

(2010) 10 P&H CK 0098

In the Punjab And Haryana At Chandigarh

Case No : C.W.P. No's. 10992, 11929 and 12240 of 2010

Tata Sky Limited

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision : 25-10-2010

Acts Referred:

British North America Act, 1867 — Section 91, 92
Constitution of India, 1950 — Article 245, 246(1), 246(3), 248, 254
Entertainment (Small Lotteries and Gaming Act, 1956 — Section 4(1)
Finance Act, 1994 — Section 65(105)
Haryana Passengers and Goods Taxation Act, 1952 — Section 3(3)
Prasar Bharati (Broadcasting Corporation of India) Act, 1990 — Section 2
Punjab Entertainments Duty Act, 1955 — Section 3(3C)

Citation : (2011) 37 VST 1

Hon'ble Judges : Ajay Kumar Mittal, J; Adarash Kumar Goel, J

Bench : Division Bench

Advocate : Aman Lekhi and D.K. Singh, for the Appellant; Piyush Kant Jain, A.A.G., for the Respondent

Judgement

Adarash Kumar Goel, J.—This order will dispose of C.W.P. Nos. 10992, 11929 and 12240 of 2010 as all the three petitions involve

common question as to validity of levy of entertainment duty u/s 3(3C) of the Punjab Entertainment Duty Act, 1955 (in short, "the 1955 Act").

According to the Petitioners, the said levy was in substance levy of service tax referable to entry 92C of List I of the Seventh Schedule to the

Constitution and was, thus, beyond the competence of the State Legislature. The same does not fall in entry 62 of List II providing for levy of

entertainment tax. Activity carried on by the Petitioner is covered by taxable service u/s 65(105)(zk) to the Finance Act, 1994, as amended by the

Finance Act, 2001 providing for levy of service tax on service by a broadcasting

agency in relation to broadcasting. The expression broadcasting has been defined u/s 65(15) of the said Act as having same meaning as u/s 2(c) of the Prasar Bharati (Broadcasting Corporation of India) Act,

1990 and includes receiving of signals through space or cables, direct to home (DTH) signals or other means as specified therein.

2. The Petitioner in C.W.P. No. 10992 of 2010 has its broadcasting centre which downlinks signals from broad caster's satellite and uplinks the

same to its own satellite for transmission through dish antennas to the subscribers. The signals broadcasted by the Petitioner are in encrypted

format and are decrypted/decoded by set top boxes and the viewing cards inside the set top boxes for the customers to receive DTH broadcasting

service. The set top boxes are separately sold to the customers. The subscribers are required to pay subscription charges.

3. The Petitioner has licence under the Indian Telegraph Act, 1885 and Indian Wireless Telegraphy Act, 1933 in accordance with the Government

of India guidelines dated March 5, 2001 for providing direct to home (DTH) broadcasting service. The Petitioner has also obtained permission to

establish, maintain and operate uplinking hub as per guidelines notified on December 2, 2005. It has also entered into an agreement with the

Government of India dated March 24, 2006 to pay annual fee which is a specified percentage of its gross revenue. As per DTH licence dated

March 24, 2006, the Petitioner is governed by legislation enacted in connection with broadcasting. It is liable to provide access to various content

providers/ channels. Under Article 268A read with Article 270 of the Constitution and recommendations of the 12th Finance Commission, 30.5

per cent of net proceeds of service tax is distributed amongst States. Broadcasting is covered by entry 31 of List I. Predominant aspect of the

activity of the Petitioner is broadcasting service by carrying signals through electromagnetic waves in Ku Band, content of which is provided by

third party and entertainment provided is incidental to the broadcasting. The same is not provided by the Petitioner but by the channels whose

signals are carried by the Petitioner.

4. In reply filed on behalf of the State, the levy under the 1955 Act as amended by 2010 Act has been defended on the plea that tax on

entertainment being expressly covered by entry 62 of List II cannot be held to be

covered by entry 92C of List I. The State tax was not on broadcasting service but on entertainment.

Question for consideration:

5. The question which arises for consideration is whether levy of entertainment tax is covered by entry 62 of List II or is tax on broadcasting service covered by entry 92G of List I.

Statutory provisions

6. Relevant provisions are as under:

Constitutional entries:

List I

Entry 31. Posts and telegraphs, telephones, wireless, broadcasting and other like forms of communications.

