THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 05.09.2011

+ **W.P.(C) 2194/2010**

BHARTI TELEMEDIA LTD ... Petitioner

- versus -

GOVERNMENT OF NCT OF DELHI AND ANR ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr S. Ganesh, Sr Advocate with Mr D.K. Singh and Mr Pradeep Shukla

For the Respondents : Mr Parag P. Tripathi, ASG with Mr Jamal Akhtar for Mr N. Waziri

AND

+ **W.P.(C) 1312/2010**

TATA SKY LTD ... Petitioner

versus

GOVERNMENT OF NCT OF DELHI AND ANR ... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Aman Lekhi, Sr Advocate with Mr D.K. Singh and Mr pradeep Shukla

For the Respondents : Mr Parag P. Tripathi, ASG with Mr Jamal Akhtar for Mr N. Waziri

AND

+ **W.P.(C) 2718/2010**

BHARAT BUSINESS CHANNEL LTD ... Petitioner

versus

GOVERNMENT OF NCT OF DELHI AND ANR ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Aman Lekhi, Sr Advocate with Mr Vivek Sarin
For the Respondents : Mr Parag P. Tripathi, ASG with Mr Jamal Akhtar for Mr N. Waziri

AND

\+ **W.P.(C) 4621/2010**

DISH TV INDIA LIMITED ... Petitioner

versus

GOVERNMENT OF NCT OF DELHI AND ANR ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Varun Sarin
For the Respondents : Mr Parag P. Tripathi, ASG with Mr Jamal Akhtar for Mr N. Waziri

CORAM:
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J

1. These petitions raise common issues and are, therefore, being decided together. Briefly put, the challenge is to the Delhi Entertainments and Betting Tax Act, 1996 (hereinafter referred to as 'the said Act') to the extent it imposes a tax on entertainment through 'direct-to-home (DTH) service'.

Rival Contentions

2. Mr Ganesh, senior advocate, appearing for Bharti Telemedia Ltd and Mr Aman Lekhi, senior advocate, appearing for Tata Sky Ltd and Bharat Business Channel Ltd, contented on behalf of the petitioners that the DTH service is a broadcasting service falling within the meaning of taxable service under section 65(105)(zk) of the Finance Act, 1994 and is amenable to service tax @10.33% on the gross amount paid by a subscriber for providing the DTH broadcasting service. The service tax is imposed by the Finance Act, 1994 in exercise of Parliament's exclusive power to levy a tax on services under article 246(1) read with Entry 92C of List I of the VIIth Schedule to the Constitution of India. It was also contended on behalf of the petitioners that Parliament alone has the exclusive power to tax DTH services and that the States do not have any power to tax the said service by any name called. It is argued that the State legislature cannot, in the guise of imposing a tax on

entertainments, in exercise of its powers under Entry 62 of List II of the VIIth Schedule to the Constitution, impose a tax on the DTH service. Consequently, it was submitted that the said Act, to the extent it attempts at encompassing DTH services within the ambit of entertainment tax, is unconstitutional. It is further argued on behalf of the petitioners that the taxable event for the levy of service tax is exactly the same as the taxable event for the levy of entertainment tax, which is, the provision of DTH service by transmitting DTH signals. And, therefore, there is a clear trespass into Parliament's exclusive domain. Mr Varun Sarin, appearing for Dish TV India Ltd, adopted the arguments of Mr Ganesh and Mr Lekhi.

3. On the other hand, Mr Parag Tripathi, the learned Additional Solicitor General of India, appearing on behalf of the Government of National Capital Territory of Delhi based his arguments on the "aspect theory". He submitted that the same transaction or activity may have more than one aspect and these aspects may fall within entries of different lists. Thus, while one aspect may be taxed under an entry in List I another aspect may be taxed under an entry in List II. Therefore, both Parliament and the State legislatures would be competent to make laws for taxing the aspect relevant to them without impinging on each other's domains. According to Mr Tripathi, DTH service had two aspects – (1) a

service aspect; and (2) an entertainment aspect. The former is taxed under the Finance Act, 1994 read with entry 92C of List I and the latter is subjected to tax as an entertainment under the said Act read with entry 62 of List II. He further submitted that there a two separate and distinct taxable events in respect of the two aspects. It was therefore contended by him that the said Act, by including DTH service within the ambit of entertainment, had not transgressed the Constitution.

4. In rejoinder, Mr Ganesh submitted that the "aspect theory" can only be invoked and applied in order to justify the levy of two taxes on one transaction if the transaction gives rise to two distinct and different taxable events, such as manufacture and sale of goods or holding a licence to practice and rendering professional services and so on. He maintained that in the present case the event for the service tax regime is the provision of the broadcasting service and in the entertainment tax regime contemplated under the said Act also the taxing event is the provision of DTH broadcasting service. Thus, according to him, the taxable event being the same, the aspect theory would have no application and, without that, the impost of entertainment tax on DTH service would be unconstitutional. Mr Lekhi added that "entertainment through DTH service" as used in section 2(i) of the said Act refers to nothing but the pictures,

images and sounds transmitted through space and that is exactly what is meant by broadcasting service. Consequently, Mr Lekhi contended, what is sought to be included in entertainment is in fact a "taxable service" under the service tax regime. He submitted that the attempt on the part of the State legislature to bring in DTH service within the ambit of "entertainment" is a disguised and indirect transgression into a prohibited field.

