
(2010) 07 UK CK 0054
In the Uttarakhand High Court

Tata Sky Limited	Vs	APPELLANT
The State of Uttarakhand and Others		RESPONDENT

Date of Decision : 26-07-2010

Acts Referred:

Constitution of India, 1950 — Article 245, 246, 246(1), 246(3), 248
Finance Act, 1994 — Section 65, 66, 67, 68
Finance Act, 2001 — Section 137, 65, 65(13), 65(5), 65(63)
Finance Act, 2002 — Section 65, 65(14), 65(15), 65(80), 65(90)
Finance Act, 2003 — Section 65, 65(105), 65(16), 65(95), 66(1)
Finance Act, 2005 — Section 65(105), 65(16)
Prasar Bharati (Broadcasting Corporation of India) Act, 1990 — Section 2
Telegraph Act, 1885 — Section 4
Uttar Pradesh Entertainments and Betting Tax Act, 1979 — Section 2, 3, 4, 4A, 4A(4)

Citation : (2010) 07 UK CK 0054

Hon'ble Judges : J.S. Khehar, C.J.;Sudhanshu Dhulia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

J.S. Khehar, C.J.—After the decision of the Union Cabinet dated 02.11.2000, whereby "Direct-to-Home" (DTH) broadcasting was permitted in India, prohibition on the reception and distribution of television signals in Ku Band was withdrawn by the Department of Telecommunications, through a notification dated 09.01.2001. In order to give effect to the decision of the Cabinet, as also, the notification issued by the Department of Telecommunications, referred to above, guidelines dated 15.03.2001 were issued laying down the procedure for obtaining licences for providing "Direct-to-Home" (DTH) broadcasting service in India on 15.03.2001. In the aforesaid guidelines, the conditions of eligibility were also prescribed.

2. In so far as the procedural aspect of the matter is concerned, interested parties were to be required to submit an application to the Secretary, Ministry of Information and Broadcasting. If the applicant was found eligible (for setting up a "Direct-to-Home" (DTH) platform in India) on the basis of the information

furnished, the applicant was to be subjected to security clearance (in consultation with the Ministry of Health Affairs), and to clearance for satellite use (in consultation with the Department of Space). If an applicant was successful in obtaining the aforesaid clearances, the applicant was to be required to pay an initial non-refundable entry fee of Rs. 10 crores to the Ministry of Information and Broadcasting. Only upon the payment of the aforesaid nonrefundable entry fee, an applicant would become eligible for further consideration. Having followed the aforesaid procedure, an applicant would be informed of the intent of the Ministry of Information and Broadcasting to issue the licence sought by it. Thereafter, an applicant had to obtain SACFA clearance from the Wireless Planning & Coordination Wing of the Ministry of Communications for SACFA clearance. Within one month of the receipt of the aforesaid clearance, the applicant/licensee had to submit a bank guarantee to the Ministry of Information and Broadcasting for an amount of Rs. 40 crores, to be valid for the duration of the period of licence. Only after making the aforesaid deposit an applicant was to be invited to sign a licence agreement with the Ministry of Information and Broadcasting. Having done so, an applicant was to be required to seek Wireless Operational Licence for establishment, maintenance and operation of "Direct-to-Home" (DTH) platform, from the Wireless Planning and Coordination Wing of the Ministry of Communications. After executing the licence agreement, a licensee would make himself liable to pay annual fee equivalent to the 10% of its gross revenue (reflected in the audited accounts of the licensee) for each financial year, within one month of the end of the year. The licensee additionally made himself liable to pay licence fee for spectrum use, at the rates prescribed by the Wireless Planning & Coordination Authority under the Department of Telecommunications. It is therefore apparent, that the desire to obtain a licence to set up a "Direct-to-Home (DTH) platform could not be easily fulfilled. Besides the technology, it required extensive financial inputs besides a cumbersome procedure of clearances.

3. Tata Sky Limited, the petitioner in Writ Petition (M/B) No. 4 of 2010 is a company incorporated under the Companies Act, 1956. The petitioner company has its registered office at Bombay. The petitioner company was granted a statutory licence u/s 4 of the Indian Telegraph Act, 1885 and Indian Wireless Telegraphy Act, 1933 after it successfully followed the rigours of procedure noticed in the foregoing paragraph. The aforesaid licence was valid for a period of 10 years. While obtaining the aforesaid licence, the petitioner company paid a sum of Rs. 10 crores to the Ministry of Information & Broadcasting as an initial non-refundable entry fee. The petitioner company also furnished a bank guarantee for an amount of Rs. 40 crores valid for a period of 10 years (commensurate with the duration of the licence agreement). In terms of the licence granted to the petitioner company, it has been paying an annual fee equivalent to 10% of its gross revenue (reflected in the audited accounts of the company for that particular financial year) within one month of the end of the year. The petitioner company has also been paying additional licence fee and

royalty for spectrum used as prescribed by the Wireless Planning and Coordination Authority under the Department of Telecommunications.

4. The "Direct-to-Home" (DTH) broadcasting licence granted to the petitioner, operationally extends to the entire country. It is the case of the petitioner, that the petitioner company having complied with the formalities of procedure expressed above, is not required to obtain any other permission or to pay any further cess/duty at the hands of any other authority, for carrying out the "Direct-to-Home" (DTH) broadcasting service in India.

5. It would be pertinent to mention, that the "Direct-to-Home" (DTH) broadcasting service, is an important medium for information dissemination. The service facilitates dissemination of news, current affairs, sports events, educational programmes, programmes related to public health, employment opportunities, consumer awareness etc. All these facilities are in addition to, catering the recreational needs of customers to whom the service is provided. It is also relevant to mention, that the "Direct-to-Home" (DTH) service, can be used in any geographical location, unlike the traditional delivery platform - analog cable, which is limited to small geographical locations. Cable operators cannot penetrate in remote locations, whereas there is no such limitation in the "Direct-to-Home" (DTH) broadcasting service. Another advantage of the "Direct-to-Home" (DTH) platform, according to the petitioner is, that it has a capacity to transmit far more channels, as compared to the traditional - analog cable.

6. Prior to the introduction of the "Direct-to-Home" (DTH) broadcasting service, entertainment tax was being recovered by the State of Uttarakhand from cable operators u/s 4C of the Uttar Pradesh Entertainment and Betting Tax Act, 1979 (hereinafter referred to as the Entertainment Act, 1979). After the petitioner company obtained its statutory licence on 24.03.2006, it commenced to provide "Direct-to-Home" (DTH) services to its customers in the State of Uttarakhand. The petitioner company started transmitting T.V. channels to its customers in the same manner as T.V. channels were hitherto being transmitted to customers by cable operators in the State of Uttarakhand. Treating "Direct-to-Home" (DTH) service at par with the analog cable service, District Magistrates of different districts in the State of Uttarakhand started issuing notices to the petitioner company requiring it to deposit entertainment tax under the Entertainment Act, 1979. This action of the State Government was assailed by the petitioner company by filing Writ Petition (M/S) No. 2562 of 2007, and thereafter, Writ Petition (M/S) No. 353 of 2008.

7. The principal contention on behalf the petitioner, while assailing the action of the District Magistrates, in demanding entertainment tax for providing "Direct-to-Home" (DTH) service to its customers was, that the "Direct-to-Home" (DTH) service had not been included in the definition of the term "entertainment" under the Entertainment Act, 1979. As such, levy of entertainment tax on "Direct-to-Home" (DTH) service under the Entertainment Act, 1979 was, not leviable. On the issue, it was sought to be pointed out, that the States of Karnataka and

Maharashtra had carried out amendments in their respective enactments, so as to include the "Direct-to-Home" (DTH) service, within the meaning of the term "entertainment", and only thereafter, had commenced to charge entertainment tax on "Direct-to-Home" (DTH) service. It was pointed out, that the Uttarakhand Legislature had not carried out any such amendments in the Entertainment Act, 1979, so as to include "Direct-to-Home" (DTH) services, as amenable to entertainment tax under the provisions of the Entertainment Act, 1979. The claim of the petitioner company therefore was, that entertainment tax could not be levied on it in terms of the existing provisions of the Entertainment Act, 1979. At the time when the aforesaid challenge was raised by the petitioner company through Writ Petition (M/S) No. 2562 of 2007 and Writ Petition (M/S) No. 353 of 2008, the term "entertainment" was defined in Section 2(g) of the Entertainment Act, 1979, as under:

2. Definitions.- In this Act,-

(g) "entertainment" includes any exhibition, performance, amusement, game, sports or race (including horse race) to which persons are admitted for payment and in the case of cinematography exhibitions, includes, exhibition of newsreels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately;

8. In response to the assertions made at the hands of the petitioner company in Writ Petition (M/S) No. 2562 of 2007 and Writ Petition (M/S) No. 353 of 2008 the State of Uttarakhand adopted the stance that entertainment tax could be levied by the Uttarakhand Legislature under entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India. It was sought to be submitted, that the petitioner company was providing entertainment to its customers, and as such, levy of entertainment tax on it was wholly justified. It was therefore the contention of the State of Uttarakhand, that recovery of entertainment tax for "Direct-to-Home" (DTH) service by the State of Uttarakhand was legitimate as also legally permissible.

9. This Court, during the course of adjudication of Writ Petition (M/S) No. 353 of 2008 (filed by the petitioner company) analyzed various provisions of the Entertainment Act, 1979, Thereafter, it arrived at the conclusion that Section 4-A had been inserted into the Entertainment Act, 1979, so as to enable it to levy entertainment tax on exhibition of films in cinema houses, and Section 4B was added to the Entertainment Act, 1979 to enable it to levy entertainment tax on exhibition of video in public service vehicles and hotels, and likewise, Section 4-C which was added by way of an amendment to the Entertainment Act, 1979 to levy entertainment tax on proprietors of cable television network providing cable services. It was however held, that there was no provision in the Entertainment Act, 1979, under which the State Government could recover entertainment tax from "Direct-to-Home" (DTH) broadcasting operators, and as such, it was concluded, that the levy of entertainment tax on the petitioner company under the Entertainment Act, 1979, was impermissible in law.

10. This Court, while disposing of Writ Petition (M/S) No. 3 53 of 2008, distinguished "cable services" from "Direct-to-Home services" by holding, that the technology used in the latter envisaged transmission of electromagnetic waves through beams, whereas the technology used in the former involved transmission of electromagnetic waves through cables. On the basis of the aforesaid conclusion, this Court held, that the action of the State of Uttarakhand in treating "Direct-to-Home" (DTH) service providers, at par with cable operators for levy of entertainment tax, was unjustified.

11. This Court, despite having recorded the conclusion noticed in the foregoing paragraph, pointed out that it was open to the Uttarakhand Legislature to amend the existing provisions of the Entertainment Act, 1979, so as to include "Direct-to-Home" (DTH) services within the ambit of the provisions of the Entertainment Act so as to levy entertainment tax thereon; in the same manner as earlier amendments were introduced into the Entertainment Act, 1979, for levying entertainment tax on exhibition of films, exhibition of video shows in public service vehicles and hotels, and on proprietors of cable television networks for providing cable services; as also by other State legislatures. Relevant extract of the observations recorded by this Court during the course of adjudication of Writ Petition (M/S) No. 3 53 of 2008 are being reproduced hereunder:

And, the State legislature, if so advised, may come with the amendments like the one brought by State Legislature of Maharashtra in the Bombay Entertainments Duty Act, 1923. Unless such amendment is brought by the Legislature to bring the broadcasting agencies into the net of the entertainment tax, said tax cannot be levied on the broadcasting agencies for DTH service provided by them to its subscribers.

