

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

W.P.(C) 1120/2015 & CM No.1991/2015

Reserved on: May 5, 2016

Decision on: August 5, 2016

CARLSBERG INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr V. Lakshmikumaran with Mr M. P. Devnath, Mr Abhishek Anand, Mr Vivek Sharma, Mr Yogendra Aldak and Mr Karan Sachdev, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr Sanjay Jain, ASG with Mr R. D. Bhardwaj, CGSC, Mr Bhagwan Swaroop Shukla, CGSC, Mr Shreshth Jain, Mr Vidur Mohan, Mr Aakash Nagar and Mr Jitendra Kr. Tripathi, CGP for Respondent No.1/UOI.

Mr Satish Kumar, Senior Standing counsel for Service Tax.

Ms Noopur Singhal, Advocate or Mr Anil Grover, Advocate for State of Haryana.

WITH

+

W.P.(C) 5498/2015 & CM Nos.9883/2015 & 10428/2015

**INTERNATIONAL SPIRITS AND WINES ASSOCIATION
OF INDIA (ISWAI) & ORS.**

..... Petitioners

Through: Mr V. Lakshmikumaran with Mr M. P. Devnath, Mr Abhishek Anand, Mr Vivek Sharma, Mr Yogendra Aldak and Mr Karan Sachdev, Advocates.

versus

UNION OF INDIA THROUGH: THE SECRETARY
DEPARTMENT OF REVENUE & ORS.

..... Respondents

Through: Mr Sanjay Jain, ASG with Mr R. D. Bhardwaj, CGSC, Mr Bhagwan Swaroop Shukla, CGSC, Mr Shreshth Jain, Mr Vidur Mohan, Mr Aakash Nagar and Mr Jitendra Kr. Tripathi, CGP for Respondent No.1/UOI.

Mr Anuj Aggarwal, Additional Standing Counsel, GNCTD (Civil) with Mr Shubhanshu Gupta, Advocate for GNCTD.

Ms Sonia Sharma, Senior Standing counsel for the department of Service Tax/Respondent Nos.2 & 4.

AND

+

W.P.(C) 5713/2015 & CM No.10271/2015

CONFEDERATION OF INDIAN ALCOHOL
BEVERAGES COMPANIES

..... Petitioner

Through: Mr V. Lakshmikumaran with Mr M. P. Devnath, Mr Abhishek Anand, Mr Vivek Sharma, Mr Yogendra Aldak and Mr Karan Sachdev, Advocates.

versus

UNION OF INDIA THROUGH: SECRETARY
DEPARTMENT OF REVENUE & ORS.

..... Respondents

Through: Mr Sanjay Jain, ASG with Mr R. D. Bhardwaj, CGSC, Mr Bhagwan Swaroop Shukla, CGSC, Mr Shreshth Jain, Mr Vidur Mohan, Mr Aakash Nagar and Mr Jitendra Kr. Tripathi, CGP for Respondent No.1/UOI.

Mr Anuj Aggarwal, Additional Standing Counsel, GNCTD (Civil) with Mr Shubhanshu Gupta,

Advocate for GNCTD.

Ms Sonia Sharma, Senior Standing counsel for the
department of Service Tax/Respondent Nos.2 & 4.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G E M E N T

%

05.08.2016

Dr. S. Muralidhar, J.

1. These are three petitions filed under Article 226 of the Constitution of India challenging the constitutional validity of Section 66B of the Finance Act, 1994 ('FA 1994') read with 65B(40) and Section 66D of the FA 1994 as amended by Clause (f) of Section 107 and Clause (2) of Section 109 of Finance Act, 2015 ('FA 2015') respectively, along with Notification No. 14/2015/-ST dated 19th May 2015, which levies service tax with effect from 1st June 2015, on persons who manufacture alcoholic liquor for human consumption on job work basis. Also challenged is the constitutional validity of Section 113(A) (1) of the Finance Act, 2009 ('FA, 2009') by which Section 65(19) of the FA 1994 stood amended.

2. The central thrust of the Petitioners' argument is that Parliament lacks the legislative competence to enact the said amendments since the activity of manufacture of alcoholic liquor for consumption, whether for oneself or for another person, lies exclusively within the domain of the State Legislature under Entry 51 of List II of Schedule VII to the Constitution. The case of the Respondents on the other hand is that service tax introduced by way of Chapter V to the FA 1994 is within the legislative competence of the Parliament to levy and collect. The topic of legislation is sought to be traced

to the residual Entry 97 of List I of the VII Schedule to the Constitution. The Respondents contend that service tax is not levied on the manufacture of alcohol but on the service aspect of the contract of manufacturing of alcohol on behalf of the principal manufacturer/brand owner. For the reasons to follow, this Court agrees with the Respondents and rejects the challenge raised by the Petitioners.