Entry 92C. Taxes on services

List II

Entry 62. Taxes on luxuries, including taxes on entertainment, amusements, betting and gambling.

Punjab Entertainment Duty Act:

3. Duty on payment for admission to entertainments.--(1) A person admitted to an entertainment shall be liable to pay an entertainment duty at a rate (not exceeding one hundred and twenty five per centum of the payment of admission) which the Government may specify, by a notification in this behalf and the said duty shall be collected by the proprietor and rendered to the Government in the manner prescribed.

(1A) Notwithstanding anything contained in Sub-section (1), the Government may, by notification, levy lump sum entertainment duty at a rate not exceeding,--

(a) eight thousand rupees per annum in the local area of a City constituted as such under the Punjab Municipal Corporation Act, 1976, or of

municipality declared as such under the Punjab Municipal Act, 1911 ; and

(b) Six thousand rupees per annum in areas other than the local areas specified in Clause (a); in respect of entertainments arranged by a proprietor

by replay of video tape, a video, cassette or a video player or video record player and the lump sum duty so levied shall be recoverable from the

proprietor.

(2) A draft of the proposed order specifying the rate of entertainments duty referred to in Sub-sections (1) and (1-A) shall be notified for the

information of all persons likely to be affected thereby and it shall take effect only after the Government has considered all objections received

within a period of thirty days from the date of such publications, and has notified the same again, with or without modification:

Provided that if the Government consider that such an order should be brought into force at once, the final notification may issue without previous

publication:

Provided further that Government may impose an entertainments duty on complimentary tickets at a rate different from that imposed on other kinds

of payment for admission subject to the maximum specified in Sub-section (1).

(3) Until such time as the duty referred to in Sub-sections (1), (1A) and (2) has been finally notified, the entertainments duty shall be levied at the

rates in force in this behalf immediately before the commencement of this Act.

(3A) Notwithstanding anything in this section, the amount of duty shall be calculated to the nearest multiple of 5 naye paise by ignoring 2 naye paise

or less and counting more than 2 naye paise as 5 naye paise.

(3B) Notwithstanding anything contained in Sub-sections (1), (1A), (2) and (3), in the case of entertainment provided with the aid of antenna or

cable television to a connection holder, the proprietor of such entertainment shall pay entertainment duty at such rate per connection per month as

the State Government may specify from time to time by a notification in the official gazette but not exceeding seventy-five rupees per month per

connection.

(3C) Notwithstanding anything contained in this section, in the case of entertainment, provided with the aid of dish relating to direct-to-home

television, the proprietor of such entertainment shall pay entertainment duty at the rate of 10 per cent of the charges, received by such proprietor

from the subscriber. The entertainment duty shall be paid by the proprietor by the 10th day, commencing from the close of the concerned calendar

month.

(4) The final notification specifying the rates of entertainment duty shall be laid

before the Legislature at the session immediately following its publication.

3A. Entertainment duty is not leviable in case tax is paid under Punjab Act 8 of 1954.--Notwithstanding anything contained in this Act, no

entertainment duty shall be leviable on the proprietor who opts to pay entertainment tax under the Punjab Entertainment Tax (Cinematograph Shows) Act, 1954.

2. Definitions.--In this Act unless the context otherwise requires:

(a) "Admission to entertainment" includes admission to any place in which the entertainment is being held or is to be held and where television

exhibition is being provided with the aid of any type of antenna with a cable network attached to it or cable television in residential or non-

residential areas for which persons are required to make payment by way of contribution or subscription or installation and connection charges or

any other charges collected in any manner whatsoever;

(aa) "antenna" means an apparatus which receives television signals which enable viewers to tune into transmissions including national or

international satellite transmissions and which is erected or installed for exhibition of films or moving pictures or series of pictures by means of

transmission of television signals by wire where subscriber's television sets at the residential or non-residential place are linked by metallic coaxial

cable or optio-fibre cable to a central system called the head-end, on payment by the connection holder of any distribution or subscription or

installation and connection charges or any other charges collected in any manner whatsoever ;

(aaa) "cable television" means a system organized on payment by a connection holder of any contribution or subscription or installation and

connection charges or any other charges collected in any manner whatsoever, for exhibition of films or moving pictures or series of pictures by

means of transmission of television signals by wire where subscriber's television set is linked by metallic coaxial cable or optio-fiber cable to a

central system called the head-end, by using a video cassette or disc or both, recorder or player or similar such apparatus on which prerecorded

vide cassettes or discs or both are played or replayed and the films or moving pictures or series of pictures which are viewed and heard on the

television receiving set at a residential or non-residential place of a connection holder;