12. During the course of hearing of Writ Petition (M/S) No. 353 of 2008, the learned Single Judge dealing with the matter, was required to examine another contention advanced at the hands of the petitioner company, namely, that since "Direct-to-Home" (DTH) service was amenable to service tax at the hands of the Central Government under entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India, the Uttarakhand Legislature had no power to levy any further tax on the same activity of the petitioner company. On the instant submission advanced at the hands of the petitioner company, the learned Single Judge, while disposing of Writ Petition (M/S) No. 353 of 2008 having referred to Articles 245, 246, 265 and 268A, as also, entries 92C of the Union List and 62 of the State List, contained in the Seventh Schedule of the Constitution of India, concluded by observing that "entertainment tax" was leviable on the petitioner company at the hands of the State of Uttarakhand, even though "service tax" was payable by the petitioner company to the Central Government on the same activity by the petitioner company. In this behalf, learned Single Judge, while disposing of Writ Petition (M/S) No. 353 of 2008, observed as under:

However, this Court is of the opinion that a harmonious construction needs to be

adopted in interpreting the field of legislation mentioned in Entry 62 of State List and Entry 92C of the Union List. Merely for the reason that a service tax is payable by certain broadcasting service operators, it cannot be said that no entertainment tax can be levied by the State.

In its ultimate conclusion, while disposing of Writ Petition (M/S) No. 353 of 2008, on 26.11.2008, this Court recorded as under:

For the reasons as discussed above, this Court is of the view that though, there is legislative competence of the State to levy entertainment tax on the entertainment provided by the petitioners (broadcasting agencies) to its subscribers, but same cannot be levied without there being specific provision in such local Act (U.P. Entertainments and Betting Tax Act, 1979). As such, the notices issued by the respondent District Magistrate for recovery of entertainment tax from the petitioners, being without authority of law, are liable to be quashed.

13. The State of Uttarakhand, being dissatisfied with the order dated 26.11.2008, by which Writ Petition (M/S) No. 353 of 2008 was disposed of, filed Special Appeal No. 21 of 2009 to assail the aforesaid order dated 26.11.2008. Similarly, Special Appeals were filed in connected cases disposed of alongwith Writ Petition (M/S) No. 353 of 2008. While examining Special Appeal No. 21 of 2009 (challenging the decision rendered by this Court in disposing of the petitioner Company's case Writ Petition (M/S) No. 353 of 2008, a Division Bench of this Court summarized the two issues examined by the learned Single Judge in the following words:

Two issues arose for consideration before the learned Single Judge, because the writ petitioners had raised two grounds of challenge. First issue related to the levy and imposition of entertainment tax qua the writ petitioners in the light of the provisions contained in 1979 Act. The second issue related to and arose out of the second ground of challenge, viz. that since the writ petitioners were paying service tax leviable through a Legislation enacted under Entry No. 92(c) of the Union List of the Seventh Schedule of the Constitution of India, the State Legislature had no power to legislate by providing for levy and imposition of entertainment tax in terms of Entry No. 62 of the State List in the Seventh Schedule of the Constitution of India.

In so far as the first question examined by the learned Single Judge was concerned, the Division Bench, while disposing of Special Appeal No. 21 of 2009, upheld the decision rendered by the learned Single Judge by observing:

By going through all the relevant provisions of 1979 Act, learned Single Judge found himself of the view that no provision of 1979 Act provided for imposition or levy of entertainment tax qua DTH service providers. We intend to fully agree with this view of the learned Single Judge because we ourselves are of the view, after going through all the provisions of 1979 Act as it stood at the time the impugned judgment was delivered, that this Act did not contain any provision

which authorized or permitted the imposition or levy of entertainment tax qua DTH service providers.

While dealing with the second issue adjudicated upon by the learned Single Judge, the Division Bench observed as under:

In so far as the second issue is concerned, we are firmly of the opinion that even though the Constitutional Scheme is clear that the levy and imposition of the entertainment tax as covered by Entry (62) of the State List is clearly distinct than the levy and imposition of service tax as originating from Entry 92 (c) of the Union List, both the legislations operate in different, distinct and independent fields and therefore, both the legislatures, the State legislature as well as the Union Parliament were competent to legislate in their respective fields. In the present case, there was no occasion for the learned Single Judge to have gone into that aspect because of the fact that he had himself concluded that the law as it stood at the relevant time did not authorize imposition or levy of entertainment tax qua DTH service providers. Be that as it may, in our considered opinion the issue raised in the Special Appeals filed by the writ petitioners challenging the aforesaid part of the judgment of the learned Single Judge is only of an academic importance and nature because, the said issue actually should not have arisen for consideration in the light of the finding on the first issue.

14. It would be pertinent to mention, that during the pendency of Special Appeal No. 21 of 2009, the Uttarakhand Legislative Assembly enacted the Uttarakhand (the Uttar Pradesh Entertainment and Betting Tax Act, 1979) (Amendment) Act, 2009 the aforesaid amendment was notified on 16.03.2009.. Through the aforesaid enactment, the term "Direct-to-Home" (DTH) broadcasting was sought to be defined through Section 2 (ff) to the Entertainment Act, 1979, additionally, the existing Section 2(g) defining the term "entertainment" was amended to include "Direct-to-Home" (DTH) broadcasting service. The aforesaid two amendments carried out by the Uttarakhand Legislative Assembly are being extracted hereunder:

Section 2-Definitions

(ff)"Direct-to-Home (DTH) Broadcasting" a service for multi channel distribution programmes direct to subscriber's premises without passing through an intermediary such as cable operator by uplinking to a satellite system."

(g) "Entertainment" includes Direct-to-Home Broadcasting service and any exhibition, performance, amusement, game, sport or race (including horse race) to which persons are admitted for payment and in the case of cinematograph exhibition, includes exhibition of news-reel, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately.

In connection with the aforesaid amendment, the Division Bench, while disposing of Special Appeal No. 21 of 2009, observed as under:

We do wish to observe that it shall be open to the Writ Petitioners to challenge the aforesaid Amendment Act, if so advised and the judgment of the learned Single Judge impugned in these appeals as well as the judgment passed by us today shall not come in their way in doing so. However, we also do wish to observe that any challenge to the aforesaid Amendment Act shall be dealt with and decided on its own merits and in accordance with law.

15. Dissatisfied with the order dated 23.03.2009 passed by the Division Bench dismissing Special Appeal No. 21 of 2009, the State of Uttarakhand preferred Petition for Special Leave to Appeal (Civil) No. 14605 of 2009 State of Uttarakhand and Ors. v. Tata Sky Limited before the Supreme Court. The aforesaid Petition for Special Leave to Appeal was summarily dismissed by the Apex Court on 16.07.2009.

16. The first contention advanced by the learned Counsel for the petitioners during the course of hearing of the instant writ petition was, that the Uttarakhand Legislature was incompetent to levy entertainment tax on "Direct-to-Home (DTH) broadcasting service, inasmuch as, the authority to legislate on the aspect of "Direct-to-Home" (DTH) broadcasting service, as also, the authority to impose tax on account of "service" rendered by the petitioner company through the process of "Direct-to-Home" (DTH) broadcasting service, is vested only with the Parliament. In this behalf, reliance, at the hands of the learned Counsel for the petitioners, was placed on entries 31 and 92C of the Union List, contained in Seventh Schedule of the Constitution of India. Entries 31 and 92C, referred to by the learned Counsel for the petitioner, are being extracted hereunder:

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

92C. Taxes on services.

Referring to entry 31 (extracted above), it is the contention of the learned Counsel for the petitioners, that wireless, broadcasting and other like forms of communications, include within their ambit "Direct-to-Home" (DTH) broadcasting, and therefore, "Direct-to-Home" (DTH) broadcasting service must be deemed to fall within the purview of entry 31 of the Union List, contained in the Seventh Schedule of the Constitution of India. It is submitted that the activity of "Direct-to-Home" (DTH) broadcasting is a "service", and the authority to levy tax thereon rests exclusively with the Parliament under entry 92C (extracted above) of the Union List, contained in the Seventh Schedule of the Constitution of India.

17. It is also the submission of the learned Counsel for the petitioners, that the entire activity of "Direct-to-Home" (DTH) broadcasting service, is regulated, under the law enacted by the Parliament, and by the Central Government. In this behalf it is pointed out, that licences for operating "Direct-to-Home" (DTH) broadcasting services are issued under the Indian Telegraph Act 1885, as also, the Indian Wireless Telegraphy Act, 1933. It is also contended, that tax on

broadcasting services, including "Direct-to-Home" (DTH) broadcasting service, is levied under the Finance Acts promulgated from time to time by the Parliament.

18. In order to substantiate the assertions noticed in the foregoing paragraph, it is contended, that the guidelines issued by the Government of India on 15.03.2001 prescribed not only the conditions of eligibility but also the procedure and the manner in which licences for operating "Direct-to-home" (DTH) broadcasting services in India could be issued. It is pointed out, that having followed the prescribed procedure, the petitioner company was granted a statutory licence on 24.03.2006 u/s 4 of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 for operating "Direct-to-Home" (DTH) broadcasting services in India. During the process of being granted the aforesaid licence, the petitioner company was required to deposit a sum of Rs. 10 crores to the Ministry of Information and Broadcasting as an initial non-refundable entry fee and to furnish a bank guarantee for an amount of Rs. 40 crores for the duration of the licence. Additionally, the terms of the licence the petitioner company was required to pay an annual fee equivalent to 10% of its gross revenue (reflected in the audited accounts of the company for the financial year) within one month of the end of the year. It is also submitted, that the petitioner company was required to pay, in addition to the aforesaid licence fee, royalty for spectrum use at the rates prescribed by the Wireless Planning & Coordination Authority under the Department of Telecommunications. It is therefore contended, that the entire regulation of the "Direct-to-Home" (DTH) broadcasting service is vested with the Parliament, and the execution thereof with the Central Government.

19(i). In so far as the imposition of tax envisaged under entry 92C, contained in the Union List of the Seventh Schedule of the Constitution of India is concerned, learned Counsel for the petitioners has invited this Court's attention to the fact, that broadcasting was subjected to tax liability as a "service" for the first time under the Finance Act, 2001. Chapter V. of the Finance Act, 2001 bears the heading "Service Tax". Section 65(13) of the Finance Act, 2001 defines the term "broadcasting" as under:

65. Definitions.- In this Chapter unless the context otherwise requires,-

(13) "broadcasting" has the meaning assigned to it in Clause (c) of Section 2 of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 (25 of 1990);

To understand the meaning assigned to broadcasting under the Finance Act, 2001, reference must necessarily be made to Section 2(c) of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990. Section 2(c), referred to above, is being reproduced hereunder:

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

(c) "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.

Section 65(63) of the Finance Act, 2001 defines "service tax" as under:

65. Definitions.- In this Chapter unless the context otherwise requires,-

(63) "service tax" means tax leviable under the provisions of this Chapter;

And Section 65(72) (zk) defines "taxable service". While defining taxable services the aforesaid provision includes therein a "broadcasting agency", as a "service provider". Section 65(72)(zk) is being extracted hereunder:

65. Definitions.- In this Chapter unless the context otherwise requires,-

(72) "taxable service" means any service provided,-

(zk) to a client, by a broadcasting agency or organization in relation to broadcasting, in any manner;

And the term "service provider" shall be construed accordingly;

Section 66(5) specifies the quantum of tax liability on a "service provider" providing broadcasting services. Section 66(5) is being reproduced hereunder:

66. Charge of service tax.-(5) With effect from the date notified u/s 137 of the Finance Act, 2001, there shall be levied a service tax at the rate of five per cent of the value of the taxable services referred to in Sub-clauses (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn) and (zo) of Clause (72) of Section 65 and collected in such manner as may be prescribed.