5. In support of his contentions Mr Ganesh had placed reliance on the following decisions:-

i) ***Godfrey Phillips India Ltd v. State of U.P.:*** ***(2005) 2 SCC 51;*** and

ii) ***BSNL v. Union of India:*** ***(2006) 3 SCC 1.***

6. Mr Aman Lekhi relied upon the following decisions:-

i) ***T.N. Kalyana Mandapam Assn. v. Union of India:*** ***(2004) 5 SCC 632;***

ii) ***State of West Bengal v. Purvi Communication (P) Ltd:*** ***(2005) 3 SCC 711;*** and

iii) ***Imagic Creative (P) Ltd v. CCT:*** ***(2008) 2 SCC 614.***

7. Mr Parag Tripathi referred to and relied upon the following decisions:-

i) ***Federation of Hotel & Restaurant Assn of India v. Union of India:*** ***(1989) 3 SCC 634;***

ii) ***Express Hotels (P) Ltd v. State of Gujarat:*** ***(1989) 3 SCC 677;*** and

iii) ***All-India Federation of Tax Practitioners v. Union of India:*** ***(2007) 7 SCC 527.***

Nature of service

8. As mentioned in the Bharti Telemedia Ltd petition, which we are taking up as the representative case for facts, it has a single broadcasting service at Manesar, Haryana for its operations which were launched in August 2008. Under a licence/permission granted by the Government of India, Ministry of Information and Broadcasting, Bharti Telemedia had set up a Hub which enables it to downlink signals from the satellites of various broadcasters of TV channels and to then uplink the signals to its own Ku Band (INSAT 4CR satellite) designated transponders for transmission of the signals in Ku band. These signals are received by the dish antennae installed at the subscribers' premises. Since these signals are in encrypted form they are decrypted by the Set-Top Boxes and the viewing cards inside these boxes to enable subscribers to view the

various TV channels on their TV sets. The subscribers have to obtain a connection for which they pay monthly charges varying from Rs 99/- to Rs 400/- depending on the choice of channels. The set-top boxes are installed without any consideration and remain the property of Bharti Telemedia.

Provisions under challenge

9. The challenge is mainly to sections 2(a), 2(aa), 2(m)(vi), 7(1) and 8(2) of the said Act (The Delhi Entertainments and Betting Tax Act, 1996) and to rules 12A, 26A and 31 of the Delhi Entertainments and Betting Tax Rules, 1997 as amended by the Delhi Entertainment and Betting Tax (Amendment) Rules, 2010.

10. Sections 2(a), 2(aa), 2(m)(vi), 7(1) and 8(2) and other relevant provisions of the said Act are as under:-

> "2. **Definitions**
>
> In this Act, unless the context otherwise require, –
>
> (a) "**addressable system**" means an electronic device or more than one electronic devices put in an integrated system through which television signals and value added services can be sent in encrypted or unencrypted form, which can be decoded by the device or devices at the premises of the subscriber within limits of the authorization made, on the choice and request of such subscriber, by the service provider to the subscriber;

(aa) "**admission to an entertainment**" includes admission to any place in with the entertainment is held and in case of entertainment through cable service and **direct-to-home (DTH) service** with or without cable connection, each connection to a subscriber shall be deemed to be an admission for entertainment;

xxxxx xxxxx xxxxx xxxxx

(ha) "**direct-to-home (DTH) service**" means distribution of multi-Channel television and radio programmes and similar content by using a satellite system, by providing signals directly to subscriber's premises without passing through an intermediary or otherwise;

(i) "**entertainment**" means any exhibition, performance, amusement, game, sport or race (including horse race) or in the case of cinematograph exhibitions, cover exhibition of news-reels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately, **and also includes entertainment through** cable service and **direct-to-home (DTH) service**;

xxxxx xxxxx xxxxx xxxxx

(m) "**payment for admission**" includes –

xxxxx xxxxx xxxxx xxxxx

(vi) any payment made by a person by way of contribution, subscription, installation or connection charges or any other charges collected in any manner

whatsoever for entertainment through direct-to-home (DTH) broadcasting service or distribution of television signals and value-added services with the aid of any type of addressable system, which connects a television set, computer system at a residential or non-residential place of subscriber's premises, directly to the satellite or otherwise;"

xxxxx xxxxx xxxxx xxxxx

(s) "**subscriber**" means a person who received the signals of television network and value-added services from multi – system operator or from cable operator or from direct-to-home (DTH) broadcasting service at a place indicated by him to the service provider, without further transmitting it to any other person.

Explanation I: In case of hotels, each room or premises where signals of cable television network are received shall be treated as a subscriber.

Explanation II: In case of direct-to-home (DTH), every television set of computer set receiving the signals shall be treated as a subscriber;"

"**7. Tax on cable, video service and direct-to-home (DTH) service:-**

(1) Subject to the provisions of this Act, there shall be levied and paid an entertainment tax on all **payments for admission to an entertainment through a direct-to-home (DTH)** or through a cable television network with addressable system or otherwise, other than entertainment to which section 6 applies, at such

rates not exceeding rupees six hundred for every subscriber for every year as the Government may, from time to time, notified in this behalf, which shall be collected by the proprietor and paid to the Government in the manner prescribed.

xxxxx xxxxx xxxxx xxxxx

8. Information before holding entertainment

(1) xxxxx xxxxx xxxxx xxxxx

(2) No proprietor of a cable television network or video cinema or direct-to-home (DTH) shall provide entertainment unless he obtains permission from the Commissioner in the manner prescribed.

xxxxx xxxxx xxxxx xxxxx."

(emphasis added)

Provisions of the Constitution of India

11. The relevant provisions of the Constitution of India are 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 eliminated 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 in the seventh schedule (in this Constitution referred to as the "State list").

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

Entry 92C of list I (Union List) reads as under: –

"**92C.** Taxes on services."

