

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 22ND DAY OF MARCH 2016/2ND CHAITHRA, 1938

WP(C).No.18328 of 2015 (M)

PETITIONER(S):-

M/S. KANJIRAPPILLY AMUSEMENT PARK AND HOTELS PVT. LTD.,
ATHIRPPILLY ROAD, KANJIRAPPILLY PO, CHALAKUDY,
THRISSUR 680721;
REPRESENTED BY ITS JOINT MANAGING DIRECTOR,
MR. SIMON K.FRANCIS

BY ADVS.SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURRYAN THOMAS

RESPONDENT(S):-

1. UNION OF INDIA,
REPRESENTED BY SECRETARY TO REVENUE DEPARTMENT,
MINISTRY OF FINANCE, NEW DELHI - 110001.
2. THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX,
C.R. BUILDING, MANANCHIRA, CALICUT - 670001.
3. STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM - 695001.

R1 & R2 BY SENIOR STANDING COUNSEL FOR C.B.E.C.
SRI.THOMAS MATHEW NELLIMOOTTIL.
R3 BY SPECIAL GOVERNMENT PLEADER SRI.BOBBOY JOHN.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16-03-2016,
ALONG WITH WP(C).No.18329/2015-M AND CONNECTED CASES, THE COURT ON
22-03-2016 DELIVERED THE FOLLOWING:-

“C.R.”

K. Vinod Chandran, J

W.P.(C).Nos.18328 of 2015-M, 18329 of 2015-M,
18330 of 2015-M, 18444 of 2015-E, 18446 of 2015-E,
19718 of 2015-L & 35646 of 2015-E.

Dated this the 22nd day of March, 2016.

JUDGMENT

Whether the removal of “*admission and access to entertainment event and amusement facilities*” [sub-clause (j) of Section 66D of the Finance Act, 1994] from the Negative List of “Services” by an Amendment of 2012 and the consequent imposition of service tax on such activity would result in the Union Parliament trenching upon the exclusive field assigned to the State, under Entry 62 List II of the Seventh Schedule of the Constitution of India is the question raised herein.

2. Entry 62 of List II [*any reference to Lists I, II or III is to the Lists under the Seventh Schedule of the Constitution*] deals with “taxes on luxuries, including taxes on entertainments, amusements, betting and gambling”. The State has also brought out the Kerala Local Authorities Entertainments Tax Act, 1961 [hereinafter referred to as “State Act of 1961”], wherein Section 3, the charging section, provides for levy of tax and the rate of tax;

the same being on the price for admission to any entertainment at a rate not less than 24% and not exceeding 48%. The measure applicable to amusement parks; is separately provided under Section 3B, a non-obstante clause; different from that provided under the charging section. The measure for levy of entertainment tax, annually, is based on the investment and area in which such park is situated, at the rates fixed by the local authority within the range of rates provided in the table,. The levy now imposed as “service tax” by the Amendment of 2012 in the Finance Act, 1994 is on the price on admission and access to such amusement parks, which trench upon the State's powers, is the contention of the petitioners herein.

3. I have heard both learned Counsel appearing for the petitioners and both the learned Standing Counsel for Central Board of Excise and Customs and the Union of India. The parties have placed a number of decisions before this Court which shed light on how the concept of service tax evolved over the years and how in different situations, relying on the power of the Union Parliament to impose tax on “services”; the levy has been upheld as coming under the residuary clause - Entry 97 of List I.

4. Service tax, as it was in its nascent stage, was tax levied on certain services provided by certain categories of persons including legal entities, like Corporations, Associations, etc.:. As it evolved it encompassed, within its wide range, every aspect of transaction between human beings that has an element of consideration. It was in the Union budget for the year 1994-95 that the concept of service tax was introduced. In 2003, by the 80th Amendment of the Constitution, Article 268A was incorporated in the Constitution of India along with introduction of item 92C, “Taxes on services”, in List I. An argument was raised that Entry 92C has not come into effect for reason of it being not notified by the Central Government but one need not dwell upon the argument, since “services” is a category which do not appear in List I and is not enumerated either in List II or List III. The Courts have always upheld the power to impose tax on services under the residuary Entry 97 of the Constitution of India.

5. The learned Counsel for the petitioners contend that resort to the residuary entry can be had only when it is found that the object of tax is not available in any of the other entries in List II and List III. The petitioners are all Corporate bodies carrying on

amusement parks, which come within the ambit of amusement and entertainment as contained in Entry 62 of List II. The local bodies are also taxing the petitioners on the basis of a valid enactment brought under Entry 62 by the State. Hence, there can be no service element in the amusement enjoyed by the persons who get admitted to the facilities with the sole intention of amusement and entertainment. There can be no service element found, since what the petitioners offer is amusement and entertainment and what the recipients get is also amusement and entertainment, which clearly is covered by the field delineated under Entry 62. There is no activity carried on inside the premises of the petitioners other than the persons admitted, regaling themselves in various activities which tend to amuse and entertain those individuals. The bulwark of the submissions made by the petitioners is based on the decision of a learned Single Judge of this Court in ***Kerala Classified Hotels and Resorts Assn. & Ors. v. Union of India & Ors.*** [2013 (3) KLJ 354], which was affirmed by a Division Bench in ***Union of India v. Kerala Bar Hotels Association*** [2015(1) ILR Kerala 267].