A perusal of the aforesaid provisions reveals, that for the first time under the Finance Act, 2001, tax at the rate of five per cent of the value of taxable services was levied on a broadcasting agency (i.e. five per cent of the gross amount charged by the service provider).

19(ii). The term "broadcasting" was re-defined u/s 65(14) of the Finance Act, 2002 as under:

65. Definitions.- In this Chapter, unless the context otherwise requires,-

(14). "broadcasting" has the meaning assigned to it in clause(c) of Section 2 of the Prasar Bharti (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 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;

The term "broadcasting agency or organization" was also defined u/s 65(15) under the Finance Act, 2002. The aforesaid provision is also being extracted hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires,-

(15) "broadcasting agency or organization" means any agency or organisation engaged in providing service in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, having its head office situated in any place outside India, includes its branch office or subsidiary or representative in India or any agent appointed in India or 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 programme or collecting broadcasting charges on behalf of the said agency or organization;

Section 65(80) under the Finance Act, 2002 defined the term "service tax" as under:

65. Definitions.- In this Chapter, unless the context otherwise requires,-

(80) "service tax" means tax leviable under the provisions of this Chapter;

Section 65(90) (zk) again while defining "taxable services", it included therein a "broadcasting agency" as a "service provider". Section 65(80)(zk) of the Finance Act, 2002 is reproduced hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires,-

(90). "taxable service" means any service provided,-

(zk) to a client, by a broadcasting agency or organization in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, 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 programme or collecting broadcasting charges on behalf of the said agency or organization.

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 a 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;

And the term "service provider" shall be construed accordingly;

Section 66(5) of the Finance Act, 2002 specified the quantum of tax liability on a service provider, providing broadcasting service to the following effect. Section 66(5) aforesaid is reproduced hereunder:

66. Charge of service tax.-(5) With effect from the date notified u/s 137 of the Finance Act, 2001 (14 of 2001), there shall be levied a service tax at the rate of five per cent of the value of the taxable services referred to in Sub-clauses (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn) and (zo) of Clause (90) of Section 65 and collected in such manner as may be prescribed.

A perusal of the provisions of the Finance Act, 2002 reveals, that as hitherto before (under the Finance Act 2001) service tax at the rate of five per cent of the value of taxable service was leviable on a service provider rendering broadcasting services (i.e. five per cent of the gross amount charged by the service provider) even under the Finance Act, 2002.

19(iii). Under the Finance Act, 2003, the term "broadcasting" was re-defined through Section 65(15), which is being extracted hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires.-

(15) "broadcasting" has the meaning assigned to it in Clause (c) of Section 2 of the Prasar Bharti (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 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;

The Finance Act, 2003 also defined the term "broadcasting agency or organization" in Section 65(80). Section 65(15) of the Finance Act, 2003 is also being reproduced hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires.-

(16) "broadcasting agency or organization" means any agency or organization engaged in providing service in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, having its head office situated in any place outside India, includes its branch office or subsidiary or representative in India or any agent appointed in India or 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 programme or collecting the broadcasting charges on behalf of the said agency or organization;

Section 65(95) of the Finance Act, 2003, defines the term "service tax". Section

65(95) aforesaid is being reproduced hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires.-

(95) "service tax" means tax leviable under the provisions of this chapter;

Section 65(105)(zk) of the Finance Act, 2003 again while defining the term "taxable service", it included therein a "broadcasting agency" as a "service provider". Section 65(105)(zk) aforesaid is being extracted hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires.-

(105) "taxable service" means any service provided,-

(zk) to a client, by a broadcasting agency or organization in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, 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 programme or collecting the broadcasting charges on behalf of the said agency or organization.

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 a taxable service in relation to broadcasting, even if the encryption of signals or beaming thereof through the satellite might have taken place outside India;

and the term "service provider" shall be construed accordingly;

Section 65(105) of the Finance Act, 2003 specified, that quantum of tax liability on a service provider providing broadcasting services as under:

66. Charge of service tax.-(1) There shall be levied a tax (hereinafter referred to as the service tax) at the rate of eight per cent of the value of the taxable services referred to in Sub-clauses (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t) (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zp), (zq), (zr), (zs), (zt) (zu), (zv), (zw), (zx), (zy), (zz) and (zza) of Clause (105) of Section 65 and collected in such manner as may be prescribed.

A perusal of the aforesaid provisions reveals, that under the Finance Act, 2001, service tax levied on service providers rendering broadcasting services were enhanced from five per cent to six per cent of the value of taxable service (i.e. eight per cent of the gross amount charged by the service provider) under the Finance Act, 2003.

19(iv). The provisions of the Finance Act, 2004 on the subject matter of the controversy in hand were identical to the ones incorporated under the Finance Act, 2002, and as such, the relevant provisions of the Finance Act, 2004 are not

being reproduced here.

19(v). In so far as the Finance Act, 2005 is concerned, it re-defined the term "broadcasting" u/s 65(16)). Section 65(16) of the Finance Act, 2005 is being reproduced hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires.-

(15)"broadcasting" has the meaning assigned to it in Clause (c) of Section 2 of the Prasar Bharti (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 electromagnetic 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;

Likewise, the term "broadcasting agency or organization" was again redefined u/s 65(105)(zk) of the Finance Act, 2005, which is being reproduced hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires.-

(16) "broadcasting agency or organization" means any agency or organization engaged in providing service in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, having its head office situated in any place outside India, includes its branch office or subsidiary or representative in India or any agent appointed in India or 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 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 electromagnetic 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;

The term "service tax" retained the same definition as was assigned to it by the Finance Act, 2003 even for the Finance Act, 2005. However, Sub-clause (zk) as defined in the Finance Act, 2005 was given a different meaning and effect. In this behalf Section 65(105)(zk) of the Finance Act, 2005 is being reproduced hereunder:

65. Definitions.- In this Chapter, unless the context otherwise requires.-

(105) "taxable service" means any service provided,-

(zk) to a client, by a broadcasting agency or organization in relation to broadcasting in any manner and, in the case of a broadcasting agency or organization, 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 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 myltisystem operator or any other person on behalf of the said agency or organization.

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 a taxable service in relation to broadcasting, even if the encryption of signals or beaming thereof through the satellite might have taken place outside India;

and the term "service provider" shall be construed accordingly;

The quantum of service tax under the Financial Act 2005, on service providers, rendering broadcasting services was sustained at the same rate as in the preceding Finance Act 2004.

19(vi). A perusal of the provisions of the various Finance Acts reproduced hereinabove, according to the learned Counsel for the petitioners, reveals, that "service tax" was levied on "Direct-to-Home" (DTH) broadcasting services thereunder. The aforesaid legislation, according to the learned Counsel for the petitioners had obviously been enacted by the Parliament under entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India.

20. On account of the regulation of "Direct-to-Home" (DTH) services, by the Central Government as has been sought to be demonstrated through the factual position noticed in the paragraph preceding the foregoing paragraph. And on account of the fact, that regulation of "Direct-to-Home" (DTH) broadcasting services was under the legislative competence of the Parliament under entry 31 of the Union List, contained in the Seventh Schedule of the Constitution of India. And additionally, because service tax was levied on "Direct-to-Home" (DTH) broadcasting services by the Parliament through various Finance Acts from time to time under entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India. It is submitted, that it is imperative to conclude that regulation, as also, taxability on "Direct-to-Home (DTH) broadcasting services,

was a field exclusively within the domain of the Parliament and the Central Government. As such, it is submitted, that in terms of the mandate of Article 246 of the Constitution of India, no State Legislature was entitled to enact law in a field duly occupied by the Parliament. Article 246 of the Constitution of India relied upon by the learned Counsel for the petitioner is being extracted hereunder:

246. Subject-matter of laws made by Parliament and by the Legislatures of States.-(1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in Clause (3), Parliament and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

Having relied on Article 246 of the Constitution of India, learned Counsel for the petitioners placed vehement emphasis on Clause (1) thereof, which vested in the Parliament overriding effect notwithstanding anything the provisions, contained in Clauses (2) and (3) of Article 246 of the Constitution of India. The submissions noticed hereinabove constitute the foundation of the first contention advanced by the learned Counsel for the petitioner.

21. In order to substantiate his first contention, learned Counsel for the petitioner placed emphatic reliance on the judgment rendered by the Supreme Court in *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, , whereupon our attention was invited to the following:

38. It is obvious that Article 246 imposes limitations on the legislative powers of the Union and State Legislatures and its ultimate analysis would reveal the following essentials:

1. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clause (2) and (3). The non-obstante clause in Article 246(1) provides for predominance or supremacy of Union Legislature. This power is not encumbered by anything contained in clause (2) and (3) for these clauses themselves are expressly limited and made subject to the non-obstante clause in Article 246(1). The

combined effect of the different clauses contained in Article 246 is no more and no less than this: that in respect of any matter falling within List I, Parliament has exclusive power of legislation.

2. The State Legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III. The exclusive power of the State Legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to Clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an entry in List I and an entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State Legislature.

3. Both Parliament and the State Legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III.

41. The words "notwithstanding anything contained in Clauses (2) and (3)" in Article 246(1) and the words "subject to Clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between the entries in the Union and State Lists. In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of "pith and substance" appears to fall exclusively under one list, and the encroachment upon another list is only incidental.

75. "Legislative relations between the Union and the States inter se with reference to the three Lists in Schedule VII cannot be understood fully without examining the general features disclosed by the entries contained in those Lists": Seervai in his Constitutional Law of India, 3rd Edn., Vol. 1 at pp. 81-82. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives

independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935 the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation.

Learned Counsel then placed reliance on *Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others*, , the Apex Court in para 44 held inter alia as under:

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*, 4th Edn., Vol. 1 at p. 166 in para 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 Schedule VII to the Government of India Act, 1935, 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 Schedule VII 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 Government of India Act, 1935. This scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results.

Accordingly, it is the vehement contention of the learned Counsel for the petitioners, that the field levying tax in respect of "Direct-to-Home" (DTH) broadcasting services, must be deemed to vest exclusively in the Parliament. In view of the enactments, referred to by the learned Counsel for the petitioner-company, it is submitted that regulation of the service of "Direct-to-Home" (DTH) broadcasting, as also, levy of "service tax" thereon, it stands established that the field of regulations, as also, taxability on "Direct-to-Home" (DTH) broadcasting services must be deemed to be occupied and vested in the Parliament, and therefore, cannot be encroached upon by State Legislatures.