(b) "Commissioner" means the Excise and Taxation Commissioner, Punjab, for the time being;

(c) "Entertainment Tax Officer" means the Excise and Taxation Officer appointed as such under this Act;

(d) "entertainment" includes any exhibition, performance, amusement, game, sport, or race to which persons are ordinarily admitted on payment

for exhibition of films, or moving pictures or series of pictures which are shown in a cinema house or on the television receiving set, with the aid or

any type of antenna with a cable network attached to it or cable television for which persons are required to make payment by way of contribution

or subscription or installation and connection charges or any other charges of collected in any manner whatsoever;

(e) "payment for admission" includes--

(i) any payment made by a person admitted to any part of a place of entertainment and in a case where such person is subsequently admitted to

another part thereof for admission to which an additional payment is required, such additional payment, whether actually made or not;

(ii) in case of free, surreptitious, unauthorised or concessional entry, whether, with or without the knowledge of proprietor, the payment which

would have been made if the person concerned had been admitted on payment of the full charges ordinarily chargeable for such admission;

(iii) Any payment for any purpose whatsoever connected with an entertainment which a person is required to make as a condition of attending or

continuing to attend the entertainment in addition to the payment, if any, for admission to the entertainment;

(iv) Any payment made by a person by way of contribution or subscription of installation and connection charges or any other charges collected in

any manner whatsoever for television exhibition with the aid of any type of antenna with a cable network attached to it or cable television or a dish

relating to direct-to-home television network.

(g) "proprietor" in relation to any entertainment includes the owner, partner or a person responsible for management thereof and any person

responsible for or for the time being in charge of the management for providing

cable connection from any type of antenna or cable television or for providing direct-to-home television service.

Service tax provisions

Section 65(105)(zk). "taxable service" means any service provided or to be provided to a client, by a broadcasting agency or organization in

relation to broadcasting, in any manner and, in the case of broadcasting agency or organisation, having its head office situated in any place outside

India, includes service provided by its branch office or subsidiary or representative in India or any agent appointed in India or by any person who

acts on its behalf in any manner, engaged in the activity of selling of time slots for broadcasting of any programme or obtaining sponsorships for

programmes or collecting the broadcasting charges or permitting the rights to receive any form of communication like sign, signal, writing, picture,

image and sounds of all kinds by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other

means to cable operator, including multisystem operator or any other person on behalf of the said agency or organisation.

Explanation.--For the removal of doubts, it is hereby declared that so long as the radio or television programme broadcast is received in India and

intended for listening or viewing, as the case may be, by the public, such service shall be taxable service in relation to broadcasting, even if the

encryption of the signals or beaming thereof through the satellite might have taken place outside India.

Section 65(15). "broadcasting" has the meaning assigned to it in Clause (c) of Section 2 of the Prasar Bharati (Broadcasting Corporation of India)

Act, 1990 (25 of 1990) and also includes programme selection, scheduling or presentation of sound or visual matter on a radio or a television

channel that is intended for public listening or viewing, as the case may be; and in the case of a broadcasting agency or organization, having its head

office situated in any place outside India, includes the activity of selling of time slots or obtaining sponsorships for broadcasting of any programme

or collecting the broadcasting charges or permitting the rights to receive any form of communication like sign, signal, writing, picture, image and

sounds of all kinds by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other means to

cable operator including multisystem operator or any other person on behalf of the said agency or organization, by its branch office or subsidiary or

representative in India or any agent appointed in India or by any person who acts on its behalf in any manner ;

Section 2(c) Prasar Bharati Act, 1990

"broadcasting" means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by

transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly

through the medium of relay stations and all its grammatical variations and cognate expressions shall be construed accordingly

Rival contentions

7. Contention raised on behalf of the Petitioner is that under Article 246(3) of the Constitution, legislative power of States is subject to legislative

powers of the Centre under Article 246(1). Since the subject-matter of broadcasting service is exclusively reserved for Central legislative field, the

same will stand excluded from List II on principle of federal supremacy and occupied field. In pith and substance, the levy is on broadcasting

service as apart from broadcasting, no other taxing event has taken place and the event of broadcasting service itself has been covered in the

definition of entertainment which is the basis of the levy for entertainment duty. When there is no separate taxing event, aspect theory cannot be

invoked to justify State levy on an event which is covered by Central levy. In any case, if broadcasting service and entertainment are both covered

in a composite transaction, entertainment duty could be only on part of charges recovered by the Petitioner attributable to entertainment.