W.P.(C) No. 1120 of 2015

3. W.P.(C) No. 1120 of 2015 is by Carlsberg India Pvt. Ltd. ('CIPL'), a company located in Haryana, engaged in manufacturing, brewing and bottling of alcoholic liquor for human consumption i.e., beer of its own brands as well as brands owned by others. The challenge in the petition by CIPL is *inter alia* to the constitutional validity of Section 113(A) (1) of FA, 2009 by which Section 65(19) of the FA 1994 stands amended. CIPL has further challenged the validity of a clarification issued by the Central Board of Excise & Customs ('CBEC') by Para No. 3.1 of Circular No. 334/13/2009 dated 6th July 2009. Challenge is also laid to a show cause notice ('SCN') dated 22nd July 2014 issued to CIPL by the Additional Director General, Directorate General of Central Excise Intelligence ('DGCEI'), demanding service tax of Rs. 1,49,16,892 in respect of 'business auxiliary service' provided by CIPL to M/s United Breweries Ltd. ('UBL') for the period 23rd September 2009 to 30th June 2012 together with interest and penalty.

4. The relevant facts, as regards W.P. (C) 1120 of 2015, are that Kool Breweries Ltd. ('KBL') was engaged in the manufacturing, brewing and

bottling of alcoholic liquor for human consumption i.e. beer of their own brands as well as brands owned by others. KBL held the requisite licenses from the Haryana State Government and has been paying State Excise Duty under the provisions of Punjab Excise Act 1914 ('PE Act'), as applicable to the State of Haryana on the beer manufactured by it, whether under its own or other brand names. It is stated that in terms of the scheme of amalgamation approved by the High Court of Punjab & Haryana by order dated 24th March 2014, KBL amalgamated with CIPL. The appointed date for the amalgamation in terms of the above order was 1st April 2013. It is accordingly contended that the expression 'Petitioner' in W.P.(C) No. 1120 of 2015 would mean CIPL as well as KBL which had merged with CIPL with effect from 1st April 2013.

5. KBL entered into an agreement with UBL on 7th February 2011 for the purposes of manufacture and sale of beer under the brand name of 'Kingfisher'. UBL agreed to provide process parameters to KBL. UBL also permitted KBL to use the trademarks owned by UBL. On its part KBL agreed to manufacture and dispose of UBL's beer to the State Beverages Corporation/State regulated depots, wholesalers/indenters having necessary permits/licenses.

6. CIPL states that under the above agreement dated 7th February 2011, UBL's only responsibility was branding of the beer and to provide the process of manufacture of beer under its brand name. It was KBL's responsibility for brewing, bottling, packaging, storing and selling of beer of the Kingfisher brand, including usage of all ingredients, raw materials,

brewing specifications. All proceeds from the sale of beer were to be deposited in a bank account, jointly operated by KBL and UBL exclusively for beer produced under Kingfisher brand. The operational costs such as raw material etc. were to be met out of those accounts. KBL was entitled to a specified amount per case as retention towards energy and fixed costs. The bottle cost at the prevailing market rate was also to be paid on this account. A specified amount was to be paid to UBL as brand fee. The surplus, if any, was to be reimbursed by KBL to UBL. It is stated that KBL was thus comprehensively responsible for the complete value chain right from procurement of raw material to storage, processing, manufacturing, selling and distribution of beer. The sales invoices in respect of goods sold were raised by KBL.