6. The petitioners specifically rely on the second part of the challenge raised in the aforesaid case with respect to the levy on services in a hotel, guest house, etc. in relation to providing for accommodation for a continuous period of less than three months as included in the Finance Act, 1994 under sub-clause (zzzzw) of Clause 105 of Section 65 of the Finance Act, 1994 as it stood then. The challenge was on the question of Union Parliament having trenched upon the power of the State Government to tax luxuries under Entry 62 of List II. The reasoning would be identical in the present case and, hence, the writ petitions are to be allowed, following the binding precedent of the judgment of the learned Single Judge as affirmed by the Division Bench, is the contention raised.

7. The learned Senior Standing Counsel for Central Board of Excise and Customs, however, seek dismissal of the writ petitions on the ground of application of the “aspect theory” and there being two distinguishable aspects involved, one the services offered by the petitioners and the other the amusements and entertainments enjoyed by the entrants. The different aspects are liable to be taxed by the Union Parliament and the State. There is

no overlapping of the power and the trenching, if at all, is incidental, which does not take away the power of the Union Government, is the defence.

8. *State of W.B. v. Kesoram Industries Ltd.* [(2004)

10 SCC 201] reiterated that the various entries in the three Lists are not powers of legislation, but only fields of legislation. The source of legislative power has to be traced to Article 245. Article 246 of the Constitution, effects a complete separation of the taxing power of the Union and the States, wherein no overlapping can be found. The Constitution gives independent sources of power of taxation to the Union and the States. The Entries in the Lists have been held to be a simple enumeration of broad categories not allocated on a scientific or logical reasoning and, hence, has to be given the widest amplitude inspired by “*a broad and generous spirit and not in a narrow pedantic sense*” (*sic*). The resolution of a conflict between List I and List II is to be addressed, as held by the majority in the following manner [para 129(5)]:

“(5) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause “subject to” does not arise. If there is

conflict, the correct approach is to find an answer to three questions step by step as under:

One - Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?

Two - In which entry the impugned legislation falls by finding out the pith and substance of the legislation?

and

Three - Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?"

This is the essential equation on which the challenge has to be tested. The petitioners rely on the declaration found in para 129 (9): *"The residuary power of legislation in the field of taxation spelled out by Article 248 (2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II" (sic)*. Amusements being covered under Entry 62 of List II no power can be traced to the residuary power to tax the very same activity is the long and short of the petitioners argument.

9. Even before the concept of service tax was introduced, the question of both the Union and the States taxing the very same transaction arose with respect to the expenditure tax levied under Entry 97 of List I and the luxury tax levied under

Entry 62 of List II. ***Federation of Hotel & Restaurant Association of India, Etc. v. Union of India [(1989) 3 SCC 634]***

challenged the vires of the Expenditure Tax Act, 1987 [hereinafter referred to as “Expenditure Tax Act”], on grounds of lack of legislative competence, which was sought to be sustained by the Union under 248 (2) read with Entry 97 of List I. Tax on expenditure was sought to be imposed on the class of hotels or lodging houses where the room charges for any unit of residential accommodation are Rs.400 or more per day per individual. The impost termed “expenditure tax” was argued to be a misnomer and was contended to be in its true nature and character, nothing more or less than, a tax on luxuries coming under Entry 62 List II, on which already there was a tax imposed by the State.

10. Simultaneously the constitutional validity of legislation of various States imposing a tax on luxuries under Entry 62 of List II, to luxury provided in the hotels and lodging houses the charge of which is above Rs.35/- per day per person [as found in the Gujarat legislation, taken as representative of the various legislation challenged] was also challenged. The said challenge was answered in ***Express Hotels Pvt. Ltd. v. State of***

Gujarat [(1989) 3 SCC 677] The main grounds of challenge to the legislation under Entry 62 List II were that (i) the entry provides only for taxation of goods and articles and (ii) the scheme imposing tax on the price rather than the quality of the services is bad.

11. The Supreme Court upheld the levy by the Central Government on the expenditure resorting to the principles of “aspect theory”. The question framed, as available in **Federation case** (*supra*), was the following [vide para 29]:

“The crucial questions therefore, are whether the economists' concept of such a tax qualifies and conditions the legislative power and, more importantly, whether “expenditure” laid out on what may be assumed to be “luxuries” or on the purchase of goods admits of being isolated and identified as a distinct aspect susceptible of recognition as a distinct field of tax legislation”.