22. As against the contention advanced by the learned Counsel for the petitioners, it is the submission of Shri S.N. Babulkar, learned Advocate General of the State of Uttarakhand, that the contentions advanced by the learned Counsel for the petitioners are not justified specially in the background of the interpretation of the relevant provisions of the Constitution of India at the hands of the Apex Court. In order to repudiate the first contention advanced by the learned Counsel for the petitioners, learned Counsel for the respondents have placed reliance of the judgment rendered by the Apex Court in *State of Andhra*

Pradesh and others, etc. Vs. McDowell and Co. and others, etc., , wherefrom learned Counsel for the respondents has invited the pointed attention of this Court to the following observations:

36. In view of our finding that the impugned enactment is perfectly within the legislative competence of the State Legislature and is fully covered by Entry 8 read with Entry 6 of List II, it is not necessary for us to deal with the arguments based upon Clause (3) of Article 246 of the Constitution except to say the following: once the impugned enactment is within the four corners of Entry 8 read with Entry 6, no Central law whether made with reference to an entry in List I or with reference to an entry in List III can affect the validity of such State enactment. The argument of occupied field is totally out of place in such a context. If a particular matter is within the exclusive competence of the State Legislature, i.e., in List II that represents the prohibited field for the Union. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the States. The concept of occupied field is really relevant in the case of laws made with reference to entries in List III. In other words, whenever a piece of legislation is said to be beyond the legislative competence of a State Legislature, what one must do is to find out, by applying the rule of pith and substance, whether that legislation falls within any of the entries in List II. If it does, no further question arises; the attack upon the ground of legislative competence shall fail. It cannot be that even in such a case, Article 246(3) can be employed to invalidate the legislation on the ground of legislative incompetence of State Legislature. If, on the other hand, the State legislation in question is relatable to an entry in List III applying the rule of pith and substance, then also the legislation would be valid, subject to a Parliamentary enactment inconsistent with it, a situation dealt with by Article 254. Any incidental trenching, as already pointed out, does not amount to encroaching upon the field reserved for Parliament, though as pointed out by T.L. Venkatarama Iyer, J. in A.S. Krishna Vs. State of Madras, , the extent of trenching beyond the competence of the legislating body may be an element in determining whether the legislation is colourable. No such question arises here.

In addition to the aforesaid, reference has also been made to the decision rendered by the Supreme Court in The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others, , wherefrom reference has been made to the following conclusion:

34. In the instant case, respondent 1 engaged in receiving and providing TV signals to individual cable operators is liable to pay tax under Sub-section (4-a) of Section 4A of the Act. The expression "cable operator" has been defined by Explanation to Sub-section (4-a) of Section 4A as aforesaid for the purpose of the Sub-section only. Similarly, the meaning of sub-cable operator is given in the said Explanation. There is no dispute that respondent 1 being a cable operator within the meaning assigned by the Explanation to Sub-section (4-a) of Section 4A receives TV signals and transmits such signals to their sub-cable operator

through their multi-system operator which is, in other words, a cable television network. There is also no dispute that after transmission of such signals by respondent 1 to their sub-cable operators they, in turn, provide cable service for exhibition of such performance, film or programme to individual customers. The respondents have, in fact, admitted this position. The respondents are carrying on business as multi-system operator (MSO) being engaged in receiving and providing TV signals only to the individual cable operators of various localities.

35. The Cable Television Networks (Regulation) Act, 1995 a central legislation has been enacted to regulate the operation of cable television networks in the country and for matters connected therewith. This enactment does not, in our opinion, fetter the legislative power or competence of the State to levy tax on luxuries including taxes on entertainments, amusements, betting and gambling falling under Entry 62 of List II of the Seventh Schedule to the Constitution. The power of regulation or control under the said central enactment is separate and distinct from the power of taxation by the State legislature under Entry 62 of List II: being a specific power, the power of taxation cannot be cut down or fettered by the general power or regulation as exercised by Parliament in enacting the said 1995 Act. 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. 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, 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 (4-a) of Section 4A of the Act is the 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 mechanical 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 (4-a) of Section 4-A of the said 1982 Act when he receive 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 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 T.V. screen. The sub-cable operators are mere franchisees who receive signals for transmission to the viewers only on payment of price promised or paid in terms of agreements entered by and between them. This is clear from the below- set- out terms of the Franchise Agreement:

Grant

The Network hereby grants to the Franchisee and the Franchisee accepts the right to receive signals through a Feeder Line for further instant transmission / communication in the TERRITORY on the terms and conditions set out in this agreement.

Price

The price payable by the Franchisee for access to the signals provided by the NETWORK shall be as follows:

- (a) Rs. 25/- per subscriber per month to be paid before the 7th day of the month.
- (b) The FRANCHISEE will keep an interest-free deposit of Rs. 50/- per subscriber with the NETWORK.
- (c) The price mentioned in (a) above is liable to change depending upon the market conditions and by mutual understanding between the parties of the area.

Terms and Conditions

- (a) The NETWORK shall not provide any connections direct to home in the territory where the FRANCHISEE is operating.
- (b) The FRANCHISEE would provide a list of subscribers within seven days of

signing this agreement with full name, address and other information of relevance as required by the NETWORK. Subsequently any change in the subscriber list would be communicated to the NETWORK within seven days. The FRANCHISEE would submit complete information and not withhold the name of subscribers or declare less number of subscribers to the NETWORK.

* * * (d) The FRANCHISEE is authorised to receive and immediately re-transmit and/or communicate the signals of the NETWORK. Recording and then retransmission of the signals by the FRANCHISEE is not allowed. However for any such intentions the FRANCHISEE will have to take written permission from the NETWORK.

* * * (j) The FRANCHISEE shall not transmit or restraint any signals to his subscribers which are not transmitted by the NETWORK without the prior written consent of the NETWORK.

* * * (m) The FRANCHISEE shall be liable to pay all applicable taxes, charges etc. levied or imposed by the Government or which may be imposed in future by the Govt. or any other statutory or regulatory body of the region.

38. 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. 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 are admittedly engaged in the business of receiving broadcast signals and then instantaneously sending or transmitting such visual or audio visual signals by coaxial cable, to subscribers' homes through their various franchisees. 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 franchisees. 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 service of the respondents, no entertainments can be offered or provided to the subscribers and/or viewers.

39. In the tax matters, the State Legislature is free, if it has legislative competence, to choose the persons from whom the tax levied on entertainments is to be collected. In other words, what are taxed are the entertainments, which is very much within the ambit of Entry 62 of List II of the Seventh Schedule. It is the respondents who as cable operator for the purpose of the said 1982 Act are engaged in the business of providing or offering entertainments which include showing of films, various serials, cricket matches and dramatic performances to the subscribers, and the tax is imposed on the act of offering such entertainments in this way to such subscribers and/or viewers. The entire communication network service is built up and controlled by the respondents. Whatever amount is received or receivable by the respondent in respect of providing such entertainments is taxable under Sub-section (4-a) of Section 4-A of the said 1982 Act which has a direct and sufficient nexus with the entertainments.

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 of 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 of the power of levying entertainment tax on entertainment.

42. It is thus clear that the cable operator, respondent 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 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, unconceivable 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 of 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's validity is beyond question. Thus, respondent 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 (4-a) of Section 4-A 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 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 the public. In the present case, respondent 1 sends visual images and audio signals for presentation to the individual subscribers in 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 1. Therefore, it cannot be disputed that the price or prices received or receivable by respondent 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 1 in relation to any month or part thereof.

23. We have given our thoughtful consideration to the first contention advanced by the learned Counsel for the petitioner-company. In fact, the first contention advanced at the hands of the learned Counsel for the petitioner company, in the strict sense, does not even lie in the mouth of the petitioner company. When the petitioner company had earlier approached this Court by filing Writ Petition (M/S) No. 353 of 2008 the principal contention advanced at the hands of the petitioner company was, that "Direct-to-Home" (DTH) broadcasting service having not been included in the term "entertainment" u/s 2(g) of the Entertainment Act, 1979, no tax could be levied thereon. On the issue in hand, it was sought to be pointed out, that the States of Karnataka and Maharashtra had carried out amendments in their respective enactments, so as to include the "Direct-to-Home" (DTH) broadcasting service, within the meaning of the term "entertainment", and only thereafter, had levied entertainment tax on the "Direct-to-Home" (DTH) service. It was pointed out, that no such or similar amendment had been carried out in the Entertainment Act, 1979 so as to make "Direct-to-Home" (DTH) service amenable to levy of entertainment tax. The aforesaid contention advanced on behalf of the petitioner company was accepted by this Court. Despite the aforesaid, while disposing of Writ Petition (M/S) No. 353 of 2008, this Court proceeded to hold, that it was open to the State of Uttarakhand to amend the existing provisions of the Entertainment Act, 1979, so as to levy entertainment tax on "Direct-to-Home" (DTH) broadcasting services. In consonance with the pointed contention advanced by the learned Counsel for the petitioner, the Uttarakhand Legislative Assembly amended the definition of the term "entertainment" contained in Section 2(g) of the Entertainment Act, 1979 through the Uttarakhand (The Uttar Pradesh Entertainment and Betting Tax Act, 1979) Amendment Act, 2009 notified on 16.03.2009. By virtue of the aforesaid amendment "Direct-to-Home" (DTH) broadcasting service was included in the definition of the term "entertainment". As already noticed above, through the instant Writ Petition the petitioner company has not assailed the amendment, whereby the definition of the term "entertainment" was widened so as to include "Direct-to-Home" (DTH) broadcasting services within its ambit. Thus viewed, the deficiencies in the Entertainment Act, 1979, to the effect, that there was no

provision therein, whereby entertainment tax could be levied on "Direct-to-Home" (DTH) broadcasting service, stood remedied by an amendment made in the definition of the term "entertainment" u/s 2(g) of the Entertainment Act, 1979 (which was notified on 16.03.2009). In carrying out the aforesaid exercise the Uttarakhand Legislature had abided by the advice and liberty tendered to it by this Court. Thus, having made up the deficiency in the same manner as had been done by the States of Karnataka and Maharashtra by carrying out amendments in their respective enactments. It was, therefore, not open to the petitioner to re-agitate the matter, specially when, the petitioner's only objection stood dealt with and remedied by the amendment notified on 16.03.2009. But then, the primary consideration seems to be monetary. Even though the petitioner company started to transmit TV programmes to its customers in the State of Uttarakhand soon after it obtained its statutory licence on 24.03.2006, it successfully avoided paying any "entertainment" tax thereon through the legal process which had culminated in favour of the petitioner company on 16.11.2008 when Writ Petition (M/S) No. 353 of 2008 filed by the petitioner was allowed in its favour. Although the issue of legislative competence was raised by the petitioner company during the first round of litigation, the same had been decided against the petitioner by the learned Single Judge (in his judgment dated 16.11.2008, rendered in Writ Petition (M/S) No. 353 of 2008), as also, by the Division Bench (in their judgment dated 23.03.2009, rendered in Special Appeal No. 21 of 2009). For the instant reason also, there is absolutely no justification at the hands of the petitioner company to assail the action of the Uttarakhand Legislative in levying entertainment tax on "Direct-to-Home" (DTH) broadcasting service within the State of Uttarakhand.