Entry 62 of list II (State List) reads as under: –

"**62.** Taxes on luxury, including taxes on entertainment, amusements, betting and gambling."

<u>The decisions cited</u>

12. We shall take up the decisions cited at the bar in chronological order. The first is the decision of a constitution bench of the Supreme Court in ***Federation of Hotels*** *(supra).* The challenge was to the constitutional validity of the Expenditure Tax Act, 1987 which envisaged a 10% ad valorem tax on "chargeable

expenditure" in a particular class of hotels. One of the contentions was that the Act was not one imposing an expenditure tax (which was within the legislative competence of Parliament) but, in pith and substance, was either a tax on luxuries falling within Entry 62 of List II or a tax on the sale of goods within the ambit of Entry 54 of List II (neither of which was within the legislative competence of Parliament). While considering this contention, the majority view (R.S. Pathak, CJ and M.N. Venkatachaliah, Sabyasachi Mukharji, S. Natarajan, JJ) as to how potential overlap situations are to be dealt with was as follows:-

> "Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other." [at page 651]

The majority view was that :-

> **"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. **<u>The same transaction may involve two or more</u>**

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 [AIR 1945 PC 98]* 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...""
>
> (emphasis added)

The Supreme Court further observed as under:-

> "**37.** It is trite that the true nature and character of the legislation must be determined with reference to a question of the power of the legislature. The consequences and effects of the legislation are not the same thing as the legislative subject-matter. It is the true nature and character of the legislation and not its ultimate economic results that matters.
>
> **38.** Indeed, as an instance of different aspects of the same matter, being the topic of legislation under different legislative powers, reference may be made to the annual letting value of a property in the occupation of a person for

his own residence being, in one aspect, the measure for levy of property tax under State law and in another aspect constitute the notional or presumed income for the purpose of income tax."

xxxxx xxxxx xxxxx xxxxx

"**43.** The subject of a tax is different from the measure of the levy. The measure of the tax is not determinative of its essential character or of the competence of the legislature. In *Sainik Motors* v. *State of Rajasthan [AIR 1961 SC 1480]*, the provisions of a State law levying a tax on passengers and goods under Entry 56 of List I were assailed on the ground that the State was, in the guise of taxing passengers and goods, in substance and reality taxing the income of the stage carriage operators or, at any rate, was taxing the "fares and freights", both outside of its powers. It was pointed out that the operators were required to pay the tax calculated at a rate related to the value of the fare and freight. Repelling the contention, Hidayatullah, J., speaking for the court said: (SCR p. 525)

> "We do not agree that the Act, in its pith and substance, lays the tax upon income and not upon passengers and goods. Section 3, in terms, speaks of the charge of the tax 'in respect of all passengers carried and goods transported by motor vehicles', and though the measure of the tax is furnished by the amount of fare and freight charged, it does not cease to be a tax on passengers and goods.""

The Supreme Court concluded that the tax in question was essentially a tax on expenditure and not on luxuries or sale of goods

falling within the State power. Recognising the aspect theory, the Supreme Court held that the "expenditure" aspect of the transaction fell within the Union power and therefore sustained the legislative competence of Parliament to impose a tax on that aspect.

13. The next decision in ***Express Hotels*** *(supra)* is also of the same constitution bench of the Supreme Court as in the case of ***Federation of Hotels*** *(supra).* In fact, both these decisions were pronounced on the same day i.e., 02.05.1989. One of the contentions raised in ***Express Hotels*** *(supra)* was that the taxation entry in Entry 62 of List II providing for taxes on 'luxuries' contemplates, and takes within its sweep, a tax on goods and articles in their aspect and character as luxuries and does not include 'services' or 'activities' and that, therefore, the levy on the services for lodging provided at the hotels was beyond the scope of Entry 62 List II. While rejecting the said contention, the Supreme Court made the following observations:-

> **"15.** We are dealing with an entry in a Legislative List. The entries should not be read in a narrow or pedantic sense but must be given their fullest meaning and the widest amplitude and be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in them."
>
> **"21.** The concept of a tax on "luxuries" in Entry 62, List II cannot be limited merely to tax things tangible and

> corporeal in their aspect as "luxuries". It is true that while frugal or simple food and medicine may be classified as necessities; articles such as jewellery, perfume, intoxicating liquor, tobacco, etc., could be called articles of luxury. But the legislative entry cannot be exhausted by these cases, illustrative of the concept. The entry encompasses all the manifestations or emanations, the notion of "luxuries" can fairly and reasonably (*sic*) can be said to comprehend the element of extravagance or indulgence that differentiates "luxury" from "necessity" cannot be confined to goods and articles. There can be elements of extravagance or indulgence in the quality of services and activities."

In the same decision, the Supreme Court also observed that:-

> "25..... The concept of "luxuries" in the legislative entry takes within it everything that can fairly and reasonably be said to be comprehended in it. The actual measure of the levy is a matter of legislative policy and convenience. So long as the legislation has reasonable nexus with the concept of "luxuries" in the broad and general sense in which the expressions in legislative tests (*sic* lists) are comprehended, the legislative competence extends to all matters "with respect to" that field or topic of legislation."
>
> 27. .... Once the legislative competence and the nexus between the taxing power and the subject of taxation is established, the other incidents are matters of fiscal policy behind the taxing law. The measure of the tax is not the same thing as, and must be kept distinguished from, the subject of the tax.

14. The Supreme Court in ***Kalyana Mandapam*** *(supra)*, inter alia, held that:-

"58. A tax on services rendered by mandap-keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities. Section 65 clause (41) sub-clause (*p*) of the Finance Act, 1994, defines taxable service (which is the subject-matter of levy of service tax) as any service provided to a customer

> "by a mandap-keeper in relation to the use of a mandap in any manner including the facilities provided to [a customer] in relation to such use and also the services, if any, rendered as a caterer".

