid down under the

State sales tax laws would, therefore, be applicable also for the purpose of carrying out assessment under the Central Act. Sub-section (2) of section 9 provides that the authorities under the State Act for the purpose of making assessment and reassessment under the 1956 Act shall have all the powers which they have under the general sales tax law of the State. Assessment would mean the entire process of computation and levy of tax. (See The Additional Income Tax Officer, Salem Vs. E. Alfred, at page 446; [1962] Supp. 1 SCR 143 at 149 and S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore, at pages 761-762; [1968] 2 SCR 674 at 678.

52. It is also submitted by counsel for the petitioners that no specific amendment has been made in the M.P. Act of 1936 with respect to DTH services whereas cable operator, cable services, cable television network and subscriber have been defined by inserting amending section 2(aaa). Similarly, section 3B was also inserted. In this regard, reliance has been placed by the counsel for the petitioners on the decisions of the apex court in Commissioner of Income Tax, Udaipur Rajasthan Vs. Mcdowell and Co. Ltd., Mathuram Agrawal Vs. State of Madhya Pradesh, , Housing Board of Haryana Vs. Haryana Housing Board Employees Union and others, and Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others,

53. In Commissioner of Income Tax, Udaipur Rajasthan Vs. Mcdowell and Co. Ltd., , the apex court has considered the rule of ejusdem generis and has held that it applies when statute contains an enumeration of specific word which constitutes a class or category which is not exhausted by enumeration, the general terms follow enumeration and there is no indication of a different legislative intent. The general words are construed as limited to things of the same kind as those specified.

54. In Mathuram Agrawal Vs. State of Madhya Pradesh, , the apex court has laid down that the words cannot be added or substituted as to give a meaning to the statute which will serve the spirit and intention of the Legislature.

55. In Housing Board of Haryana Vs. Haryana Housing Board Employees Union and others, , the apex court considered the rule of ejusdem generis when particular words pertaining to a class of genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. The apex court in Housing Board of Haryana Vs. Haryana Housing Board Employees Union and others, , has laid down thus:

51. When particular words pertaining to a class of genus are followed by general words, the latter, namely, the general words are construed as limited to things of the same kind as those specified (see: Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, , Thakur Amar Singhji Vs. State of Rajasthan, This is known as the rule of ejusdem generis reflecting an attempt to reconcile incompatibility between the specific and general words (M.C. Chacko Vs. The State Bank of Travancore, Trivandrum,

52. This court in Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others, , laid down that the rule applies when ''(1) the statute contains an enumeration of specific words; (2) the subjects of enumeration constitute a class or category; (3) that class or category is not exhausted by the enumeration; (4) the general terms follow the enumeration; and (5) there is no indication of a different legislative intent''.

53. Thus, it is essential for application of the ejusdem generis rule that enumerated things before the general words must constitute a category or a genus. It was, therefore, pointed out Lord Simonds in Russel (Inspector of Taxes) v. Scott [1948] 2 All ER 1; [1948] AC 422 (HL) that ''indeed if a collection of items is heterogeneous, it almost seems a conflict in words to say that they belong to the same genus.

56. The apex court in Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others, , has held thus:

9. Before dealing with the contention relating to article 19 we consider it proper to dispose of the argument founded on the ejusdem generis rule and article 14 of the Constitution. It was contended by Shri Sen that the only way in which section 43 can be saved from the challenge of arbitrariness is to construe the expression ''any cause other than'' in section 43(1) ejusdem generis with the causes specified in clauses (a) to (g) of section 42(1). We do not agree with this submission. The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration and (v) there is no indication of a different legislative intent- In the present case it is not easy to construe the various clauses of section 42 as constituting one category or class. But that apart, the very language of the two sections and the objects intended respectively to be achieved by them also negative any intention of the Legislature to attract the rule of ejusdem generis.