It was held that *“the law 'with respect, to a subject might incidentally 'affect' another subject; but that is not the same thing as the law being on the latter subject”* (sic- para 31) . Even if there is an amount of overlapping when the power is exercised by two legislatures, if the overlapping is in law and is only an incidental trenching upon one, by the other, then it was held to be

permissible. When the very same transaction involve two or more taxable events in its different aspects, then even if there was overlapping it would not “*detract from the essential distinctiveness of these two aspects*”(sic-para 31).

12. The argument that recourse to the residuary power under Article 248 read with Entry 97 of List I should be the last refuge and would be available only if the other entries in List II and List III do not cover the topic was answered in the following manner, in paragraph 39:

“39. Petitioners' reference to legislative practice as determining the scope of the present legislation does not assist them. There are two infirmities in the contention. The first is 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 nondescript imposed in exercise of the residuary powers so long as such tax is not specifically enumerated in Lists II and III. Secondly, there is no conclusive material indicating that the appropriate legislature had limited the notion of a tax of this kind within any confines It is relevant to recall the words of Lord Uthwatt in *Wallace Brothers case* [AIR 1948 PC 118] quoted in *State of Madras v. Gannon Dunkerley & Co.* [AIR 1958 SC 560]:

“The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words in the enabling Act”.

The expenditure tax was held to be an impost on the distinct aspect, viz., the expenditure aspect of the transaction falling within the Union's power under the residuary clause; while the States power was to tax the aspect of luxury; quite distinct from expenditure though both the aspects arise in the same transaction.

13. In ***Express Hotels*** (*supra*) the challenge to the enactments under Entry 62 of List II was not on the question of overlapping of legislative powers, but on the question, *inter alia*, of the legality insofar as the service or activity of providing an accommodation being covered under the definition of luxuries. According to the petitioners, it contemplated a tax only on goods and articles, which, by their nature and user can be termed to be luxuries. The contention was negatived and it was held that “a *luxury which can reasonably be said to be amenable to a potential conception does provide the nexus*” (*sic-para 26*). It was held so

in para 27:

“Once the legislative competence and the nexus between the taxing power and the subject of taxation is established, the other incidents are matters of fiscal policy behind the taxing law. The measure of the tax is not the same thing as, and must be kept distinguished from, the subject of the tax”.

14. In the above cases *(i) Federation & (ii) Express Hotels* (both supra), the levy by the Union and the State was on the single transaction of a person renting out a room *inter alia* in a hotel. If the rent exceeded the limit provided in the State enactment and the Central enactment, then the person was liable to pay expenditure tax to the Central Government and luxury tax to the State Government. Both the levies were upheld, since the object of taxation was held to be on two different aspects of the very same transaction. One, the expenditure occasioned on such renting out by the individual, upon which the Union was held to have power to levy tax under the residuary entry, Entry 97, which is not an item enumerated either in List I, List II or List III. On such renting out of a room exceeding the rental amount as provided under the State legislation; which rental, based on the rental

amount, was determined as a luxury by a State legislature, competent to so determine a luxury under Entry 62 of List II; the individual would be liable to luxury tax also.

15. The decisions referred to on the specific levy of service tax are ***Gujarat Ambuja Cements Ltd. v. Union of India*** [(2005) 4 SCC 214], ***Bharat Sanchar Nigam Ltd. v. Union of India*** [(2006) 3 SCC 1], ***All-India Federation of Tax Practitioners and Others v. Union of India and Others*** [(2007) 7 SCC 527] and ***Association of Leasing and Financial Service Companies. v. Union of India*** [(2011) 2 SCC 352].

16. ***Gujarat Ambuja Cements Ltd.*** (*supra*) was a challenge against the services rendered, by a clearing and forwarding agent and a goods transporter, being treated as 'taxable services' under the Finance Act, 1994. The argument was that the tax levied under Entry 97 List I was in fact a tax on the transport of goods impinging upon Entry 56 List II. It was succinctly stated: "*Legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery*"(sic-para 27). Drawing such a distinction it was held that the object of taxation under Entry 56

List II, are goods and passengers, while that under Entry 97 List I, was the service provided of transportation for a consideration. Aspect theory was applied to uphold the levy.

