* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ WP(C) No.3398/2010

Judgment reserved on: 20th May, 2011

% **Judgment pronounced on: 23rd September, 2011**

HOME SOLUTIONS
RETAILS (INDIA) LTD. ..... PETITIONER

Versus

UNION OF INDIA & ORS. ..... RESPONDENTS

ALONG WITH CONNECTED WRIT PETITIONS BEING

WP (C) Nos. 3746, 3750, 3782, 3783, 3809, 3837, 3838, 3856, 3867, 3868, 3869, 3881, 3886, 3936, 4010, 4025, 4026, 4028, 4050, 4054, 4079, 4081, 4086, 4087, 4091, 4092, 4098, 4115, 4132, 4139, 4144, 4214, 4216, 4319, 4367, 4440, 4503, 4538, 4539, 4549, 4616, 4650, 4757, 4787, 4792, 4907, 4929, 4952, 5067, 5074, 5123, 5127, 5137, 5138, 5145, 5159, 5160, 5221, 5222, 5223, 5224, 5226, 5227, 5241, 5246, 5263, 5267, 5286, 5291, 5338, 5342, 5346, 5353, 5472, 5545, 5548, 5639, 5652, 5679, 5747, 5751, 5844, 5856, 5896, 5960, 5965, 5970, 5972, 6004, 6021, 6025, 6030, 6047, 6084, 6174, 6189, 6296, 6320, 6345, 6376, 6377, 6392, 6401, 6449, 6490, 6535, 6551, 6553, 6604, 6605, 6659, 6666, 6668, 6669, 6673, 6741, 6750, 6785, 6842, 6861, 6869, 6882, 6883, 7032, 7075, 7106, 7237, 7307, 7308, 7328, 7356, 7369, 7393, 7394, 7454, 7605, 7710, 7747, 7772, 7775, 7896, 7916, 7917, 7930, 7954, 7986, 7988, 8005, 8069, 8087, 8088, 8099, 8124, 8288, 8316, 8317, 8320, 8323, 8379, 8380, 8386, 8387, 8388, 8389, 8390, 8391, 8392, 8447, 8488, 8588, 8674 of 2010,

15, 202, 242, 476, 498, 866, 965, 968, 1121, 1128, 1220, 1488, 1585, 1640, 1783, 1787, 1996, 2015, 2341, 2573, 2582, 2613, 2651, 2652,

2654, 3008, 3019, 3058 and 3373 of 2011.

ADVOCATES APPEARED:

For Petitioners:

Mr.Harish Salve, Dr. A.M. Singhvi, Mr. S. Ganesh, Mr. N.K. Kaul, Sr. Advocates with Mr. Rishi Agarwala, Mr. Ameet Naik, Mr. Akshay Ringe, Mr.Nikhil Rohtagi, Mr. Vatsal Shah, Mr.S.Sukumaran, Mr.Anand Sukumaran and Mr.Bhupesh Kumar Pathak, Ms. Dhanashree Deoskar, Mr. Aneesh Patnaik, Advocates for Petitioner in CWP No. 3398/2010

Mr. Sumesh Dhawan, Ms. Vatsala Kak, Advs. for Petitioners in CWP Nos. 5159/2010 & 5160/2010

Mr.Rajiv Bansal, Advocate for petitioners in CWP Nos.4952/2010 & 5267/2010.

Mr. Amit Gupta, Mr. A.S. Aman, Advs. for Petitioner in CWP No.5241/2010

Mr. P.K. Sahu, Mr. Srinivas, Mr. Sandeep Jha, Mr.Prashant Shukla, Advs. for Petitioner in CWP Nos. 4139, 5246 & 5246 of 2010

Mr. Ruchir Bhatia, Adv. for Petitioner in CWP Nos. 4050, 4539, 5342, 5346, 6741, 7710, 7772 & 7775 of 2010

Mr. Manish Sharma and Mr.Vishal Malhotra, Advs. for petitioner in CWP No.5751/2010

Mr. Milanka Chaudhury, Mr.Puneet Yadav and Mr.Abhishek Sharma, Advs. for Petitioner in CWP No. 6376/2010

Ms. Meenakshi Arora and Ms.Vaishnavi Krishnamani, Advs. for Petitioner in CWP No.5639/2010

Mr. Rajat Bhalla, Adv. for Petitioner in CWP No.6449/2010

Mr. Biji Rajesh, Mr. Shiladitya Goswami, Advs. for Petitioner in CWP No.6047/2010, 6785/2010

Mr. Shivanand Thakur, and Mr.Rajesh Bhatnagar, Advs. for Petitioner in CWP No.8069/2010

Mr. Jasmeet Singh, Mr. K.D. Sengupta, Advs. for Petitioner in CWP Nos. 6861, 6883, 7393 & 7930 of 2010 and 15/2011.

Mr. S.P. Menia, Adv. for Petitioner in CWP No.8674/2010

Mr. R.K. Pandey, Adv. for Petitioner in CWP No.866/2011

Mr. J.K. Mittal, Mr. Arun Gulati, Advs. for Petitioner in CWP No.7747/2010

Ms.Vibha Datta Makhija and Mr.Philemon Nongbri, Advocates for Petitioner in CWP No. 6869/2010

Mr. Anuj Berry and Mr.Manu Nair, Advs. for Petitioner in CWP Nos. 4538/2010 & 5074/2010.

Mr. Akashdeep Kakkar, Adv. for Petitioners in CWP Nos.8386, 8387, 8390, 8391 & 8392 of 2010

Mr. Raman Kapur, Advocate for Petitioners in CWP No.7988/2010

Mr.Debashish Moitra and Mr.Rajat Jain, Advocates for Petitioner in CWP No.5896/2010

Mr.Vijay K. Singh, Advocate for Petitioner in CWP No. 242/2011 and 1128/2011

Mr.Mohan Kukreja, Advocate for Petitioner in CWP No.6750/2010

Mr.M.P.Devnath, Mr.Monish Panda and Mr.Abhishek Anand, Mr.K. Krishnamohan Menon, Advocates for Petitioners in WP(C) Nos. 3746, 4086, 4092, 5291, 6174, 8288, 8388 and8389 of 2010 and 1585/2011.

Mr. Gaurang Kanth, Mr. Saurabh Khanna, Advs. for Petitioner in CWP Nos. 6047/2010 & 6785/2010

Mr. Satyen Sethi, Mr. A.T. Panda, Advs. for Petitioner in CWP No.5972 of 2010

Mr.Atul Jain, Advocate for Petitioner in CWP No. 965/2011.

Ms.Roopa Dayal, Advocate for Petitioners in CWP Nos. 4650, 7307, 7308 and 7356 of 2010

Mr. Raj K. Batra, Mr. Rohan Ahuja, Advocates for Petitioners in CWP Nos. 6377, 6401, 6490, 6551 and 6553 of 2010

Mr.Pawan Kumar Bansal, Advocate for Petitioner in CWP No.7106/2010

Mr. Ashu Kansal, Mr. Aniket Gautam, Advs. for Petitioner in CWP Nos. 5067, 5224, 7328, 8099, 8320 & 8323 of 2010

Mr.Tarun Gulati, Mr. Neil Hildreth, Mr.Sparsh Bhargava, Mr.Rony O John, Mr.Shashi Mathews, Ms.Shruti Sabharwal and Mr. Kishore Kunal, Advocates for Petitioners in CWP Nos. 4081, 4616, 5286, 6296 & 7032 and 5263 of 2010

Mr. Rajiv K. Garg and Ashish Garg, Advocates for Petitioner in CWP Nos. 4757/2010, 5896/2010, 6320/2010 and 7394/2010.

Mr. Ashish Batra, Adv. for Petitioner in CWP No.3750/2010

Mr. Hemant K. Chaudhry, Adv. for Petitioner in CWP No.8317/2010

Mr.Kunal Tandon, Advocate for Petitioners in CWP Nos. 4115/2010, 5965, 5970 & 7986 of 2010

Mr.Mrityunjay Kumar Tiwary, Advocate for Petitioner in CWP No. 7454/2010

Ms. Alka Srivastava, Adv. for Petitioner in CWP Nos.5221, 5222, 5223, 5226 of 2010

Mr. Piyush Kumar, Ms. Shikha Sapra, and Mr. Abhinav Jain, Advs. for Petitioners in CWP Nos. 4440/2010 and 4054/2010

Mr. Kunal Sinha, Adv. for Petitioner in CWP No.6605/2010

Mr.Arun Kumar Roy, Advocate for Petitioner in CWP No. 15/2011

Mr.Niraj Singh and Mr.Lakhmi Chand, Advocates for Petitioner in CWP No. 6345/2010

Mr.L.K.Bhushan, Mr.Munish Malik and Mr.Gaurav Bahl, Advocates for Petitioner in CWP No. 4929/2010

Mr. Gaurav Gupta, Adv. for petitioners in CWP Nos. 6535/2010 & 8380/2010

Mr.Kavin Gulati and Ms.Rashmi Singh, Advocates for Petitioners in CWP Nos. 8316/2010 and 8588/2010

Mr. Ajit Warrier, Mr. Varun Shankar, Mr. Divyakant Lahoti, Adv. for Petitioner in CWP No.7075/2010

Mr.Sunil Kumar, Advocate for Petitioner in CWP No.498/2011.

Mr.Prem Prakash, Advocate for Petitioner in CWP No.7369/2010.

Mr.Ajay Bhargava, Ms.Vanita Bhargava and Mr.Nitin Misra, Advocates for petitioners in CWP Nos. 3783, 4025, 4087, 4098, 4132, 4907, 5545, 5548, and 6604 of 2010

Mr. Amir Singh Pasrich, Mr.Mohit Sharma and Mr.Aditya Jain, Advocates for Petitioner in CWP No. 4787/2010

Mr. Balbir Singh, Mr. Deepak Sinhmar, Adv. for petitioner in CWP No.3936/2010

Mr. Vivek Sarin, Adv. for the petitioner in CWP No.8447/2010

Mr. K.K. Khurana, Mr. Anshul Arora, Mr. A.K. Mehta, Adv. for petitioners in CWP Nos. 1121/2011, 1220/2011

Mr.R.K.Gupta, Advocate for Petitioner in CWP No.6084/2010.

Mr.Rakesh Mukhija, Mr.Gurpreet Singh and Mr.Rohit Sharma, Advocates for Petitioner in CWP No.4539/2010, 5145/2010, 6030/2010, 6673/2010 and 7954/2010.

Mr.Sanjeev Kumar and Mr.Manu Yadav, Advocates for Petitioners in CWP 4079/2010

Mr.Manu Monga, Advocate for Petitioner in CWP No.5652/2010

Mr.Amit Sood, Advocate for Petitioners in CWP Nos.5227/2010 and 7237/2010

Mr.Alishan Naqvee and Ms.Rupal Bhatia, Advocates for Petitioners in CWP Nos.3867, 3868, 3869, 3881, 3886/2010, 4050, 4319, 5353 and 8088/2010.

Mr. Neeraj Kishan Kaul, Sr. Adv. with Mr.Kapil Rustagi and Mr.Karan Luthra, Advocates for petitioner in WP(C) 1488/2011

Mr. K.K. Narang, Mr.Sanjay Visen and Mr.Kaushal Narayan

Mishra, Advocates for Petitioners in CWP No.1783/2011, 1787/2011 & 2015/2011

Mr.Rajeev Kumar and Ms.Alka Srivastava, Advocates for Petitioners in CWP No.5221/2010, 5222/2010, 5223/2010 and 5226/2010.

Mr.Anirban Bhattacharya and Mr.Viveknanda, Advocates for Petitioners in CWP Nos.4079/2010 and 7075/2010.

Mr.Vikas Chopra and Mr.Ashish Mahajan, Advocates for Petitioner in 4139/2010.

Mr.Rajeev Kumar, Advocate for Petitioner in CWP Nos.5221/2010,5222/2010,5223/2010 and 5226/2010.

Mr. Sudhir Makkar, Adv. for Petitioners in CWP Nos.2613/2011 & 2654/2011

Mr. Chirag M. Shroff, Adv. for the Petitioner in CWP Nos.2651/2011 and 2652/2011

Mr. Manish Sharma, Adv. for Petitioner in CWP No.3058/2011

Mr.Rahul Raj Verma, Adv. for Petitioner in CWP No.1121/2011 and CWP 1220/2011.

For Respondents:

Mr.A.S.Chandhiok, ASG with Mr. Bhagat Singh, Mr.H.C.Bhatia, Ms.Sonia Sharma, Mr.Gurpreet S. Parwanda and Mr.Sumit Batra, Mr. Jatan Singh, Mr.Ruchir Mishra, Mr. S.P. Kansal, Mr. Vikrant Sharma, Mr. Ravinder Agarwal, Ms. Anjana Gosain, Mr.Sachin Datta, Mr.B.V.Niren, Advocates for respondent Union of India.