57. In the instant case, it cannot be said that the definition contained in section 2(aaa) of cable operator, cable services, cable television network and subscriber, VCR in section 2(g) or VCP in section 2(h) restricts the application of the provision of section 2(c), sections 2(d)(vii) and section 2(d)(iv) only to cable television, VCR, etc.

58. In view of the aforesaid, in our opinion, the submission based on the rule of ejusdem generis fails.

59. Coming to the next submission of counsel for the petitioners that the DTH services are covered by entry 92C of List I of the Seventh Schedule to the Constitution and, therefore, the M.P. Act of 1936 does not have any authority to tax DTH services. Entry 92C of List I of the Seventh Schedule to the Constitution is as follows:

taxes on services.

60. Entry 62 of List II of the Seventh Schedule to the Constitution is as follows:

taxes on luxuries, including taxes on entertainment, amusements, betting and gambling.

61. The broadcasting services have been brought within the purview of service tax net with effect from July 16, 2001 by the Finance Act, 2001 u/s 65(105)(zk). The DTH services are covered under broadcasting services and are taxable.

62. It was also submitted by the counsel appearing for the petitioners that the service tax is destination based consumption tax which is borne by the consumer and not on commercial activity or on the business. Similarly, the entertainment tax is also borne by the consumer. The taxing event in the service tax is a provision/consumption of service and in case of entertainment tax, it is the provision of "entertainment". Currently, various State Governments have defined the-DTH broadcasting services as "entertainment" and are levying tax on the same. Thus, in pith and substance, the State Governments are taxing DTH broadcasting service while taxing the "entertainment". The action is violative of article 246 of the Constitution of India and it amounts to entrenchment upon the field reserved to the Union of India under entry 92C of List I of the Seventh Schedule to the Constitution. Thus, the field being occupied by the Union, the States by deeming and inclusive definition of "entertainment" cannot tax DTH broadcasting service.

63. Reliance has been placed by the counsel for the petitioners on a decision of the apex court in Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others, wherein the apex court has laid down that construction of taxation entry which may lead to overlapping must be eschewed. The apex court has laid down thus (pages 559 and 560 in 139 STC):

44. The Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This mutual exclusivity is reflected in article 246(1) and has been noted in H. M. Seervai''s Constitutional Law of India, Fourth Edition, Volume 1, at page 166, in paragraphs 1A, 25 where, after commenting on the problems created by the overlapping powers of taxation provided for in other countries with federal structures such as the United States, Canada and Australia, the learned author opined:

The Lists contained in the Schedule VII to the G. I. Act, 35, provided for distinct and separate fields of taxation and it is not without significance that the concurrent legislative List contains no entry relating to taxation but provides only for "fees" in respect of matters contained in the List but not including fees taken in any court. List I and List II of the Seventh Schedule thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the G. I. Act, 35. This scheme of the legislative Lists as regards taxation has been taken over by the Constitution of India with like beneficial results.

46. Therefore, taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field it would follow that other fields in the legislative Lists must be construed to exclude this field so that there is no possibility of legislative trespass.

64. In our opinion, the State Government is not taxing broadcasting services but it is levying ''''entertainment tax" provided by the DTH service provider under entry 62 of List II of Seventh Schedule to the Constitution. The entertainment aspect is different than service aspect and there is no overlapping in law.

65. The apex court in The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others, has laid down that a tax under entry 62 of List II of the Seventh Schedule to the Constitution may be imposed not only on the person spending on entertainment but also on the act of a person entertaining or the subject of entertainment. We find that there is no overlapping or entrenching upon the field.

66. The apex court in The State of West Bengal Vs. Kesoram Industries Ltd. and Others, , has laid down that List I has the priority over Lists II and List III has priority over List II. However, still the redominance 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. The court has to determine the field of legislation wherein, the impugned legislation falls by applying the doctrine of pith and substance. When once it is found that the impugned legislation fails within the power expressly conferred upon the Legislature which enacted it, an incidental encroaching in/trenching on the field assigned to another Legislature is to be ignored. The apex court has further laid down that if 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 the power of legislation in respect whereof has been conferred on Parliament.