17. In ***Bharat Sanchar Nigam Ltd.*** (*supra*) the Hon'ble Supreme Court was concerned with the question of whether the facility of a mobile phone connection was a sale or service or both. There was no question of conflict as against the two legislative entries. The issue was whether the transaction had both components of service and sale, and if so the extent to which the respective legislatures could levy tax. It was held that the transaction involved in providing telephone connection, though a composite contract of service and sale, the power of the State to tax the sale element would arise only if there is a discernible sale of goods and only to the extent relatable to such sale. The Hon'ble Supreme Court deprecated the practice of imposing a tax on goods (under Entry 54 List II) and then looking around for the goods. The value addition to the SIM card was only on the basis of the chip embedded therein, which could attract electromagnetic waves or radio frequencies, the latter of which were held to be not goods under clause (d) of Article 366 (29-A) of the

Constitution. The tax imposed was on the sale of SIM cards, which price included the activation charges. The goods in a telecommunication transaction were said to be limited to the handsets supplied by the service provider and as to the SIM cards, the issue was left to the decision of the authorities under the respective sales tax legislation. It is a fact that the sales tax authorities have not attempted to impose a tax on the SIM card, presumably for reason only of the nominal value of such card, without the ability to receive electromagnetic waves or radio frequencies for effectuating a call, enabled only by the activation. There was found neither transfer or consumption of the waves as such nor was there discernible any of the essential elements; to bring it within the definition of sale of goods. Electro magnetic waves were found to be a mere '*medium of communication*'. Many of the principles laid down have a definite correlation, but the decision does not specifically address the problem of overlapping or trenching, which is the issue to be decided in the present case.

18. ***All-India Federation of Tax Practitioners*** (*supra*) challenged the levy of service tax on practicing Chartered

Accountants, Cost Accountants and Architects who were already taxed under Entry 60 List II, which tax was on their 'profession'. The Hon'ble Supreme Court considered the evolution of service tax and termed it a destination based consumption tax as is seen from paragraphs 6 and 7 of the said judgment:

“6. At this stage, we may refer to the concept of “Value Added Tax” (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.

7. In the light of what is stated above, it is clear that service tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax”.

Service tax was held to be an economic concept, evolved on account of the service industry becoming a major contributor to the GDP of an economy, which resource was sought to be tapped with the Finance Act, 1994; providing further legal back up by the

introduction of Article 268-A in the Constitution. As a concept of economics, it was found that there was no difference between consumption of goods and consumption of services, both being intended at satisfying human needs. “Service tax” was held to be *“a value added tax, which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services” (sic-para 22).*

19. For illustration the activity carried on by an Event Manager, which for him is a profession was referred to. The term “profession” as defined under Entry 60, would not include “services” was the clear finding of the Hon'ble Supreme Court. The tax on professions etc., under Entry 60 List II, was held to be tax on the individual person/firm/Company and the status he enjoys as such professional. Entry 60 List II was not a general entry and being a taxing entry, cannot be read to include every activity of a Chartered Accountant, Cost Accountant or Architect for consideration, was the finding. Service tax was tax on the activity carried on by the Chartered Accountant or Architect, which has reference to each of such transaction or contract by which the Accountant or Architect renders his professionally based services.

The activity thus undertaken by the Chartered Accountant was found to have two aspects; one, from the point of view of the Chartered Accountant, which is an activity undertaken by him as a professional based on his performance and skill. The other, from the point of view of the client, when the Chartered Accountant provides him with certain services. The tax on profession was held to be tax levied on his status, as a registered professional within the local limits, whether or not he has any work. The tax levied on the service, on the other hand, is on the basis of the individual work done by the Accountant or Architect, for each of his clients. The Parliament's legislative competence to levy service tax on Chartered Accountants, Cost Accountants and Architects under Entry 97 of List I was upheld, as distinguished from the field covered under Entry 62 of List II; found to be operating in different spheres.

20. *Association of Leasing and Financial Service Companies* (*supra*) considered the issue whether financial leasing services, including equipment purchase and hire purchase could be brought under the service tax net, when the delivery of goods on hire purchase or system of payment by installments was

deemed to be a sale under Article 366(29-A)(c). Two distinct transactions were found to be in existence in leasing activities, a “finance lease” and an “operating lease”. The former was found to be one which transfers substantially all risks and rewards of ownership; and partakes the character of a mere funding of the purchase, bringing it within the definition of financial services. The income which the lessor earns by way of finance/interest charges in addition to the management fees, documentation charges etc. was the measure of tax, for the purpose of calculating the value of taxable services under the Finance Act was the finding. The principal amounts repaid by the lessee was found to be outside the service tax net since that was not the consideration for services rendered. The additional reasoning was that the principal amounts repaid, were credited to the capital account of the lessor/service provider. The interest or finance charges and the management/ processing/ documentation fees/ charges were credited to the revenue account of the service provider; which was the consideration for service provided on which service tax was payable, held the Hon'ble Supreme Court.

21. The importance of the aforesaid decision is insofar as a transaction which was deemed to be a sale under Article 366 (29-A), was held to be properly levied with service tax despite **BSNL** (*supra*) having found hire purchase transaction not being a composite one involving sale and service. The decision in **BSNL** (*supra*) was held to be of no application in deciding the issue, since legislative competence was never the issue in **BSNL** (*supra*). It is in this background that the decisions of this Court relied on by the petitioners have to be looked into.