8. On the other hand, the contention on behalf of the State is that the Central levy as well as the State levy are on different aspects and by applying

principles of harmonious construction, the State levy could be held not to be in conflict with the Central levy. In pith and substance, the State levy is

not on broadcasting service but on entertainment and falls under entry 62 of List II. If entertainment duty is not allowed to be levied, power of the

State Legislature under entry 62 will be nullified. Entertainment is the main activity for which charges are collected by the Petitioner and

broadcasting service is only a medium for the entertainment. Mere fact that

content of signals is provided by third party is not enough to exclude levy of tax on provider of entertainment by carrying the signals to the customers for which charges are collected. Charges are not collected under a composite transaction but only for entertainment and expenditure on or in connection with broadcasting may be cost of the person providing entertainment. Settled law on interpretation of scope of taxing entries

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

10. Principle of federal supremacy can be invoked only if there is irreconcilable conflict in entries in Union and State Lists. If two entries can be reconciled by harmonious construction or by applying principle of pith and substance, there is no occasion to apply the principle of federal supremacy. Concept of repugnancy under Article 254 relating to List III is different from repugnancy arising due to overlapping in List I and List II in which case principle of pith and substance is applied to determine legislative competence. Entries in the Lists are not powers of legislation but fields of legislation. Taxation is distinct matter for legislative competence. Power to tax cannot be deduced from general entry. There is no overlapping in taxing power. Entries 82 to 92C and 97 of List I and entries 45 to 63 of List II deal with taxes. There is no entry relating to tax in List III.

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

12. Subjects of tax which fall in power of a particular Legislature in one aspect

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

13. Some of the leading judgments on the subject are Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, , Godfrey Phillips

India Ltd. and Another Vs. State of U.P. and Others, , Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, and The

State of West Bengal Vs. Kesoram Industries Ltd. and Others, .

14. We may extract observations from The State of West Bengal Vs. Kesoram Industries Ltd. and Others, (at pages 751, 753, 757, 758, 760,

792 of 266 ITR):

31. Article 245 of the Constitution is the fountain source of legislative power. It provides--subject to the provisions of this Constitution, Parliament

may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the

State. The legislative field between Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has

exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to

the said power of Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called

the "Concurrent List". Subject to the abovesaid two, the Legislature of any State has exclusive power to make laws with respect to any of the

matters enumerated in List II, called the "State List". Under Article 248 the exclusive power of Parliament to make laws extends to any matter not

enumerated in the Concurrent List or the State List. The power of making any law imposing a tax not mentioned in the Concurrent List or the 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. and Others Vs.

State of Bihar and Others, .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 enumeration of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include

within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of the Legislature of any State is questioned on the ground that it encroaches upon the legislative competence

of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further

question need be asked and Parliament's legislative competence must be upheld. Where there are three Lists containing a large number of entries,

there is bound to be some overlapping among them. In such a situation the

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

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There

the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the

Legislature which enacted it, an incidental encroaching in the field assigned to another Legislature is to be ignored. While reading the three Lists,

List I has priority over Lists III and II and List III has priority over List II. However, still, the predominance of the Union List would not prevent

the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.(emphasis supplied).

43. In 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 percentage 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

1. Here italicised.

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 circumstance 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 circumstance 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 page 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 page 217,

para 276)

"It is enough to note that our Constitution has certainly a bias towards the 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 measure of the tax though it may constitute one relevant factor out of many for

throwing light on determining the general character of the tax.

(5) The entries, in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from the

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 the two entries so as to avoid conflict and overlapping ?

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

Three--Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an

incidental trenching upon another field of legislation be ignored ?

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for

determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as

unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess,

whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention

of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the

Central Government by reason of the incidence of levy being permissible to be

passed on 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 the 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 and 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 the exercise of such power, in the interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of entry 50 in List II and entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.