67. In our opinion, there is no entrenching upon the power of the Union by the M.P. Act of 1936 and by bringing the DTH services within the purview of section 65(105)(zk) of the Finance Act, 2001, what is taxed by the Union is "broadcasting sendee" and not "entertainment" and under entry 62 of List II of the Seventh Schedule to the Constitution, the M.P. Act of 1936 imposes a tax on "entertainment". Both the provisions have their independent existence. Thus, it cannot be said that the field of "entertainment" is occupied by, the: aforesaid provision of the Finance Act, 2001.

68. It was also submitted by counsel appearing for the petitioners that the predominant element and intention in the licence granted to a DTH operator u/s

4 of, the Indian Telegraph Act, 1885 is one of "service" and not of "entertainment". Reliance has been placed by the counsel for petitioners on a decision of the apex court in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, [2006] 3 SCC 1, in which it has been laid down that the licence is for providing telecommunication service and not for supply of any goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of licence cannot be broken into pieces. In the said case, the question was of liability of sales tax and the question arose about the separate service and sale transaction. It was held that telephone service is nothing but a service. There may be a transfer to use any "goods" as defined in this case in providing of a telephone connection by a telephone service operator to a subscriber. It is possible for the State to tax the sale element provided there is a discernible sale and the dominant intention test is satisfied but only to the extent relatable to such sale.

69. In the instant case on facts there is no question of breaking integrity of a licence as "entertainment" is clearly provided by DTH service providers. Thus, they are liable to "entertainment" tax. The question involved in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, was different and there was no sale found on facts. Thus, levy of sales tax was held to be invalid.

70. It was then contended by Shri Singh, learned counsel for the petitioners, that the State Government has no authority to impose tax on indivisible service under the garb of entertainment tax when the Government of India has already brought the same within the ambit of service tax. The entertainment element in the said activity must be discernible by the authority of law by way of specific enabling provision in the Constitution and in absence of such provision, it does not come within the competence of the State to levy tax on entire consideration so received on a telecommunication service when sale is already available to service tax under entry 92C of List I of the Seventh Schedule to the Constitution.

71. It was further submitted by counsel for the petitioner that payment for subscription is liable for service tax under entry 92C of List I of the Seventh Schedule to the Constitution and service tax at the rate of 10.36 percent is paid on the said subscription amount received from subscriber for availing of DTH services and as such there is no question of levy of entertainment tax by the State on the said subscription amount when nothing is paid towards "admission to entertainment".

72. The aforesaid submission has no legs to stand as the apex court in The State of West Bengal Vs. Kesoram Industries Ltd. and Others, has laid down that merely because quantum of coal/mineral produced and dispatched from the land is a factor taken into consideration, for determining the value of the land, it does not become a tax on coal or mineral. The quantification of levy by reference to quantity of brick earth dispatched is a methodology adopted for the purpose of finding the quantity of brick earth removed from the land: It has a definite and direct co-relation with the land and hence, the cesses are valid as tax on land

under entry 49 of List II of the Seventh Schedule to the Constitution. The apex court has held thus (pages 801 and 802 in 266 ITR):