The nature and character of this service tax is evident from the fact that the transaction between a mandap-keeper and his customer is definitely not in the nature of a sale or hire-purchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well-established judicial principle that so long as the legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the legislature (*Prafulla Kumar* v. *Bank of Commerce [AIR 1947 PC 60]*)....."

15. Next, is another constitution bench decision of the Supreme Court in the case of ***Godfrey Phillips*** *(supra)*. The imposition and levy of a luxury tax on tobacco and tobacco products by treating them as "luxuries" within the meaning of the word in Entry 62 of List II was the subject matter of challenge. While construing provisions of the Constitution of India and the relevant entries in the Seventh Schedule, the Supreme Court sounded a warning that opinions expressed by courts of countries like United States of America, Canada or Australia may not be of any help. In this context, the Supreme Court observed as follows:-

> "43. Before we proceed further we would like to clear the ground. Whatever be the similarities between the Constitutions of other countries with similar federal structures as this country such as the United States, Canada or Australia, this Court has, as a general rule held that the opinions expressed by the courts of those countries may not be helpful in construing the allocation of legislative heads in our Constitution ..... Given the wealth of authority on the question of interpretation of legislative heads in this country, we deem it sufficient to restrict our opinion based on the views expressed by this Court.
>
> 44. The Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This mutual exclusivity is reflected in Article 246(1) and has been noted in H.M. Seervai's *Constitutional Law of India*, 4th Edn., Vol. 1 at p. 166 in para 1A.25 where, after commenting on the problems created by the overlapping powers of taxation

provided for in other countries with federal structures such as the United States, Canada and Australia, the learned author opined:

> "The lists contained in Schedule VII to the Government of India Act, 1935, provided for distinct and separate fields of taxation, and it is not without significance that the concurrent legislative list contains no entry relating to taxation but provides only for 'fees' in respect of matters contained in the list but not including fees taken in any court. List I and List II of Schedule VII thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the Government of India Act, 1935. This scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results."

45. This view has also been reiterated in *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar [(1983) 4 SCC 45]*: (SCC pp. 92-93, paras 75 & 76)

> "A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually

> exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation.
>
> … Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise."

(See also *State of W.B.* v. *Kesoram Industries Ltd [(2004) 10 SCC 201]*)"

16. In view of the above, the Supreme Court held that taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. "*If the taxing power is within a particular legislative field, it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass.*"

17. The Court also reiterated the well established principle that incidence of a tax is not relevant in determining the subject matter of a tax. In this regard, the Supreme Court noted as follows:-

> "47. Classically, a tax is seen as composed of two elements: the person, thing or activity on which the tax is imposed and the incidence of tax. Thus every tax may be levied on an object or an event of taxation. The distinction between the two may not, ultimately, be material in the context of

the Indian Constitution as we will find later. But for the time being we may note that both these elements are distinct from the incidence of taxation. For example, the tax may be imposed on goods on the event of their manufacture, sales, import, etc. The law imposing the tax may also prescribe the incidence or the manner in which the burden of the tax would fall on any person and would take within itself the amount and measure of tax. The importance of this distinction lies in the fact that in India, the first two have been given a constitutional status, whereas the incidence of tax would be a matter of statutory detail. The incidence of tax would be relevant in construing whether a tax is a direct or an indirect one. But it would be irrelevant in determining the subject-matter of the tax. (See *Chhotabhai Jethabhai Patel & Co.* v. *Union of India [AIR 1962 SC 1006]*.)"

48. An illustration of this distinction is nicely brought out in *State of Karnataka* v. *Drive-in-Enterprises [(2001) 4 SCC 60]*. Entertainment tax was levied by the Karnataka Cinemas (Regulation) Act, 1964 and the Rules framed thereunder by the State in respect of a film show. A higher rate of tax was levied on persons who drove their cars in to view the film from the comfort of their cars. The challenge to the Act was that entertainment tax could be levied only on human beings and not on any inanimate object, namely, motor vehicles. The challenge was negatived on the ground that the State was competent to levy tax on entertainment under Entry 62 List II. That was the subject-matter of the tax. The incidence of the tax was on the persons entertained. Clearly the manner in which the burden would fall viz. on persons either with or without motor vehicles would not affect either the object or the nature of the tax.

> Motor vehicles were neither the object of taxation nor the taxable event but were part of the incidence of the tax.

18. The Supreme Court, in ***Godfrey Phillips*** *(supra)* further noted that a taxation entry in a legislative list may be with respect to an object or an event or may be with respect to both and that Article 246 makes it clear that the exclusive powers conferred on Parliament or the States to legislate on a particular matter includes the power to legislate with respect to that matter. Hence, the Court held that where the entry describes an object of tax, all taxable events pertaining to the object are within that field of legislation unless the event is specifically provided for elsewhere under a different legislative head. The Supreme Court noticed that where there is the possibility of legislative overlap, courts have resolved the issue according to settled principles of construction of entries in the legislative lists. The **first** such principle being that legislative entries should be liberally interpreted and the **second** being that competing entries must be read harmoniously. In this regard the Supreme Court observed as under:-

> "50. The first of such settled principles is that legislative entries should be liberally interpreted, that none of the items in the list is to be read in a narrow or restricted sense and that each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it (*United Provinces* v. *Atiqa Begam [AIR 1941 FC 16]*, *Western*

India Theatres Ltd. v. *Cantonment Board [AIR 1959 SC 582=1959 Supp 2 SCR 63]*, SCR at p. 69 and *Elel Hotels & Investments Ltd.* v. *Union of India [(1989) 3 SCC 698*).