24. The first submission advanced by the learned Counsel for the petitioner-company can be examined from another angle as well. According to the learned Counsel for the petitioner, levy of tax by a State Legislature on the "service component" as the basis of levying tax is most definitely unacceptable, because "taxes on services" can be levied only under entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India by the Parliament. Since jurisdiction and authority to levy tax on "services" has been vested with the Parliament, to the exclusion of all State Legislatures, the tax levied for "Direct-to-Home" (DTH) broadcasting under the Entertainment Act, 1979 is based on authority unconstitutionally exercised by the Uttarakhand Legislature. There can be no dispute about the authenticity of the contentions advanced by the learned Counsel for the petitioner. The State Legislature, can under no circumstances, levy tax on the "service component" of "Direct-to-Home" (DTH) broadcasting service. But if the levy of tax by a State Legislature is on the "entertainment component" as the basis, as is the assertion of the learned Counsel for the respondents, a different connotation to the issue would arise. In the aforesaid backdrop, levy of "entertainment" tax on "Direct-to-Home" (DTH) broadcasting services may well be legitimate and justified because entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India,

rests the jurisdiction and authority to levy tax on "entertainment" with the State Legislature. Entry 62 of the State List is being extracted hereunder:

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

During the course of hearing, we repeatedly asked the learned Counsel for the petitioner company, whether or not, the petitioner-company had assailed the validity of the inclusion of "Direct-to-Home" (DTH) broadcasting service, in the definition through the term "entertainment" u/s 2(g) of the Entertainment Act, 1979 by an amendment carried out by the Uttarakhand Legislature and duly notified on 16.03.2009. In response, learned Counsel acknowledged, that the definition of the term "entertainment" u/s 2(g), which had been incorporated "Direct-to-Home" (DTH) broadcasting service as one of the modes of entertainment, was not a subject matter of challenge at the hands of the petitioner company. It is however sought to be clarified, that the legislative competence of the Uttarakhand Legislature, to levy tax on "Direct-to-Home" (DTH) broadcasting service, is the basis of assailing the action of levying tax on the petitioner-company, and if the said challenge is accepted by this Court, the inclusion of the term "Direct-to-Home" (DTH) broadcasting service, in Section 2(g) of the Entertainment Act, 1979 will also have to be declared unconstitutional. This response, to our mind, blows the wind out of the submission of the learned Counsel for the petitioner. Having not assailed the definition of the term "entertainment" wherein "Direct-to-Home" (DTH) broadcasting service had been included, by the Uttarakhand (the Uttar Pradesh Entertainment and Betting Tax Act, 1979) Amendment Act, 2009 notified on 16.03.2009, the petitioner company expressly acknowledged, that "Direct-to-Home" (DTH) broadcasting service is an "entertainment". It is therefore apparent, that tax was levied on "Direct-to-Home" (DTH) broadcasting service under the Entertainment Act, 1979, was not on the "service" component thereof, but on account of the "entertainment" component thereof. We are therefore satisfied, that the imposition of tax on "Direct-to-Home" (DTH) broadcasting service under the Entertainment Act, 1979 by the Uttarakhand State Legislature was based on the legislative authority flowing from entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India; and not out of entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India. The aforesaid legislative enactment, as also, the consequential imposition of tax, in our considered view, was fully justified and with the consonance of the Constitution of India.

25. In spite of the learned Counsel for the petitioner having remained silent on the issue whether "Direct-to-Home" (DTH) broadcasting service, falls in the category of "entertainment" or not, we are of the view that the instant issue goes to the root of the matter, and therefore, deserves to be settled one way or the other. In fact, there is no room for any confusion, in so far as the instant aspect of the matter is concerned, inasmuch as, in The State of West Bengal and Others

Vs. Purvi Communication Pvt. Ltd. and Others, , while examining the legislative competence of a State Legislature to levy "entertainment" tax, under entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India, on cable television network operators, it was held as under:

36. Therefore, the respondents as a cable operator have direct and proximate nexus with the entertainments provided by them through their cable television network and, as such, they are the taxable person in respect of their gross receipts in relation to any month for providing entertainments to the individual viewers. Therefore, the respondents have a direct and proximate nexus with the entertainments presented to the viewers inasmuch as in terms of the respondent's agreement vide Clause 4(d): "Recording and then retransmission of the signals by the franchisee is not allowed". That apart, the name of every subscriber having connection with the respondent's network must be on their records and the franchisee must furnish information of business honestly and completely to the respondents pursuant to Clause 4(c) of the said agreement. In the event, any charge received from a subscriber is not paid to the respondent, the franchisee shall pay a sum equivalent to three times of the amount that the franchisee has saved by not paying the requisite amount to the respondents in respect of such subscriber.

37. In our view, the respondents as a cable operator, for the purpose of levy and collection of tax under Sub-section (4-a) of Section 4-A 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 to make law for the levy and collection of tax on such entertainments.

Since it is not disputed, that transmission of channels by "Direct-to-Home" (DTH) broadcasting service, rendered by the petitioner company, is the same activity which is carried on by cable operators, and since, the Supreme Court upheld the levy of "entertainment" tax on cable television network operations, there can be no dispute that "Direct-to-Home" (DTH) broadcasting can justifiably be described as an "entertainment".

26. Despite the conclusion already drawn in respect of the first submission advanced by the learned Counsel for the petitioner in the foregoing paragraphs, we shall now endeavour, independently of the aforesaid conclusions, examine the legal authenticity of the first contention advanced by the learned Counsel for the petitioner company. Before dealing with the first contention, it is necessary to mention, that the regulatory mechanism on the subject of "entertainment" is a State subject, under entry 33 of the State List, contained in the Seventh Schedule of the Constitution of India. Entry 33 of the State List is being reproduced hereunder:

33. Theaters and dramatic performances; cinemas subject to the provisions of entry 60 of List 1; sports, entertainments and amusement.

It is therefore apparent that the subject of regulation of "entertainment", as also, the levy of tax on "entertainment" (vide entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India) rests with the State Legislatures. The regulation of "Direct-to-Home" (DTH) broadcasting as a "service" under the provisions of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933, as also, the levy of tax on "Direct-to-Home" (DTH) broadcasting as a "service" under the provisions of the different Finance Acts relied upon by the petitioner company, to our mind, will not have any effect on the legislative competence of State Legislature either to regulate or to levy tax on "Direct-to-Home" (DTH) broadcasting services as an "entertainment", under entries 33 and 62 of the State List, contained in the Seventh Schedule of the Constitution of India respectively. To our mind, even the judgments relied upon by the learned Counsel for the rival parties, lead to the same conclusion. In State of Andhra Pradesh(s) case (supra), it was held, that the sole exercise that needed to be carried out was to determine, whether the legislation under reference was within the scope of legislative competence of a State Legislature? According to the conclusions recorded in the aforesaid case, it was held, that for finding the correct answer, it is necessary to determine, whether the subject of the legislation in question, falls under one of the entries of the State List, contained in the Seventh Schedule of the Constitution of India. If, while carrying out the aforesaid exercise, it can be concluded that the subject of the legislation under reference, falls within one of the entries of the State List, contained in the Seventh Schedule of the Constitution of India; it would be correct to conclude, that the State Legislature had the jurisdiction and authority to enact the legislation in question. In so far as the present controversy is concerned, the subject of "entertainment" is in the area of legislative competence of State Legislatures, not only on the aspect of regulation (entry 33 of the State List), but also on the aspect of levy of tax (entry 62 of the State List). The petitioner company having not contested the inclusion of "Direct-to-Home" (DTH) broadcasting service within the definition of the term "entertainment" in Section 2(g) of the Entertainment Act, 1979, the levy of tax on "Direct-to-Home" (DTH) broadcasting service under the Entertainment Act, 1979, it must be deemed to have acceded, that the subject of the legislation was "entertainment" (and not "service"). Accordingly, there is hardly any difficulty for us to conclude, that the levy of "entertainment" tax was valid and justified, as also, within the scope and jurisdictional authority of the Uttarakhand Legislative Assembly under entry 62 of the State List contained in Seventh Schedule of the Constitution of India. We have therefore no hesitation in concluding that the Entertainment Act, 1979 is perfectly within the legislative competence of the State legislature.

27. We are also satisfied, that there is no conflict on the subject of "entertainment" between any of the entries of the State List, with any of the

entries in the Union List, contained in the Seventh Schedule of the Constitution of India. Reliance at the hands of the learned Counsel for the petitioner company on entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India is wholly misconceived, because the same governs a totally distinct subject, namely, "service". In view of the above, reliance placed by the learned Counsel for the petitioner company on M/s Hoechst Pharmaceuticals Limited's case (supra) is clearly misconceived, because the controversy in the instant case does not relate to an issue, the subject matter whereof needs to be reconciled on the basis of some seeming conflict between two overlapping entries - one in the Union List, and the other in the State List. The subject of "service" in entry 92C of the Union List, and the subject of "entertainment", contained in entry 62 of the State List, are separate and distinct subjects, with no overlapping or grey areas. For exactly the same reasons, the judgment in Godfrey Philips India Limited's case (supra) relied upon by the learned Counsel for the petitioner, has no relevance to controversy being adjudicated upon by us. We are satisfied, that the conclusion drawn by us hereinabove is also in consonance with the principles laid down in State of West Bengal's case (supra). The petitioner company having not contested the inclusion of "Direct-to-Home" (DTH) broadcasting service within the definition of the term "entertainment"; and the subject of "entertainment" being within the area of legislation ear-marked for State Legislatures, both for purposes of regulation, as also, for levy of tax, there can be no doubt that the action of making a provision for levy of entertainment tax on "Direct-to-Home" (DTH) broadcasting service under the Entertainment Act, 1979 was fully justified and in consonance with law.

28. The proposition sought to be projected by the learned Counsel for the petitioner company, in advancing his first contention, can be examined from another perspective. The instant consideration involves the examination of a number of entries, contained in the Seventh Schedule of the Constitution of India. While dealing with the relevant entries, they have been divided into three sets. Each set of relevant entries, has been examined separately to draw inferences, eventually leading to a definite conclusion.

In the first set, reference deserves to be made to entry 32 of the Union List, contained in the Seventh Schedule of the Constitution of India. Entry 32 of the Union List is being extracted hereunder:

32. Property of the Union and the revenue there from, but as regards property situated in a State subject to legislation by the State, save in so far as Parliament by law otherwise provides.

A perusal of the aforesaid entry reveals, that the same deals with property in the ownership of the Union, and relates to the subject of earning revenue therefrom. Despite the fact, that the aforesaid entry has been included in the Union List, and as such, legislation in respect thereof exclusively vests in the Parliament, yet the aforesaid entry in respect of properties owned by the Union, but located in a State, has been made subservient to existing legislation at the hands of the

concerned State Legislature within whose territorial jurisdiction the property is located. The aforesaid entry caters to an eventuality where a State legislation can not be overlooked, and therefore, seeks to clarify the position in the said background, to the effect that law made by Parliament would have an overriding effect. The inference that deserves to be drawn from entry 32 of the Union List is, that each entry is explicit, and in case of a likely conflict, the issue is appropriately clarified by the entry itself.

In the second set, reference deserves to be made to entries 1, 2, 12, 13, 17, 22, 23, 24, 32, 33, 37 and 54 of the State List, contained in the Seventh Schedule of the constitution of India. The aforesaid entries are being extracted hereunder for facility of reference:

1. Public order (but not including the use of any naval, military or Air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power."

2. Police (including railway and village police) subject to the provisions of entry 2A of List I.

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and III with regard to such waterways; vehicles other than mechanically propelled vehicles.

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water subject to the provisions of entry 56 of List I.

22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.

23. 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.

24. Industries subject to the provisions of entries 7 and 52 of List I.

32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities, unincorporated trading, literacy, scientific, religious and other societies and associations; co-operative societies.

33. Theaters and dramatic performances, cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

A perusal of the aforesaid entries reveals, that although the aforesaid entries, have been placed in the State List, and therefore, the State Legislatures are vested with the exclusive authority to legislate on the subjects referred to therein, yet each of the aforesaid entries has been made subservient to one or the other entry (expressly or impliedly) of the Union List. Emphasis recorded by us while extracting the aforesaid entries, substantiates the issue being projected. The inference that deserves to be drawn is, that on an aspect pertaining to the same or similar subject matter(s) entries are recorded in such detail, as to clearly decipher, which aspect thereof falls within the purview of the Parliament, as against the remainder which falls within the purview of the State Legislatures. The second set illustrates that the entries in the State List, contained in the Seventh Schedule of the Constitution of India, whenever considered appropriate, have been made subservient to entries in the Union List contained in the Seventh Schedule of the Constitution of India leaving no room for any overlapping or gray areas.

In the third set, reference deserves to be made to entry 84 of the Union List, contained in the Seventh Schedule of the Constitution of India. Entry 84 of the Union List is being extracted hereunder:

84. Duties of excise on tobacco and other goods manufactured or produced in India except-

(a) alcoholic liquors for human consumption.