7. It is stated that DGCEI initiated an investigation and searched the brewery premises and the office premises of KBL. During the course of search, various documents as well as information were recovered. Summons were issued to both KBL and UBL and statements were recorded under Section 14 of the Central Excise Act, 1944 ('CE Act'). After conclusion of the investigation the impugned SCN was issued on 22nd July 2014, where *inter alia* the case of the DGCEI was that KBL was producing beer for and on behalf of the UBL and therefore was rendering business auxiliary services within the meaning of Section 65(19)(v) of the FA 1994. The case of the DGCEI was that the activity of manufacture of 'excisable goods' was excluded from the purview of Section 65(19) of the FA 1994 with effect from 1st September 2009. 'Excisable goods' under Section 2(d) of the CE Act was defined as those goods specified in the First and Second Schedule to the

Central Excise Tariff Act, 1985 ('CET Act'). Note 11 to Chapter 22 of the First Schedule to the CET which exclusively covered 'beverages, spirits and vinegar' clarified that the said Chapter 22 did not cover alcoholic liquors for human consumption. Therefore, they did not fall within the definition of 'excisable goods' as mentioned in Clause (b) of the Explanation to Section 65 (19) of the FA 1994. Thus, 'alcoholic liquor for human consumption' did not fall under the purview of "excisable goods" and so was not covered within the exclusion clause of definition of "Business Auxiliary Services", under Section 65(19) of the Finance Act, 1994. However, since 1st July 2012 the processes undertaken by KBL were covered under the negative list of services and therefore not amenable to service tax. The case of the Respondents in the SCN was that KBL had resorted to fraud, suppression of facts and wilful misstatements and, therefore, the extended period of limitation could be invoked. The Petitioner had wrongly availed the exemption granted by Notification No. 39/2009-ST dated 23rd September 2009 and deposited service tax of Rs. 22,64,427 along with interest of Rs. 7,09,346 on 26th March 2013.

8. The concept of a 'negative list' of activities that would not be amenable to service tax was introduced by the FA, 2012 with effect from 1st July 2012. Section 66D which enumerated the negative list was inserted and under clause (f) therein "any process amounting to manufacture or production of goods" was made part of the negative list of services. Further Section 65B (40) of FA 1994 defined "any process amounting to manufacture or production of goods" to include "any process amounting to manufacture of alcoholic liquors for human consumption". A further change was introduced

with Section 107 Clause (f) of the FA 2015 omitting the words ‘alcoholic liquors for human consumption’ occurring in Section 65B (40) of the FA 1994. Further Section 109 (2) of the FA 2015 substituted Clause (f) of Section 66D of the FA 1994 to provide for tax on “services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption”. In effect the manufacture of alcoholic liquor for human consumption was removed from the negative list by virtue of the amendment brought about by Section 109 (2) of the FA 2015.

9. Notification dated 19th May 2015 issued by the Central Government stated that the appointed date on which Section 107(f) and Section 109 (2) of the Finance Act, 2015 would come into force was 1st June 2015. Therefore with effect from 1st June 2015 alcoholic liquor manufactured for human consumption on job work basis attracted service tax. The above amendments introduced by the Finance Act, 2015 led to filing of the two connected writ petitions.

W.P.(C) Nos. 5498/2015 & 5713/2015

10. The W.P.(C) No. 5498 of 2015 is by the International Spirits & Wines Association of India (‘ISWAI’) and All India Brewers’ Association (‘AIBA’), praying for a declaration that Section 107 (f) and Section 109(2) of the Finance Act, 2015 are *ultra vires* the Constitution of India in so far as Section 66B read with the amended Section 66D and Section 65B(40) of the FA Act 1994 provides for service tax on the activity of manufacture of alcoholic liquor for another person. The Notification dated 19th May 2015

appointing 1st June 2015 as a date from which said provisions came into force has also been challenged. It is stated that members of ISWAI and AIBA are directly and adversely affected by the said amendments. During the pendency of the writ petition, Globus Spirits Limited ('GSL') and Aroma India Pvt. Ltd. ('AIPL'), who are discharging state excise duty on contract manufacturing activity, sought to be impleaded as Petitioners 3 and 4 respectively in the aforementioned writ petition. For the reasons therein, their application CM 10428 of 2015 is allowed and GSL and AIPL are permitted to be impleaded as co-petitioners in W.P. (C) No. 5498 of 2015.

11. The third petition i.e. W.P.(C) No. 5713 of 2015 is by the Confederation of Indian Alcohol Beverages Companies ('CIABC'), an apex body of the branded segment of the leading Indian made foreign liquor manufactures and marketers which has been formed with the object of promoting and protecting the interests of the members in the business of alcoholic beverages. The prayers in these petitions are identical to the prayers in the writ petition filed by ISWAI and AIBA.