The aspect theory

15. Aspect theory has been subject-matter of several decisions. In *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*, the levy considered was expenditure tax under Central law with reference to the contention that the same was in substance tax on luxury under entry 62 of List II. Stand of the Central Government was that expenditure aspect was different from luxury aspect and expenditure aspect could be held to be excluded from the luxury aspect. The plea was upheld. It was observed (at page 119 of 74 STC):

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

27. The Judicial Committee in *Prafulla Kumar Mukherjee v. Bank of Commerce* AIR 1947 PC 60: [1947] FCR 28, referred to with approval the following observations of Sir Maurice Gwyer "C.J." in AIR 1941 47 (Privy Council) :

"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 adherence 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 (PC) at page 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. Lord Simonds in

AIR 1945 98 (Privy Council) in the context of concepts of duties of excise and tax on sale of goods said:

"... The two taxes, the one levied 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"". . ." (page 115)

". . . it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its ""matter""), are a kind

most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of

a pocket gadget compactly assembling knife blade, screwdriver, 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." (page 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. . ." (page 117).

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

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

17. In All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, , challenge was to the levy of service tax on service rendered by practising chartered accountants, cost accountants and architects by the Central Legislature and objection thereto was based on entry 60, List II providing for power of State Legislature to tax professions, trades, callings and employment. Repelling the challenge, it was held that entry 60 of List II did not include tax on services. Tax on profession was different from tax on professional service. It was observed (at pages 166, 169, 170 and 171 of 9 VST):

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 professional 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 a saleable or marketable

commodities produced by the Assessee and cleared by the Assessee for home consumption under the Central Excise Act. . .

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 are 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 v. State of Haryana* [1981] 2 SCC 318, the Appellants were transport operators. The State of Haryana

levied a tax on passengers and goods under the Haryana Passengers and Goods Taxation Act, 1952. The Appellants questioned the vires of

Section 3(3) insofar as the levy of tax on passengers and goods carrying 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 List II or III, and in the case of a tax, if it is not mentioned in either of 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 does not fall under

entry 60, List II. That, service tax would fall under entry 92C/entry 97 of List I.

48. In Tamil Nadu Kalyana Mandapmam 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 (in paragraph 56 of 135 STC) 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 Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and

Others, . 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.

18. In *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, , relied upon on behalf of the Petitioner, the aspect theory

was held not to be applicable as the transaction by which mobile phone service was provided was held to be service and not deemed sale falling

under entry 54, List II read with Article 366(29A). The finding recorded is (at pages 127 and 129 of STC):

84. As we have said Article 366(29A) has no doubt served to extend the meaning of the word "sale" to the extent stated but no further. We

cannot presume that the constitutional amendment was loosely drawn and must proceed on the basis that the parameters of "sale" were carefully

defined. But having said that, it is sufficient for the purposes of this judgment to find, as we do, that a telephone service is nothing but a service.

There is no sales element apart from the obvious one relating to the handset, if any. That and any other accessory supplied by the service provider

in our opinion remain to be taxed under the State sales tax laws. We have given the reasons earlier why we have reached this conclusion.

88. ... No one denies the legislative competence of 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. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29A), the value of the goods

involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in *Gannon Dunkerley and Co. and Others Vs.*

State of Rajasthan and Others, :

"... The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods

involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works

contract only can be included in the value of the goods. . .".

Indivisible or composite transaction

19. Question of a transaction being indivisible or composite in the context of sale and service has no relevance. The said issue has been considered

in the context of validity of sales tax law with reference to meaning of "sale". Before 46th Amendment to the Constitution, certain transactions were

held to be indivisible contracts not amounting to sale. It was held that there was no power to levy sales tax even on the sale element in such

transactions. By Constitutional amendment, the said transactions were included in the definition of sale or purchase of goods to the extent of

element of sale of goods and splitting up became permissible. They became akin to composite transactions which could be split up. Even after 46th

Amendment, certain transactions are held to be indivisible transactions of service. The concept has been duly considered in *Bharat Sanchar Nigam*

Ltd. and Another Vs. Union of India (UOI) and Others, .

20. In *Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others*, , the question was whether entire turnover of design in

an advertisement service was liable to service tax or only the service element. It was held that if contract was divisible, only service element could

be subjected to service tax and sale element was subject to sales tax. In that case, the Karnataka High Court held that transaction being indivisible,

the entire transaction was liable to service tax. The transaction was held to be composite transaction and not indivisible transaction. Relevant

observations are (at pages 378, 379, 380, 381 and 384 of STC):

16. The Appellant, in their returns, made three categorical divisions in regard to its tax liabilities (1) the amount of service tax on the specific design

and production; (2) the amount of Karnataka sales tax on the specified item on the first sale; and (3) when certain items are outsourced, the tax

payable on resale of the said goods in terms of Section 6(4) of the Karnataka Sales Tax Act.