(b) Opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

The aforesaid entry deserves to be compared with entry 51 of the State List, contained in the Seventh Schedule of the Constitution of India. Entry 51 of the State List is also being reproduced hereunder:

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in subparagraph (b) of this entry.

On comparison between entry 84 of the Union List and entry 51 of the State List, a clear and definite conclusion can be drawn i.e., which part of the same subject matter fall in the Union List, as also, which part of the same subject matter falls

in the State List. The distinction has been clear, so as to leave no room for any ambiguity. The inference that deserves to be drawn from the third set is, that there are even entries on the same subject matter in the two different Lists, but each entry is so defined to leave no room for any doubt.

It is in the background of the aforesaid three inferences, that entry 92C of the Union List deserves to be compared with entry 62 of the State List. An examination of the aforesaid two entries reveals nothing common or overlapping therein. The aforesaid two entries are on distinct subjects, in respect whereof there can be no confusion or overlapping. Herein there is no room for the applicability of the rule of pith and substance, applied in case of overlapping entries or in grey areas. Entry 62 of the State List has not been made subservient to entry 92C of the Union List, unlike a host of illustrative instances referred to in the second set above. It would be wholly inappropriate for us to read anything into an entry which is not so expressly intended to be part thereof. Even otherwise the precision with which the entries have been recorded, as has been highlighted through the three sets of illustrations referred to above, there is no room to even contemplate such an exercise. Thus viewed, we are satisfied in concluding, that on the subject of "service" entry 92C of the Union List contained in the Seventh Schedule of the Constitution of India, vests legislative jurisdiction thereof with the Parliament. Likewise, on the subject of "entertainment", entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India vests legislative jurisdiction thereof with the State Legislatures. The levy of tax at the hands of Parliament on the subject "service" on "Direct-to-Home" (DTH) broadcasting service, is therefore legitimate and valid. The levy of the tax at the hands of the State Legislatures on the subject of "entertainment" on "Direct-to-Home" (DTH) broadcasting service, independently of the tax levied by Parliament, is also in our considered view, legitimate and valid.

29. We have examined the first contention advanced by the learned Counsel for the petitioner from a number of different angles and perspectives. As is apparent from the conclusions recorded hereinabove, we have not been able to accept the veracity of the first contention from any of the different view points. For the reasons recorded by us in the foregoing paragraphs, we find no merit in the first contention advanced by the learned Counsel for the petitioner.

30. The second contention advanced by the learned Counsel for the petitioners was, that legislative competence of a taxing statute has to be determined by keeping in mind the taxable event. If the taxable event falls within the legislative competence of the Legislature, which has enacted the same, it would be valid; otherwise not. In order to explain his point of view, it is submitted, that tax can be levied on a particular taxing event falling in particular taxing entry. The aforesaid submission, stated in other words would mean, that one taxing event cannot be subjected to tax under two taxing entries. In the present controversy, it is submitted, that the taxing event is "Direct-to-Home" (DTH) broadcasting service. The aforesaid taxing event can be subjected to tax, either under entry

92 C of the Union List, or under entry 62 of the State List, but never under both. In so far as the present controversy is concerned, it is the case of the learned Counsel for the petitioner company, that the taxable event ("Direct-to-Home" (DTH) broadcasting service), must be deemed to be covered under Entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India. It is therefore asserted, that entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India, cannot be relied upon to levy tax on the same taxable event. It is accordingly sought to be explained that, "Direct-to-Home" (DTH) broadcasting service having been subjected to tax under the different Finance Acts, enacted by the Parliament, cannot be subjected to tax yet again by a State Legislature. By the act of levying tax on "Direct-to-Home" (DTH) broadcasting service, it is contended, the Uttarakhand Legislature has entrenched upon the legislative field occupied by the Union. As such, it is submitted, that the Entertainment Act 1979, in so far as it has enacted law to levy tax on "Direct-to-Home" (DTH) broadcasting service, is liable to be declared as ultravires the provisions of the Constitution of India. It is the vehement contention of the learned Counsel for the petitioners, that there cannot be overlapping in the field of taxing legislation, and since, tax on the subject of "Direct-to-Home" (DTH) as a broadcasting as a "service" has been specifically provided for under the Union List, contained in Seventh Schedule of Constitution of India, it obliterates the right of a State Legislature to levy tax by relying on an entry, contained in the State List. It is submitted, that even if it is assumed, that there is an element of "entertainment" in the "Direct-to-Home" (DTH) broadcasting service, it is not open to the Uttarakhand Legislature to levy tax thereon, under entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India. It is therefore submitted, that the Uttarakhand Legislature has no right, whatsoever, to levy "entertainment" tax on "Direct-to-Home" (DTH) broadcasting services.

31. In order to repudiate the second contention advanced by the learned Counsel for the petitioners, it is the submission of the learned Counsel for the respondents, that the issue in hand has been incorrectly projected at the hands of the learned Counsel for the petitioners. It is the assertion at the hands of the learned Counsel for the respondents, that the amendments made in the Entertainment Act, 1979 do not, in any manner, transgress into the subject of "service", exclusively ear-marked for the Parliament under the Union List, contained in the Seventh Schedule of the Constitution of India. In order to substantiate the instant contention, learned Counsel for the respondents also placed reliance on another judgment rendered by the Apex Court in *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , wherefrom our attention has been invited to the following observations:

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 State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarized and restated by a Bench of three learned Judges of this Court on a review of the available decision in *Hoechst Pharmaceuticals Ltd. v. State of Bihar* - They are-

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

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

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

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

(5) Where the legislative competence of the Legislature of any State is

questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in Lists 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)

32. The abovestated are general principles. Legislations in the field of taxation and economic activities need special consideration and are to be viewed with larger flexibility in approach. Observations of the Constitution Bench in *R.K. Garg v. Union of India* (1981) 4 SCC 676, are apposite, wherein this Court has emphasized a greater latitude - like play in the joints - being allowed to the Legislature because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula. In this field the Court should feel more inclined to give judicial deference to legislative judgment. Their Lordships quoted with approval the following statement of Frankfurter, J. in *Morey v. Doud* (1957) 354 US 457:

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

Their Lordships further observed that the courts ought to adopt a pragmatic approach in solving problems rather than measuring the propositions by abstract symmetry. The exact wisdom and nice adaptations of remedies may not be possible. Even crudities and inequities have to be accommodated in complicated tax and economic legislations.

32. We have given our thoughtful consideration to the second contention advanced by the learned Counsel representing the petitioner company. The petitioner company, in our considered view, has caused a confusion by intertwining the incidence by levy of "service" tax with the incidence of levy of "entertainment" tax, to make out that the same are not two separate incidents but a common incident. "Service" tax can be imposed only by Parliament by enacting a law under entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India. The incidence of the aforesaid tax liability, in our considered view, is the licence agreement, which the petitioner company obtained from the Ministry of Information and Broadcasting, Government of India, on 24.03.2006. It is this incidence of operating "Direct-to-Home" (DTH) broadcasting, as a "service" that required the petitioner to pay charges and deposits including guarantees as well as fee under the regulatory provisions contained in the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933, and under the orders passed by the Central Government. All the aforesaid regulatory measures were permissible under entry 31 of the Union List, contained in the Seventh Schedule of the Constitution of India. In addition thereto, tax on the "Direct-to-Home" (DTH) broadcasting, as a "service" rendered by the petitioner company was imposed at different rates under the Finance Acts promulgated from time to time. The levy of tax at the hands of Parliament under the Finance Acts was permissible under entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India. There is, therefore, even in our view, no difficulty in accepting, that the taxing event for levying "service" tax on the petitioner was "Direct-to-Home" (DTH) broadcasting service, as is the contention of the learned Counsel for the petitioner. In contradistinction to the aforesaid incidence on levy of "service" tax, in our considered view, the incidence for the levy of "entertainment" tax is to be deciphered from the basis on which "entertainment" tax has been levied. In this behalf it would be pertinent to mention that, the State of Uttarakhand levied "entertainment" tax at the rate of Rs. 25/- per month per connection for domestic consumers, and at the rate of Rs. 50/- per T.V. set per month in the case of hotels and restaurants. The taxable event for levying "entertainment" tax, in our view, is based on the individual contracts executed by the petitioner company with its customers, to whom it provides viewing channels through "Direct-to-Home" (DTH) broadcasting service. The instant aspect of the matter can be easily illustrated from the manner in which entertainment tax is imposed in cinema theatres. Each ticket which is sold, at the hands of a cinema theatre, has a component of entertainment tax. The same principle has obviously been followed for levying "entertainment" tax on "Direct-to-Home" (DTH) broadcasting service, under the impugned legislation. It,

therefore, emerges that the taxing event for levying tax on "Direct-to-Home" (DTH) broadcasting services under the Entertainment Act is based on the contractual agreements executed with customers for transmitting TV channels to its customers. Providing T.V. channels to its customers, can certainly be described as a means of "entertainment", and as such, there can hardly be any cause to dispute the levy of "entertainment" tax on the same. It clearly emerges from the aforesaid analysis that the incidence of "service" tax and that of "entertainment" tax are separate and distinct. The contention advanced on behalf of the petitioner company that the incidence of levy of the two taxes i.e., "service tax" and "entertainment tax" as one, seems to have been wrongly drawn from the common terminology used in the provisions for levying both the said taxes. Thus viewed there is hardly any merit even in the second contention advanced by the learned Counsel for the petitioner-company.

33. The third contention advanced by the learned Counsel for the petitioners was, that the substance of the contract in the present case, as is evident from the licence agreement dated 24.03.2006 entered into between the Government of India and the petitioner company, is for "service" and not for "entertainment". It is submitted, that the Government of India had granted the aforesaid licence under Central Legislations (which fall under entry 31 of the Union List, contained in the Seventh Schedule of the Constitution of India) to provide "Direct-to-Home" (DTH) broadcasting services in the whole of the country. It is submitted, that individual State(s) cannot, by defining the same "service" differently through a State Legislation, impose tax thereon. It is submitted that tax is being levied on the same aspect/sphere of activity by the Parliament, as also, by the State Legislature. It is pointed out that this is clearly impermissible in law in view of the separation of the subjects of legislation expressed in Article 246 of the Constitution of India. It is accordingly asserted, that such a regulation and imposition of tax through the hands of the State Legislation would amount to an encroachment on the powers of the Parliament, and would have to be declared as unconstitutional. In this behalf, it is submitted, 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 "entertainment". It is also submitted, that taxing "Direct-to-Home (DTH) broadcasting services as "entertainment" through a State Legislation purportedly enacted under entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India, would be violative of Article 246 of the Constitution of India, as the same involves providing broadcasting services, as defined under the different Finance Acts, throughout the country with absolute disregard to State boundaries. It is therefore contended, that even if it is assumed (though it is not admitted), that the transaction of providing "Direct-to-Home" (DTH) broadcasting service represents two contracts, one of "service" and the other "entertainment", since "service" is a common component, which is not discernible and distinguishable, the same must be treated as a part of the main component i.e., "service". In this behalf, it is the contention of the learned Counsel for the petitioner, that it is not open to the State Government to

separate a composite whole, so as to segregate a part of it; and by describing a part of it as "entertainment" to levy tax thereon.

34. In order to buttress the third submission advanced on behalf of the learned Counsel for the petitioner, reliance has been placed on the judgment rendered by the Supreme Court in Gujarat Ambuja Cements Ltd. and Another Vs. Union of India (UOI) and Another, , wherein in para 23 it has been held that -

...This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field.