Submissions of the Petitioners

12. Mr. V. Lakshmikumaran, learned counsel appearing for the Petitioners made the following submissions:

- (i) There is a complete and careful demarcation of taxes in the Constitution and there is no overlapping as far as the fields of taxation are concerned. The mutual exclusivity as reflected in Article 246(1) of the Constitution requires the taxing entries to be construed so as to maintain exclusivity. Although the taxing entries must be given a liberal

interpretation, it must be such as not to bring within the purview of a Union taxing entry, a tax which falls within the domain of the state legislature.

(ii) In the present case, the two competing entries are Entry 51 of List II of the Seventh Schedule which provides for State Legislature to make laws for levy of duties of excise on alcoholic liquors for human consumption and Entry 97 of List I which permits Parliament to make laws on “any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists”. It is submitted that in the garb of ‘aspect theory’ the Parliament cannot levy tax on activity which falls within the exclusive legislative competence of the State Legislature.

(iii) KBL/CIPL was engaged in the manufacture of alcoholic liquor for human consumption and had been paying the appropriate state excise duty and value added tax (‘VAT’) for their activity. The said activity, therefore, could not be charged to service tax by the Parliament. By amending Section 65(19) of the FA 1994, the Parliament was seeking to usurp the exclusive jurisdiction of the State Legislature to levy excise duty on the manufacture of alcoholic liquor for human consumption. Inasmuch as the service tax is a value added tax and is leviable on an activity of professional service and not on the activity of manufacture of goods, the amendment to Section 65(19) of the FA 1994 is a colourable exercise of legislative power impinging on the exclusive legislative domain of the State Legislature. While the Parliament has power to levy excise duty on manufacture of alcoholic liquor, there is a clear exclusion

under Entry 84 (a) of List I of the Seventh Schedule of the Constitution of excise duty on alcoholic liquor for human consumption. That falls within the exclusive domain of Entry 51 of List II of the Seventh Schedule of the Constitution.

(iv) It is the same activity of manufacture on which both excise duty and service tax was sought to be levied. In other words the taxable event continued to be the manufacture of liquor, whether it was done for oneself or for another person. Therefore, on the very same nature and aspect of the activity there could not be two levies namely excise duty and service tax.

(v) Reliance is placed on the decision in **Navinchandra Mafatlal v. CIT (1954) 26 ITR 758 (SC)**, wherein it was emphasised that the words of a legislative entry had to be given the widest possible scope and ambit. This was followed in **Godfrey Philips Ltd. v. State of UP 2005(2) SCC 515** and **Hoechst Pharmaceuticals v. State of Bihar 1983 (4) SCC 45**. The reliance is also placed on decisions in **International Tourist Corporation v. State of Haryana (1981) 2 SCC 318** which emphasised that a Union legislation could be traced to Entry 97 of List I “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”. The nomenclature of levy was not of relevance to determine its real character and what has to be examined is the true nature of the tax imposed in reference to the charge, i.e. the taxable event and the incidence of levy. Here it was the manufacture of alcoholic liquor for human consumption. A reference is placed on the

decisions in *State of Kerala v. Maharashtra Distilleries Ltd. (2005) 11 SCC 1* and *Municipal Council, Kota v. Delhi Cloth & General Mills Co. Ltd. (2001) 3 SCC 654*.

(vi) It is pointed out that the Entry 51 of List II is similar to the relevant part of Entry 84 of List I which deals with duties of excise on tobacco and other goods manufactured. Neither Entry 84 of List I nor Entry 51 List II makes distinction between manufacture of liquor on job work basis and manufacture on the manufacturer's own account. The reference is made to the decisions in *Empire Industries Ltd. V. Union of India (1985) 3 SCC 314* and *Ujagar Prints v. Union of India (1989) 3 SCC 488*. Thus if the State Legislatures were to levy tax on manufacture of liquor on job work basis, that would be covered under Entry 51 of List II. Consequently, levy of service tax on such job charges are unconstitutional and could not be sustained on the basis of Entry 97 of List I. The reference is made to Notification No. 119/1975-CE dated 30th April 1975, which levied excise duty only on the activity of manufacture on job work basis and that too only on the job work charges.

(vii) Referring to the decision in *All India Federation of Tax Practitioners v. UOI (2007) 7 SCC 527*, it is submitted that there has to be a separate levy for taxable events which are identified to be different and distinct. However, in the present case where the taxable event is the same, viz., the activity of manufacture on job work basis and both excise duty and service tax cannot be levied simultaneously. Reference is also made to the decision in *Bharat Sanchar Nigam Limited. v. UOI 2006 3*

SCC 1 and the judgment of the Kerala High Court in ***Union of India v. Kerala Bar Hotels Association 2014 (36) STR 1205 (Ker.)***.

