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/-

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 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;

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 (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

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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

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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

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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.

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 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

 --

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 (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;

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 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.

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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),

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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.

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 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

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 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

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 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

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 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

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 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

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 "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

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 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.

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 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?

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 (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

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 "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

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 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

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 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."

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 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

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 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:

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 "... 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

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 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

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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

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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

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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

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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

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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

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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

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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

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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

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