53. The argument of Mr Salve is in fact that the breadth of an entry is curtailed by the second principle of construction. The second principle is that competing entries must be read harmoniously. The proper way to avoid a conflict would be to read the entries together and to interpret the language of one by that of the other *Governor General in Council* v. *Province of Madras [1945 FCR 179 = AIR 1945 PC 98]*, FCR at pp. 191-92, *State of Bombay* v. *Narothamdas Jethabhai [AIR 1951 SC 69]*, *Bar Council of U.P.* v. *State of U.P. [(1973) 1 SCC 261]*, *D.G. Gose & Co. (Agents) (P) Ltd.* v. *State of Kerala [(1980) 2 SCC 410]*, *Federation of Hotel and Restaurant* v. *Union of India [(1989) 3 SCC 634]*, SCC at pp. 657, 667-68, *State of W.B.* v. *Kesoram Industries [(2004) 10 SCC 201*, SCC at p. 289, para 50 : Scale at p. 462 and *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, Re [AIR 1939 FC 1]*, AIR at pp. 8, 40."

19. While considering the meaning to be ascribed to the word "includes" appearing in Entry 62 List II, the Supreme Court made an important observation that "***entertainments, amusements, betting and gambling are all activities***". In the context of the case before it, the Supreme Court concluded 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."

20. ***Purvi Communication*** *(supra)* is a decision of a three-judge bench of the Supreme Court. Sub-section (4-a) of Section 4-A of the West Bengal Entertainment-cum-Amusement Tax Act, 1982 was the subject matter of consideration before the Supreme Court. The said provision was as under :-

> "(4-*a*) Where any owner, or any person for the time being in possession, of any electrical, electronic or mechanical device, is a cable operator and receives through such device the signal of any performance, film or any other programme telecast, and thereafter such owner or person, against payment received or receivable,—
>
> *(i)* exhibits such performance, film or programme through cable television network directly to customers, or
>
> *(ii)* transmits such signal to a sub-cable operator, who in turn provides cable service for exhibition of such performance, film or programme to the customers,

> such owner or person shall be liable to pay tax from the month in which he exhibits such performance, film or programme or transmits such signal to a sub-cable operator on the basis of his monthly gross receipt at such rate, not exceeding twenty-five per centum of the monthly gross receipt, as may be specified by the State Government by notification published in the Official Gazette."

21. One of the questions for consideration before the Supreme Court was whether clause (ii) of sub-section (4-a) of Section 4-A of the said West Bengal Act was beyond the legislative competence of the State Legislature? The Supreme Court held that the State Legislature was competent in enacting the said provision. The Court, inter alia, observed :-

> "35. ... The purpose of sub-section (4-*a*) of Section 4-A of the Act is the levy and collection of tax from any person who provides cable service directly to consumers or transmits to a sub-cable operator through a cable television network and otherwise controls or is responsible for the management and operation of a cable television network and such person has been defined as "cable operator" being a taxable person exclusively for the purpose of levy and collection of entertainment tax only when a cable operator so defined receives through any electrical, electronic and mechanical device the signal of any performance, film or any other programme telecast and provides cable service directly to consumers or transmits signals to a sub-cable operator through a cable television network and otherwise controls or is responsible for the management and operation of a cable television network. The person who

has been defined as cable operator exclusively for the purpose of levy and collection of entertainment tax has a direct and proximate nexus with the amusements and entertainments to the viewers at every home or place inasmuch as he is the person directly connected with presentation of entertainments to the subscribers. A person is also a "cable operator" for the purpose of sub-section (4-*a*) of Section 4-A of the said 1982 Act when he receives the signal of any performance, film, or any other programme telecast and transmits such signal to a sub-cable operator through cable television network or otherwise controls or is responsible for the management and operation of cable television network against payment received or receivable by him. Therefore, a cable operator is the source of entertainment to the individual subscribers because, it is he who receives the signal of performance, film, and any programme which is transmitted or given to a large number of sub-cable operators (although they call them as cable operator). The viewers enjoy, or are entertained by such performance, film, or programme because of receiving and transmitting video or audio-visual signals through coaxial cable or any other device by the respondents. No entertainment can be presented to the viewers unless a cable operator transmits the video and audio signals to a sub-cable operator for instantaneous presentation of any performance, film or any programme on their TV screen. The sub-cable operators are mere franchisees who receive signals for transmission to the viewers only on payment of price promised or paid in terms of agreements entered by and between them...."

In this backdrop, the Supreme Court held as under:-

"37. In our view, the respondents as a cable operator, for the purpose of levy and collection of tax under sub-section

(4-*a*) of Section 4-A of the Act have direct and close nexus with the entertainments made available to the viewer through their cable television network. The performance, film or programmes shown to the viewers through the cable television network come within the meaning of entertainments and therefore within the legislative competence of the State Legislature under Entry 62 of List II of the Seventh Schedule to the Constitution to make law for the levy and collection of tax on such entertainments.