The Apex Court, also in the matter of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, , in para 88 has held as under:

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

The Apex Court, in the aforesaid judgment, further held as under:

The license clearly manifest that it is one for providing telecommunication service and not for supply of goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of the license cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated....

Based on the aforesaid it is emphasized that action of the Uttarakhand Legislature is totally unacceptable.

35. The third contention raised by the petitioner can easily be resolved through existing judicial precedent. In this behalf, reference may first of all be made to Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, . In the aforesaid case the appellants were engaged in the hotel/industry. The appellants were subjected to tax at the rate of 10% ad valorem on chargeable expenditure under the Expenditure Tax Act, 1987. Tax was charged only from such hotels wherein room charges for a single unit of residential accommodation was Rs. 400/- per day or more. The said tax was levied by the Parliament by drawing its authority from entry 97 of the Union List, contained in the Seventh Schedule of the Constitution of India. It was urged that the levy of tax which was subject matter of challenge did not satisfy the concept of "expenditure" as was known to law and recognized by experts in finance. The case set up by the appellants was, that levy of tax through the Expenditure Tax

Act, 1987 had no rational connection with the concept of "expenditure". It was sought to be contended that the levy in question, was clearly of the nature of a tax on "luxuries" contemplated under entry 62 of State List. According to the appellants, if a State legislature had enacted a similar law, it would have been held to be within its competence under entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India. It was then submitted, that recourse to the residuary power under Article 248 read with entry 97 of the Union List should be the very last refuge and would be available if, and only if, the other entries in the State List and the Concurrent List did not cover the subject. The aforesaid contention was sought to be repudiated by the respondents by asserting, that if a subject is not shown to fall within the fields of legislation in the State List or the Concurrent List, no further inquiry was necessary, to support the legislative competence of the Parliament to legislate on the subject. It was pointed out, that since "expenditure" as a subject was not provided for in either the State List or in the Concurrent List, as such, there could be no dispute, that the Parliament could legislate thereon. It was further contended, that the measures adopted for the levy of the tax would not necessarily determine its essential character, and that, the object on which the "expenditure" was laid out might be an item of "luxury" or it might not be one, or the "expenditure" might constitute the price of the goods, but if what was taxed keeping in mind the "expenditure" aspect, the legislative competence of the Parliament could not be questioned. The question posed for adjudication was summarized by the Apex Court as under:

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.

On the issue canvassed the majority view was expressed in the following words:

88. ...I think that the learned Attorney General is right in urging that, merely because the 1987 Act as well as the State Acts levy taxes which have ultimate impact on persons who enjoy certain luxuries, the pith and substance of both cannot be considered to be the same. The object of a tax on luxury is to impose

a tax on the enjoyment of certain types of benefits, facilities and advantages on which the legislature wishes to impose a curb. The idea is to encourage society to cater better to the needs of those who cannot afford them. For instance, a luxury tax may, to cite a catchy example, encourage construction of "janata" hotels rather than five star hotels. Such a tax may be on the person offering the luxury or the person enjoying it. It may be levied on the basis of the amount received for providing, or the amount paid for or expended for enjoying, the luxury. Conceivably, it could be on different bases altogether. The object of an expenditure tax - and, that, conceptually, there can be an expenditure tax is borne out by Azam Jha case (1971) 3 SCC 621 - is to discourage expenditure which the legislature considers lavish or ostentatious. The object of the first would be to discourage certain types of living or enjoyment while that of the second would be to discourage people from incurring expenditure in unproductive or undesirable channels. If a general Expenditure Tax Act, like that of 1957, had been enacted, no challenge to its validity could have been raised because it incidentally levied the tax on expenditure incurred on luxuries. 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".

It is therefore apparent, that the Apex Court clearly opined that the issue arising for consideration has to be examined by keeping in mind the aspect which was the basis of the legislation. In the matter, which was subject matter of consideration, the question to be determined was, whether the object of the legislation was "expenditure" or "luxuries". As in the present case, wherein the question to be determined is, whether the levy of tax by the Uttarakhand Legislature was on the "service" aspect, or the "entertainment" aspect. The Apex Court arrived at the conclusion that the object, while enacting the Expenditure Tax Act, 1987, was "expenditure" and accordingly arrived at the conclusion that the legislation in question at the hands of the Parliament was valid. On the same analogy, we have already arrived at the conclusion that the object of levying Tax in the present case was "entertainment", and therefore, the conclusion, that the Uttarakhand legislature was fully competent to enact the legislation in question is the only legally valid and justified conclusion, can not be of any doubt whatsoever.

36. On the issue being considered, reference needs also to be made to the decision rendered by the Apex Court in *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, . The question, which came up for consideration in the aforesaid case was, whether SIM (Subscribers' Identification Module) provided to customers by mobile cellular telephone companies was a "sale" or a "service" or both. The issue had come up for consideration before the Supreme Court on the basis of three judgments, the first rendered by the Allahabad High Court in *Union of India v. State of Uttar Pradesh* (1999) 114 STC 288, the second rendered by the Andhra Pradesh High Court in *Union of India v. Secretary, Revenue Department* (1999) 113 STC 203 and the third rendered by the Punjab and Haryana High Court in *Union of India v. State of Haryana* (2001) 123 STC 539, wherein it was held, that no component of sale was involved in providing SIM cards to customers. All the aforesaid three judgments came to be assailed before the Apex Court. The judgment rendered by the Supreme Court in the matter stands reported as *State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another*, . Suffice it to notice that the judgments rendered by the High Courts, were set aside. Despite the aforesaid determination, on a similar matter which came up for consideration before the Kerala High Court in *Escotel Mobile Communications Limited v. Union of India* (2002) 126 STC 475, the High Court took the view that activation charges of a SIM card formed a part of consideration, and as such, could be subjected to sales tax. Besides the aforesaid, it was also held, that the act of selling SIM cards and the process of activation thereof were both services and fell within the definition of taxable service under the provisions of the Finance Act, 1994. It is therefore apparent, that Kerala High Court held, that the transaction between the mobile Cellular Telephone Company and its customers was a "sale" as well as a "service". The judgment rendered by the Kerala High Court was taken in appeal to the Supreme Court which disposed of the same in *Bharat Sanchar Nigam Limited's* case, (supra). The Apex Court concluded in paragraph 84, that a telephone service is nothing but a "service". It also concluded, that no sales element is involved in the transaction providing telephone services. Yet in paragraph 87 the Court opined as under:

87. It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact, as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles: if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it

would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the "aspects" doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others,

...subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power.

* * * There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects.

(emphasis is ours)

A perusal of the aforesaid conclusion leads to the inference, that although tax could be levied, as a "service" on a Mobile Cellular Telephone company for providing SIM cards to a customer, the question, whether sales tax could also be levied by the State Government, was a question of fact depending on whether a SIM card was a separate object of "sale", and in case the answer to the aforesaid factual aspect of the matter was in the affirmative, then the concerned State Government could also levy sales tax thereon. The aforesaid determination at the hands of the Supreme Court therefore leaves no room for any doubt, that the same transaction can involve two or more taxable aspects/events. When the aspects are distinct and separate, the State Legislature would be competent to levy tax, in addition to the levy of tax by the Parliament on a distinct taxable event, which falls within the sphere of its legislative competence. It therefore goes without saying, that on separate and distinct taxable events, it is open to the Parliament to levy tax based on a subject contained in one of the entries of the Union List, and simultaneously, it is also open to the State Legislatures to levy tax thereon on a subject which falls within one of the entries of the State List. On the aforesaid issue, the judgment rendered in Bharat Sanchar Nigam Limited's case (supra), affirmed the earlier decision rendered by the Supreme Court in State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, (even though on another aspect, not relevant to the present controversy, the judgment rendered in State of Uttar Pradesh's case (supra) was overruled). It is therefore also necessary to refer to the judgment rendered in State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, . In this behalf the following observations recorded in different parts of the said judgment, which are relevant to the present controversy, are being extracted hereunder:

24. The question whether a given activity is one of sale or service is a vexed question. The terminology employed to describe an activity as sale or service is

not conclusive in itself. By calling sale as service or vice versa, the substance of the transaction will not get altered. The question has to be determined by discerning the substance of the transaction in the context of the contract between the parties or in a case of statutory contract in the light of the relevant provisions of the Act and the Rules. If an activity or activities are comprehensively termed as "service" but they answer the description of "sale" within the meaning of a statute, they can nonetheless be regarded sale for the purpose of that statute. In other words, it is possible, an activity may be service for purposes of one Act and sale for purposes of another Act. It may also be that in a given case, on the facts of that case, a particular activity can be treated as "service" but in a different fact situation the same could be sale under the same statute. In *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, the question that fell for consideration of the Constitution Bench of this Court was, whether the service of meals to casual visitors in the restaurant was taxable as a "sale" (i) when the charges were lump sum per meal, or (ii) when they were calculated per dish? It was held that in both the above situations it would be "service". On an application filed to review the said judgment while dismissing the review petition it was observed that the judgment had rested on the factual foundation and must be understood in that light. Rejecting the contention that the respondent therein as well as the States were apprehensive that the judgment would be invoked by the restaurant-owners in cases where there was a sale of food and title in the food passes to the customers, as one which could not be reasonably entertained, it was held: (SCC p. 173, para 12)

Indeed, we have no hesitation in saying that where food is supplied in an eating house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax.

27. It may be mentioned that during the relevant period (1988) no service tax was enforced. It was in 1994 that service tax was levied for the first time as per Chapter V of the Finance Act, 1994. Section 66 thereof created charge of service tax in regard to taxable services. "Service tax" is defined in Clause (34) of Section 65 to mean tax chargeable under the provisions of that chapter. "Taxable service" is defined [under Sub-clause (b) of Clause (41) of Section 65] to mean any service provided to, inter alia, a subscriber by the telegraph authority in relation to a telephone connection. No provision of the U.P. Act or the said Finance Act, 1994 or the Constitution of India is brought to our notice to hold that rentals collected by Dot from the subscriber cannot be subjected to tax as is done under the U.P. Act. Merely because service tax is imposed by Parliament under the said Finance Act in respect of telephone connection to a subscriber, is no ground to hold that the State cannot levy tax under the U.P. Act.

31. Whether a given contract falls under one or the other category is essentially a question of fact to be determined on the terms of the contract between the

parties or, in case of a statutory contract, the rules governing such a contract.

34. In regard to sale of goods where the service is incidental, the principle of non-separability will apply in the absence of a specific valid statutory provision; for example, in a restaurant /hotel, where food or other articles are sold, the supply of service like providing cutlery-washing liquid, towels, music etc., is merely incidental and it would not be permissible to treat such service as a transfer of right to use the goods for the purpose of taxation under the relevant Sales Tax Act. Where, however, the supply of service as well as supply of goods are prominent objectives and they have been clubbed together under a composite contract, it would be possible to treat them separately; for example, where in a holiday package, transportation, boarding and lodging are separately treated, it would be possible to assess them separately, though covered under the same contract."

38. Having given our anxious consideration to the submissions made in regard to the composite contract of service of goods and the classification, above referred, we are of the view that they will not apply to the present case. Here the service of telephone connection cannot be artificially split into various categories - supply of instruments and accompaniment on the one hand and supply of telegraphic line/connection on the other, to name the former as "sale" and the latter as "service". The analogy of composite contract will apply where "sale" and "service" are two different independent objects."

39. Inasmuch as we have found that DoT is a "dealer" as defined in Section 2(c) of the U.P. Act and it collects rentals for the supply of transfer of use of telephone connection, which is compendiously called "service" and that the supply of telephone satisfies the requirements of a transfer of the right to use the goods within the meaning of "sale" in Section 2(h); it also receives consideration, therefore, the requirements of charging Section 3 read with Section 3(f) are satisfied. The judgments and orders under challenge in these appeals are, therefore, set aside.