17. The Tribunal as also the High Court opined that the contract was an indivisible one. The effect of such an indivisible contract, visa-vis works

contract came up for consideration before this Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, wherein it was

clearly held (at page 387 of STC ; AIR page 578, para 48):

"48. To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the

contracts of the Respondents have been held by the learned Judges of the court below to be. The several forms which such kinds of contracts can

assume are set out in Hudson on Building Contracts, at page 165. It is possible that the parties might enter into distinct and separate contracts, one

for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done."

19. The question came for consideration again in Builders Association of India and Others Vs. Union of India (UOI) and Others, and Gannon

Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . It has expressly been laid down therein that the effect of amendment by

introduction of Clause (29A) in Article 366 is that by legal fiction, certain indivisible contracts are deemed to be divisible into contract of sale of

goods and contract of service. In Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, it had been held (at pages 233-34 of

STC; SCC pages 394 and 395, para 47):

"47. Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has

been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved

in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and

services."

23. The question yet again came up for consideration before a three-judge Bench of this Court in Bharat Bharat Sanchar Nigam Ltd. and Another

Vs. Union of India (UOI) and Others, wherein it was held (at page 119 of VST ; SCC pages 30, 31 and 32, paras 44, 45 and 50)

"44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works

contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third

involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally

permitted in Sub-clauses (b) and (f) of Clause (29A) of Article 366, there is no other service which has been permitted to be so split. For

example, the sub-clauses of Article 366(29A) do not cover hospital services.

Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale ? doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client ? strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, , namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods ? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is as to what is "the substance of the contract". We will, for the want of a better phrase, call this the dominant nature test.

50. What are the ""goods"" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject-matter of sale or purchase. The court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject-matter of sale or purchase. In arriving at a conclusion the court would have to approach the matter from the point of view of a reasonable person of average intelligence."

32. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a

composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct.

21. In the present context, issue of splitting up of transactions of broadcasting and entertainment is not involved. The tax is on entertainment aspect and calculation of tax is on the basis of charges recovered for providing entertainment. The expression entertainment has been used in a very wide sense and covers entertainment of any kind.

Scope of entry 62

22. Scope of entry 62 has been gone into, inter alia, in *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, , wherein it was observed:

... In view of this well established rule of interpretation, there can be no reason to construe the words "taxes on luxuries or entertainments or amusement" in entry 50 as having a restricted meaning so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments, or amusements. The entry contemplates luxuries, entertainments, and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to the tax. ..

23. The above observations have been reiterated in *Express Hotels Private Ltd. Vs. State of Gujarat and Another*, .

24. In *The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others*, , it was observed (at page 170 of STC):

35.... Under the legislative field exclusively reserved for the State Legislature, the levy of tax by more than one statute on different taxable objects

and taxable persons is not prohibited by the Constitution of India. The Bengal Amusements Tax Act, 1922 and the West Bengal Entertainments

and Luxuries (Hotels and Restaurants) Tax Act, 1972 are two statutes which have been enacted under the same legislative field, i.e., entry 62 of

List II of the Seventh Schedule to the Constitution of India, and the two statutes apply admittedly to levy of tax on amusements, entertainments and luxuries in their respective area but the area of application of the said 1982 Act is different as would be evident from the provisions of the 1922 Act and the 1972 Act as aforesaid. The said 1982 Act was, for the first time, enacted by the State Legislature in 1982 and its area of application was initially confined to levy and collection of tax from the holders of television set or sets u/s 4 of that Act. Thereafter, u/s 4A of that Act, inserted by the West Bengal Taxation Laws (Second Amendment) Act, 1983, the area of its application was extended to levy and collection of tax from the holders of video cassette recorder. The purpose of Sub-section (4a) of Section 4A of the Act is to levy and collection of tax from any person who provides cable service directly to consumers or transmits to a sub-cable operator through a cable television network and otherwise controls or is responsible for the management and operation of a cable television network and such person has been defined as "cable operator" being a taxable person exclusively for the purpose of levy and collection of entertainment tax only when a cable operator so defined receives through any electrical, electronic and mechanic device the signal of any performance, film or any other programme telecast and provides cable service directly to consumers or transmits signals to a sub-cable operator through a cable television network and otherwise controls or is responsible for the management and operation of a cable television network. The person who has been defined as cable operator exclusively for the purpose of levy and collection of entertainment tax has a direct and proximate nexus with the amusements and entertainments to the viewers at every home or place inasmuch as he is the person directly connected with presentation of entertainments to the subscribers. A person is also a "cable operator" for the purpose of Sub-section (4a) of Section 4A of the said 1982 Act when he receives the signal of any performance, film, or any other programme telecast and transmits such signal to a sub-cable operator through cable television network or otherwise controls or is responsible for the management and operation of cable television network against payment received or receivable by him. Therefore, a cable operator is the source of entertainment to the individual subscribers because, it is he who receives the signal of performance, film, and any programme which is transmitted