Mr. Mukesh Anand, Adv. for Department of Service Tax & Central Board of Excise & Customs in CWP Nos. 3398/2010, 3746, 3750, 3782, 3783, 3809, 3837, 3838, 3856, 3867, 3868,

3869, 3881, 3886, 3936, 4010, 4025, 4026, 4028, 4050, 4054, 4079, 4081, 4086, 4087, 4091, 40, 92, 4098, 4115, 4132, 4139, 4144, 4214, 4216, 4319, 4367, 4440, 4503, 4538, 4539, 4549, 4616, 4650, 4757, 4787, 4792, 4907, 4929, 4952, 5067, 5074, 5123, 5127, 5137, 5138, 5145, 5159, 5160, 5221, 5222, 5223, 5226, 5227, 5246, 5267, 5291, 5639, 5652, 5679, 5751, 6750, 6785, 6842, 6869, 6882, 7369, 7393, 7454, 7747, 7916, 7917, 7954, 8087, 8088, 8099, 8316, 8317, 8320, 8323, 8379, 8380, 8386, 8387, 8388, 8389, 8390, 8391, 8392, 8447, 8488, 8588, 8674 of 2010 and CWP Nos. 965, 968, 1121, 1128, 1220, 1585, 2613, 2651, 2652 and 2654 of 2011

Mr. Satish Kumar, Adv. for Department of Revenue, Ministry of Finance, Central Board of Excise & Customs, DG, Service Tax in CWP Nos. 5224, 5241, 5338, 5342, 5346, 5353, 5545, 5546, 5747, 5844, 5856, 5896, 5960, 5965, 5970, 5972, 6004, 6021, 6025, 6030, 6047, 6084, 6174, 6189, 6296, 6320, 6345, 6376, 6377, 6392, 6401, 6449, 6490, 6535, 6551, 6553, 6605, 6659, 6666, 6668, 6669, 6741, 6861, 6883, 7032, 7075, 7106, 7237, 7307, 7308, 7328, 7356, 7394, 7605, 7710, 7747, 7772, 7775, 7896, 7916, 7986, 8005, 8069, 8087, 8088, 8099, 8124, 8288, 8488, of 2010, 242, 498, 866, 1783, 1787, 1996, of 2011

Mr.Atul Nanda, Sr. Advocate with Mr.Ruchir Mishra, Mr.Anuj Aggarwal and Mr.Gaurav Khanna, Advocates for UOI in CWP Nos. 4754/2010, 5145/2010, 6376/2010, 6401/2010, 6449/2010, 7237/2010, 7916/2010, 7930/2010 and 7986/2010.

Mr. Amish Tandon, Adv. for Respondent No.36 to 38 in CWP No. 5896/2010

Mr. Amrreeta Swaarup, Adv. for Respondent Nos. 27 to 29 in CWP No.15/2011

Mrs.Anusuya Salwan, Advocate for Respondent No.4 in CWP No. 6296/2010

Mr. Shobit Chandra, Adv. for Respondent No.8 in CWP

No.3782/2010

Mr. Anil Grover, Mr. Rakesh Kumar Garg, Advs. for Respondents in CWP No. 15/2011

Mr. Neeraj Chaudhary, CGSC for UOI in CWP Nos.4952, 5267, 6666, 6668, 6669, 6673, 6882 of 2010 and CWP No.1220, 2573 and 2582 of 2011

Mr. Sunil Kumar, Mr. Rajiv Ranjan Mishra, Advs. for UOI in CWP No.3837/2010

Mr. Sumesh Dhawan, Ms. Vatsala Kak, Advs. for Respondent Nos. 4 to 6 in CWP No. 6741/2010 and for Respondent No.7 in CWP No.3837/2010.

Ms.Pooja Singh, Advocate for Respondent No.8 in CWP Nos. 3809/2010 & 3837/2010 and for Respondent No.6 in CWP Nos.4503/2010 & 5751/2010

Ms.Malabika Sarkar, Ms.Susmita Lal and Mr.G.K.Sarkar, Advocates for Respondent No. 8 in CWP No.6861/2010

Mr. Kapil Kher, Adv. for Respondent No.5 in CWP No.4081/2010, for Respondent Nos. 48 & 49 in CWP No.4025/2010 and for Respondent Nos. 17 & 18 in CWP No.15/2011

Ms. Neha Mittal, Adv. for Respondent No.4 in CWP No.6396/2010

Mr. Sahil Mongia, Adv. for Respondent Nos. 20, 21 and 22 in CWP No. 7394/2010

Mr.Nirbhay Sharma for Mr. Anjum Javed, Adv. for Respondent No. 4 in CWP Nos.6861/2010 & 6883/2010.

Ms.Bhanita Patowary, Advocate for Respondent No.7 in CWP

No. 6376/2010

Mr.Rajan Bhanti, Advocate for Respondent No.5 in CWP No.6376/2010

Mr. Vaibhav Arora, Mr.Ajay Monga, Mr. Ateev Mathur and Mr.Sumit Bansal, Adv. for Respondent No.5 in CWP No.4929/2010 and for Respondent Nos. 6 to 8 in CWP No.4010/2010

Mr. Satyen Sethi, Mr. A.T. Panda, Advs. for Respondent No.3 in CWP No.4092/2010

Ms.Priyanka Kathuria and Ms.Sangeeta Chandra, Advocates for Respondent DDA in CWP No.4132/2010.

Mr. Sangeeta Sharma, Adv. for Respondent No.8 in CWP 4050/2010

Ms.Archana Gaur, Advocate for MCD in CWP No.4132/2010.

Mr.Rajiv Nanda, Addl. Standing Counsel with Ms.Rachna Saxena, Advocate for Respondent No.4 in CWP Nos. 5291/2010 and 5965/2010

Ms.Bindra Rana and Ms.Meenu Sharma, Advocates for Respondent No.21 in CWP No.6376/2010

Mr. Neil Hildreth, Mr.Sparsh Bhargava, Mr.Rony O John, Mr.Shashi Mathews and Ms.Shruti Sabharwal, Advocates for Respondent No.39 in CWP No.3838/2010, for Respondents No.6 and 7 in CWP No. 7106/2010, for Respondent No.49 in CWP No.4091, for Respondent No.51 in CWP No. 6376/2010

Mr. Rajat Aneja, Adv. for Respondent Nos. 7 to 11 in CWP No.4092/2010

Mr. Rakesh Chitkara, Mr. Surender Gupta, Advs. for respondent

in CWP Nos. 5679/10, 5844/10, 5856/10, 5960/10, 6666/10, 6668/10, 6669/10, 8087/10 & 8124 of 2010

Mr. Arun K. Sharma, Adv. for Respondent No.4 in CWP No.7605/2010

Mr. Arun Vohra, Adv. for Respondent No.4 & 6 in CWP No.8380/2010

Mr. K.K. Khurana, Mr. Anshul Arora, Mr. A.K. Mehta, Adv. for Respondent No.54 in CWP No.5127/2010

Mr. Praveena Gautam, Adv. for Respondent No.5 in CWP No.6376/2010

Mr. Vikram Saini, Adv. for Respondent No.4 in CWP No.6296/2010

Mr. S.P. Kaushal, Mr. Vikrant Sharma, Adv. for Respondent Nos.14 to 18 in CWP No.4792/2010

Mr. B.B. Gupta, Adv. for Respondent in CWP Nos. 4319, 5067, 5241, 5970, 5972/2010.

Ms. Aakansha Munjhal, Adv. for Respondent-JSL in CWP No.4050/2010

Mr. Mahesh B. Chhibber, Adv. for Respondent Nos. 12 to 16 in CWP No.4139/2010

Mr. Mehjaveen A. Marak, Adv. for Respondent No.5 in CWP No.4539/2010

Mr. Vaneet Garg, Adv. for respondent Nos. 51 to 57 in CWP No. 5896/2010 and for Respondent Nos. 9 & 10 in CWP No. 7394/2010

Mr. Kartik Bhatnagar, Mr. Sarthak, Advs. for Respondent in

CWP No.5159/2010

Mr. Akashdeep Kakkar, Adv. for Respondent in CWP No.15/2011

Mr. Digvijay Rai, Adv. for AAI in CWP Nos. 4538, 5074 & 7106 of 2010

Mr. Vinod Mehta, Adv. for Respondent Nos. 21, 22, 23, 42 & 43 in CWP No.15/2011

Ms. Divya Jain, Mr. Atul Grover, Adv. for Respondent Nos. 8 & 9 in CWP No.5346/2010

Mr. Kapil Arora, Ms. Manjula, Advs. for Respondent No.13 in CWP No.7394/2010

Mr. Anshul Arora, Mr. A.K. Mehta, Adv. for Respondent No.54 in CWP No.4050/2010

Mr. Navneet Kumar and Mr.Deepak Chawla, Adv. for J&K Bank.

Mr.Anil Kher, Sr.Advocate with and Mr.S.S. Pandit, Advocate for Respondent No.17 and 18 in CWP No.7393/2011 for Respondent No.5 in CWP No.4081/2010 and for Respondent Nos.48 and 49 in CWP No.4025/2011.

Mr.Mahesh B. Chhiber, Advocate for Respondent No.12 to 16 in CWP No.4139/2010.

Ms.Amreeta Swarup, Advocate for Respondents No.27 to 29 in CWP No.15/2011

Mr.Harsh Raghuvanshi for Mr. Arvind Nayar, Advocate for Respondent No.7 in CWP No.3837/2010.

Mr.Rahul Raj Verma, Advocate for Respondent No.54 in WPC

4050/2010.

Mr.Shobhit Chandra, Advocate for respondent No.8 in WP(C) No.3782/2010.

Mr.Arvind Nayyar and Ms.Taniya Sharma, Advocates for Applicant Ambiance Mall in CWP No.3750/2010.

Mr.Anurag Chawla, Advocate for Respondent in CWP No.15/2011

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether reporters of the local papers 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 the Digest? Yes

DIPAK MISRA, CJ

In this batch of writ petitions preferred under Article 226 of the Constitution of India, the constitutional validity of Section 65(105)(zzzz) of the Finance Act, 1995 (for short 'the 1995 Act') and Section 66 as amended by the Finance Act, 2010 (for brevity 'the 2010 Act') is called in question. The matters were initially placed before a Division Bench wherein the learned counsel for the parties raised many a submission and regard being had to the nature of the cases, the

Division Bench thought it appropriate that the controversy should be dwelled upon by a larger Bench. Thereafter, the matters have been placed before us.

2 For the sake of clarity and convenience, we shall advert to the facts adumbrated in W.P.(C) No.3398/2010 and deal with the contentions canvassed by the learned counsel for the parties in all the writ petitions as the issue is common to all. The petitioner, a registered company under the Companies Act, 1956, has taken commercial property / shops on rent for carrying on its retail business. It takes immovable property by way of lease or licence and once the lease deed or the deed of licence is entered with the owner, there is no continuous flow of transaction between them. The tenant is entitled to use the premises for a fixed tenure under the agreement and the transaction with the owner is a onetime transaction. The transactions are principal to principal and there is no value addition by providing the premises on lease / licence by the owner of the property. The petitioner, as pleaded, is a substantial contributor to the sustained growth and development of the national economy and has contributed huge amounts to the revenue by payment of taxes, charges and cess under diverse heads and the

premises occupied by it establishing commercial establishments like shops are meant for diverse situations and, accordingly, arrangements have been made. The consideration paid by the petitioner under the lease deed or agreement of licence is purely a consideration for acquiring the occasional and possessory rights of these premises and utilizing the same. The premises that have been taken by the petitioner have been referred to in the petition and it is urged that in the case of the agreements that have been entered with the respective owners, the liability rests with the owners to pay the service tax but the owners insist upon the petitioner to make payment of the service tax. It is contended that an artificial liability has been created on the tenants by the Finance Act, 1994 which introduced the service tax. Reference has been made to sub-section 90(a) which was inserted in Section 65 of the Finance Act, 1994 by the Finance Act, 2007 to tax any "service provided to any person by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce". The renting of immovable property has been defined to include renting, letting, leasing, licensing and other similar arrangements of immovable property for use in the course of

furtherance of business or commerce including use as factory, building, warehouse, exhibition halls, multiple use building, etc. The said provision came into force with effect from 1.6.2007. It is urged that contrary to the express words of the provisions of the Act, the first respondent, placing an erroneous interpretation on Section 65(105)(zzzz) as it stood in 2007, issued a notification No.24/2007 dated 22.5.2007. After the notification was issued, a circular dated 4.1.2008 was issued by the Ministry of Finance of the Union of India. The constitutional validity of the notification and the circular was questioned before this Court in the case of ***Home Solution Retail India Ltd. v. Union of India*****, 158 (2009) DLT 722 (DB)**.