22. Service Tax as was introduced initially by the Finance Act 1994, included only three services; that provided by a stock-broker, a telegraph authority and an insurer. By the 1997 amendment 18 different services were categorised as “taxable services” in sub clauses (a) to (r) of Section 65 (41). Numerous additions followed and eventually Section 65 and 65A were deleted with effect from the date on which the Central Government notified the Amendment of 2012. The method of inclusion of transactions which could be deemed to be taxable services has been done away with and there is a definition for service introduced as per the amendment. After the amendment of 2012,

“service” and “taxable service” have been so defined under
Section 65B (44) & (51) :

“(44) “service” means any activity carried out by
a person for another for consideration, and includes a
declared service, but shall not include -

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable
property, by way of sale, gift or in any other manner; or

(ii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the
employer in the course of or in relation to his
employment;

(c) fees taken in any court or Tribunal
established under any law for the time being in force.

Explanation 1. - For the removal of doubts, it is
hereby declared that nothing contained in this clause
shall apply to, -

(A) the functions performed by the Members of
Parliament, Members of State Legislature, Members
of Panchayats, Members of Municipalities and
Members of other local authorities who receive any
consideration in performing the functions of that office
as such member; or

(B) the duties performed by any person who
holds any post in pursuance of the provisions of the
Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2.- For the purposes of this Chapter,-

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 3.- A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory”.

(51) “taxable service” means any service on which service tax is leviable under section 66B”.

23. The definition of “service” is all encompassing; bringing within it, “any activity carried out by a person for another for consideration”. Interesting is the fact that even the activity

carried on by Courts for which a 'fee' was payable, was found to be included in the definition; which prompted the exemption made. Service among its numerous dictionary meanings, include an unselfish act for the benefit of another without any expectation of reward or returns; which is excluded in the first limb of the definition clause. This definitely partakes every human activity where consideration passes from one to another and every such activity has the nature and character of a service, in the expanding horizons of service tax regime. The definition takes within its ambit only activity carried on by a person for another for consideration. The method of inclusion of taxable services has been done away with and the charging section under Section 66B, provides a uniform levy on all services other than that specified in the negative list, which is provided under Section 66D; from which admission and entrance to entertainment and amusement facilities are now removed.

24. The fact that admission to entertainment events and access to amusement facilities are included in the negative list itself is a pointer that the same partakes a service and the Parliament initially exempted it from the levy. The exclusion of

such activity from the negative list empowers the Union Parliament to tax the said services. The issue to be decided is whether the activity can only be taxed by the State for reason of the entire activity being subsumed in the definition of 'amusement' leaving nothing else to be taxed by the Union.

25. The learned Single Judge and the Division Bench of this Court; were concerned with two issues in the afore-cited decisions:- whether (i) the service provided or to be provided to any person in relation to service of food and beverages and (ii) the service provided, in providing accommodation for a continuous period of less than three months could be brought under the service tax net. On the question of supply of food and beverages the learned Single Judge and the Division Bench found that Article 366(29-A)(f) deemed the *“supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration”*{sic-Art: 366(29)(c)} to be a sale from one to the other. Sub-clause (f) of Article 366 (29-A) was brought in, by reason of **Northern India Caterers**

(India) Ltd. v. Lt. Governor of Delhi [(1978) 4 SCC 36] and **State of Punjab v. Associated Hotels of India Ltd. [(1972) 1 SCC 472]** having held that the supply of food and beverages in a hotel is a part of service. It was held in **BSNL(supra)** that of the transactions covered under Article 366(29-A); only works contract and the supply of food and beverages; could have, within the same transaction an element of supply and sale. By the constitutional amendment the entire activity i.e., the service of providing food and beverages was deemed to be a sale of goods. After having created such a fiction, there could be no further fiction employed so as to demarcate a separate service element which could be taxed under the residuary entry under List I by the Union was the finding in **K. Damodarasamy & Bros Vs. State of T.N. (2000) 1 SCC 521**; which was followed by the learned Single Judge and the Division Bench of this Court.

26. The issue herein stands on a totally different footing. There is no question of a deeming provision being employed herein. Here, the challenge is on the basis of the field having been covered by Entry 62 List II comprehensively leaving no room for any other aspect to be ferreted out. In the present

case, what is sought to be taxed is the access to amusements and entertainment, which are also taxed by the State under Entry 62 List II. The argument is that what the petitioners offer is amusement and entertainment and what the entrant to such parks enjoys is also amusement or entertainment, which field is entirely covered by Entry 62 and nothing remains to be taxed by the Union and no service is offered. When it is argued that the petitioners offer amusement and entertainment; the corollary is that what is offered for amusement, for a fee, is essentially a service offered for consideration.

