

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 3RD DAY OF JULY 2013/12TH ASHADHA, 1935

WP(C).No. 15938 of 2011 (N)

PETITIONERS:

1. KERALA BAR HOTELS ASSOCIATION,
REPRESENTED BY ITS SECRETARY M.D.DANESH, 35/1697,
K.B.H.A HOUSE, SOUTH JANATHA ROAD, PALARIVATTOM,
COCHIN-682 025.

2. HOTEL LAKE PALACE, A REGISTERED FIRM,
REPRESENTED BY ITS MANAGING PARTNER D.RAJEEV,
ANCHALUMMOODU, KOLLAM.

BY SRI. N. VENKETARAMAN, SENIOR ADVOCATE,
ADVS.SRI.V.L.SHENOY,
SRI.L.JAYAWANTH.

RESPONDENTS:

1. UNION OF INDIA, REPRESENTED BY
SECRETARY TO GOVERNMENT, MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE), NEW DELHI-110 001.
2. CENTRAL BOARD OF EXCISE AND CUSTOMS,
DEPARTMENT OF REVENUE, MINISTRY OF FINANCE,
GOVERNMENT OF INDIA, NEW DELHI - 400 012.

3. COMMISSIONER OF CENTRAL EXCISE,
SERVICE TAX AND CUSTOMS, C.R.BUILDING, I.S.PRESS ROAD,
COCHIN-682 018.

4. STATE OF KERALA, REPRESENTED BY
SECRETARY TO GOVERNMENT, TAXES DEPARTMENT,
THIRUVANANTHAPURAM, KERALA - 695 001.

R1 BY SRI.P.PARAMESWARAN NAIR,A.S.G OF INDIA,
R2 & R3 BY SRI.TOJAN J.VATHIKULAM, S.C,
SRI.JOHAN VARGHESE,S.C,
SRI.THOMAS MATHEW NELLIMOOTIL,S.C,
R4 BY SPL. GOVERNMENT PLEADER SRI. SEBASTIAN CHEMPAPPILLY,
GOVT. PLEADER SMT. ROSE MICHAEL.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 29-01-2013, ALONG WITH W.P.(C).NO.14045/2011 AND CONNECTED
CASES, THE COURT ON 03-07-2013 DELIVERED THE FOLLOWING:



A.M.SHAFFIQUE, J

W.P.C.Nos.14045 of 2011,
14130 of 2011, 15867 of 2011,
15938 of 2011 & 1918 of 2013

Dated this the 3rd day of July 2013

J U D G M E N T

The petitioners in the above writ petitions are challenging the validity of sub clause (zzzzv) and (zzzzw) of clause 105 of Section 65 of the Finance Act, 1994 and Section 66 of the Finance Act, 1994 as amended by the Finance Act 2011 relating to levy of service tax on taxable services referred there and for consequential¹reliefs. The relevant portion reads as under:

“(zzzzv) services provided or to be provided to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises;

(zzzzw) Services provided or to be provided to any person, by a hotel, inn, guest house, club or camp-site, by whatever name called, for providing of accommodation for a continuous period of less than three months;"

2. The main contention urged by the petitioners is that the imposition of service tax in relation to serving of food or beverage including alcoholic beverages represents only sale of goods which transaction squarely falls under Entry 54 of List II (State List) of the 7th schedule to the Constitution of India and therefore within the exclusive competence of the State Legislature. The service tax was originally introduced by the Parliament in exercise of the residuary power under Entry 97 of List I. Though Entry 92 C has been introduced to List I of the 7th schedule which enables the Union to levy "Taxes on Services", the said entry had not come into effect as it was not notified by the Government. Similarly the State Legislature had enacted Kerala Tax on Luxuries Act, by which tax is levied for

✓

accommodation. By introducing service tax on the basis of sub clauses (zzzzv) and (zzzzw) to clause 105 of Section 65 the Parliament has encroached upon the legislative powers of the State under Entry 54 and 62 of List II. The main contention of the petitioners is with reference to the legislative competence of the Parliament to impose a tax on sale of goods which is absolutely the domain of the state legislation.