38. A tax under Entry 62 of List II of the Seventh Schedule to the Constitution may be imposed not only on the person spending on entertainment but also on the act of a person entertaining, or the subject of entertainment. It is well settled by this Court that such tax may be levied on the person offering or providing entertainment or the person enjoying it. The respondents are admittedly engaged in the business of receiving broadcast signals and then instantaneously sending or transmitting such visual or audio-visual signals by coaxial cable, to subscribers' homes through their various franchisees. It has been made possible for the individual subscribers to choose the desired channels on their individual TV sets because of cable television technology of the respondents and of sending the visual or audio-visual signals to sub-cable operators, and instantly retransmitting such signals to individual subscribers for entertaining them through their franchisees. The respondents' act is, no doubt, an act of offering entertainment to the subscribers and/or viewers. The respondent is very much directly and closely involved in the act of offering or providing entertainment to subscribers who are on his record. For the fact of offering or providing entertainment to the subscribers and/or viewers, the respondents receive charges, which are realised or collected by their franchisee from the ultimate

subscribers. Their franchisee, called as sub-cable operator under the said 1982 Act having no independent role to offer or provide entertainments to the subscribers inasmuch as franchisees have to depend entirely on the respondents' communication network and this communication network of the respondents consists of receiving and sending visual images and audio and other information for preparation of the subscribers and/or viewers; without the communication network service of the respondents, no entertainments can be offered or provided to the subscribers and/or viewers.

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

22. We now come to the Supreme Court decision in ***BSNL*** *(supra)* wherein one of the issues which arose for consideration was :-

> "(*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?" (para 32)

The Supreme Court was required to determine the nature of the transaction by which mobile phone connections are enjoyed. The question was whether it was a sale or a service or both a sale and a service? As observed by the Supreme Court, if it was a sale then the States had the legislative competence to levy sales tax on the transaction under Entry 54 List II of the Seventh Schedule to the Constitution. On the other hand, if it was a service, then, Parliament alone could levy service tax under Entry 97 List I (now, Entry 92-C of List I, after 2003). If the nature of the transaction had elements of both sale and service, the question which arose was whether both the State legislature and Parliament could levy their separate taxes together or only one of them. The Court, inter alia, held:-

> "The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale."

The Supreme Court also observed:-

> **"88.** No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the

> sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. ..."

It was however clarified that:-

> "The 'aspect theory' would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."

23. In ***All India Federation of Tax Practitioners*** *(supra),* the issue was whether Parliament was competent to impose a service tax on practising chartered accountants and architects in the wake of Entry 60, List II of the Seventh Schedule to the Constitution which enabled the State Legislatures to exclusively enact laws with regard to "*taxes on professions, trades, callings and employments*". The Court answered in the affirmative by applying the 'aspect theory' in the following manner:-

> **"33.** Applying the above tests laid down in the aforestated judgments to the facts of the present case, we find that Entry 60 of List II, mentions "taxes on professions, trades, callings and employments". Entry 60 is a taxing entry. It is not a general entry. Therefore, we hold that tax on professions, etc. has to be read as a levy on professions, trades, callings, etc., *as such*. Therefore, Entry 60 which

refers to professions cannot be extended to include services. This is what is called as an Aspect Theory. If the argument of the appellants is accepted, then there would be no difference between interpretation of a general entry and interpretation of a taxing entry in List I and List II of the Seventh Schedule to the Constitution. Therefore, "professions" will not include services under Entry 60. For the above reasons, we hold that Parliament had absolute jurisdiction and legislative competence to levy tax on services..."

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

> The activity undertaken by the chartered accountant or cost accountant is similar to saleable or marketable commodities produced by the assessee and cleared by the assessee for home consumption under the Central Excise Act."

The following observations of the Supreme Court are also relevant:-

> **"44.** Competence to legislate flows from Articles 245, 246 and the other articles in Part XI. A legislation like the Finance Act can be supported on the basis of a number of entries. In the present case, we are concerned with the constitutional status of the levy, namely, service tax. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of Parliament and the State Legislatures are subject to constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to taxes on professions, trades, callings, etc. Therefore, Entry 60 of List II and Entries 92-C/97 of List I operate in different spheres."

24. Finally, we are left with the decision of the Supreme Court in ***Imagic*** *(supra).* The question for determination before the Supreme Court was whether the charges collected towards the

services for evolution of prototype conceptual design (i.e., creation of concept), on which service tax had been paid under the Finance Act, 1994 (as amended from time to time) were liable to tax under the Karnataka Value Added Tax Act, 2003. While considering this question the Court observed that:-

> **"28.** ..... In the matter of interpretation of a taxing statute, as also other statutes where the applicability of Article 246 of the Constitution of India, read with the Seventh Schedule thereof is in question, the Court may have to take recourse to various theories including "aspect theory", as was noticed by this Court in *Federation of Hotel & Restaurant Assn. of India* v. *Union of India [(1989) 3 SCC 364]"*.
>
> **"31.** The court, while interpreting a statute, must bear in mind that the legislature was supposed to know law and the legislation enacted is a reasonable one. The court must also bear in mind that where the application of a parliamentary and a legislative Act comes up for consideration; endeavours shall be made to see that provisions of both the Acts are made applicable.
>
> **32.** Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of

service provided. The approach of the assessing authority, to us, thus, appears to be correct."

Principles

25. From the above decisions of the Supreme Court, the following principles concerning interpretation of taxing entries in the Union List and State List from the standpoint of legislative competence can be set down:-

1. The entries should not be read in a narrow or pedantic sense but must be given their fullest meaning and the widest amplitude and be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in them. [***Express Hotels*** *(supra)*].
2. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. [***Godfrey Phillips*** *(supra)*].
3. Whenever an apparent overlap has occurred the Supreme Court has adopted the following two settled principles to resolve the conflict:-
   (i) Legislative entries should be liberally interpreted;
   (ii) Competing entries must be read harmoniously. The proper way to avoid a conflict would be to

read the entries together and to interpret the language of one by that of the other. [***Godfrey Phillips*** *(supra)*].

4. Classically, a tax is seen as composed of two elements:-

   (i) the person, thing or activity on which the tax is imposed; and

   (ii) the incidence of tax.