Based on the aforesaid conclusions, we have no doubt, whatsoever, that on "Direct-to-Home" (DTH) broadcasting service, it is open to the Parliament, as also, the State Legislature to levy tax simultaneously. Our aforesaid conclusion is based on the fact, that the taxable sphere for levy of taxes at the hands of the two legislatures was based on two separate and distinct aspects, wherein one of the events falls within the legislative competence of the Parliament, and the other falls in the legislative competence of the State Legislature.

37. Lastly reference may be made to the decision In All India Federation of Tax Practitioners v. Union of India. Herein the legislative competence of the Parliament in levying tax on "services" rendered by practicing chartered accountants, cost accountants and architects was questioned by the appellants. The aforesaid tax was levied through the Finance Act, 1998, whereby Sections 65, 66 and 68 of the Finance Act, 1994 were sought to be substituted, and

Section 67 of the Finance Act, 1994 was sought to be amended. By the aforesaid substitution/amendment, "service" tax was levied on "services" rendered by a practising chartered accountant, cost accountant and architect, in his professional capacity, at the rate of 5% of the amount charged. At the juncture when the aforesaid amendment was carried out, the Union List in the Seventh Schedule of the Constitution of India, did not contain entry 92C referred to hereinabove. Accordingly, at that juncture the source of legislative power was sought to be drawn by the Parliament from entry 97 of the Union List, contained in the Seventh Schedule of the Constitution of India. The primary contention at the hands of the tax payers was, that taxes on "professions", trades, callings and employments were within the exclusive domain of State legislatures under entry 60 of the State List, contained in the Seventh Schedule of the Constitution of India. Entry 60 of the State List is being extracted hereunder:

60. Taxes on professions, trades, callings and employments.

It was submitted on behalf of the appellants before the Supreme Court, that there was no difference between tax on "profession" and tax on "service". It was asserted, that the term "profession" was synonymous with the term "service", and therefore, tax on "profession" would include tax on "service". It was contended that a "profession" cannot exist without "service", as "service" was the core of every profession. In fact, it was suggested, as noticed above, that the two words were interchangeable. Since tax on "profession" could only be levied by the State legislature, according to the appellants, there was no question of levying "service" tax on any "profession" through the Finance Act, 1998. The case sought to be set up by the appellants before the Supreme Court was, that there could not be a "profession" without "service", and therefore, "service" rendered by a professional to his client was nothing but "service" rendered as a "professional". The argument thus sought to be advanced was, that since tax in the instant case was being levied on a "profession", it could only be levied by a State legislature under entry 60 of the State List, contained in the Seventh Schedule of the Constitution of India. On the aforesaid analogy, it was asserted on behalf of the appellants, that the source of power could not be traced to entry 97 of the Union List, contained in the Seventh Schedule of the Constitution of India, so as to enable the Parliament to levy tax on a "profession" by treating it as "service". In other words, it was contended, that tax on "profession" under entry 60 of the State List, contained in the Seventh Schedule of the Constitution of India would include tax on "service". While adjudicating upon the controversy, the Supreme Court in All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, categorized entries in the Union List of the Seventh Schedule of the Constitution of India in two groups i.e., general entries and taxing entries. So as to distinguish general entries from taxing entries, it observed as under:

30. ...there are two groups of entries in each of the three Lists in the Seventh Schedule. In List I, Entries 1 to 81 refer to several matters over which Parliament

has authority to legislate. But Entries 82 to 92 enumerates the taxes which could be imposed by a law of Parliament. An examination of these two groups of entries shows that while the main subject of legislation finds place in the first group, a tax in relation thereto is separately mentioned in the second group. For example, Entry 22 in List I refers to "Railways" whereas Entry 89 refers to "Terminal taxes on goods or passengers, carried by railway". If Entry 22 is construed as involving taxes to be imposed, then Entry 89 would be superfluous. Similarly, Entry 41 of List I refers to "Trade and commerce with foreign countries; import and export across customs frontiers", however, Entry 83 refers to "Duties of customs including export duties". If Entry 41 of List I, which refers to trade and commerce with foreign countries and which refers to import and export, is to be interpreted as including duties of customs under that Entry, then Entry 83 would be rendered superfluous. Similarly, Entries 43 and 44 of List I relate to incorporation, regulation and winding up of corporations whereas Entry 85 provides for "Corporation tax". If Entries 43 and 44 are to cover taxes then Entry 85 would be rendered superfluous.

31. Turning to List II, Entries 1 to 44 form one group mentioning the "subjects" on which States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. At the relevant time, Entry 18 referred to "Lands" whereas Entry 45 referred to "Land Revenue". If land revenue was to fall under Entry 18 then Entry 45 would be rendered superfluous. The above analysis is not exhaustive. However, the above analysis shows that taxation is not intended to be compromised (sic comprised) in the main subject in which an extended construction can be given as that test cannot be applied to taxation. Taxing entries are distinct entries. This distinction between the abovementioned two groups of entries is also manifest in the language of Article 248 Clauses (1) and (2) as also in the language of Entry 97 in List I of the Seventh Schedule to the Constitution. [See *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*,].

Having made the aforesaid distinction, the Apex Court, relying on a number of judgments, then recorded the following conclusion:

33. ...We find that Entry 60 of List II, mentions "Taxes on professions, trades, callings and employments". Entry 60 is a taxing entry. It is not a general entry. Therefore, we hold that tax on professions etc. has to be read as a levy on professions, trades, callings etc., as such. Therefore, Entry 60 which refers to professions cannot be extended to include services. This is what is called as an Aspect Theory. If the argument of the appellants is accepted, then there would be no difference between interpretation of a general entry and interpretation of a taxing entry in List I and List II of the Seventh Schedule to the Constitution. Therefore, "professions" will not include services under Entry 60. For the above reasons, we hold that Parliament had absolute jurisdiction and legislative competence to levy tax on services. While interpreting the legislative heads under List II, we have to go by schematic interpretation of the three Lists in the

Seventh Schedule to the Constitution and not by dictionary meaning of the words "profession" or "professional" as was sought to be argued on behalf of the appellants otherwise the distinction between general entries and taxing entries under the three Lists would stand obliterated. The words "in relation to" and the words "with respect to" are no doubt words of wide amplitude but one has to keep in mind the context in which they are used.

(iv) Meaning of the words taxes "on" professions

34. As stated above, Entry 60, List II refers to taxes on professions, etc. It is the tax on the individual person/firm or company. It is the tax on the status. A chartered accountant or a cost accountant obtains a licence or a privilege from the competent body to practise. On that privilege as such the State is competent to levy a tax under Entry 60. However, as stated above, Entry 60 is not a general entry. It cannot be read to include every activity undertaken by a chartered accountant/cost accountant /architect for consideration. Service tax is a tax on each activity undertaken by a chartered accountant/cost accountant or an architect. The cost accountant/chartered accountant/architect charges his client for advice or for auditing of accounts. Similarly, a cost accountant charges his client for advice as well as doing the work of costing. For each transaction or contract, the chartered accountant/cost accountant renders profession based services. The activity undertaken by the chartered accountant or the cost accountant or an architect has two aspects. From the point of view of the chartered accountant/cost accountant it is an activity undertaken by him based on his performances and skill. But from the point of view of his client, the chartered accountant/cost accountant is his service provider. It is a tax on "services". The activity undertaken by the chartered accountant or cost accountant is similar to saleable or marketable commodities produced by the assessee and cleared by the assessee for home consumption under the Central Excise Act.

While drawing the aforesaid conclusion, a clear distinction was drawn between two different aspects i.e., "professions" and "services", whereupon in its ultimate analysis, it was held:

52. For the above reasons, we find no merit in Civil Appeal No. 7128 of 2001 filed by All India Federation of Tax Practitioners and Ors. We hold that Parliament has legislative competence to levy service tax by way of the impugned Finance Act, 1994 and Finance (No. 2) Act, 1998 under Entry 97 of List I on chartered accountants, cost accountants and architects. We further hold that the above position now stands fortified by the Constitution (Eighty-eighth Amendment) Act, 2003 which has inserted Article 268A and Entry 92C which clearly indicates that Entry 60 of List II and Entry 92C of List I operate in different spheres. However, we make it clear that before us there is no challenge to the Constitutional validity of the said Constitution (Eighty-eighth Amendment) Act, 2003.

The distinction drawn by the Apex Court between two different aspects/spheres,

i.e., "professions", on the one hand, and "services" on the other in All-India Federation of Tax Practitioner's case (supra) is a distinction, similar to the one which has been drawn by us between two different aspects/spheres of "Direct-to-Home" (DTH) broadcasting service i.e., "entertainment" on the one hand and "services" on the other.

38. Based on the judgments referred to hereinabove, there can hardly be any dispute, that it was the aspect of "entertainment" which prompted the Uttarakhand Legislature to levy tax on "Direct-to-Home" (DTH) broadcasting services. And that, the legislative competence for the same emerged from entry 62 of the State List, contained in the Seventh Schedule of the Constitution of India. "Service tax" levied on "Direct-to-Home" (DTH) broadcasting services under the different Finance Acts (referred to above) was based on a totally distinct aspect, namely, "services". And the legislative competence for the same emerged from entry 92C of the Union List, contained in the Seventh Schedule of the Constitution of India. The aforesaid determination at our hands, while negating the contention of the petitioners under the aspect theory, also negates the contention of the petitioners, that "tax" has been levied on the same aspect by the Parliament, as also, the State legislature. We, therefore, find no justification in the contention advanced, that tax was being levied on the same aspect/sphere of activity by the Parliament, as also, by the State Legislature. In view of the above, we find no merit even in the third contention advanced by the learned Counsel for the petitioners.

39. During the course of disposal of the present controversy, we heard learned Counsel representing the rival parties in Bharat Business Channel Limited v. State of Uttarakhand and Ors. Writ Petition (M/B) No. 05 of 2010 and Bharati Telemedia Limited v. State of Uttarakhand and Ors. Writ Petition (M/B) No. 06 of 2010 as well. We did so, because the main case being disposed of through the instant order was clubbed to be disposed of together with the aforesaid two cases. During the course of hearing, it emerged that the controversy raised in all the three writ petitions was identical. Accordingly, while disposing of the three writ petitions together, although the main order has been passed in Tata Sky Limited v. State of Uttarakhand and Ors. Writ Petition (M/B) No. 04 of 2010, yet submissions were advanced by the learned Counsel for the rival parties in all the three cases. The submissions advanced by all the learned Counsel have been duly considered by us, while recording our judgment in the main writ petition i.e., Tata Sky Limited v. State of Uttarakhand and Ors. Writ Petition (M/B) No. 04 of 2010. As such, the two connected cases shall also be deemed to have been disposed of through the instant common judgment being rendered by us.

40. Having considered submissions advanced by the learned Counsel for the rival parties, we are of the view that the amendments incorporated by the Uttarakhand Legislature through the Uttarakhand (the Uttar Pradesh Entertainment and Betting Tax Act, 1979) (Amendment) Act, 2009, notified on 16.03.2009, were fully within its legislative competence, and that, the aforesaid

amendments did not encroach upon an area over which the Parliament exclusively had the authority to legislate. The levy of entertainment tax on the petitioner- company under the Entertainment Act, 1979 being fully justified, the challenge raised by the petitioner to the same is liable to be declined, and as such, is hereby declined. The instant writ petition and the two connected writ petitions (referred to in the foregoing paragraph), are accordingly dismissed.