3. Counter affidavit is filed by respondents 1 to 3 inter alia contending that the legislation has been brought in terms of Article 248 of the Constitution read with Entry 97 of List I of the 7th schedule. Therefore according to the respondent, on a perusal of judgments cited by them it is all the more clear that service tax can be imposed on the service involved during the sale of a product and so long as the Statute does not transgress to any restriction contained in the Constitution, contentions regarding lack of legislative power cannot be sustained. It is further contended that the

✓

Sales Tax Act and the Kerala Tax on Luxuries Act are framed by the State Government. Service tax levied by the Government of India is not for serving alcoholic beverages and it is a tax on the services provided by restaurants and hotels. In that view of the matter, according to them, the challenge to the provisions aforesaid are absolutely baseless and seeks for dismissal of the writ petitions. Reliance is placed on various judgments of the Supreme Court which I shall deal with herein after.

4. Heard the learned senior counsel Sri. N.Venkataraman, learned senior counsel Dr.K.B.Mohamedkutty, Sri.Thomas Mathew Nellimoottil and Sri.John Varghese, learned Standing Counsel for Central Board of Excise. Having regard to the contentions urged by either side, the following questions arise for consideration:

- i) Whether "taxes on the sale and purchase of goods" in Entry 54 of List II of the seventh schedule covers service in the light of the definition of "tax on sale and

✓

purchase of goods" under Article 366 (29A) (f) of the Constitution of India.

ii) Whether the service provided in a hotel, inn, guest house, club etc. imposed with luxury tax under State Act in terms of Entry 62 of List II can be separately assessed and imposed by the Union with service tax, invoking the residuary powers at Entry 97 of List I of the Constitution.

5. The relevant entries of List I and II of the seventh schedule reads as under:

List I — Union List

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

List II — State List

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

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

✓

8. Article 246 and 366 (29A) reads as under:

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.

366. Definitions.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say

(29-A) "tax on the sale or purchase of goods" includes—

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;



6. The judgment in **State of M.P. v. Rakesh Kohli**, (2012) 6 SCC 312) is relied upon by the learned counsel for respondent to highlight the principles to be kept in mind by courts while considering constitutionality of a statute and the Supreme Court held as under:

"32. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:

- (i) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,*
- (ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,*
- (iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,*
- (iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and*
- (v) in the field of taxation, the legislature enjoys greater latitude for classification.*

✓

Similar views were expressed by the Supreme Court in **Karnataka Bank Ltd. v. State of A.P.** [(2008) 2 SCC 254], **Govt. of A.P. v. P. Laxmi Devi** [(2008) 4 SCC 720] and **Greater Bombay Coop. Bank Ltd. v. United Yarn Tex (P) Ltd.** (2007) 6 SCC 236). There is no dispute regarding the proposition as held in the above judgments and hence the only enquiry is to find out whether the impugned legislation has trespassed upon the legislative powers of the State Government, keeping in mind the limitations as held in the aforesaid judgments.

7. The Supreme court had occasion to consider the constitutional validity of service tax in various instances. It is not disputed that the validity of the impugned amendments have been considered earlier. I would therefore, before proceeding to consider the validity of the amendments refer to the judgments relied upon by either side.

8. In **Assn. of Leasing & Financial Service Companies v. Union of India**, (2011) 2 SCC 352),

✓

Supreme Court was considering the imposition of service tax on *financial leasing services* including equipment leasing and hire purchase and while upholding the amendment considered the entire history of service tax and held as under:

"38. In *All-India Federation of Tax Practitioners* case this Court explained the concept of service tax and held that service tax is a value added tax ("VAT", for short) which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer. That, service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994.

That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation, etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of Section 65(105)(zm) of the Finance Act, 1994 (as amended). Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted."

"Scope of Article 366(29-A)

49. If one examines Article 366(29-A) carefully, one finds that clause (29-A) provides for an inclusive definition and has two limbs. The first limb says that the tax on sale or purchase of goods includes a tax on transactions specified in sub-clauses (a) to (f). The second limb provides that such transfer, delivery or supply of goods referred to in the first limb shall be deemed to be a sale of those goods by the person making the

transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made. Now, in K.L. Johar case, this Court held that the States can tax hire-purchase transactions resulting in sale but only to the extent to which tax is levied on the sale price. This led Parliament to say, in the Statement of Objects and Reasons to the Constitution (Forty-sixth Amendment) Act,

"though practically the purchaser in a hire-purchase transaction gets the goods on the date of entering into the hire-purchase contract, it has been held by the Supreme Court in K.L. Johar case that there is a sale only when the purchaser exercises the option to purchase which is at a later date and therefore only the depreciated value of the goods involved in such transaction at the time the option is exercised becomes assessable to sales tax which position has resulted in avoidance of tax in various ways".