27. Amusement and entertainment like every human activity has evolved over the times and the concept itself has diversified for reason of man's continuous quest for novelty. The entertainment offered by solo art performances, evolved into group performances, and eventually to organized theater, then to cinema and now the numerous variants termed the visual media. Parallel to Art, was the development of another area of entertainment devised by man - sport - which originated with individual competitions and now has acquired professional proportions with competitions between nations; taking it almost

out of the category of entertainment or amusement; at least for the players. A major diversification devised by man is adventure sports, which is sought to be simulated in the amusement parks set up by the petitioners herein. The brave take to the wilds to scale mountains or skim the rapids while the more staid prefer the thrill offered by the rides, wheels and water revelry offered at the amusement parks. The rash take to speeding on the roads for amusement, putting in peril the life, limb and property of the public, while the parks offer simulated seats and screens to experience the very same adrenalin rush. All for a price, which makes it a 'service for consideration'.

28. The petitioners would urge this Court to go by the definition of 'Amusements', for example as found in the Wharton's Law Lexicon (15th Edition), which is as follows:

“**Amusements**, words 'entertainments' and 'amusements' are wide enough to include theaters, dramatic performances, cinemas, sports and the like, *Y.V.Srinivasamurthy v. State of Mysore*, AIR 1959 SC 894 (896), Constitution of India, Sch VII List II, Entry 62, 63”.

One cannot go by the dictionary meaning of amusement or entertainment, since it is a very subjective concept. Reading a

book for some may be a luxury, given the constraints of time, for others, it could be a pastime and to still many an onerous task. An amusement as such indulged in by a person cannot be taxed since the definition mandates that there should be a consideration passed from one to another. Swimming could, for some, be an amusement and if carried out in a natural river or stream, there would not be any element of service nor would be there, passing of consideration. But, when a swimming pool is offered or the current in a river is simulated in an artificial water body and the person who owns and built it provides and offers the facility for a fee, then the partaking of the facility would result in the amusement of another. There is also definitely, an element of service in providing a facility, which would result in the enjoyment of an activity capable of being termed as an amusement or entertainment. The facility for the provider is not an amusement, but it is a service offered for a fee. The carrying on of an amusement park is an activity carried out for another; the admittance to which park is regulated by fees. It definitely partakes two distinct and different aspects; the power to tax, which; is respectively on the Union Parliament and the State

Legislature. This Court is definitely of the opinion that the Union Parliament has the legislative competence to tax the aspect of service in an amusement park.

29. The argument of the field being entirely occupied by Entry 62 List I is also based on the Entertainments Tax Act, of the State, more specifically Section 3B. Section 3B, a non-obstante clause, provides a measure of tax based on the investment made and the area covered; which takes in the entire facilities offered and the same having been taxed by the State, there could be no further tax levied on the service, which also, could only be the provision of such facilities, is the argument. The submission ignores two cardinal principles as enunciated in the aforecited decisions. Foremost, the cited decisions have cautioned the courts in mixing up the object of taxation and the measure employed; the latter of which may at times provide an indication as to the nature of tax but never determine it. Then again, the legislation enacted cannot decide the field of taxation, as the power to tax is to be sourced to the Constitution; to Article 245 and the fields of taxation determined from the three lists under the Seventh Schedule, as demarcated by Article 246.

30. The table provided under Section 3B of the Entertainments Tax Act, provides the measure on which the tax is to be assessed and the rates at which it has to be done. Apposite would be reference to para 33 of ***Kesoram Industries Ltd.*** (*supra*):

“33. We now proceed to enter a deeper dimension in the field of tax legislation by considering the problem of devising the measure of taxation. This aspect has been dealt with in detail in *Union of India v. Bombay Tyre International Ltd.* [(1983) 4 SCC 210]. Tracing the principles from the leading authority of *A Reference under the Govt. of Ireland Act, 1920 and Section 3 of the Finance Act (Northern Ireland) 1983*, *Re*[1936 AC 352] passing through *Ralla Ram v. Province of East Punjab* [1948 FCR 207] and treading through the law as it has developed through judicial pronouncements one after the other, this Court has made subtle observations therein. It has been long recognised that the measure employed for assessing a tax must not be confused with the nature of the tax. A tax has two elements: first, the person, thing or activity on which the tax is imposed, and second, the amount of tax. The amount may be measured in many ways; but a distinction between the subject-matter of a tax and the standard by which the amount of tax is

measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax. It is true that the standard adopted as a measure of the levy may be indicative of the nature of the tax, but it does not necessarily determine it. The nature of the mechanism by which the tax is to be assessed is not decisive of the essential characteristic of the particular tax charged, though it may throw light on the general character of the tax”.