3. In the case of ***Home Solution Retail India Ltd.*** (supra), it was contended that the notification and circular had come into existence by absolute fallacious interpretation placed on Section 65(105)(zzzz) and Section 65(90)(a) inasmuch as an attempt has been made to levy service tax on renting of immovable property as opposed to the levy of service tax on the service provided "in relation to renting of immovable property". The Division Bench adverted to the language employed in the notification dated 22.5.2007 and the circular dated 4.1.2008 and

after referring to the decisions in ***T.N. Kalyana Mandapam Association v. Union of India & Others*****, (2004) 5 SCC 632**, ***All India Federation of Tax Practitioners & Ors. v. Union of India*****, (2007) 7 SCC 527**, ***Doypack Systems Private Limited v. Union of India,*** **(1998) 2 SCC 299**, ***BSNL v. Union of India*****, (2006) 3 SCC 1**, ***Commissioner of Income-tax, Bangalore v. B.C. Srinivasa Shetty*****, (1981) 2 SCC 460**, ***Lucknow Development Authroity v. MK Gupta*****, (1994) 1 SCC 243**, ***NS Nayak and Sons v. State of Goa*****, (2003) 6 SCC 56** and interpreting the terms "in relation thereto", distinguished the decision rendered in ***T.N. Kalyana Mandapam Association*** (supra) holding that the utilization of premises as a *mandap* by itself would constitute service as has been held by the Apex Court but the same is different from the kind of activity that is contemplated under Section 65(105)(zzzz). The Division Bench thereafter proceeded to state as follows:

> "33. The next decision which requires consideration is the decision of the Supreme Court in the case of *All India Federation of Tax Practitioners* (supra). We have already quoted paragraph 8 of the said decision wherein it has been observed that service tax is a value added tax and that just as excise duty is a tax on value

addition on goods, services tax is on value addition by rendition of services. A distinction has also been sought to be made between property based services and performance based services. The property based services cover service providers, such as architects, interior designers, real estate agents, construction services, mandap keepers, etc. Whereas the performance based services are those provided by persons, such as stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc. The Supreme Court also noted that service tax is a tax on service and not on the service provider.

34. From the above discussion, it is apparent that service tax is a value added tax. It is a tax on value addition provided by a service provider. It is obvious that it must have connection with a service and, there must be some value addition by that service. If there is no value addition, then there is no service. With this in mind, it would be instructive to analyse the provisions of Section 65(105)(zzzz). It has reference to a service provided or to be provided to any person, by any other person in relation to "renting of immovable property for use in the course or furtherance of business or commerce". The wordings of the provision are so structured as to entail – a service provided or to be provided to 'A' by 'B' in relation to 'C'. Here, 'A' is the recipient of the service, 'B' is the service provider and 'C' is the subject matter. As pointed out above by Mr Ganesh, the expression 'in relation to' may be of widest amplitude, but it has been used in the said Act as per its context. Sometimes, 'in relation to' would include the subject matter following it and on other occasions it would not. As in the case of the

service of dry cleaning, the expression 'in relation to dry cleaning' also has reference to the very service of dry cleaning. On the other hand, the service referred to in Section 65(105)(v), which refers to a service provided by a real estate agent 'in relation to real estate', does not, obviously, include the subject matter as a service. This is so because real estate by itself cannot by any stretch of imagination be regarded as a service. Going back to the structured sentence, i.e.– service provided or to be provided to 'A' by 'B' in relation to 'C', it is obvious that 'C' can either be a service (such as dry cleaning, hair dressing, etc.) or not a service by itself, such as real estate. The expression "in relation to" would, therefore, have different meanings depending on whether 'C' is a service or is not a service. If 'C' is a service, then the expression 'in relation to' means the service 'C' as well as any other service having connection with the service 'C'. Where 'C' is not a service, the expression 'in relation to' would have reference only to some service which has a connection with 'C'. But, this would not imply that 'C' itself is a service.

35. From this analysis, it is clear that we have to understand as to whether renting of immovable property for use in the course or furtherance of business or commerce by itself is a service. There is no dispute that any service connected with the renting of such immovable property would fall within the ambit of Section 65(105)(zzzz) and would be exigible to service tax. The question is whether renting of such immovable property by itself constitutes a service and, thereby, a taxable service. We have already seen that service tax is a value added tax. It is a tax on the value addition provided by some service provider. Insofar as

renting of immovable property for use in the course or furtherance of business or commerce is concerned, we are unable to discern any value addition. Consequently, the renting of immovable property for use in the course or furtherance of business of commerce by itself does not entail any value addition and, therefore, cannot be regarded as a service. Of course, if there is some other service, such as air conditioning service provided alongwith the renting of immovable property, then it would fall within Section 65(105)(zzzz).

36. In view of the foregoing discussion, we hold that Section 65(105)(zzzz) does not in terms entail that the renting out of immovable property for use in the course or furtherance of business of commerce would by itself constitute a taxable service and be exigible to service tax under the said Act. The obvious consequence of this finding is that the interpretation placed by the impugned notification and circular on the said provision is not correct. Consequently, the same are ultra vires the said Act and to the extent that they authorize the levy of service tax on renting of immovable property per se, they are set aside.

37. Before parting with this batch of cases, we would like to observe that we have not examined the alternative plea taken by the petitioners with regard to the legislative competence of the Parliament in the context of Entry 49 of List II of the Constitution of India. Such an examination has become unnecessary because of the view we have taken on the main plea taken by the petitioners as indicate above."

[Emphasis added]

4. From the aforesaid decision, it is quite vivid that the Division Bench has held that Section 65(105)(zzzz) could not have brought in its ambit and sweep the renting out of immovable property for use in the course of furtherance of business or commerce to constitute a taxable service and thereby exigible to service tax and, accordingly, the notification and circular were declared ultra vires.

5. After the said decision was rendered, Section 65(90)(a) and Sections 65 and 66 were amended. For the purpose of better appreciation, the provision that existed prior to the Finance Act, 2010 and post amendment by the Finance Act, 2010 are produced below in a tabular form:

PRIOR TO FINANCE ACT, 2010	POST AMENDMENT BY FINANCE ACT, 2010
"Section 65 (90a) "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include– (i) renting of immovable property by a religious body or to a religious body; or	"Section 65(90a) "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include– (i) renting of immovable property by a religious body or to a religious body; or

(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or filed, other than a commercial training or coaching centre; Explanation No.1:- For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theaters, exhibition halls and multiple-use buildings; Explanation No.2: - For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;	(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or filed, other than a commercial training or coaching centre; Explanation No.1:- For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, ware houses, theaters, exhibition halls and multiple-use buildings; Explanation No.2: - For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;
"Section 66-Charge of Service Tax-	"Section 66-Charge of Service Tax-
There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub clauses ….(zzzz)…. of Clause (105) of Section 65 and collected in such manner as may be prescribed.	There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub clauses ….(zzzz)…. of Clause (105) of Section 65 and collected in such

	manner as may be prescribed.
"Section 65(105) "taxable service" means any service provided or to be provided – … (zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce. Explanation 1. – For the purposes of this sub-clause, "immovable property" includes- (i) building and part of a building, and the land appurtenant thereto; (ii) land incidental to the use of such building or part of a building; (iii) the common or shared areas and facilities relating thereto; and (iv) in case of a building located in a complex or an industrial estate, but does not include - All common areas and facilities relating thereto, within such complex or estate, but does not include- (a) vacant land solely under for	"Section 66(105) "taxable service" means any service provided or to be provided – … (zzzz) to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or furtherance of business or commerce. Explanation 1. – For the purposes of this sub-clause, "immovable property" includes- (i) building and part of a building, and the land appurtenant thereto; (ii) land incidental to the use of such building or part of a building; (iii) the common or shared areas and facilities relating thereto; and (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate, *(v) Vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or*

agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes; (b) vacant land whether or not having facilities clearly incidental to the use of such vacant land; (c) land used for educational, sports, circus, entertainment and parking purposes; and (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hotels, boarding houses, holiday accommodation, tents, camping facilities. Explanation 2 – For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;	*commerce;* But does not include - (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes; (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land; (c) land used for educational, sports, circus, entertainment and parking purposes; and (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities. Explanation 2 – For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purpose shall be deemed to be immovable property for use in the course or furtherance of business or commerce;

Be it noted, the amendments have been brought with retrospective effect.

6. Challenging the validity of the amendments, Mr. Harish N. Salve, learned senior counsel, has submitted that the Parliament has no authority to enact the impugned legislation as renting of immovable property is a tax on lands and buildings which squarely comes within Entry 49 of List II of the Seventh Schedule of the Constitution of India. The learned senior counsel further submitted that the use of the word 'taxes' in Entry 49 connotes a multitude of taxes imposable on land when the renting of an immovable property would squarely fall within Entry 49 of List II. Relying on the decision in ***State of West Bengal v. Kesoram Industries Ltd.*, (2004) 10 SCC 20**, it is submitted that reading Entry 49 of List II in a wide manner, it would include all types of taxes imposed or imposable on lands and buildings and the same would fall within the exclusive authority of the State Legislature and in no manner would come within the residuary Entry 97 of List I by virtue of which the Parliament can legislate. He has propounded that the service tax imposed by the Parliament on renting of immovable property takes into account the use of the land or building, hence, it is a

tax which the State Legislatures alone could conceivably impose under Entry 49 of List II. In order to buttress the aforesaid submission, reliance has been placed on the decision in ***Ajoy Kumar Mukherjee v Local Board of Barpeta*****, AIR 1965 SC 1561** wherein a tax had been imposed under Section 62 of the Assam Local Self Government Act, 1953 and while upholding the validity of the tax, the Apex Court noted that the tax was, in substance, a tax on the land but the charge only arose on the land which was used for a market. Expanding the aforesaid stream of logic, the learned senior counsel submitted that the act of renting of an immovable property by one person to another for "commercial use" would come within the exclusive jurisdiction of the State Legislature.

7. Pyramiding the above assertions, the learned senior counsel contended that the impugned tax has direct nexus with the immovable property and is nothing but a tax on land and buildings, the measure being the rent payable by the tenant to the landlord for renting of the immovable property. There is no difference between the transaction of renting of immovable property and the property itself and, therefore, the provision is a colourable piece of legislation.

8. The second plank of the learned senior counsel's submissions emphasises on the relevance of the concept of "Aspect Theory" to the Indian Constitutional scheme. It is urged by him that the "aspect doctrine" is not applicable to the Indian Constitutional scheme as there exist two separate Lists. As a clarification, it is proponed that the "Aspect Theory" enunciated in ***Federation of Hotel Restaurant Association of India*** (supra) limits itself only to such aspects which could be directly covered by a specific entry in the two Lists. It is urged by him that if Entry 97 is taken recourse to despite the specific Entry of List II, it would create conflict and render the specific Entry of List II subservient to the residuary Entry of List I which is not permissible under the Constitutional scheme. Pressing into service the decision in ***Godfrey Phillips India Ltd. Vs. State of U.P.*****, (2005) 2 SCC 515**, he further submitted that in the Indian context, if an aspect is covered by an Entry in List I, then it cannot be said that another aspect cannot be taxed under an Entry within List II. The same logic, however, does not extend to a situation where the contest or cavil is between the residuary Entry within List I and a specific Entry within List II.

9. Mr. Salve has further argued that in the light of the judgment rendered in ***Home Solutions*** (supra), renting by the landlord for commercial purposes to the tenant, per se, could not be construed as rendering of service. The concept of "service seeker" and "service provider" as enunciated in the Finance Act 1994 is wholly absent in the impugned legislation. He further submitted that the respondent's justification of the impost on the ground that the power to tax rests with the Parliament, employing deeming fiction to describe the tax as a service tax within the residuary power of the Parliament, is totally contrary to the constitution bench judgment of the Apex Court in ***Godfrey Phillips India Ltd.*** (supra) wherein it has been authoritatively pronounced that the Parliament cannot employ a deeming fiction to bring in an incident of tax or a taxable event within its fold. Highlighting the said proponement, it is urged that merely describing the tax to be a "service tax" would not alter the nature of the tax for being a tax on land and building and, therefore, the Parliament does not have the legislative competence to introduce a deeming fiction to tax renting of immovable property and, therefore, the impugned provision deserves to be declared ultra vires.

10. Dr. Singhvi, learned senior counsel appearing in some of the writ petitions, has submitted at the fore that there is no service involved in the letting of immovable property and consequently, it is not open to the Parliament to impose service tax on the assumption that the taxable service is involved in letting of immovable property. It is submitted by him that it is well settled in law that the Legislature in enacting a law is entitled to enact or prescribe a deeming fiction but the exercise of the said power comes with a limitation that by deeming a fiction, the legislature cannot transgress upon a constitutional restriction or the field of legislation that is reserved or demarcated for another legislature. Alternatively, it is urged that any legal fiction, embedded in the provisions of law enacted by the Legislature, does not confer any legislative competence upon it which it does not otherwise possess under the Constitution and the tax on the use of land and building for a particular purpose being squarely covered under Entry 49 of List II cannot be covered under the conception of 'deemed'. Edificing the said proposition further, he submitted that letting of immovable property for commercial purpose also constitutes a particular use of the property and, therefore, the tax on such letting is squarely covered

under Entry 49 of List II. In this regard, reliance has been placed on the decision of the Supreme Court in ***Kesoram Industries Limited*** (supra).