Thus, we find from the Statement of Objects and Reasons that the concept of "deemed sale" is brought in by the Constitution (Forty-sixth Amendment) Act only in the context of imposition of sales tax and that the words "transfer, delivery or supply" of goods is referred to in the second limb of Article 366 (29-A) to broaden the tax base and that as indicated in the Report of the Law Commission prior to the judgment of this Court in Gannon Dunkerley case, works contract was always taxed by the States as

✓



part of the word "sale" in Entries 48/54 of List II."

X X X X

"54. xxxxx One must also bear in mind that Article 366(29-A) is essentially sales tax specific. It was brought in to expand the tax base which stood narrowed down because of certain judgments of this Court. That is the reason for bringing in the concept of "deemed sale" under which tax could be imposed on mere "delivery" on hire purchase [see clause (c)] which expression is also there in the second limb of the said article."

X X X X

"63. In our view, the judgment in BSNL case has no application to the present case. As stated above, what is challenged in this case is the service tax imposed by Section 66 of the Finance Act, 1994 (as amended) on the value of taxable services referred to in Section 65(105)(zm) read with Section 65(12) of the said Act, insofar as it relates to financial leasing services including equipment leasing and hire purchase as beyond the legislative competence of Parliament by virtue of Article 366(29-A) of the Constitution. In short, the legislative competence of Parliament to impose service tax on financial leasing services including

equipment leasing and hire purchase is the subject-matter of challenge. Legislative competence was not the issue before this Court in BSNL case. In that case, the principal question which arose for determination was in respect of the nature of the transaction by which mobile phone connections are enjoyed. The question was whether such connections constituted a sale or a service or both. If it was a sale then the States were legislatively competent to levy sales tax on the transaction under Entry 54, List II of the Seventh Schedule to the Constitution. If it was service then the Central Government alone had the legislative competence to levy service tax under Entry 97, List I and if the nature of the transaction partook of the character of both sale and service, then the moot question would be whether both the legislative authorities could levy their separate taxes together or only one of them. It was held that the subject transaction was a service and, thus, Parliament had legislative competence to levy service tax under Entry 97, List I."

"66. In the circumstances and for the reasons given hereinabove, the question of splitting up of transactions, as contended on behalf of the appellant(s), does not arise. As held hereinabove, equipment leasing and hire-purchase finance constitute long-term financing activity. Such an activity was not the subject-matter of the discussion in BSNL case. The service tax in the present case is neither on the material nor on sale. It is on

the activity of financing/funding of equipment/asset within the meaning of the words "financial leasing services" in Section 65(12)(a)(i).

67. Lastly, we may state that this Court has on three different occasions upheld the levy of service tax with reference to Entry 97 of List I in the face of challenges to the competence of Parliament based on the entries in List II and on all the three occasions, this Court has held that the levy of service tax falls within Entry 97 of List I. The decisions are in *T.N. Kalyana Mandapam Assn.*, *Gujarat Ambuja Cements Ltd.* and *All-India Federation of Tax Practitioners.*"

9. In **All-India Federation of Tax Practitioners v. Union of India, (2007) 7 SCC 527** the question was regarding the competence of Parliament to levy service tax on practising chartered accountants and architects having regard to Entry 60, List II of the Seventh Schedule to the Constitution and Article 276 of the Constitution, and the Supreme Court held as under:

"46. xxxxxx In the present matter, as stated hereinabove, the State Legislature is empowered to levy tax on professions, trades, callings, etc., as such and, therefore, the word

"services" cannot be read as synonymous to the word "profession" in Entry 60. Therefore, tax on services do not fall under Entry 60, List II. That, service tax would fall under Entry 92-C/Entry 97 of List I."