31. A brief reference to the various decisions relied on by the Constitution Bench also would be apposite. The measure, of annual value of building, adopted for the purposes of levying building tax by the State and determining income from property under the Income Tax Act , were upheld holding that the identical measure did not detract from the fact of the levies were separate imposts {***Ralla Ram Vs. Province of East Punjab 1948 FCR 207, D.G. Ghose & Co. (Agents) (P) Ltd. Vs State of Kerala (1980) 2 SCC 410***} . A tax on passengers and goods assessed as a rate on the fares and freight payable; challenged as a tax on income, was upheld holding that the measure did not decide the subject of levy {***Sainik Motors Vs. State of Rajasthan AIR 1961***

SC 1480}. *Ujagar Prints Ltd. Vs. Union of India* [AIR 1989 SC 516] affirmed that *“when enacting a measure to serve as a standard for assessing the levy, the legislature need not contour it along lines which spell out the character of the levy itself” (sic-para 34)*. In ***Hingir Rampur Coal Co.* (supra)**, it was further held:

“In this connection it is always necessary to bear in mind that where an impugned statute passed by a State Legislature is relatable to an Entry in List II it is not permissible to challenge its vires only on the ground that the method adopted by it for the recovery of the impost can be and is generally adopted in levying a duty of excise” [para 22].

32. ***Kesoram Industries Ltd.(supra)*** concluded the discussion on that issue with: *“Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy” (sic-para 38)*. Identical was the finding in ***Express Hotels (supra)*** : *“Once the legislative competence and the nexus between the taxing power and the subject of taxation is established, the other incidents are matters of fiscal policy behind the taxing law. The measure of the tax is not the same thing as , and must be kept distinguished*

from, the subject of tax”(sic-para 27).

33. Yet another contention raised by the petitioners is that before legislative competence of the Parliament can be traced to the residuary entry, the legislative incompetence of the State Legislature has to be clearly established. The submission is that, Entry 62 List II having covered 'amusements" the amusement parks set up by the petitioners cannot at all be taxed by the Parliament, especially under the residuary clause. The argument is urged on the basis of the decision in ***M/s. International Tourist Corporation v. State of Haryana* [AIR 1981 SC 774]**. That was a case in which a tax on goods and passengers, carried by a motor vehicle through the roads within the State, was sought to be levied, on the fare or rate, for the distance covered within the State. *Interalia* it was contended that the Parliament having exclusive legislative power over National Highway's under Entry 23 List I, such tax under the residuary clause could have been levied only by the Parliament and not by the State. The Hon'ble Supreme Court negatived such contention, finding that tax on goods and passengers were covered under Entry 56 List II and the nondescript residuary clause cannot be relied on to hold the

State to have no competence under that entry. It was in that context that it was held:

“The federal nature of the constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle State autonomy must be rejected”. (para-7)

34. In the present case, no such contention can be taken, since the Supreme Court has time and again, after the Finance Act, 1994 came into force, upheld the tax levied on “services” as being available to the Union Parliament under the residuary clause. In such circumstances, it cannot at all be said that the field is entirely covered by Entry 62 List II. Amusements are covered by Entry 62 List II and the aspect of “service” involved, when the facilities for amusement is offered for a price cannot be ignored. The Union Parliament's power to levy such tax by an appropriate enactment cannot also be effaced merely for the reason that amusements are covered under Entry 62. Reference also can be made to paragraph 39 of the ***Federation***

case (supra); extracted herein above. The enactment made by the State legislature cannot decide the power of the Union Parliament.

35. Yet another contention raised by the petitioners is relying on the decision of the High Court of Madras, in ***Mediaone Global Entertainment v. The Chief Commissioner of Central Excise*** [W.P.No.225 of 2012 & connected cases, dated 26.06.2013]. A Division Bench of the High Court, while considering the sustainability of levy of service tax on producers or distributors/sub-distributors/ exhibitors of movies, held so:

“47. As pointed out earlier, according to Section 66D(j), “admission to entertainment event or access to amusement facilities” are non-taxable Negative List services. What is not taxable is “tax on admission to entertainment events or access to amusement facilities”, the reason, being, “tax on admission or entry of such events is covered in the State List, which is subjected to Entertainment Tax”.

This Court, with due respect, is unable to agree with the extracted statement, since the Union Parliament quite aware of their power and the fields available under List I and List II would not have included “amusement” in the Negative List only for the reason that

that is a field in which the State has the power to levy tax. This is because even *dehors* inclusion in the Negative List the Parliament would not be able to trench upon the field specifically set apart for the States under List II. Amusement facility, as defined under Section 65B(9), are facilities wherein exclusively rides, gaming devices, water and theme parks and so on and so forth are made available for fun or recreation. The Negative List also did not refer to “amusement”, but tax on admission on entry of such events quite understanding the power to levy service tax on such facilities offered by one to another for a consideration. The tax now levied on the admissions cannot also detract from the essential nature and character of the tax being one on the services; since it is only a measure and as has been held earlier, it would not determine the object of taxation.