   The incidence of tax would be relevant in construing whether a tax is a direct or an indirect one. But it would be irrelevant in determining the subject-matter of the tax. [***Godfrey Phillips*** *(supra)*].

5. It is the true nature and character of the legislation and not its ultimate economic results that matters.

   Corollary 1: The subject of a tax is different from the measure of the levy.

   Corollary 2: The measure of the tax is not determinative of its essential character or of the competence of the legislature. [***Federation of Hotels*** *(supra)*]

6. 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**.** [***Federation of Hotels*** *(supra)*].

7. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the

court has to look into the pith and substance of the legislation. [***All India Federation of Tax Practitioners*** *(supra)*].

8. The court must also bear in mind that where the application of a parliamentary and a legislative Act comes up for consideration; endeavours shall be made to see that provisions of both the Acts are made applicable. [***Imagic*** *(supra)*].

9. The performance, film or programmes shown to the viewers through the cable television network come within the meaning of entertainments and therefore within the legislative competence of the State Legislature under Entry 62 of List II of the Seventh Schedule to the Constitution to make law for the levy and collection of tax on such entertainments. [***Purvi Communications*** *(supra)*].

Analysis of the Tax in question

26. Keeping the above principles in mind, the first thing is to see as to whether there is any overlap insofar as Entry 92C of List I and Entry 62 of List II are concerned? Entry 92C of List I provides for "taxes on services" while Entry 62 of List II relates to "taxes on luxury, including taxes on entertainment, amusements, betting and gambling". The two entries clearly operate on entirely different fields. As there should not be, there is no overlapping insofar as the two entries *per se*

are concerned. Therefore, the next question would be whether the said Act, to the extent it imposes an "entertainment tax" on 'direct-to-home (DTH) service', falls within Entry 62 List II or not? This requires the determination of the true nature and character of the tax. If we come to the conclusion that the tax on DTH service contemplated under the said Act is, by its nature and character, irrespective of its nomenclature, a tax on entertainment and not a tax on services, then, it cannot be said that there is any trespass into Parliament's exclusive domain of legislating on the field of "taxes on services" under Entry 92C of List I. However, if we come to the conclusion that the tax on DTH service as envisioned under the said Act is, by its nature and character, a tax on a service, then, clearly, it would also have to be held that the said Act has encroached upon the power of Parliament to tax services.

27. Clearly, then, the key question is what is the true nature and character of the tax under the said Act in respect of DTH service? At this juncture it would be appropriate to clear the ground that the measure of a tax or the incidence of a tax or the economic effects of a tax are not material in determining the true nature and character of the impost. So, the argument that the petitioners have already been subjected to service tax on broadcasting services and therefore the impost under the said Act is nothing but another tax on the same "amount" twice over, is of no consequence. The only thing that needs to be seen is – what is the true nature and character of the tax on DTH service under the said Act? Is it in reality a tax on entertainment or is it a tax on a service?

28. Insofar as this case is concerned, the charging section is section 7 of the said Act. Sub-section (1) of the said section 7, *inter alia*, stipulates that there shall be *levied* and *paid* an *entertainment tax* on all *payments for admission to an entertainment* through a direct-to-home (DTH) at such rates not exceeding rupees six hundred for every subscriber for every year as the Government may, from time to time, notify in this behalf, which shall be *collected* by *the proprietor* and *paid to the Government* in the manner prescribed. A plain reading of the provision makes it clear that the tax or levy is on "*entertainment*" through a DTH service. Now, "entertainment" as defined in section 2(i) of the said Act includes "*entertainment through* ***cable service*** *and* ***direct-to-home (DTH) service***". The emphasis is on "entertainment" and not on the vehicle for such entertainment. We have already seen in the case of ***Purvi Communications*** *(supra)* that the Supreme Court held the performances, films or programmes shown to the viewers through the cable television network (cable service) as falling within the meaning of "entertainments" and therefore within the legislative competence of the State Legislature under Entry 62 of List II of the Seventh Schedule to the Constitution to make law for the levy and collection of tax on such entertainments. Clearly, then, the same performances, films or programmes shown to the viewers through the DTH service would also fall within the meaning of "entertainments" and therefore the tax in question would be within the legislative competence of the State Legislature under Entry 62 of List II of the Seventh Schedule to the Constitution.

29. Arguments were advanced on the part of the petitioners that there were material differences between cable service and DTH service and therefore ***Purvi Communications*** *(supra)* did not provide an applicable analogy. But such arguments cannot be sustained inasmuch as, it is not material as to whether it is the cable service or the DTH service which is the vehicle for transporting the content which provides entertainment to the subscribers. The tax is on the entertainment and not the manner in which the content of entertainment reaches the actual persons entertained. The tax is not on the content provider or the content transporter or the person entertained – it is on the entertainment. The subscriber may be the person on whom the incidence of the tax falls and the measure of the tax may be based on the subscription money but, as we have already seen, the incidence of a tax or the measure of a tax ought not to be confused with the subject matter of the tax.

30. The charging section itself makes it clear that the *levy* is on entertainment and it is *paid* on all *payments for admission to an entertainment.* There are three very important words used in section 7(1) of the said Act and they are – "levied" (or levy), "paid" and "collected". These words are used in distinct and different senses and must not be confused with each other. The tax is "levied" on "entertainment", it is "paid" on all "payments for admission to an entertainment" and it is "collected" by "the proprietor" and "paid" to the Government in the manner prescribed. It is clear from this scheme that the tax is neither on provider of the DTH service nor on the DTH service nor on the person

entertained. Though the incidence of the tax may fall on the ultimate subscriber and the tax may have to be collected by the DTH service provider and paid to the government but, those are matters concerning incidence and measure of the tax, which, we have seen, is irrelevant for determining the subject-matter of a tax.