"48. xxxxx Of course, in the present case, we are not concerned with the services rendered by a mandap-keeper, who performs what is called as property based services. In this case, we are concerned with performance based services. However, both the categories fall within the ambit of the word "services".

49. In Gujarat Ambuja Cements Ltd. v. Union of India it was held that service tax is not a tax on goods or on passengers but it was on the transportation itself and, therefore, it falls under residuary power of Parliament under Entry 97 of the Seventh Schedule to the Constitution." xxxxxxxx "In the present case, as stated above, we are concerned with Entry 60 of List II. As stated above, service tax is on performance based services itself. It is on professional advice, tax planning, auditing, costing, etc. On each of the exercise undertaken tax becomes payable. Therefore, the above judgment has no application.

50. In Bharat Sanchar Nigam Ltd. v. Union of India the question which arose for determination before this Court was whether a telephone service (mobile or fixed) would attract liability to service (sic sales) tax. It was held that in order to attract the liability under the sales tax there has to exist what is called as "goods". Since goods in question consisted

of electromagnetic waves or radio frequencies, which carries voice, messages or other data, a telephone service was nothing but a service. We are not concerned with such a controversy in the present case. In the present case, we are concerned with the legislative competence of Parliament to legislate in respect of service tax under Entries 97/92-C of List I. In the present case, we are concerned with the period covered by the Finance Acts of 1994 and 1998. However, learned counsel for the appellants has relied upon para 82 of the said judgment in Bharat Sanchar Nigam Ltd. in which it is observed that the residuary powers of Parliament under Entry 97 of List I cannot swamp away the legislative entries in the State List. Entry 54, List II read with Article 366(29-A), therefore, cannot be whittled down by referring to the residuary provision. As stated above, we are concerned with the application of the above principles. In the present case, as stated above, we are concerned with the constitutional status of the levy. As stated above, we have to examine the nature of the levy. We have done so and we have come to the conclusion that the word profession in Entry 60, List II cannot be made synonymous with the word service and, therefore, service tax would fall under the residuary Entry 97 read with Entry 92-C after 2003. This position is also made clear by Article 268-A, inserted by the Constitution (Eighty-eighth Amendment) Act, 2003.

10. In **BSNL v. Union of India, (2006) 3 SCC 1** a three judges bench of the Supreme court while considering the question whether the providing mobile phone connections is a sale and the States are legislatively competent to levy sales tax on the transaction under Entry 54 List II of the Seventh Schedule to the Constitution or is a service when the Central Government alone can levy service tax under Entry 97, List I (or Entry 92-C of List I after 2003) or if the nature of the transaction partakes of the character of both sale and service, whether both legislative authorities could levy their separate taxes together or only one of them posed the following questions:

"32. These broadly speaking are the respective contentions and in our opinion, the issues which arise for consideration in these matters are:

(A) What are "goods" in telecommunication for the purposes of Article 366(29-A)(d)?

(B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?



(C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

(D) If the providing of a telephone connection involves sale, is such sale an inter-State one?

(E) Would the "aspect theory" be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax?"

The Supreme court further held as follows:

"41. xxxxxxxx Sub-clause (f) pertains to contracts which had been held not to amount to sale in State of Punjab v. Associated Hotels of India Ltd. That decision has by this clause been effectively legislatively invalidated."

"44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services." xxxxxx

"49. We agree. After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005 C.K. Jidheesh v. Union of India held that the aforesaid observations in Associated Cement were merely obiter and that Rainbow Colour Lab was still good law, it was not correct. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the Forty-sixth Amendment would apply.

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

x x x x

"81. Therefore the deemed sales included in Entry 54, List II (sic) would also be subject to

the limitations of Article 286 and Article 366 (29-A).

82. Being aware of the dangers of allowing the residuary powers of Parliament under Entry 97 of List I to swamp the legislative entries in the State List, we have interpreted Entry 54, List II together with Article 366(29-A) without whittling down the interpretation by referring to the residuary provision."

11. In **Godfrey Phillips India Ltd. v. State of U.P., (2005) 2 SCC 515** the Supreme court held as under:

"83. Hence on an application of general principles of interpretation, we would hold that the word "luxuries" in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury.