(viii) Mr. Lakshmikumaran also sought to distinguish the contract manufacture arrangement as in the case of agreement between KBL and UBL as distinguished from a brand licensing arrangement or the lease arrangement. In a brand licensing arrangement, the brand owner gives the right to exploit its intellectual property rights ('IPR') to the manufacturer. The right to use the IPR is an identifiable activity separate and independent from the act of manufacture and the service tax could possibly be levied on such right to use the IPR. Likewise in the lease arrangement, the act of letting out the infrastructure, was independent of the act of manufacture and therefore would attract service tax. However, in the contract manufacturing arrangement there is only one activity and therefore only one taxable event. He pointed out that although Entry 92C in the Union List covers "taxes on services" it had not yet been brought into operation. Consequently, when the activity was already covered by Entry 51 of List II, namely the activity of manufacture of alcoholic liquor for human consumption, then the question of resorting to Entry 97 of List I to justify the levy of service tax did not arise.

Submissions of the Respondents

13. In reply to the above submissions, it is submitted by Mr. Sanjay Jain, learned Additional Solicitor General of India, on behalf of the Respondents as under:

(i) The service tax in the present case was not being levied on the activity of manufacture of alcohol but on the service aspect of the contract manufacturing of alcohol on behalf of the principal manufacturer/brand owner.

(ii) There may be different types of arrangements for manufacture of alcoholic beverages. There may be a 'brand licensing arrangement' under which the job worker to whom the task of manufacturing alcoholic beverages is given holds licence while the property, risk and reward of the products so manufactured, rest with the licensee/manufacture. The brand owner apart from giving permission to such manufacturer is not directly involved in manufacture and retail of alcohol. In such instance, the taxable service was the service by way of grant of permission by the brand owner to the licensee to use the brand name for sale of alcohol.

(iii) There can be an arrangement of lease whereby the Lessee could produce alcoholic beverages for the owner of the production facilities. The consideration was in the form of rent paid to the owner by the manufacturer. The taxable service would be the renting of the production facilities to the lessee by the lessor.

(iv) There could also be an arrangement of 'contract manufacturing' where the principal manufacturer or the brand owner outsources the services of manufacturing to a contractor (job worker), who possesses manufacturing facilities, under the terms of a license. The taxable service here is the outsourced service provided by the job worker who

produces alcohol not for commercial retail but for the commercial use by the principal manufacturer (brand owner). The cost of raw materials and in some cases even the capital goods and other expenses are either reimbursed or paid by the brand owner. The statutory levies including State excise duty are also to be reimbursed to the outsourced manufacturer by the brand owner. The alcoholic beverages are sold by or under the directions of the brand owner and the profit or loss on account of manufacturing and sale of alcoholic beverages is entirely on account of the brand owner who thus holds the licence property, risk and reward of the products.

(v) The fourth arrangement is where the alcoholic beverages are manufactured by the distillers who also own the brand names affixed on such beverages. There is no activity of rendering of any service as it is purely the activity of the manufacturer. Hence there is no service tax levied.

(vi) The Petitioners herein are contract manufacturers of alcoholic beverages and on that basis they have claimed to enter into Contract Manufacturing Agreements, which is the third category.

(vii) Internationally, the services of contract manufacturing of beverages including ethyl alcohol, spirits, liqueurs, wines, malt, malt liquors and other spirituous beverages and the manufacturing services on physical inputs owned by others have been recognized. Attention has been drawn to the Division 24 and Division 88 of the Central Product Classification ('CPC') for goods and services circulated by the

United Nations Statistical Commission.

(viii) It is legally permissible that the same activity may involve two or more taxable events. One aspect is the 'service rendered to the principal manufacturer' which is amenable to service tax. The other is the manufacturing aspect which is amenable to state excise duty. The mere fact that there can be overlapping of two aspects does not impinge upon the power to levy tax on both aspects.

(ix) Since the aspect of rendering of services by manufacturing alcohol for another person is distinct from the activity of manufacture of alcohol for one's own per se, it cannot be said that service tax is levied on the same activity on which the State excise duty is also levied. In other words the Parliament is not seeking to legislate on a topic exclusively within the domain of the State under Entry 51 of List II of the Seventh Schedule of the Constitution.