36. In addition to the afore-cited judgments on the issue of measure of levy not being determinative of the character of levy, **Gujarat Ambuja Cements Ltd.** (*supra*) assumes significance, insofar as the statement:

“34. The point at which the collection of the tax is to be made is a question of legislative convenience and part of the machinery for

realisation and recovery of the tax. The manner of the collection has been described as “an accident of administration; it is not of the essence of the duty” It will not change and does not affect the essential nature of the tax. Subject to the legislative competence of the taxing authority a duty can be imposed at the stage which the authority finds to be convenient and the most effective, whatever stage it may be. The Central Government is therefore legally competent to evolve a suitable machinery for collection of the service tax subject to the maintenance of a rational connection between the tax and the person on whom it is imposed. By Sections 116 and 117 of the Finance Act, 2000, the tax is sought to be levied on the recipients of the services. They cannot claim that they are not connected with the service since the service is rendered to them”.

37. In the context of the ground raised that the activities sought to be taxed are covered by Entry 62 List I, useful reference again can also be made to ***All-India Federation of Tax Practitioners*** (*supra*), wherein as an illustration of the activity undertaken by an Event Manager was referred to: “A person who

undertakes such activity belongs to the profession of Event Management and 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 organising 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” (sic-para 24). The reasoning applies squarely in the present case.

38. In the teeth of the binding precedents it cannot be said that the measure employed by the State legislature would take away the power granted by the Constitution to the Union Parliament to tax 'services' covered under Entry 97 of List I. It

could also be recapitulated that ***Federation (supra)*** upheld the levy of expenditure tax on the provision for accommodation and in the same breath, by another decision of the same bench on the same day, upheld the luxury tax on the very same transaction in ***Express Hotels (supra)***.

39. The reliance placed by the petitioners is also on the finding of the learned Single Judge, as affirmed by the Division Bench, with respect to the aspect of luxury having covered the entire activity of providing of accommodation being covered by the field under Entry 62. The learned Single Judge has dealt with the issue in the following manner:

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

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

The Division Bench affirmed the said view and having extracted the definition of 'luxury' in the Kerala Tax on Luxuries Act, 1976 [for brevity “Act of 1976”]; held that the power exercised by the Parliament is in a matter covered under Entry 62 List I. Both the Courts have relied on **Godfrey Phillips India Ltd. v. State of U.P.** [(2005) 2 SCC 515] to find that luxury is an activity, enjoyment or indulgence, and there is no service element discernible. **Godfrey Phillips India Ltd.** (*supra*) was a case in which the specific issue considered was as to levy of tax on sale of tobacco on the premise that tobacco used in smoking and chewing is an item of luxury. The finding of the Court was also that luxuries as included

in Entry 62 List II does not take within its ambit goods and what has been done by the State is to impose a tax on the sale of tobacco, which was specifically provided under Entry 54 of List II. Tobacco is 'declared' to be goods of 'special importance in inter-state trade and commerce', under Section 14 of the Central Sales Tax Act, 1956; as permitted by Article 286 (3) of the Constitution. Tobacco was also subject to additional duties of excise levied by the Centre, under the Additional Duties of Excise (Goods of Special Importance) Act, 1957; a proportionate portion of which was shared by the States, which prohibited the States from levying any sales tax on tobacco. In the guise that tobacco is an item of luxury; what could not be done directly cannot be done indirectly was the finding.

40. There is no doubt that tax on luxury could only be levied on an activity and cannot be on goods or items of luxury, going by **Godfrey Phillips India Ltd.** (*supra*). On the same reasoning amusements also refer to activities and no tax can be levied on goods of amusement. Here there is also no such ground raised. This Court would have felt compelled to refer the matter to a Division Bench, but for the fact that the issue dealt with in the

cited judgments and in the instant cases are on different subjects and distinct transactions; the identity being confined to the levy challenged; of the Union Parliament.

41. The petitioners, maintaining an amusement park, are obliged to pay entertainment tax to the State, whether or not there are entrants to the park. The Union Parliament has provided for a tax on admission to the parks, making it clear that the levy is only when the service is availed of. The “service” provided is the object of taxation and it is imposed on the admission fee which is a permissible measure of tax and the incidence is at the time when a person pays the admission fee to enter the park. Here we have to fall back on the test laid down by ***Kesoram Industries Ltd.*** (supra), extracted herein above. We have seen that there is no conflict between the two entries, which are fields of legislation. The two aspects taxed by the respective legislatures are the 'service' and the 'amusement'. The tax, imposed by the Union Parliament, in pith and substance, is also one on the service offered by the petitioners. This Court does not find any trenching of the Union Parliament on the power conferred on the State, in fact or in law, since the respective legislatures tax two different

aspects. The incidental overlapping, if at all, is only to be ignored; going by the above cited precedents of the Hon'ble Supreme Court.

The writ petitions would stand dismissed. No costs.

Sd/-
K.Vinod Chandran
Judge.

vku/-

[true copy]