"93. Given the language of Entry 62 and the legislative history we hold that Entry 62 of List II does not permit the levy of tax on goods or articles. In our judgment, the word "luxuries" in the entry refers to activities of indulgence, enjoyment or pleasure. Inasmuch as none of the impugned statutes seek to tax any activity and admittedly seek to tax goods described as luxury goods, they must be and are declared to be legislatively incompetent. However, following the principles in Somaiya

✓

Organics (India) Ltd. v. State of U.P. while striking down the impugned Acts we do not think it appropriate to allow any refund of taxes already paid under the impugned Acts. Bank guarantees if any furnished by the assesseees will stand discharged."

12. In **T.N. Kalyana Mandapam Assn. v. Union of India, (2004) 5 SCC 632**) the Supreme Court was considering whether the imposition of service tax on the services rendered by the mandap-keepers was intra vires the Constitution, and held as under:

"44. In regard to the submission made on Article 366(29-A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods". In other words, the operative words of the said sub-article are supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods."

✓

13. In **K. Damodarasamy Naidu & Bros. v. State of T.N., (2000) 1 SCC 521** while considering the entitlement of the States to levy tax on the sale of food and drink a Constitutional Bench of the Supreme Court held as under:

"9. The provisions of sub-clause (f) of clause (29-A) of Article 366 need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of sub-clause (f) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned counsel. The supply of food by the restaurant-owner to the customer though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy

restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs 50 for its supply and it is on Rs 50 that the restaurant-owner must be taxed."

14. In **Federation of Hotel & Restaurant Assn. of India v. Union of India, (1989) 3 SCC 634**) a constitution bench of the Supreme Court while considering the constitutional validity of the Expenditure Tax Act, 1987 (Central Act 35 of 1987) held as under:

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

↙

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

"54. In the present case, the bases of classification cannot be said to be arbitrary or unintelligible nor as being without a rational nexus with the object of the law. A hotel where a unit of residential accommodation is priced at over Rs 400 per day per individual is, in the legislative wisdom, considered a class apart by virtue of the economic superiority of those who might enjoy its custom, comforts and services. This legislative assumption cannot be condemned as irrational. It is equally well recognised that judicial veto is to be exercised only in cases that leave no room for reasonable doubt. Constitutionality is presumed."xxxxx

"62. A taxing statute is not, per se, a restriction of the freedom under Article 19(1) (g). The policy of a tax, in its effectuation, might, of course, bring in some hardship in some individual cases. But that is inevitable, so long as law represents a process of abstraction from the generality of cases and

reflects the highest common factor. Every cause, it is said, has its martyrs. Then again, the mere excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per se, and without more, constitute violation of the rights under Article 19(1)(g)." xxxxxx

15. It is not in dispute that under Article 246(1) of the Constitution, Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (the State List).

16. In **Assn. of Leasing & Financial Service Companies** (Supra), the Supreme Court has considered the scope of Article 366(29-A) of the Constitution of India and had formed an opinion that the first limb of the said Article says that the tax on sale or purchase of goods includes a tax on transactions specified in sub Clauses (a) to (f). It was also found that the said Article is brought in to expand the

tax base which should narrow down because of certain judgments of the Court. The deemed sale is therefore brought into effect as a concept in the constitutional definition. The Supreme Court also observed that **BSNL** (*Supra*) had no application to the factual situation as it was only concerned with the question as to whether the mobile connections constituted a sale or service or both. In fact, in **BSNL** (*Supra*) the Supreme Court held that providing mobile phone connections is only a service. In **All-India Federation of Tax Practitioners** (*Supra*), the question involved was whether the services rendered by Chartered Accountants could be imposed with service tax in the light of Entry 60 of List II. In that case also, Supreme Court had occasion to consider the judgments in **Gujarat Ambuja Cements Ltd. v. Union of India** and also **BSNL** (*Supra*). In **BSNL** (*Supra*) as already held, the Supreme court had occasion to consider the scope of Article 366 (29-A) it is held that after the 46th amendment the sale element of those