As a tax the impugned levy of cess is clearly covered by entry 5 of List II (as the High Court has held, and we add) read with entries 49, 50 and 66 of List II. There is no challenge to the declaration of the area as a special development area and the constitution of Special Area Development Authority for the administration thereof. In other words, the constitutional validity of the enactment as a whole and the rules framed thereunder is not put in issue. What is under challenge is only the levy of cess. There is nothing wrong in the State legislation levying cess by way of tax so as to generate its funds. Although it is termed as a ''cess on mineral right'', the impact thereof falls on the land delivering the minerals. Thus, the levy of cess also falls within the scope of entry 49 of List II. Inasmuch as the levy on mineral rights does not contravene any of the limitations imposed by Parliament by law relating to mineral development, it is also covered by entry 50 of List II, The power to levy any tax or fee lying within the legislative competence of the State Legislature can be delegated to any institution of local Government constituted by law within the meaning of entry 5 in List II. The entries 5, 23, 49, 50 and 66 of List II provide adequate constitutional coverage to the impugned levy of cess. True it is that the method of quantifying the cess is by reference to the quantum of mineral produced. This would not alter the character of the levy. There are myriad methods of calculating the value of the land for the purpose of quantifying the tax reference whereto has already been made by us in the other part of this judgment. Validity of cess upon the land quantified by reference to the quantity of its produce was held to be a levy on the land and hence constitutional in AIR 1949 81 (Federal Court) and Ajoy Kumar Mukherjee Vs. Local Board of Barpeta, . It does not become excise duty on manufacture and production of goods merely on account of having relation with the quantity of product yielded by the land. Rather it is a safe, sound and scientific method of determining the value of the land to which the product relates. The levy of cess considered as a tax is constitutionally valid.

73. The apex court in The State of West Bengal Vs. Kesoram Industries Ltd. and Others, , has also laid down that declaration u/s 2 of the Tea Act, 1953 in terms of entry 52 of List I of the Seventh Schedule to the Constitution does not amount to vesting the power to tax or levy fee in the Central Government by reference to tea or on tea estates. The fact that section 25 of the Tea Act empowers the Central Government to levy a duty or cess upon tea or tea leaves for the purpose of that Act, can in no manner deprive the State Legislature of its power to tax the land comprised in tea estate.

74. The "aspect theory" came to be considered by the apex court in Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, , wherein the apex court has observed arguendo assuming that the tax events are treated as conjoint or same or even otherwise, the "aspect theory" establishes that tax can be levied. The apex court in the context of imposing tax

on luxuries or on the price paid for goods has further laid down that there might be overlapping but overlapping must be in the law. The same transaction may; involve two or more taxable events in its different aspect. The apex court has held thus (pages 119, 120, 121, 123, 125, 135, 143 and 145 in 74 STC):

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 the 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.

....

31. Indeed, the law ''with respect to'' a subject might incidentally ''affect'' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in AIR 1945 98 (Privy Council) (PC)at page 141; 1945 F.C.R. 179 (Federal Court) at page 193, in the context of concepts of duties of excise and tax on sale of goods said:

...The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon 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 separate 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 upon 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"....

...it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its "matter"), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling, knife blade, screwdriver, fish-sealer, 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.

...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 precursory 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....

....

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

43. The subject of a tax is different from the measure of the levy. The measure of the tax is not determinative of its essential character or of the competence of the Legislature. In Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan, , the provisions of a State law levying a tax on passengers and goods under entry 56 of List I were assailed on the ground that the State was, in the guise of taxing passengers and goods, in substance and reality taxing the income of the stage carriage operators or, at any rate, was taxing the ''fares and freights'', both outside of its powers. It was pointed out that the operators were required to pay the tax calculated at a rate related to the value of the fare and freight. Repelling the contention, Hidayatullah, J., speaking for the court, said:

...We do not agree that the Act, in its pith and substance, lays the tax upon income and not upon passengers and goods. Section 3, in terms, speaks of the charge of the tax "in respect of all passengers carried and goods transported by motor vehicles", and though the measure of the tax is furnished by the amount of fare and freight charged, it does not cease, to be a tax on passengers and goods....

Indeed, reference may be made to the following statement in Encyclopedia Britannica (Volume 14, page 459) ''on ''luxury tax:

''A different approach to luxury taxation, much less frequently found, seeks to single out the luxury component of spending on a given object rather than taxing specified goods and services as luxuries. One example of this is the Massachusetts five percent tax on restaurant meal of $. 1 or more....

(emphasis supplied)

....