11. Dr. Singhvi, drawing analogy from the internationally followed principles, further submitted that even internationally, leasing / letting of immovable property is exempted from value added taxation since it has been construed that the same does not provide any value addition and since the Government of India has sought to rely upon the internationally accepted value added tax regime, it needs to follow the same fully and exempt leasing / letting of immovable property from the domain of value added tax. In this regard, he has placed reliance on the decision of the House of Lords in ***Commissioners of Custom and Excise v. Sinclair Collis Limited (2001) UKHL 30*** (7th June, 2001).

12. The learned senior counsel has further drawn inspiration from the observations of the European Union Court in ***Belgium v. Temco Europe SA*** [Case C-284/03 of 18.11.2004] wherein it has been held that if the leasing/ letting of immovable property is a passive transaction, then it would be exempted.

13. Mr. S. Ganesh, learned senior counsel, analysing the anatomy of the provisions under Section 65, submitted that among the taxable services, the taxable service in Sub-clause (zzzz), to which the constitutional challenge in these proceedings relates, was initially inserted by the Finance Act of 2007 with effect from 1st June 2007 and the taxable service was defined to mean "any service provided or to be provided to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce" and, hence, in the absence of service component, service tax cannot be imposed. Emphasis has been laid on the expression "renting of immovable property" as defined in Clause (90)(a) of Section 65 of the Act.

14. It is his submission that letting of immovable property is merely a property transaction and does not involve remotely any value addition whatsoever which results from the rendering of the service and therefore, the service tax is not leviable. He has heavily relied on the decision rendered in ***All India Federation of Tax Practitioners*** (supra) wherein the Apex Court has noted that a service tax is a tax on value addition made by rendering of services.

15. The learned senior counsel further submitted that the impugned levy of tax is nothing but a tax on the letting of immovable property and the same is squarely covered by Entry 49 of List II and consequently, the Parliament has no legislative competence to levy the said tax under residuary Entry 97 of List I of the Seventh Schedule. The service tax imposed by the Parliament on renting of immovable property, it is urged, takes account of the user of the land or building and hence, it is a tax which the State Legislatures alone can impose under Entry 49 of List II. The learned senior counsel has commended us to the decisions in ***D.G. Gose Co. (Agents Pvt. Ltd.) vs. State of Kerala,*** **(1980) 2 SCC 410** and ***Goodricke Group Ltd. v. State of West Bengal,*** **(1995) Supp. 1 SCC 707** to highlight that Entry 49 of List II has been endowed with wide range of coverage and interpretation.

16. It is further canvassed by the learned senior counsel that under the constitutional scheme, a single transaction or taxable event cannot be taxed by both the Parliament and the State Legislature. It is argued by him that there exists a meticulous separation of all the taxing powers of the Parliament as compared to the taxing powers of the State in order to avoid any kind of overlapping whatsoever between the two.

It is proponed that it has been held by the Apex Court that the very same transaction cannot be subjected to tax by both the Parliament and the State Legislature.

17. Questioning the levy of service tax on renting of immovable property with retrospective effect from 1st June 2007, he submitted that there can be no retrospective authorization of penal action to be taken against assessees including, in particular, the imposition of penalties or penal interest and prosecution, and that such retrospective imposition of penal action would be unconstitutional in the light of the decision in ***Star India Pvt. Ltd v. CCE,*** **(2005) 7 SCC 203**.

18. Mr. S.K. Bagaria, learned senior counsel, relying on ***All India Federation of Tax Practitioners*** (supra) and ***Association of Leasing and Financial Service Companies vs. Union of India and ors.*****, (2011) 2 SCC 352**, delineated at the outset the essential features of service tax to mean that it is leviable only on services provided by the service provider to its customer and it is fundamentally and inseparably connected with the value addition. The learned senior counsel has further submitted that renting of immovable property for use in the

course or furtherance of business or commerce by itself does not entail any value addition and, therefore, cannot be regarded as a service.

19. The learned senior counsel has placed reliance on ***Hansraj & Sons v. State of Jammu & Kashmir*, (2002) 6 SCC 227, *Member-Secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution v. Andhra Pradesh Rayons Ltd.*, (1989) 1 SCC 44, *Saraswati Sugar Mills v. Haryana State Board*, (1992) 1 SCC 418** and ***Commissioner of Gift Tax, Madras v. N.S. Getty Chettiar*, (1971) 2 SCC 741** to reinforce his submission that the definition of 'taxable service' is a matter which relates to chargeability and the charging provisions have to be strictly construed.

20. It is urged by Mr. Bagaria that the constitutional concepts relating to service tax as laid down by the Apex Court cannot be whittled or nullified by a statutory amendment. Elaborating further, it is put forth that a transaction relating to mere renting of immovable property could never be termed as rendering of any service giving rise to a value addition as the elements of service as well as value addition are completely absent.

21. The learned senior counsel, placing reliance on ***Puran Singh Sahni v. Sundari Bhagwandas Kripalani,*** **(1991) 2 SCC 180**, has submitted that in Section 65(90a), the expression 'renting of immovable property' has been defined to include renting, letting, leasing, licensing or other similar arrangements of immovable property and all these activities of immovable property are recognized in law as transfer of right in land/buildings by the lessor to the lessee and the transaction is recognized as a transfer of property from the lessor to the lessee under Section 105 of the Transfer of Property Act, 1882 and the instrument effectuating such a transfer defined as conveyance is liable to stamp duty under the provisions of the Indian Stamp Act, 1899. The learned senior counsel has placed reliance on ***Ajoy Kumar Mukherjee*** (supra) ***Goodricke Group Ltd.*** (supra) and ***International Tourist Corporation v. State of Haryana*****, (1981) 2 SCC 318** and submitted that any tax levied on such transaction, in pith and substance, is nothing else but a tax on land/building under Entry 49 of List II of the Seventh Schedule of the Constitution as such a transaction involves transfer of right to enjoy such property and has direct nexus with the land/building in question. Therefore, the Parliament, by merely giving

it a label of service, cannot subject it to service tax as such an exercise is nothing but a colourable exercise of power.

22. Mr. A.S. Chandhiok, learned Additional Solicitor General, countering the aforesaid submissions, has contended that by virtue of the amendment incorporated by the Finance Act, 2010, the levy is on the very activity of renting, leasing, letting, licensing of the immovable property or permitting the immovable property through any arrangement whatsoever to be used in the course or furtherance of business or commerce and for the said purpose, transfer of right, title and interest is totally irrelevant. It is his further submission that the activity which is sought to be taxed under Section 65(105)(zzzz) is allowing/permitting the usage of immovable property in the course and furtherance of business which is neither covered under the Transfer of Property Act nor under the Indian Easements Act and by no means is a tax on land and building to come within the ambit and sweep of Entry 49 of List II of the Seventh Schedule of the Constitution. Combating the submission as regards the legislative competence of the Parliament, the learned Addition Solicitor General has submitted that in order to take aid of Entry 49 of List II, certain conditions precedent are to be

satisfied such as the tax ought to be a direct tax on land and building, and the land or building is to be taxed as units of taxation as it has no concern with ownership, division of interest or occupation. That apart, submits Mr. Chandhiok, it does not cover indirect tax on land and building and as a natural corollary, ousts tax on income from land or building from its purview. It is canvassed by him that the tax in the present case is an indirect tax and the impost is on the activity and not on renting or leasing. It is canvassed by him that the subject of tax or the event of taxation is different from the measure of levy and the mode of assessment and the latter cannot be taken into consideration for determining the nature and character of tax.

23. Mr. Chandhiok has urged that ***Kesoram's case*** (supra) could not be relied upon to justify the impugned levy under Entry 49 of List II inasmuch as the levy therein was a direct tax on land and the measure of the said direct tax on land was classified on the basis of different users of land at different rates. It is submitted by him that the issue to be dealt with therein was whether the tax was on land falling under List II or on the Coal Mines or Tea Estate which is a subject matter of List I. The court interpreted the said provisions and concluded that the tax

under the said provisions would remain tax on land irrespective of use to which it is put because classification of land in different identifiable groups was only for the purpose of taxation. Distinguishing the decision in ***Ajoy Kumar*** (supra), the learned Additional Solicitor General submitted that in the said case, the levy was directly on land itself but was to be measured/recovered when it was being used as market and the Apex Court had concluded that the tax was on land but the charge arose only when the land was used for a market, whereas in the present case, the levy is not on land but on the activity of renting, leasing, letting, licensing, allowing and permitting the usage of immovable property in the course or furtherance of business or commerce.

24. The learned Additional Solicitor General contended that a tax on land is to be measured with reference to its income and nothing else and in the case of ***DG Fose and Co.(Agents) Pvt. Ltd.*** (supra), tax was levied directly on building and was measured on the basis of annual value which was challenged on the ground that the State Legislature had no competence because only the Union had the power to levy tax on annual capital value which was rejected by the court by reiterating

the law that the legislature was free to take a decision as to the measure of tax but the same is not the situation in the case at hand. The learned ASG, deriving strength from the decisions in ***Tamil Nadu Kalyana Mandapam Assn.*** (supra); ***All India Federation of Tax Practitioners and Ors.*** (supra) and ***Association of Leasing and Financial Service Companies*** (supra), also submitted that levy of service tax under Article 248(2) read with Entry 97 of List I is permissible.

25. On the nature of service tax, the learned ASG submitted that besides the fact that service is inherent under Section 65(90a) and Section 65(105)(zzzz), there is value addition and the whole activity has an inseparable nexus with commercial activity. Emphasizing on the concept of Value Added Tax (VAT), it is submitted by him that VAT was based on the additional services and the related VAT liability of the service provider can be calculated by deducting input tax credit from the tax collected on the services making it a multi point tax on value addition which is collected at different stages of providing services with provision for set off for the tax paid at the previous stage / tax on inputs. In this regard, the learned ASG has referred to the statutory provisions of the Central Excise Act, 1944, the Finance Act,

1994 and the CENVAT Credit Rules, 2004, Dr. Raja J. Chelliah Committee's report on tax reforms as well as the decision in ***All India Federation of Tax Practitioners and Ors.*** (supra) wherein the Supreme Court has described service tax as VAT.

26. The learned ASG, justifying the retrospective operation of the impugned provisions, in his final lap, submitted that only the retrospective operation of Section 65(105)(zzzz) had been challenged and that too as an alternative relief. It is submitted that by virtue of Section 76(a)(6)(h) of the Finance Act, 2010, Section 65(105)(zzzz) had been amended to clarify the intent of the legislature w.e.f. 11.5.2007 and further Section 77 of the Finance Act, 2010 validated all actions. Referring to the first ***Home Solutions*** case (supra), the learned ASG submitted that the court, in the said case, had not quashed or invalidated the substantive provisions of law which still remains intact. Further, relying on the decisions in ***Empire Industries Limited and Ors. v. Union of India and Ors.*****, (1985) 3 SCC 314,** ***Pyare Lal Sharma Vs Managing Director and Ors.,*** **(1989) 3 SCC 488** and ***A. Manjula Bhashini and Ors. v. The Managing Director, A.P. Women's Cooperative Finance Corporation Ltd. and Anr.,*** **(2009) 8**

SCC 431, it is submitted that the legislature has the power to amend the law with retrospective effect.

27. Pressing into service the decision in ***Shiv Dutt Rai Fateh Chand and Ors. v. Union of India and Anr.*, (1983) 3 SCC 529** wherein the Supreme Court had upheld the levy of penalty in the year 1996 with effect from 1957, the learned ASG submitted that penalty can also be levied retrospectively.

28. In response to the aforesaid submission, the petitioners in their rejoinder, citing the decision in ***Governor-General in Council v. Province of Madras,* AIR 1945 PC 98** which was followed by the Supreme Court in ***R.R. Engineering Co. v. Zilla Parishad,* (1980) 3 SCC 330**, have submitted that the name given to a tax is immaterial and has no impact or bearing on the issue of its constitutional validity. It is also submitted that the mere fact that Section 65 (105) (zzzz) of the Finance Act regarded the letting of immovable property for commercial purpose as a service and proceeded to levy service tax on the same does not lead to the conclusion that the said tax was in reality and in substance a service tax. The issue of constitutional validity of a

tax/levy depends on its essential nature and not merely its nomenclature.

29. It is further reiterated that it is a settled legal position that the legal fiction contained in the provisions of law enacted by the Legislature does not confer any legislative competence upon the Legislature. In this context, the decisions in ***State of Madras v. Gannon Dunkerley & Co. Ltd.,*** **(1959) SCR 379*, Bhopal Sugar Industries v. Sales Tax Officer,* (1964) 1 SCR 481*, Twentieth Century Finance Co. Ltd. v. State of Maharashtra,* (2000) 6 SCC 12*; All India Federation of Tax Practitioner's case*** (supra) ***Tamil Nadu Kalyanmandapam Association*** (supra) and ***Association of Leasing and Financial Service Companies*** (supra) have been pressed into service.

