IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 3RD DAY OF JULY2013/12TH ASHADHA, 1935

WP(C).No. 14045 of 2011 (E)

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PETITIONER(S):

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1. KERALA CLASSIFIED HOTELS AND RESORTS ASSOCIATION,

(REGN NO:T 1832/2009)T.C.NO.25/3592(2),

NEERAZHI LANE, PULIMOODU GPO,

THIRUVANANTHAPURAM-695 024,

REPRESENTED BY ITS SECRETARY V.KRISHNAKUMAR &

PRESIDENT G.SOBODHAN.

2. M/S.R.C.PARK,OPPOSITE TOWN HALL,

KUNNAMKULAM, THRISSUR DISTRICT-680 503,

REPRESENTED BY ITS MANAGING PARTNER, K.K.RADHAKIRSHNAN.

3. M/S.K.K.RESIDENCY

(A UNIT OF K.K.BUILDERS), OPPOSITE BUS STAND,

PAYYANNUR, KANNUR DISTRICT -670 307,

REP.BY ITS MANAGING PARTNER K.K.MOHANDAS

4. WATER WORLD TOURISM COMPANY(P)LTD.,

MUNICIPAL SHOPPING CENTRE, OPP BOAT JETTY,

ALAPPUZHA-688 013, REPRESENTED BY ITS

DIRECTOR MAHTEW JOSEPH.

5. PEARL VIEW HOTELS PVT LTD, VENUS CONRNER,

KODUVALLY,PEARL VIEW JUNCTION, THALASSERRY-670 101,

REPRESENTED BY ITS MANAGING DIRECTOR, A.M.RAVEENDRAN

BY DR.K.B.MUHAMED KUTTY,SENIOR ADVOCATE

BY ADV. SRI.S.ARUN RAJ

RESPONDENT(S):

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1. UNION OF INDIA,

REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,

FINANCE DEPARTMENT, NEW DELHI-110 001.

Kss .2/-

..2....

WPC.NO.14045/2011 E

2. CENTRAL BOARD OF EXCISE AND CUSTOMS,

DEPARTMENT OF REVENUE, MINISTRY OF FINANCE,

GOVERNMENT OF INDIA, NEW DELHI-110 001.

3. CHIEF COMMISSIONER OF CNETRAL EXCISE,

CUSTOMS & SERVICE TAX KERALA ZONE, C.R.BUILDING,

I.S.PRESS ROAD, COCHIN-682 018.

4. STATE OF KERALA,

REPRESENTED BY CHIEF SECRETARY,

THIRUVANANTHAPURAM.

R1 BY ADV. SRI.P.PARAMESWARAN NAIR,ASG OF INDIA

R2 & R3 BY ADV. SRI.TOJAN J.VATHIKULAM,SC,C.B. EXCISE

SRI.THOMAS MATHEW NELLIMOOTTIL,SC,CB EXCISE

R4 BY GOVERNMENT PLEADER SRI. NOUSHAD THOTTATHIL

R4 BY SPL.GOVT.PLEADER SRI.SEBASTIAN CHEMPAPPILLY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD

ON 29/01/2013 ALONG WITH WPC. NO.14130/2011 AND CONNECTED

CASES, THE COURT ON 03/07/2013 DELIVERED THE FOLLOWING:

Kss

WPC.NO.14045/2011 E

APPENDIX

PETITIONER'S EXHIBITS:

P1: COPY OF THE RELEVANT PORTION OF THE FINANCE ACT 2011

DEALING WITH CHAPTER V- SERVICE TAX.

P2: COPY OF RELEVANT PORTION OF THE LETTER NO.334/3/2011-TRU

DTD. 28/02/2011 ISSUED BY THE CBEC.

P3: COPY OF THE NOTIFICATION NO.34/2011 DTD. 25/04/2011 ISSUED

BY THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE,

DEPARTMENT OF REVENUE.

P4: COPY OF THE NOTIFICATION NO.31/2011 DTD. 25/04/2011 ISSUED

BY THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE,

DEPARTMENT OF REVENUE.

RESPONDENT'S EXHIBITS: N I L

/TRUE COPY/

P.A.TO JUDGE

Kss

A.M.SHAFFIQUE, J

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W.P.C.Nos.14045 of 2011,

14130 of 2011, 15867 of 2011,

15938 of 2011 & 1918 of 2013

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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 consequential reliefs. 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;

W.P.C..Nos 14045 of 2011

& conn.cases. 2

(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

W.P.C..Nos 14045 of 2011

& conn.cases. 3

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

W.P.C..Nos 14045 of 2011

& conn.cases. 4

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

W.P.C..Nos 14045 of 2011

& conn.cases. 5

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.

W.P.C..Nos 14045 of 2011

& conn.cases. 6

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

--

W.P.C..Nos 14045 of 2011

& conn.cases. 7

(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;

W.P.C..Nos 14045 of 2011

& conn.cases. 8

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.

W.P.C..Nos 14045 of 2011

& conn.cases. 9

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 trenched 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),

W.P.C..Nos 14045 of 2011

& conn.cases. 10

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.

W.P.C..Nos 14045 of 2011

& conn.cases. 11

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

W.P.C..Nos 14045 of 2011

& conn.cases. 12

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

W.P.C..Nos 14045 of 2011

& conn.cases. 13

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

W.P.C..Nos 14045 of 2011

& conn.cases. 14

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

W.P.C..Nos 14045 of 2011

& conn.cases. 15

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

W.P.C..Nos 14045 of 2011

& conn.cases. 16

"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." xxxxxxx "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

W.P.C..Nos 14045 of 2011

& conn.cases. 17

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.

W.P.C..Nos 14045 of 2011

& conn.cases. 18

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?

W.P.C..Nos 14045 of 2011

& conn.cases. 19

(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

W.P.C..Nos 14045 of 2011

& conn.cases. 20

"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

W.P.C..Nos 14045 of 2011

& conn.cases. 21

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

W.P.C..Nos 14045 of 2011

& conn.cases. 22

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

assessees 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."

W.P.C..Nos 14045 of 2011

& conn.cases. 23

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

W.P.C..Nos 14045 of 2011

& conn.cases. 24

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:

W.P.C..Nos 14045 of 2011

& conn.cases. 25

"... 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

W.P.C..Nos 14045 of 2011

& conn.cases. 26

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

W.P.C..Nos 14045 of 2011

& conn.cases. 27

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

W.P.C..Nos 14045 of 2011

& conn.cases. 28

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

W.P.C..Nos 14045 of 2011

& conn.cases. 29

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

W.P.C..Nos 14045 of 2011

& conn.cases. 30

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

W.P.C..Nos 14045 of 2011

& conn.cases. 31

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

W.P.C..Nos 14045 of 2011

& conn.cases. 32

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

W.P.C..Nos 14045 of 2011

& conn.cases. 33

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

W.P.C..Nos 14045 of 2011

& conn.cases. 34

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

W.P.C..Nos 14045 of 2011

& conn.cases. 35

W.P.C..Nos 14045 of 2011

& conn.cases. 36