72. The short question that one has to answer in these cases is whether the levies in question by the States and the Union can both stand or whether we have to treat the levies as either tax on ''luxuries'' or as tax on ''income'' or ''expenditure'' and thus uphold one of them but not both. I do not think there can be any doubt at all that, in the context of the social and economic conditions that prevailed in India, it was a luxury for any person to stay in hotels charging high rents and providing various types of facilities, amenities and conveniences such as telephone, television, air-conditioner, etc. The decision of this Court in A.B. Abdul Kadir and Others Vs. State of Kerala, , and in particular, the discussion at pages 699 to 701 places this beyond all doubt. This aspect has also been discussed by Thakkar, J., of the Gujarat High Court (as his Lordship then was) in the judgment under appeal and I am in agreement with his reasonings and conclusion that the Gujarat statute has been validly enacted in exercise of the powers available to the State Legislatures under entry 62 of List II. This applies equally to the other impugned State enactments as well.

....

84. ... In other words, there could be two enactments ''each, in one aspect, conferring the power to impose a tax upon goods''. The legislation was held not to be vitiated merely because there was an element of overlapping in that both excise duty and sales tax became leviable on the same assessee in respect of the same goods and by reference to the same sale price when the first sale after manufacture occurs, one by reference to the ''manufacture'' aspect and the other by reference to the ''sales'' aspect. This bifurcation of the two different aspects pertaining to goods was justified by the language of the legislative entries themselves which referred separately to the different sets of activities and put them down in different legislative Lists. Again, on the same principle, the manufacture of electricity may attract excise duty at the point of its captive consumption (under entry 84 of List I) and also a tax on the consumption or sale of electricity (referable to entry 53 of List II).

....

88. ...The fact that there will be some overlapping then or that here there is a good deal of such overlapping, because, the States have chosen to tax only some types of luxuries and the Centre to tax, at least for the time being, only expenditure which results in such luxuries, should not be allowed to draw a curtain over the basic difference between the two categories of imposts. For instance, if the conflict alleged had been between the present. State Acts and an Act of Parliament taxing expenditure incurred in the construction of theatres or the maintenance of race horse establishments or the like, there would have been no overlapping at all and the pith and substance of the Central tax could well be described as ''expenditure'' and not ''luxuries''. This distinction is not obliterated merely because of the circumstance that both legislatures have chosen to attack

the same area of vulnerability, one with a view to keep a check on ''luxuries'' and the other with a view to curb undesirable ''expenditure''.

75. We find from what has been held in aforesaid decisions that there is no overlapping in law and the State is acting within its realm under entry 62 of List II of the Seventh Schedule to the Constitution and is not entrenching upon the right reserved with the Union of India under entry 92C of List I of the Seventh Schedule to the Constitution. We are unable to accept the submission of petitioners that "aspect theory" is not applicable.

76. It was also submitted by counsel for the petitioners that there was no "admission to entertainment" which submission we have not accepted then alternatively it was submitted that even if it is "admission to entertainment" for the purpose of entertainment tax, nothing would survive of the said consideration for levy of service tax. We have already found that there is no overlapping in law and what is levied by the Central Government is the service tax at the rate of 10.36 percent and the entertainment tax at the rate specified by the State Government. Thus, we find the submission on facts and otherwise to be legally untenable.

77. In the instant case, we have found that "entertainment" is liable to be taxed by the State within the parameter of M.P. Act of 1936. There is no question of integrity of licence being broken into pieces in the instant case hence, the Central Government is levying service tax on broadcasting. "Entertainment" is different from "broadcasting" and hence, tax events are wholly different and distinctly identifiable.

78. In view of the aforesaid discussion, we find that the State is competent to levy "entertainment tax" under the Madhya Pradesh Entertainments Duty and Advertisement Tax Act, 1936 on direct to home services. Resultantly, the writ petitions being devoid of merits deserve dismissal are hereby dismissed. Parties to bear their costs as incurred of the petitions.