30. To appreciate the contentions raised at the Bar, first, we shall advert to the schematic concept pertaining to the "fields of legislation". In ***Raja Jagannath Baksh Singh v. State of Uttar Pradesh and another*****, AIR 1962 SC 1563**, while dealing with Articles 245 and 246, it has been held that it is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power

must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in the Constitution. A general word used in an entry must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.

31. In ***Union of India and others v. Shah Goverdhan L. Kabra Teachers College*****, AIR 2002 SC 3675**, it has been laid down that the power to legislate is engrafted under Article 246 of the Constitution and the various entries in the three lists of the Seventh Schedule are the "fields of legislation". The different entries being legislative heads are all of enabling character and are designed to define and delimit the respective areas of legislative competence of the Union and the State Legislature. They neither impose any restrictions on the legislative powers nor prescribe any duty for the exercise of legislative power in any particular manner. It has been a cardinal principle of construction that the language of the entries should be given the widest scope by which their meaning is fairly capable of and while interpreting an entry

of any List, it would not be reasonable to import any limitation therein. The rule of widest construction, however, would not enable the legislature to make a law relating to a matter which has no rational connection with the subject matter of an entry. Their Lordships have further opined that it is a well-settled principle that the entries in the different lists should be read together without giving a narrow meaning to any of them. The power of the Parliament as well as the State legislature is expressed in precise and definite terms. While an entry is to be given its widest meaning, it cannot be so interpreted as to override another entry or make another entry meaningless and in case of an apparent conflict between different entries, it is the duty of the Court to reconcile them. When it appears to the Court that there is apparent overlapping between the two entries, the doctrine of "pith and substance" has to be applied to find out the true nature of a legislation and the entry within which it would fall. In case of conflict between the entries in List I and List II, the same has to be decided by application of the principle of "pith and substance". The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature

which enacted it, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. When a law is impugned as being ultra-vires of the legislative competence, what is required to be ascertained is the true character of the legislation. If, on such an examination, it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object and scope and effect is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance.

32. In ***Dharam Dutta and others v. Union of India and others*****, AIR 2004 SC 1295**, it has been held thus:

> "72. The various entries in the three Lists of the Seventh Schedule are legislative heads defining the fields of legislation and should be liberally and widely interpreted. Not only the main matter but also any incidental and ancillary matters are available to be included within the field of the entry. The settled rules of interpretation governing the entries do not countenance any narrow and pedantic interpretation. The judicial opinion is for

> giving a large and liberal interpretation to the scope of the entries. Suffice it to quote from the opinion of the judicial Committee of the Privy Council in British Coal Corporation v. The King, AIR 1935 PC 158, 162 - that in interpreting a constituent or organic statute indeed that construction which is most beneficial to the widest possible amplitude of its powers must be adopted. The Federal Court in the United Provinces v. Atiqa Begum , AIR 1941 FC 16, 25 observed that none of the items in the lists is to be read in a narrow or restricted sense and all ancillary or subsidiary matters referable to the words used in the entry and which can fairly and reasonably be said to be comprehended therein are to be read in the entry. This approach has been countenanced in several decisions of this Court. (To wit, see Navinchandra Mafatlal v. CIT Bombay City (1955) 1 SCR 829, 836 : AIR 1955 SC 58 at p.61; Sri Ram Ram Narain Medhi v. State of Bombay , 1959 Supp (1) SCR 989 : AIR 1959 SC 459)"

33. In ***State of Andhra Pradesh v. K. Purushotham Reddy and others*****, AIR 2003 SC 1956**, it has been held that the conflict in the legislative competence of the Parliament and the State Legislatures having regard to Article 246 of the Constitution of India must be viewed in the light of the settled position of law which, in no uncertain terms, lays down that each Entry has to be interpreted in a broad manner. Both the Parliamentary legislation as also the State legislation must be considered in such a manner as to uphold both of them and

only in a case where it is found that both cannot co-exist, the State Act may be declared ultra vires. Clause I of Article 246 of the Constitution of India does not provide for the competence of the Parliament or the State Legislatures as is ordinarily understood but merely provides for the respective legislative fields. Furthermore, the Courts should proceed to construe a statute with a view to uphold its constitutionality.

34. In ***Welfare Association, A.R.P., Maharashtra and another v. Ranjit P. Gohil and others*****, (2003) 9 SCC 358**, while dealing with the concept of colourable legislation, it has been held that the said doctrine fundamentally dealt with the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motives does not arise at all. Whether a statute is constitutional or not is thus always a question of power (vide *Cooley's Constitutional Limitations,* Vol.1, p.379). The crucial question to be asked is whether there has been a transgression of legislative authority as conferred by the Constitution which is the source of all powers as also the separation of powers. A legislative transgression may be

patent, manifest or direct, or may also be disguised, covert and indirect. It is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The expression means that although apparently a legislature, in passing a statute, purports to act within the limits of its powers, yet in substance and in reality, it transgresses those powers, the transgression being veiled by what appears, on a proper examination, to be a mere pretence or disguise. The discerning test is to find out the substance of the Act and not merely the form or outward appearance. If the subject-matter in substance is something which is beyond the legislative power, the form in which the law is clothed would not save it from condemnation. The constitutional prohibitions cannot be allowed to be violated by employing indirect methods. To test the true nature and character of the challenged legislation, the investigation by the court should be directed towards examining (i) the effect of the legislation, and (ii) its object, purpose or design. In the said decision, it has been opined that while interpreting and construing, an effort ought to be made to make the entries effective instead of rendering them otiose. It is the duty of the court to examine the pith and substance of the Act to find out

whether the matter substantially falls under a particular entry in a list or not.

35. In ***Harakchand Ratanchand Banthia & Ors. v. Union of India & Ors*., AIR 1970 SC 1453**, it has been held as follows:

> "6. ….The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction. In in re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, 1939 FCR 18 = (AIR 1939 FC 1), Sir Maurice Gwyer proceeded to state:
>
> > "Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail; for the clause ought to be regarded as a

> last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship."

After so stating, their Lordships further proceeded to state as follows:

> "7.….It is well settled that the entries in the three lists are only legislative heads or fields of legislation and they demarcate the area over which the appropriate legislature can operate. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of subjects to the list is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories….."

36. We have referred to the aforesaid decisions only to understand the purpose behind the various entries relating to legislation by the Parliament as well as the State Legislature, the field of legislation, the doctrine of "pith and substance", adoption of a non-pedantic approach, interpretation on a wider spectrum, the true character of the enactment by paving the path of real substance, and the demarcation of the areas of legislation, incidental and ancillary encroachment, design of the statute and substantial entrenchment.

37. Presently, we shall proceed to refer to certain authorities which pertain to the imposition of tax on land as it is imperative to scan and

understand what is exactly meant by "taxes on lands and buildings". Entry 49 of List II reads as follows:

> "**49. Taxes on lands and buildings**.
> If therefore a tax is directly imposed on "buildings", it will bear a direct relation to the buildings owned by the assessee. It may be that the building owned by an assessee may be a component of his total assets, but a tax under Entry 86 will not bear any direct or definable relation to his building. A tax on "buildings" is therefore a direct tax on the assessee's buildings as such, and is not a personal tax without reference to any particular property.

38. In ***Ajoy Kumar Mukherjee*** (supra), the Constitution Bench, placing reliance on ***Ralla Ram v. Province of East Punjab*****, AIR 1949 FC 81**, opined as follows:

> "It is well-settled that the entries in the three legislative lists have to be interpreted in their widest amplitude and, therefore, if a tax can reasonably be held to be a tax on land it will come within entry 49. Further it is equally well-settled that tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the State legislature on the ground that it is a tax on income. [see Ralla Ram v. province of East Punjab, 1948 FCR 207 : (AIR 1949 FC 81)]. It follows, therefore, that the use to which the land is put can be taken into account in imposing a tax on it within the meaning of entry 49 of List II, for the annual value of land which can certainly be taken into

> account in imposing a tax for the purpose of this entry would necessarily depend upon the use to which the land is put."

39. In ***Sudhir Chandra Nawn v. Wealth-tax Officer, Calcutta and others*****, AIR 1969 SC 59**, it was held that the power to levy tax on lands and buildings under Entry 49 of List II did not trench upon a power conferred on the Parliament by Entry 88 of List I and, therefore, the enactment of the Wealth Tax Act by the Parliament was not ultra vires. In the said case, it has been opined as follows:

> "…But the legislative authority of Parliament is not determined by visualizing the possibility of exceptional cases of taxes under two different heads operating similarly on tax payers. Again entry 49 List II of the Seventh Schedule contemplates the levy of tax on lands and buildings or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under entry 86 List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under entry 49 List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax

liability will not, in our judgment, make the fields of legislation under the two entries overlapping."

40. In ***The Assistant Commissioner of Urban Land Tax and others v. The Buckingham and Carnatic Co. Ltd., Etc.*, 1969 (2) SCC 55**, the challenge was to the Madras Urban Land Tax Act, 1966. A contention was raised that the impunged Act fell in Schedule VII, List I, Entry 86 as the impugned Act was, both in form and substance, taxation of capital and, hence, beyond the competence of the State Legislature. In that context, their Lordships opined that the legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subjects to the list is not by way of scientific or logical definition but by way of a mere *sixplex enumeratio* of broad categories and, therefore, there is no conflict between Entry 86 of List I and Entry 49 of List II as the basic taxation under the two entries is quite distinct. Their Lordships proceeded to state that in Entry 86 of List I, the basis of taxation is the capital value of the asset and it is not a tax directly on the capital value of the assets of individuals and companies on the valuation data and, therefore, the tax is not imposed on the components of the assets of the assessee. Their Lordships further stated that the tax under Entry 86 proceeds on the

principle of aggregation and is imposed on the totality of the value of all the assets. After so stating, their Lordships proceeded to state as follows:

> "…It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee. But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings, is directly imposed on lands and buildings and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86, List I tax is contemplated to

> be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject-matters."
>
> [Emphasis added]

41. In ***The Second Gift Tax Officer, Mangalore v. D.H. Hazareth*****, AIR 1970 SC 999**, the Apex Court, while dealing with the impost or tax on gifts of lands and buildings, referred to Article 248 which ("imposition of" or "impost of") contains declaration of the residuary powers of the Legislature. Their Lordships observed that the Parliament has exclusive power to make any law in respect of any matter not enumerated in the Concurrent List or State List and the same includes the power of making any law imposing a tax not mentioned in either of those lists and to avoid any kind of doubt, Entry 97 has been included in the Union List. After so stating, their Lordships proceeded to lay down as follows:

> "5. It will, therefore, be seen that the sovereignty of Parliament and the Legislatures is a sovereignty of enumerated entries, but within the ambit of an

> entry, the exercise of power is as plenary as any legislature can possess, subject, of course, to the limitations arising from the Fundamental Rights. The entries themselves do not follow any logical classification or dichotomy. As was said in State of Rajasthan v. S. Chawla, (1959) Supp 1 SCR 904 = (AIR 1959 SC 544) the entries in the lists must be regarded as enumeratio simplex of broad categories. Since they are likely to overlap occasionally, it is usual to examine the pith and substance of legislation with a view to determining to which entry they can be substantially related, a slight connection with another entry in another list notwithstanding. Therefore, to find out whether a piece of legislation falls within any entry, its true nature and character must be in respect to that particular entry. The entries must of course receive a large and liberal interpretation because the few words of the entry are intended to confer vast and plenary powers. If, however, no entry in any of the three lists covers it, then it must be regarded as a matter not enumerated in any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union List as a topic of legislation."

Eventually, in the said case, it was held that gift tax is not a tax on land and building as such which is a tax resting upon general ownership of lands and buildings but is a levy upon a particular act which is transmission of title by gift. The two are not the same thing and the incidence of tax is not the same. The Apex Court ruled that since Entry 49 of the State List contemplates a tax directly levied by

reason of general ownership of lands and buildings, it cannot include gift tax as levied by the Parliament and, there being no other entry which covers a gift tax, the residuary power of the Parliament could be exercised to enact the law.

42. In ***D.G. Bose & Co. (Agents) Pvt. Ltd.*** (supra), the constitutional validity of the Kerala Building Tax Act, 1975 was challenged before the High Court of Kerala which upheld the validity of the Act. The principal contention that was canvassed before the Apex Court was that the subject matter of the Act being a tax on building is a tax on the capital value of the asset of an individual or a company and falls within the scope of Entry 86 of List I of the Seventh Schedule of the Constitution and not under Entry 49 of List II and, therefore, it travels beyond the legislative competence of the State Legislature. Their Lordships referred to the concept of tax as defined under Clause (28) of Article 366 of the Constitution of India, adverted to Entry 86 and thereafter, while dealing with Entry 49, proceeded to state as follows:

> "8. On the other hand, Entry 49 of List II is as follows:
>
> 49. Taxes on lands and buildings.
> If therefore a tax is directly imposed on "buildings", it will bear a direct relation to the

> buildings owned by the assessee. It may be that the building owned by an assessee may be a component of his total assets, but a tax under Entry 86 will not bear any direct or definable relation to his building. A tax on "buildings" is therefore a direct tax on the assessee's buildings as such, and is not a personal tax without reference to any particular property.