31. Let us consider the provisions of section 7(1) in further detail. The entertainment tax is to be "paid" on "payments for admission to an entertainment". Section 2(m) defines the expression "payment for admission" to, inter alia, include [s.2(m)(vi)] any payment made by a person by way of contribution, subscription, installation or connection charges or any other charges collected in any manner whatsoever for entertainment through direct-to-home (DTH) broadcasting service or distribution of television signals and value-added services with the aid of any type of addressable system, which connects a television set, computer system at a residential or non-residential place of subscriber's premises, directly to the satellite or otherwise. Let us compare this with the traditional concept of "payment for admission" as contemplated in section 2(m)(i) of the said Act to mean "any payment made by a person for seats or other accommodation in any form in a place of entertainment". This brings to fore the classical concept of payment for a cinema ticket or a theatre ticket. Without the ticket you cannot enter the place of entertainment and, therefore, cannot receive the entertainment. Times have changed, technology has changed and this has brought about a complete upheaval in the manner of delivering entertainment. Our drawing rooms have taken the place of the cinema hall or theatre and the

cable TV or DTH connection has taken the place of the paper ticket. Similarly, money paid for the ticket has been substituted by subscription money paid for the relevant connection (i.e., cable or DTH, as the case may be). Just as there could be no admission to a place of entertainment without a ticket, there cannot be admission to entertainment provided through a cable service or DTH service without a connection. Section 2(aa) of the said Act, *inter alia*, stipulates that in the case of entertainment through cable service and direct-to-home (DTH) service, each connection to a subscriber shall be deemed to be an admission for entertainment. In this sense the DTH connection is the "virtual ticket" and the payments for it including subscription money are the payments for admission to entertainments.

32. The entertainment tax is to be "collected" by the "proprietor" and paid to the government in the manner prescribed. The word "proprietor" as used in section 7(1) of the said Act is a term of art and has been defined in section 2(o). In relation to entertainment through a DTH system, section 2(o)(iv) of the said Act defines the word "proprietor" to include any person having licence to provide direct-to-home (DTH) service, by the Central Government under section 4 of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 and also includes the service provider of cable television signals and value added services, registered or licensed under the Cable Television Network (Regulation) Act, 1995. So, the licensed DTH service provider is only a "collector" of the entertainment tax on behalf

of the government. He is not the subject matter of the tax, nor is the service provided by him the subject-matter of the entertainment tax. At the cost of repetition but, for the sake of clarity, we state that the tax in question is neither on a person nor on a thing but on the activity of entertainment. This is the true nature and character of the tax and is, therefore, within the legislative field of Entry 62 of List II of the VIIth Schedule to the Constitution.

33. Let us understand the role played by the petitioners in delivering entertainment directly into the homes of individual subscribers or rooms of hotel guests. The petitioners downlink the signals from various satellites of various TV channels at their hub stations. From there they uplink the signals to their own Ku Band designated transponders which are then transmitted in Ku Band through satellites. Dish antennae installed by the petitioners at their subscribers' premises pick up these Ku Band signals which are then decrypted by the set-top boxes and viewing cards provided by the petitioners. These decrypted signals are then viewed by the subscribers on their TV sets. Apart from installation charges, the subscribers have to pay a monthly subscription ranging from Rs 99/- to Rs 400/- depending on their choice of channels. The payment for subscription is like the payment for a cinema ticket or a theatre ticket. Since the "admission" to entertainment in the case of entertainment through DTH service is continuous (i.e., 24 x 7 x 365), the subscription charge is on a monthly basis. The DTH connection is a "ticket" to continual entertainment at any time of the day or night. This

has been made possible because of advancement in technology. But, conceptually, the DTH connection which enables admission to entertainment is no different from the traditional cinema ticket which permits entry into a cinema hall for viewing a film.

34. The petitioners have provided the infrastructure for down-linking signals of TV channels and of up-linking them to their Ku Band designated transponders and so on till the signals are viewable by a subscriber on his TV set or display monitor. By allowing the flow of content through their infrastructural setup they are providing a service. For doing so they are subjected to service tax under the service tax regime put in place by Parliament in exercise of its legislative power under article 246 of the Constitution read with Entry 92C of List I of the VIIth Schedule thereto. Under the said Act, the subject matter of the tax is the entertainment provided by the content that flows through the petitioners' system. The DTH service provider, in a sense only acts as a conduit between the content providers (i.e., TV Channels) and the content viewers (i.e., subscribers). It is the entertainment derived from the content that is the subject matter of the tax under the said Act and not the service of enabling the flow of content through the DTH system. There is no scope of confusing one for the other.

35. Even if we assume that the concepts are intertwined, the strands can easily be separated by employing the aspect theory. The DTH system had two aspects – (1) a service aspect; and (2) an

entertainment aspect. The former is taxed as a service under the service tax regime and the latter is subjected to tax as an entertainment under the said Act read with entry 62 of List II. They are two separate and distinct taxable events in respect of each of the two aspects. In respect of the service aspect, the taxable event is flow of content through the DTH system, whereas, in respect of the entertainment aspect, the taxable event is the entertainment from the content.

Conclusion

36. Thus, in whichever way the matter at hand is looked at, the conclusion is clear that the State Legislature had (and has) the legislative competence to levy an entertainment tax on all payments for admission to an entertainment through a direct-to-home (DTH) as contemplated in Section 7 and other provisions of the said Act. Consequently, the petitions are dismissed. The parties are left to bear their respective costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

SEPTEMBER 05, 2011
HJ