✓

contracts which are covered by six sub clauses of Clause (29-A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test being applied. In **T.N. Kalyana Mandapam Assn.** (Supra) the question involved was in relation to services rendered by mandap-keepers. While upholding the imposition of service tax the Supreme Court held that in regard to Article 366(29-A)(f) it only permits State to impose tax on the supply of food and drink by whatever mode it may be made whereas it does not conceptually or otherwise include the supply of service within the definition of sale and purchase of goods. It is observed that the operative words of the sub Article that supply of food and drink and other articles of human consumption alone is deemed to be sale or purchase of goods. Whereas in **K. Damodarasamy Naidu** (Supra) the Constitution Bench of the Supreme Court held that when the tax is on supply of food and drink, it is not of relevance that

✓

the supply is by way of service or as part of a service. The price that the customer pays for the supply of food in restaurant cannot be split up though it may be a part of the service that he renders. The Supreme Court has considered the impact of the words of sub Clause (f) of Clause (29-A) of Article 366.

17. In regard to the judgment in **Federation of Hotel & Restaurant Assn. of India** (Supra), it related to the constitutional validity of the Expenditure Tax Act, 1987.

18. On a consideration of the aforesaid law laid down by the Supreme Court, I am of the view that there are two judgments which throws light on the subject matter in issue. Those are **K. Damodarasamy Naidu** (Supra) and **T.N. Kalyana Mandapam Assn.** (Supra). In fact, the effect of Article 366(29-A)(f) has been considered by the Supreme Court in **Assn. of Leasing & Financial Service Companies** (Supra) and other judgments referred above including **BSNL** (Supra). But the factual situation with

✓

reference to the case on hand is available only in the cases referred above. But it could be seen that in **T.N. Kalyana Mandapam Assn.** (Supra) the question was with reference to services rendered by mandap-keepers which is not the situation here. Here the factual situation is almost similar to the statement of law as held by the Supreme Court in **K. Damodarasamy Naidu** (Supra).

19. Now coming to Article 366(29-A)(f) of the Constitution of India one could see that a deeming provision has been incorporated by way of 46th amendment to the Constitution of India and the history of such a legislation has been clearly dealt with in the judgments cited above. The very purpose of incorporating the definition of tax on sale or purchase of goods in Article 366 was to empower the State Governments to impose tax on the supply, whether it is by way of or as a part of any service of goods either being food or any other article for human consumption or any drink either intoxicating or not intoxicating whether such supply or

✓

service is for cash, deferred payment or other valuable consideration. The words "and such transfer delivery or supply of goods" is deemed to be a sale of those goods by the person making the transfer. Therefore the incidence of tax is on the supply of any goods by way of or as part of any service. When food is supplied or alcoholic beverages are supplied as part of any service, such transfer is deemed to be a sale. Apparently, the transfer is during the course of a service and when the deeming provision permits the State Government to impose a tax on such transfer, there cannot be a different component of service which could be imposed with any service tax in exercise of the residuary power of the Central Government under Entry 97 of List I of the Constitution of India.

20. Therefore it can be seen from Article 366(29-A) (f) that service is also included in the sale of goods. If the constitution permits sale of goods during service as taxable necessarily Entry 54 has to be read giving the meaning of

✓

sale of goods as stated in the Constitution. If read in that fashion, necessarily service forms part of sale of goods and State Government alone will have the legislative competence to enact the law imposing a tax on the service element forming part of sale of goods as well, which they have apparently imposed. I am supported to take this view in the light of the Constitution Bench judgment in **K. Damodarasamy Naidu** (Supra).

21. Coming to the next question regarding the imposition of service tax in respect of hotel, inn, guest house, club or camp site etc., the contention of the petitioners is based on Entry 62 of List II. What exactly is the meaning of the expression "luxuries" in Entry 62 of List II has been held by the Constitution Bench judgment of the Supreme Court in **Godfrey Philips India Ltd.** (Supra), wherein it is held that luxuries is an activity of enjoyment or indulgence which is costly or which is generally recognised as being beyond the necessary requirements of an average

✓

member of the society. While giving the said meaning to Entry 62 and if we look at the sub Clause (zzzzw), the service tax is imposed on services provided in a hotel and other similar establishments when State Legislature had enacted the Kerala Tax on Luxuries Act by exercising their legislative power under Entry 62 of List II. When applying the dictum laid down in **Godfrey Philips India Ltd.** (Supra) which gives an extended meaning to the word "luxuries", I am of the view that the amendment now made to the service tax trenches upon the legislative function of the State under Entry 62 of List II.