9. It has to be appreciated that in almost all cases, a tax has two elements which have been precisely stated by Seervai in his "Constitutional Law of India", second edition, Volume 2, as follows, as page 1258:

> Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements: the person, thing or activity on which the tax is imposed, and the amount of the tax. The amount may be measured in many ways; but decided cases establish a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax.

It may well be that one's building may imperceptibly be the subject-matter of tax, say the wealth tax, as a component of his assets, under Entry 86 (List I); and it may also be subjected to tax, say a direct tax under Entry 46 (sic 49) (List II), but as the two taxes are separate and distinct imposts, they cannot be said to overlap each other, and would be within the competence of the legislatures concerned."

After so stating, their Lordships referred to the decisions in ***Sudhir Chandra Nawn*** (supra) and ***Buckingham and Carnauc Co. Ltd.*** (supra) and eventually held that the State Legislature was competent to tax the building under Entry 49 of List II.

43. In ***Union of India v. Harbhajan Singh Dhillon*****, AIR 1972 SC 1061**, while dealing with the requisites of a tax under Entry 49 of List II, their Lordships have ruled thus:

> "65. The requisites of a tax under entry 49, List II may be summarised thus:
>
> (1) It must be a tax on units, that is lands and buildings separately as units.
>
> (2) The tax cannot be a tax on totality, i.e. it is not a composite tax on the value of all lands and buildings.
>
> (3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns or occupies it or two or more persons own or occupy it.
>
> 66. In short, the tax under entry 49 List II is not a personal tax but a tax on property."

44. In ***Kesoram Industries Ltd. & Ors*****.,** (supra), the Constitution Bench, after dwelling upon the principle of interpretation relating to

Articles 246, 265 and the Seventh Schedule of the Constitution and the scheme and nature of the power to legislate, per majority, opined that if any power to tax is clearly mentioned in List II, the same would not be available to be exercised by the Parliament based on the presumption of residuary power. In the said case, while dealing with the concept of land in terms of Entry 49, List II, it has been stated that it has wide connotation and the land remains land though it may be subject to different uses. The nature of use of the land would not enable a piece of land to be taken out of the meaning of land itself. It has been ruled therein that to be a tax on land, the levy must have some direct and definite relationship with the land and so long as the tax is a tax on land by bearing such relationship with the land, it is open to the legislature, for the purpose of levying tax, to adopt any one of the well known modes of determining the value of the land such as annual or capital value of the land or its productivity. It has been further held that the methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on the land. The Constitution Bench has also laid emphasis on the aspect that the primary object and the essential purpose of the legislation must be

distinguished from its ultimate or incidental results or consequences for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of regulation and control belonging to the Central Government by reason of the incidence of the levy being permissible to be passed on to the buyer or consumer and thereby affecting the price of the commodity or goods. Be it noted, in the said case, their Lordships were dealing with a case whereby a Division Bench of Calcutta High Court had struck down certain levies by way of cess on coal as unconstitutional for want of legislative competence of the State legislature.

45. In ***Lt. Col. Sawai Bhawani Singh and others v. State of Rajasthan and others,*** **(1996) 3 SCC 105**, while dealing with wealth tax under Entry 49 of List II, their Lordships have held that in pith and

substance, it was a tax on property and not a personal tax. As per Entry 49 of List II, the State Legislature is competent to impose tax either on lands or on buildings or on both. A land or building or both of a person may be subjected to direct tax by the State Legislature under Entry 49 of List II and may also be the subject-matter of direct tax as a component of his total assets, like wealth tax by the Union Legislature as mentioned in Entry 86 of List I. These two taxes are separate and distinct in nature and it cannot be said that there is any overlapping or that the State Legislature is not competent to levy such tax on lands and buildings merely on the ground that they have been subjected to another tax as a component of the total assets of the person concerned.

46. From the aforesaid enunciation of law in various authorities, the following principles can be culled out:

(a) Under Entry 49 of List II, the State Legislature is competent to impose tax either on lands or buildings or on both. It is basically a tax on property.

(b) Entry 49 of List II of the Seventh Schedule contemplates levy of tax on lands and buildings or both as units.

(c) The levy of tax on lands and buildings is not concerned with the

division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings and bears a definite relation to it.

(d) The tax on land and building is a fundamental tax resting upon the general ownership of the lands and buildings but would not include a particular act like a transmission of title by gift.

(e) There is a distinction between a direct tax on the assessee's building as such and a personal tax.

(f) There is a distinction between the elements of tax, namely, the person, thing or activity on which the tax is imposed and the amount of tax.

(g) A tax may imperceptibly be the subject-matter of tax like wealth tax and may be subjected to tax as a direct tax under Entry 49 of List II.

(h) To be a tax on land, the levy must have some direct and definite relationship with the land and as long as the tax is a tax on land by bearing such relationship with the land, it is open to the State legislature, for the purpose of levying tax, to adopt any one of

the well known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.

(i) While dealing with the tax on the subject, thing or activity, the primary object and the essential purpose of the legislation must be distinguished from its ultimate or incidental results or consequences for determining the character of the levy.

(j) If a tax is imposed on any transaction in the market by persons who come there for business, it is not imposed on land but on the business involved therein.

(k) A tax levied on activity or service rendered having nexus with land or building would not come within the compartment of tax on land and building.

Be it noted, we have culled out the aforesaid principles for the sake of clarity and convenience.

47. The learned senior counsel appearing for the petitioners would contend that the levy of service tax on renting or leasing of immovable property or having similar arrangement of immovable property for use

in the course of furtherance of business or commerce is fundamentally a tax on the land which comes squarely within the legislative competence of the State Legislature. As has been noted hereinbefore, it has been vehemently urged that by introducing the doctrine of "pith and substance" or "aspect doctrine", it cannot be brought under Entry 97 of List I under the residuary power of the Parliament. That apart, it has been highlighted that there is no service rendered when the premises are let out and it is a direct tax on land and, therefore, it is a colourable piece of legislation by the Parliament and there is a direct entrenchment. Emphasis has been laid on the first ***Home Solutions case*** (supra) to bolster the submission that in the absence of any value addition, which is the essential and fundamental component of service tax, the levy is unconstitutional. Regard being had to the aforesaid facets, we think it seemly to advert to the principles that have been laid down by the Apex Court pertaining to service tax in various decisions.

48. In ***T.N. Kalyana Mandapam Association*** (supra), the assail was to the constitutional validity of Sections 66, 67(o) of the Finance Act, 1994 and Rule 2(1)(d)(ix) of the Service Tax Rules, 1994 and other provisions relating to Kalyana Mandapams and Mandap keepers. Sub-

sections 65(8), (19) and (20) of the Finance Act, 1994 defined 'caterer', 'mandap' and 'mandap keepers'. Section 65(41)(p) defines 'taxable service' to mean any service provided to a client by a mandap keeper in relation to the use of a mandap in any manner including the facilities provided to the client in relation to such use and also the services, if any, rendered as a caterer. The challenge to the constitutional validity before the High Court had met with failure. Before the Apex Court, it was the principal contention that the service tax on the mandap keepers is a colourable legislation and unconstitutional as the said tax is not on services but is, in pith and substance, only a "tax on goods" and/or land and the provisions are not within the legislative competence of the Union of India but within the competence of the State Legislature. Their Lordships posed six questions, one of which being relevant is reproduced hereinbelow:

> "Was the High Court correct in not construing the specific entries in List II viz. Entries 18, 49 and 54 by giving the widest amplitude, particularly when the Union was seeking to justify the levy under the residuary Entry 97 in List I of the Seventh Schedule of the Constitution?"

Answering the said question, their Lordships opined that service tax is imposed by the Parliament pursuant to the residuary power under

Entry 97 of List I read with Article 246 of the Constitution. Thereafter, their Lordships proceeded to state as follows:

> "46. It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter.
>
> xxx xxx xxx
>
> 51. Taxable services, therefore, could include the mere providing of premises on a temporary basis for organising any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels, etc. which provide limited access to property for specific purpose.
>
> xxx xxx xxx
>
> 53. It is also emphasized that a tax cannot be struck down on the ground of lack of legislative competence by enquiring whether the definition accords with what the layman's view of service is. It is well settled that in matters of taxation laws, the court permits greater latitude to pick and choose objects and rates for taxation and has a wide discretion with regard thereto. We may in this context refer to the decision of Mafatlal Industries Ltd. v. Union of India (SCC para 343, at pp.740-41):
>
> > "In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and

> choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters."
>
> 54. Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution.
>
> 55. In fact, making available a premises for a period of a few hours for the specific purpose of being utilized as a mandap whether with or without other services would itself be a service and cannot be classified as any other kind of legal concept. It does not certainly involve transfer of movable property nor does it involve transfer of movable property of any kind known to law either under the Transfer of Property Act or otherwise and can only be classified as a service."

49. In ***Gujarat Ambuja Cement Ltd. v. Union of India*****, AIR 2005 SC 3020**, the challenge was to the legislative competence of the Parliament to impose service tax on carriage of goods by transport operators. It was urged that the matter came exclusively under Entry 56 of List II of the Seventh Schedule which pertains to "taxes on goods and passengers covered by road or inland water ways". Their Lordships noted that service tax is distinct from a tax on the sale or

hire purchase of goods and from a tax on land. While dealing with the specific issue, the Apex Court has stated thus:

> "32. It is clear therefore that Section 66 read with Section 65(41)(j) and (ma) Chapter V of the Finance Act, 1994 do not seek to levy tax on goods or passengers. The subject matter of tax under those provisions of the Finance Act, 1994 is not goods and passengers, but the service of transportation itself. It is a levy distinct from the levy envisaged under Entry 56. It may be that both the levies are to be measured on the same basis, but that does not make the levy the same. As was held in Federation of Hotel and Restaurant Association of India etc. v. Union of India and others (1989) 3 SCC 634:
>
> > "….. subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power….. 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." (pg.652-653).
>
> 33. Since service Tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within the States exclusive power under Entry 56 of

> List II. What the Act ostensibly seeks to tax is what it, in substance, taxes. In the circumstances, the Act could not be termed to be a colourable piece of legislation. It is not the case of the petitioners that the Act is referable to any other entry apart from Entry 56 of List II. Therefore the negation of the petitioners submission perforce leads to the conclusion that the Act falls within the residuary power of Parliament under Entry 97 of List I."

50. In ***All India Federation of Tax Practitioners*** (supra), a Division Bench decision of the Bombay High Court upholding the legislative competence of the Parliament to levy service tax vide the Finance Act, 1994 and the Finance (No.2) Act, 1998 was assailed before the Apex Court. The issue that arose pertained to the competence of the 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. Their Lordships referred to the reasons for imposition of service tax, the scheme of the Finance Act, 1994 and the Finance Act, 1998, the relevant provisions of the Constitution of India and dealt with the meaning of service tax. While dealing with the concept and meaning of service tax, their Lordships opined that the concept of service tax is an economic concept. Thereafter, the Apex Court proceeded to state that as an

economic concept, there is no distinction between the consumption of goods and consumption of service as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003. Further, it is important to note that "service tax" is a value added tax which, in turn, is a general tax which applies to all commercial activities involving production of goods and provision of service. Moreover, VAT is a consumption tax as it is borne by the client, that is, the person who enjoys the benefit or avails the service. Thereafter, their Lordships referred to the decision in ***Moti Laminates (P) Ltd. v. CCE*****, (1995) 3 SCC 23** and opined thus:

> 24. The importance of the above judgment of this Court is twofold. Firstly, 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 in-built into the concept of service tax, which has received legal support in the form of the Finance Act, 1994. To give an illustration, an Event Manager (professional) undertakes an activity, namely, of organizing shows. He belongs to the profession of

> Event Management. As long as he is in the business or calling or profession of an Event Manager, he is liable to pay the tax on profession, calling or trade under Entry 60 of List II. However, that tax under Entry 60 of List II will not cover his activity of organizing shows for consideration which provide entertainment to the connoisseurs. For each show he plans and creates events based on his skill, experience and training. In each show he undertakes an activity which is commercial and which he places before his audience for its consumption. The tax on service is levied for each show. This situation is very similar to a situation where goods are manufactured or produced with the intention of being cleared for home consumption under the Central Excise Act, 1944. This is how the principle of equivalence equates consumption of goods with consumption of services as both satisfy the human needs. In the case of internet service provider, service tax is leviable for online information and database provided by websites. But no service tax is leviable on e-commerce as there is no database access.
>
> 25. On the basis of the above discussion, it is clear that service tax is VAT which in turn is both a general tax as well as destination based consumption tax leviable on services provided within the country."