(x) Reliance is placed on the decisions in ***State of Madhya Pradesh v. Rakesh Kohli* (2012) 6 SCC 312**, ***Association of Leasing and Financial Service Companies v. Union of India* (2011) 2 SCC 352**, ***Gujarat Ambuja Cements Ltd. v. Union of India* (2005) 4 SCC 214**, ***All India Federation of Tax Practitioners v. Union of India* (supra)** and ***Tamil Nadu Kalyana Mandapam Association v. Union of India* (2004) 5 SCC 632**.

(xi) The decision of the Full Bench of the Madhya Pradesh High Court in ***Maa Sharda Wine Traders v. Union of India* 2009 (15) STR 3**

(MP) is distinguishable since it was dealing with Section 65 (19) and Section 65 (76b) of the FA 1994 as it stood prior to 1st September 2009. An amendment was carried out with effect from 1st September 2009 to enable levy of service tax on contract manufacture of alcohol. By Notification dated 5th June 2012, both Sections 65 (19) and 65 (76b) of the FA 1994 were declared to be not applicable since manufacture of alcoholic beverage was included in the negative list. However, the activity of manufacture of alcohol did not include contract manufacturing which was outside the negative list under Section 66D (f) with effect from 1st June 2015. This change to the statutory provision was later than the decision in *Maa Sharda Wine Traders* (*supra*).

(xii) A challenge to the constitutional validity of the imposition of service tax on the premise that it would cause economic hardship is not tenable. Reliance is placed on the decisions in *Government of Andhra Pradesh v. Smt. P. Laxmi Devi* (2008) 4 SCC 720 and *Sat Pal and Co. v. Lt. Governor of Delhi* (1979) 4 SCC 232.

Analysis of Constitutional Provisions

14. The Court proposes to first examine the scheme of the relevant constitutional provisions. Article 245 of the Constitution provides that the Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. However, Article 245 (1) opens with phrase ‘subject to the provisions of this Constitution.’ Article 246 (1) provides that notwithstanding anything

contained in clause (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule, i.e., Union List. Article 246 (2) states that notwithstanding anything in clause (3) both the Parliament and legislature of the State would have the power to make laws in respect of any matters enumerated in List III, i.e., concurrent list. Article 246 (3) talks of “subject to clauses (1) and (2), the legislature of any State would have exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule of the Constitution”, i.e., State List.

15. Under Entry 84 of List I read with Article 246 (1) Parliament has the exclusive legislative power to enact a law for levy and collection of excise duty on the manufacture of alcoholic liquor, tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption and narcotics. Entry 51 of the State List, i.e. List II, is a mirror image of Entry 84 of the Union List. It is the State which has the exclusive power to make laws for levy of duty of excise on the activity of manufacture or produce of ‘alcoholic liquors for human consumption’ in the State.

16. The Constitution Bench of the Supreme Court in ***Union of India v. Shri Harbhajan Singh Dhillon*** 1971 (2) SCC 779 explained that before resort can be had to residuary Entry 97 of the Union List, to explain the legislative competence of Parliament to enact a taxing statute, it has to be first ascertained whether the tax legislation in question is covered by any specific entry in List II. If it does not fall under List II, then it can safely be traced to

the residuary entry in the Union List. The specific observations in para 67 of the judgment in this regard, reads as under:

“67.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 to enquire if it is a law with respect to matters or taxes as enumerated in List II. If it is not, no further question arises.”

17. In *Navinchandra Mafatlal v. Commissioner of Income Tax* (*supra*), the Supreme Court explained that “in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude.”

Relevant provisions of the FA

18. Before commencing the discussion of the legal principles involved in the constitutional challenge posed in these petitions, it is necessary to refer to the relevant provisions of the FA which are the subject matter of such challenge.

19. Under Section 65B (44) of the FA 1994, ‘service’ is defined as under:

“(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) such transfer, delivery or supply of any goods which is

- deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution; or
- (iii) 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 Legislative, 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 clause, transaction in money shall not include any include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

Explanation 3. – 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 4. – 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;”

20. Section 66B of the FA 1994 is charging section and reads as under:

“66B. Charge of service tax on and after Finance Act, 2012

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.”

21. Section 66D of the FA 1994 is titled ‘Negative list of services’. It states that the negative list shall comprise the different services and in particular Clause (f) of Section 66D included “any process amounting to manufacture or production of goods”.