Having come to the aforesaid findings, these writ petitions are allowed as follows:

i) It is declared that sub Clauses (zzzzv) and (zzzzw) to Clause 105 of Section 65 of the Finance Act 1994 as amended by the Finance Act 2011 is beyond the legislative competence of the Parliament as the sub Clauses are covered by Entry 54 and Entry 62 respectively of List II of

✓

the Seventh Schedule.

ii) That if any payments have been made by the petitioners on the basis of the impugned clauses, they are entitled to seek refund of the same.



(A.M.SHAFFIQUE, JUDGE)

jsr



APPENDIX

PETITIONER'S EXHIBITS :

- P1: COPY OF THE NOTIFICATION NUMBER 34 OF 2011 DT 25/4/2011
ISSUED BY THE R1.
- P2: COPY OF THE NOTIFICATION NUMBER 31/2011 DT 25/4/2011
ISSUED BY THE R1.
- P3: COPY OF THE CIRCULAR NUMBER 139/2011 - TRU DT 10/5/2011
ISSUED BY R2.
- P4: COPY OF THE COMMUNICATION DT 9/5/2011 ISSUED BY R3 TO THE
PETITIONER
- P5: COPY OF THE LICENSE ISSUED TO THE PETITIONER RENEWED TILL
31/3/2012 IN FAVOUR OF THE PETITIONER

RESPONDENT'S EXHIBITS : NIL.

//TRUE COPY//



P.A. TO JUDGE

BP

✓

APPENDIX

PETITIONERS' EXHIBITS:

- EXT.P.1: COPY OF THE FOREIGN LIQUOR 3 HOTEL (RESTAURANT) LICENCE ISSUED TO THE P.2. AND RENEWED UP TO 31/03/2012.
- EXT.P.2: COPY OF THE RELEVANT PORTION OF THE FINANCE ACT 2011 DEALING WITH CHAPTER V-SERVICE TAX.
- EXT.P.3: COPY OF THE NOTIFICATION NUMBER 1/2006-SERVICE TAX DTD. 1/03/2006 ISSUED BY THE MINISTRY OF FINANCE, GOVERNMENT OF INDIA.
- EXT.P.4: COPY OF THE NOTIFICATION NO.34/2011 DTD. 25/04/2011 ISSUED BY THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE.
- EXT.P.5: COPY OF THE NOTIFICATION NO.31/2011 DTD. 25/04/2011 ISSUED BY THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE.
- EXT.P.6: COPY OF THE APPLICATION DTD. 03/05/2011 SUBMITTED BY THE P.1. BEFORE R.3.
- EXT.P.7: COPY OF THE REPLY DTD. 11/05/2011 ISSUED BY THE COMMISSIONERATE OF CENTRAL EXCISE, SERVICE TAX & CUSTOMS, COCHIN.
- EXT.P.8: COPY OF THE CIRCULAR NO.136/05/2011-TRU DTD. 20/04/2011 ISSUED BY THE MINISTRY OF FINANCE.
- EXT.P.9: COPY OF THE COMMUNICATION BEARING D.O.F. NO.334/3/2011-TRU DTD. 25/04/2011 ISSUED BY MINISTRY OF FINANCE , GOVERNMENT OF INDIA.
- EXT.P.10: COPY OF THE NOTIFICATION NO.29/2011 DTD. 25/04/2011 ISSUED BY THE MINISTRY OF FINANCE.
- EXT.P.11: COPY OF THE CIRCULAR NUMBER 139/8/2011-TRU DTD. 10/05/2011 ISSUED BY R.2.

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//



P.A. TO JUDGE.

TRUE COPY



HIGH COURT OF KERALA
AT ERNAKULAM

Year and Number Of Suit : WPC/15938/2011
or other proceedings

Name Of Applicant / :
Advocate C.S. AJITH PRAKASH

Application Number : 34586/2013

Date Of Application : 04-JUL-13

Date Of Calling for Stamp : 11-JUL-13

Date Of Production of Stamp : 11-JUL-13

Date When Copy was Ready : 11-JUL-13

Date Notified for appearance : 19-JUL-13
to receive the copy

Date When copy was delivered : 11/7/13


Examiner