After so stating, their Lordships proceeded to advert to the meaning of the words "taxes on professions" and held as follows:

> "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 practice. 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.

35. For each contract, tax is levied under the Finance Acts, 1994 and 1998. Tax cannot be levied under that Act without service being provided whereas a professional tax under Entry 60 is a tax on his status. It is the tax on the status of a cost accountant or a chartered accountant. As long as a person/firm remains in the profession, he/it has to pay professional tax. That tax has nothing to do with the commercial activities which he undertakes

for his client. Even if the chartered accountant has no work throughout the accounting year, still he has to pay professional tax. He has to pay the tax till he remains in the profession. This is the ambit and scope of Entry 60, List II which is a taxing entry. Therefore, Entry 60 contemplates tax on professions, as such. Entry 60, List II refers to "tax on employments".

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39. It was further observed that a lawyer has to pay tax to take out a licence irrespective of whether he actually practices or not. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so. It was held that the impugned tax on entertainment levied by the Cantonment Board was a tax on the act of entertainment resulting in a show and, therefore, the impugned law imposing tax on entertainment fell under Entry 50 of the Provincial List in Schedule VII to the GOI Act, 1935 and not under Entry 46 (similar to Entry 60 of List II). Therefore, it was held that Bombay Legislature had power to enact the law imposing tax on entertainment which had nothing to do with the law imposing tax on the privilege of carrying on any profession, trade or calling under Entry 46 (similar to Entry 60 of List II in the present case). Therefore, this Court has clarified the dichotomy between tax on privilege of carrying on any trade or calling on one hand and the tax on the activity which an entertainer undertakes on each occasion. The tax on privilege to practice the profession, therefore, falls under Entry 60, List II. It is quite different from tax on services. Keeping in mind the aforestated dichotomy, it is clear that tax on service does not fall under Entry

> 60, List II. Therefore, Parliament has absolute jurisdiction and legislative competence to enact the law imposing tax on services under Entry 97, List I of the Seventh Schedule to the Constitution."

Eventually, it has been held in the said case that the tax on services do not fall under Entry 60, List II and the service would fall under Entry 92-C/97 of List I. Be it noted, it has been held therein that service tax is a value added tax and the value addition is on account of activities like planning, consultation, advising, etc. It is an activity which provides value addition as in the case of manufacture of goods which attracts excise duty. Their Lordships, in the said case, opined that the tax falls on the activity which is the subject matter of service tax, if the word "service" is to be substituted in the place of goods by applying the principle of equivalence.

51. In ***Association of Leasing and Financial Service Companies*** (supra), while dealing with the validity of Sections 65(12) and 65(105)(zm) of the Finance Act, 1994 as amended which pertain to the levy of service tax on leasing and hire-purchase, the Apex Court, after referring to the decisions in ***D.H. Hazareth*** (supra), ***Ujagar Prints (II) v. Union of India*****, (1989) 3 SCC 488**, ***International Tourist***

Corporation (supra) and ***Goodricke Group Ltd.***(supra), has held thus:

> "59. Applying the above decisions to the present case, on examination of the impugned legislation in its entirety, we are of the view that the impugned levy relates to or is with respect to the particular topic of "banking and other financial services" which includes within it one of the several enumerated services viz. financial leasing services. These include long-term financing by banks and other financial institutions (including NBFCs). These are services rendered to their customers which comes within the meaning of the expression "taxable services" as defined in Section 65(105)(zm). The taxable event under the impugned law is the rendition of service. The impugned tax is not on material or sale. It is on activity/service rendered by the service provider to its customer. Equipment leasing/hire-purchase finance are long-term financing activities undertaken as their business by NBFCs. As far as the taxable value in case of financial leasing including equipment leasing and hire purchase is concerned, the amount received as principal is not the consideration for services rendered. Such amount is credited to the capital account of the lessor/hire-purchase service provider. It is the interest/finance charge which is treated as income or revenue and which is credited to the revenue account. Such interest or finance charges together with the lease management fee/processing fee/documentation charges are treated as considerations for the services rendered and accordingly they constitute the value of taxable services on which service tax is made payable."

52. From the aforesaid pronouncements in the field, the following principles regarding service tax can be fruitfully culled out:

(i) The measure of taxation does not affect the nature of taxation and, therefore, the manner of quantification of the levy of service tax has no bearing on the factum of legislative competence.

(ii) Taxable services can include providing of premises on a temporary basis for organizing any official, social or business function but also other facilities supplied in relation thereto.

(iii) Levy of service tax on a particular kind of service cannot be struck down on the ground that it does not conform to a common understanding of the word 'service' as long as it does not transgress any specific restriction embodied in the Constitution.

(iv) Service tax is a levy on the event of service.

(v) The concept of service tax is an economic concept.

(vi) 'Consumption of service' as in case of 'consumption of goods' satisfies human needs.

(vii) Service tax is a value added tax which, in turn, is a general tax applicable to all commercial activities involving provision of service.

(viii) Value added tax is a general tax as well as destination based consumption tax leviable on services provided within the country.

(ix) The principle of equivalence is in-built into the concept of service tax.

(x) The activity undertaken in a transaction can have two components, namely, activity undertaken by a person pertaining to his performance and skill and, secondly the person who avails the benefit of the said performance and skill. In the said context, the two concepts, namely, activity and the service provider and service recipient gain significance.

53. Having enumerated the principles relating to the fields of legislation, the situations and circumstances when a levy on tax on land comes under Entry 49 of List II and what in conceptual essentiality covers the facet of service tax, it is presently seemly to dwell upon the three major submissions which have been astutely canvassed in different ways by the learned counsel at the Bar. What is contended by them is that renting and leasing is basically associated with the land

and putting any kind of unnecessary impact on the same would not make it a tax on any activity to bring it with the purview of Entry 97 of List I of the Constitution. It is urged that it is the duty of the court to broadly interpret the entries of the field and effort has to be made to see that the Parliament, pursuant to the residuary powers vested in it, does not trench upon the powers of the State Legislature especially in the case of a taxable event pertaining to the object which is covered within Entry 49 of List II. In essence, the proponement is that into the field of State legislation under List II, a free entry of Entry 97 of List I should not be allowed. That apart, it is submitted that the concept of service tax has been evolved by the courts of law by attaching value addition to it and in the absence of any value addition in renting, leasing and licensing or any aspect in that regard, if the same brought under the net of service tax, a constitutional amendment is required and it is not permissible to bring it in by statutory amendment as has been done by the Finance Act, 2010. The seminal submission is that there is no value addition and, therefore, the service tax is not imposable. Per-contra, the learned Additional Solicitor General would submit that once a levy of tax does not fall under List II or List III, it would fall in

List I, regard being had to the amplitude of the residuary power that has been provided in the Constitution under Entry 97 of List I of the Seventh Schedule of the Constitution. In this regard, we may note with profit certain authorities in the field.

54. In ***International Tourist Corporation*** (supra), it has been held that before exclusive legislative competence can be claimed by the Parliament by resort to the residuary power, the legislative incompetence of the State legislature must be clearly established. Entry 97 itself is specific in that a matter can be brought under that Entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those Lists. In a Federal Constitution like ours, where there is a division of legislative subjects but the residuary power is vested in the Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislature. That might affect and jeopardize the very federal principle. The federal nature of the Constitution demands that an interpretation which would allow the exercise of legislative power by the Parliament pursuant to the residuary powers vested in it to trench upon the State legislation and which would thereby destroy or

belittle state autonomy must be rejected. In the said case, it has been further opined that where the competing entries are an entry in List II and Entry 97 of List I, the entry in the State List must be given a broad and plentiful interpretation.

55. In ***Harbhajan Singh Dhillon*** (supra), it has been held thus**:**

> "59. It was also said that if this was the intention of the Constitution makers they need not have formulated List I at all. This is the point which was taken by Sardar Hukam Singh and others in the debates referred to above and was answered by Dr. Ambedkar. But apart from what has been stated by Dr. Ambedkar in his speech extracted above there is some merits and legal effect in having included specific items in List I for when there are three lists it is easier to construe List II in the light of Lists I and II. If there had been no List I, many items in List II would perhaps have been given much wider interpretation than can be given under the present scheme. Be that as it may, we have the three lists and a residuary power and therefore it seems to us that in this context; if a Central Act is challenged, as being beyond the legislative competence of Parliament, it is enough if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises."

56. In ***State of Karnataka v. Union of India & Anr.*****, AIR 1978 SC 68**, it has been held thus:

> "96. It will be seen that the test adopted in Dhillon's case (supra) was that if a subject does not

> fall within a specifically demarcated field found in List II or List III it would fall in List I apparently because the amplitude of the residuary field indicated by Entry 97, List I. Legislative entries only denote fields of operation of legislative power which is actually conferred by one of the articles of the Constitution. It was pointed out that Art. 248 of the Constitution conferring legislative power is "framed in the widest possible terms." The validity of the Wealth Tax Act was upheld in that case. The argument that a wide range given to Entry 97 of List I, read with Art. 248 of the Constitution would destroy the federal structure" of our Republic was rejected there. On an application of similar test here, the powers given to the Central Government by Section 3 of the Act, now before us, could not be held to be invalid on the ground that federal structure of the State is jeopardized by the view we are adopting in conformity with the previous decisions of this Court."

57. In ***M/s. Sat Pal and Co. etc., v. Lt. Governor of Delhi and others*****, AIR 1979 SC 1550**, while dealing with the challenge to legislative competence, it has been held thus:

> "Whenever legislative competence is in question attempt of the Courts is to find out whether the legislation squarely falls in one or the other entry. If a particular legislation is covered by any specific entry well and would be : is it beyond the legislative competence of Parliament? In undertaking this exercise it is quite often known that a legislation may be covered by more than one entry because an analysis has shown that the entries are overlapping. If the legislation may fall in one entry partly and part of it may be covered by the

> residuary entry, the legislation would nonetheless be immune from the attack on the ground of legislative competence."

After so stating, their Lordships proceeded to state that with the advancement of society, expanding horizons of scientific and technical knowledge, probe into the mystery of creation, it is impossible to conceive that every imaginable head of legislation within human comprehension and within the foreseeable future could have been within the contemplation of the founding fathers and was, therefore, specifically enumerated in one or the other of the three Lists, meaning thereby that the three Lists were exhaustive of Governmental action and activity. Elaborating further, their Lordships stated that the demands of the welfare State, hopes and aspirations and expectations in a developing society and the complex world situation with inter-dependence and hostility amongst nations may necessitate legislation on some such topics which may be inconceivable even for visionaries and, hence, could not have been within the contemplation of the founding fathers. Complex modern governmental administration in a federal set up providing distribution of legislative powers coupled with the power of judicial review may raise such situations that a subject of

legislation may not squarely fall in any specific entry in Lists I or III. Upon proper appraisal of the aforesaid, their Lordships finally opined that it may not be covered by any entry in List II, though apparently or on a superficial view it may be covered by an entry in List II. In such a situation, the Parliament would have the power to legislate on the subject in exercise of the residuary power under Entry 97, List I and it would not be proper to unduly circumscribe, corrode or whittle down this power by saying that the subject of legislation was present to the mind of the framers of the Constitution because apparently it falls in one of the entries in List II and thereby deny power to legislate under Entry 97.

58. In ***Godfrey Phillips India Ltd.*** (supra), it has been held thus–

> "46. Therefore, 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.

Further, with respect to the exclusive legislative powers of the Parliament and the States, their Lordships have held thus:

> "49. Under the three lists of the Seventh Schedule to the Indian Constitution a taxation entry in a legislative list may be with respect to an object or an event or may be with respect to both. Article 246 makes it clear that the exclusive powers conferred on the Parliament or the States to legislate on a particular matter includes the power to legislate with respect to that matter. Hence, 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. 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."

59. In ***Federation of Hotel & Restaurant v. Union of India and others*****, AIR 1990 SC 1637**, it has been held that the question of legislative practice as to what a particular legislative entry could be held to embrace is inapposite while dealing with a tax which is sui generis or non-descript imposed in exercise of the residuary powers so long as such tax is not specifically enumerated in Lists II and III.

60. As the tabular chart that we have reproduced would clearly show, Section 65 is the provision which deals with the charging of service tax. Section 66(105) defines taxable service to mean any service provided or to be provided to any person, by any other person by renting immovable property or any other service in relation to such

renting for use in the course of or furtherance of business or commerce. Section 65(90a) has been amended in 2010 to mean renting of immovable property which includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include certain aspects. Explanation No.1 to the said provision provides that "for use in the course or furtherance of business or commerce" includes the use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings. Explanation 2 further declares that for the purposes of this said clause, renting of immovable property would include allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property. The earlier provision had introduced the definition of renting of immovable property including renting, letting, leasing, licensing or other similar arrangements in the course or furtherance of business or commerce.