or given to a large number of sub-cable operators (although they call them as cable operator). The viewers enjoy, or are entertained by such

performance, film, or programme because of receiving and transmitting video or audio-visual signals through coaxial cable or any other device by

the Respondents. No entertainment can be presented to the viewers unless a cable operator transmits the video and audio signals to a sub-cable

operator for instantaneous presentation of any performance, film or any programme on their TV screen. . .

41. We also see no substance in the submission that the impugned legislation impinges on the field occupied by the Central legislation. The

aforesaid Central legislation has been enacted to regulate the operation of cable television network in the country and matters connected therewith

or incidental thereto whereas the State legislation is for levy of entertainment tax on entertainment within the legislative field exclusively assigned to

the State Legislature under entry 62 of List II of the Seventh Schedule to the Constitution. Thus the objects sought to be achieved by two different

Acts enacted under two different legislative fields exclusively assigned to the respective Legislatures are entirely distinct and separate. The Cable

Television Networks (Regulation) Act, 1995 of the Union Legislature does not denude the State Legislature for levying entertainment tax on

entertainment.

25. In *Geeta Enterprises and Others Vs. State of U.P. and Others*, , it was observed:

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-

07) 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."

7. A perusal of the various shades, aspects, forms and implications of the word "entertainment as defined in the aforesaid books clearly leads to an

irresistible inference that the word "entertainment" has been used in a very wide

sense so as to include within its ambit, entertainment of any kind including one which may be purely educative. Sub-section (3) itself by using the word "entertainment" as "any exhibitional, performance, amusement, game or sport to which persons are admitted for payment" has extended the scope of entertainment to expressly include any kind of amusement, game or sport. . .

Application of law to present case

26. We may now deal with the question raised in the present case in the light of the principles summed up in the preceding paras.

27. Levy u/s 3 is called entertainment duty calculated at a percentage of payment for admission to entertainment. It is collected from the provider

of entertainment which includes person responsible for management thereof. Entertainment provided with the aid of dish relating to DHTV has

been specifically included in the levy by amendment in the year 2010. Entry 62 of List II permits tax on entertainment. Thus, tax on entertainment

which squarely falls under entry 62 cannot be held to be encroachment of List I relating to tax on service. Levy of tax on service does not exclude

State Legislature from levying tax provided in List II. Transaction of broadcasting service and levy of tax thereon does not exclude levy of

entertainment tax covered by entry 62 of List II. Both the levies can co-exist and can be harmonized being on different aspects. Doctrine of pith

and substance cannot be applied to exclude one from the other. Principle of federal supremacy cannot be applied to such a situation. Aspect

theory fully applies.

28. The observations in concluding para 92 of *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, relied upon by the

learned Counsel for the Petitioner cannot be read in isolation so as to exclude aspect theory when a transaction clearly falls in legislative

competence of the State.

29. We also cannot accept the contention that the transaction of providing broadcasting services and entertainment should be treated as indivisible

contract so as to exclude the aspect of entertainment by holding that predominantly transaction is broadcasting and not entertainment. Nor

alternative plea of transaction being composite for splitting up entertainment from broadcasting be accepted. Rather, aspect theory has to be

applied and levy of entertainment duty on entertainment aspect is fully justified independent of service tax on broadcasting service which is a different aspect of the transaction.

30. Thus, we hold that levy of entertainment duty falls under entry 62 of List II and is not hit by entry 92C of List I. We are unable to hold that levy

of entertainment duty on providing entertainment by broadcasting signals on TV sets is ultra vires the powers of the State Legislature.

31. Accordingly, these petitions are dismissed.