61. In the first ***Home Solution*** case, the Division Bench had posed the question whether the renting of immovable property for use in the course of or furtherance of business or commerce by itself is service.

The Bench referred to Section 65(105)(zzzz) as it stood then and opined that it was unable to discern any value addition and, hence, the renting of immovable property for use in the course or furtherance of business or commerce by itself does not entail any value addition and, therefore, cannot be regarded as service. Because of the said view, the circular was quashed. Be it noted, in the said decision, the Bench has not appositely adverted to Section 65(90a) which clearly postulated that renting of immovable property includes renting, letting, leasing, licensing or other similar arrangements for use in the course or furtherance of business or commerce barring certain exceptions. In Section 66(105)(zzzz), the taxable service was defined to mean any service provided to any person by any other person relating to the renting of immovable property for use in the course of or furtherance of business or commerce. The Parliament, by amendment, has differently positioned the words "in relation to". As we perceive, the Division Bench has laid down that the mere renting of immovable property for use in the course of or furtherance of business or commerce by itself could not entail any value addition. If the definition in Section 65(90a) is taken into consideration, there is a

deeming concept with regard to service and the taxable service is based or founded on renting of immovable property. The learned senior counsel for the petitioner would contend that the Parliament cannot, by deeming fiction, create a tax liability to bring it within the purview of Entry 97 of List I as that would be an indirect entrenchment on Entry 49 of List II. Per-contra, Mr. Chandhiok, relying on the decision in ***Tamil Nadu Kalyana Mandapam Assn.*** (supra), submits that the concept of service, as is understood by a layman, is not applicable to the concept of taxing statute under the constitutional framework. He would further contend that once this Court holds that the levy does not pertain to a tax on land or building but an activity like renting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce, it would come within the residuary power of the Parliament and the same should put the controversy to rest.

62. As presently advised, we shall dwell upon the concept of value addition. The hub of the matter is when a premise is let out for use, should a person who rents an immovable property or renders any other

service in relation to such letting for use in the course or furtherance of business or commerce be liable to service tax.

63. The Division Bench in the first ***Home Solution case*** (supra), as we have reproduced hereinbefore, has opined that renting of immovable property for use in the course or furtherance of business or commerce by itself would not constitute service as there is no value addition. In the dictionary clause in Section 65(90A), while defining renting of immovable property, it has been stated that it includes renting, letting, leasing, licencing or other similar arrangements for immovable property for use in the course or furtherance of business or commerce. On a perusal of the decision in the first ***Home Solution case*** (supra), it is discernible that the Division Bench has not appositely adverted to the same. The contention that despite the amendment when the value addition as a concept is not attracted to renting, letting, leasing and licencing even for commercial purpose, the ingredients of service tax are not satisfied is not well founded. In this context, it is to be appreciated that the concept of service, as is understood in common parlance or common understanding, would not be a factor to hold a provision as unconstitutional. We need not advert

to whether the Parliament has, by using of the definition, created a fiction. The terms which are significant are renting, letting, leasing and licencing for use in the course or furtherance of business or commerce. The legislature has not merely said renting of immovable property. It has used the terminology renting of property or any service in relation to such renting and that too in the course or furtherance of business or commerce, the last part being important. While understanding the concept of service tax, it is to be kept in mind that it is both a general tax as well as a destination based consumption tax levied on services. Sometimes services can be "property based services" and "performance based services". The architects, interior designers and real estate agents would come in the category of performance service providers.

64. It is contended that when a property is leased or rented, the element of service is absolutely absent. In this context, the concept of rent has to be appositely understood. A rent is basically a reward paid for the use of the land. The tenant or the occupant pays the same to use the premises. In the economic concept, rent can be categorized into two heads, namely, contract rent and economic rent. Contract rent

fundamentally refers to the total amount of money paid for use of the land and economic rent is a part of the total payment which is made for the use of land and it is estimated on many a ground. The economic rent can be contract rent minus interest on the capital invested. To give an example, a tenant pays Rs.20,000/- per year as contract rent but the interest on capital invested is Rs.3,000/- per year. Thus, the remaining amount, that is, Rs.17,000/- (Rs.20,000.00 – Rs.3,000.00) is paid for the use of the land.

65. The concept of economic rent can also represent an amount which a factor can earn in its next best alternative use. To give an example, a piece of land yields in a particular use Rs.5,000 in a year. If it is transferred to its next best use, it can earn a better income. At one point of time, the Theory of Rent was propagated by David Ricardo. According to the Ricardian theory, rent has differential surplus and the same arises due to certain facets relating to fertility, productivity, extensive cultivation, quality, etc. Ricardo fundamentally considered rent as a surplus accruing to superior land over inferior land called "marginal land". It also depended upon shifting of population. Be it noted, the rent varies depending upon advantages. To give an

example, two decades back, a market is established in zone 'A', thereafter, a railway station starts in another zone called 'B'. The cost of a particular item on being transported from zone 'A' to outside the city will cost more than the articles transported from zone 'B'. Compared to zones 'A' and 'B', if there are other zones which are farther away like zones 'C' and 'D', they will be less advantageous. Thus, the lands or buildings located in zones 'A' and 'B' would be more advantageous. The value difference comes into play because of transport charges. The surplus arises because of the location and availability of facilities. Appreciated in this context, economic rent is a surplus which arises on account of natural differential advantages and can be treated as 'service'. That apart, scarcity of premises, the pressure of demand and the increase of population are also contributory factors. Consequently, any land or building situated in a particular place does possess certain inherent qualities which distinguishes it from land or building at other places. The factors which really weigh are location, accessibility, goodwill, construction quality and other advantages. A land or building in one area may fetch more rent than in another area. When a particular building is rented or

leased or given under arrangement for commercial or business purposes, many factors are taken into consideration. Every building or premises cannot be utilized for commercial or business purposes. When a particular building or premises has the "effect potentiality" to be let out on rent for the said purpose, an element of service is involved in the immovable property and that tantamounts to value addition which would come within the component of service tax. To further clarify, an element of service arises because a person who intends to avail the property on rent wishes to use it for a specific purpose. The value of the building gets accentuated because of scarcity of land or building, goodwill, accessibility and similar ancillary advantages which constitute value addition.

66. The modern economic theory of rent also has a nexus with demand and supply. In this analysis, rental is hiked because supply of land is scarce in relation to its demand. This economic concept is called "scarcity theory of rent". This includes the facet of competition and quality. According to the modern theory, rent is not peculiar to land alone but arises in the case of many a factor which earn over and above the transfer earnings. There is a distinction between "actual

earnings" and "transfer earnings". According to the modern analysis of rent, it is not peculiar to land alone and the concept of transfer earning is more attracted towards the building depending upon its use. As an economic concept, it has been developed that rent qua building or premises or, for that matter, land has a nexus, an inseparable one, with the potentiality of its use in a competitive market. The economic growth has an effect on rent. In this regard, modern economists have evolved certain methods, namely, technical progress in methods of production, development in means of transportation and population growth. We have referred to these concepts only to highlight that the legislature has not imposed tax on mere letting but associated it with business or commercial use. Thus, it comes within the concept of activity and the value addition is inherent. It is worth noting that the language employed in the dictionary clause and the charging section, that is, "commercial use for business purposes" have their own significance. In Black's law dictionary, "commercial" has been defined as "relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce". In ***R.M. Investment and Trading Co. Pvt. Ltd. v. Boeing Co. and***

another, **(1994) 4 SCC 541**, while dealing with the expression "commercial" it has been opined that the expression "commercial" should be construed broadly having regard to the manifold activities which are integral part of international trade today.

67. In Stroud's judicial dictionary (5th Edition), the term 'commercial' is defined as traffic, trade or merchandize in buying and selling of goods.

68. When premises is taken for commercial purpose, it is basically to subserve the cause of facilitating commerce, business and promoting the same. Therefore, there can be no trace of doubt that an element of value addition is involved and once there is a value addition, there is an element of service.

69. In view of our aforesaid analysis, we are disposed to think that the imposition of service tax under Section 65(105)(zzzz) read with Section 66 is not a tax on land and building which is under Entry 49 of List II. What is being taxed is an activity, and the activity denotes the letting or leasing with a purpose, and the purpose is fundamentally for commercial or business purpose and its furtherance. The concept has

to be read in conjunction. As we have explained that service tax is associated with value addition as evolved by the judgments of the Apex Court, the submission that the base of the said decisions cannot be taken away by a statutory amendment need not be adverted to. Once there is a value addition and the element of service is involved, in conceptual essentiality, service tax gets attracted and the impost gets out of the purview of Entry 49 of List II of the Seventh Schedule of the Constitution and falls under the residuary entry, that is, Entry 97 of List I.

70. In view of our conclusion, the decision in the first ***Home Solution*** case does not lay down the law correctly inasmuch as in the said decision, it has been categorically laid down that even if a building/land is let out for commercial or business purposes, there is no value addition. Being of this view, we overrule the said decision.

71. The next limb of attack is with regard to the retrospective applicability of the provision. The learned counsel for the petitioners have submitted that the tax and the penalty could not have been imposed with retrospective effect. It is worth noting that the Parliament, keeping in view the first ***Home Solution*** case, substituted

sub-clause (zzzz) in the present incarnation and gave retrospective effect to cure the deficiency. It is well settled in law that it is open to the legislature to pass a legislation retrospectively and remove the base on which a judgment is delivered. The said view has been stated in ***Bakhtawar Trust and others v. M.D. Narayan and others,*** **(2003) 5 SCC 298**. In the said case, in paragraphs 20 and 26, it has been held thus:

> "20. In ***Vijay Mills Company Ltd. and Ors. v. State of Gujarat and Ors.,*** **(1993) 1 SCC 345**, it was held-
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> > "18. From the above, it is clear that there are different modes of validating the provisions of the Act retrospectively, depending upon the intention of the legislature in that behalf. Where the Legislature intends that the provisions of the Act themselves should be deemed to have been in existence from a particular date in the past and thus to validate the actions taken in the past as if the provisions concerned were in existence from the earlier date, the Legislature makes the said intention clear by the specific language of the validating Act. *It is open for the legislature to change the very basis of the provisions retrospectively and to validate the actions on the changed basis*. This is exactly what has been done in the present case as is apparent from the provisions of Clauses (3) and (5) of the Amending Ordinance corresponding to Sections 2 and 4 of the Amending Act 2 of 1981. We have already referred to the effect of Sections 2 and 4 of the amending Act. *The effect of the two provisions,*

> *therefore,* ***is not only to validate with retrospective effect the rules already made*** *but also to amend the provisions of Section 214 itself to read as if the power to make rules with retrospective effect were always available under Section 214 since the said section stood amended to give such power from the time the retroactive rules were made*. The legislature had thus taken care to amend the provisions of the Act itself both to give the Government the power to make the rules retrospectively as well as to validate the rules which were already made.
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> 26. Where a legislature validates an executive action repugnant to the statutory provisions declared by a court of law, what the legislature is required to do is first to remove the very basis of invalidity and then validate the executive action. In order to validate an executive action or any provision of a statute, it is not sufficient for the legislature to declare that a judicial pronouncement given by a court of law would not be binding, as the legislature does not possess that power. A decision of a court of law has a binding effect unless the very basis upon which it is given is so altered that the said decision would not have been given in the changed circumstances."

72. In ***State of Himachal Pradesh v. Narain Singh,*** **(2009) 13 SCC 165**, it has been held that it would be permissible for the legislature to remove a defect in earlier legislation and the defect can be removed both retrospectively and prospectively by legislative action and the previous actions can be validated.

73. On the question of penalty due to non-payment of tax, it is open to the government to examine whether any waiver or exemption can be granted. It may be noted that the appeal against Home Solutions-I is pending before the Supreme Court but the operation of the said judgment has not been stayed.

74. Quite apart from the above, as we have overruled the first ***Home Solution*** case, we are disposed to think that the provisions would operate from 2007 and the amendment brought by the Parliament is by way of *ex abundanti cautela*.

75. In view of the aforesaid analysis, we proceed to enumerate our conclusions in seriatim as follows:

(a) The provisions, namely, Section 65(105)(zzzz) and Section 66 of the Finance Act, 1994 and as amended by the Finance Act, 2010, are intra vires the Constitution of India.

(b) The decision rendered in the first ***Home Solution*** case does not lay down the correct law as we have held that there is value addition when the premises is let out for use in the course of or

furtherance of business or commerce and it is, accordingly overruled.

(c) The challenge to the amendment giving it retrospective effect is unsustainable and, accordingly, the same stands repelled and the retrospective amendment is declared as constitutionally valid.

76. Consequently, the writ petitions, being sans substratum, stand dismissed without any order as to costs.

CHIEF JUSTICE

A.K. SIKRI, J.

SANJIV KHANNA, J.

SEPTEMBER 23, 2011
dk/pk