22. The expression ‘process amounting to manufacture or production of goods’ has been defined under Section 65B (40) of the FA 1994 to mean as under:

40. "process amounting to manufacture or production of goods” means a process on which duties of excise are leviable under Section 3 of the Central Excise Act, 1944 (1 of 1944) or any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any State Act for the time being in force.”

23. A Negative list regime of Service Tax came to be introduced only by FA 2012 with effect from 1st July 2012. Prior to 1st July 2012, under Section 65

(19) of FA 1994 “business auxiliary service”, a taxable service, included within its ambit production or processing of goods for, or on behalf of the client but did not include any activity that amounts to “manufacture” of excisable goods. However with effect from 1st July 2012, “any process amounting to manufacture or production of goods” which included manufacture of alcoholic liquors for human consumption was put in the newly introduced negative list of services. Therefore, till 30th June 2012 on the strength of the abovementioned provisions it is possible to levy service tax on this type of work, i.e., manufacture of alcoholic liquors fit for human consumption under the head of business and auxiliary services.

24. The effect of the further changes in 2015 by amendment to the FA was to *inter alia* bring within the net of service tax, the activity of manufacture 'for another person' of alcoholic liquor for human consumption.

Pith and substance doctrine

25. The case of the Petitioners is that by amending Section 65(19) of the FA 1994, the Parliament was seeking to usurp the exclusive jurisdiction of the State Legislature to levy excise duty on the manufacture of alcoholic liquor for human consumption. It is submitted that since service tax is not leviable on the activity of manufacture of goods, the amendment to Section 65(19) of the FA 1994 is a colourable exercise of legislative power impinging on the exclusive legislative domain of the State Legislature.

26. The two competing entries in the present case are Entry 51 of List II which according to the Petitioners covers the entire field as far as manufacture of alcoholic liquor or human consumption is concerned,

whether it is manufactured by oneself or through another by way of job work. The competing entry, relied upon by the Respondents to sustain the legislation, is Entry 97 of List I which is the residual entry. The question that then arises is whether 'in pith and substance' the provisions under challenge seek to levy service tax on manufacture *per se* of alcoholic liquor for human consumption, or on the service aspect of the manufacture which is undertaken by one entity for another on job work basis?

27.1 In ***M/s. Hoechst Pharmaceuticals Limited v. State of Bihar*** (*supra*) the pith and substance doctrine was discussed. The Petitioner in that case was engaged in the manufacture and sale of various drugs throughout India including the State of Bihar. The question that arose was whether Section 5 of the Bihar Finance Act, 1981 ('BF Act') which provided for the levy of a surcharge on every dealer whose gross turnover during a year exceeds Rs. 5 lakhs was constitutionally valid. It was sought to be defended on the ground that Section 5 of the BF Act which has the heading "Levy of tax on the sale and purchase of goods in Bihar" is relatable to Entry 54 of List II of the Seventh Schedule. Whereas the appellants contended that the field of price fixation of essential commodities was an occupied field by virtue of various control orders issued by the Central Government under sub-Section 3 (1) of the Essential Commodities Act, 1955 which allows the manufacturer or producer of goods to pass on the tax liability to the consumer and therefore the legislature of Bihar had no legislative competence to enact Section 5 (3) of the BF Act. The High Court had upheld the constitutional validity of the Section and therefore the manufacturing company approached the Supreme Court.

27.2 The Supreme Court in *M/s. Hoechst Pharmaceuticals Limited v. State of Bihar* (*supra*) explained that the true principle applicable in judging the constitutional validity is to determine whether in its pith and substance it is a law relatable to Entry 54 of the State List. The Court referred to Article 254 which provided for the method of resolving conflicts between a law made by the Parliament and a law made by the legislature with respect to matter falling in the Concurrent List. The Supreme Court explained that the various entries in three lists were not 'powers of legislation' but 'fields of legislation'. It was emphasized that 'the power to tax cannot be deduced from a general legislative entry as an ancillary power'. It was pointed out that there was no overlapping anywhere in the taxing power when List I and II of the Schedule were scrutinized. The Constitution gives independent sources of taxation to the Union and the States. The Supreme Court explained the approach to be adopted in the event of seemingly conflicting entries in the lists:

"In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if loss wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation by the application of the doctrine of 'pith and substance' appears to fall exclusively under one list, and the encroachment upon another list is only incidental."

27.3 The Supreme Court in *M/s. Hoechst Pharmaceuticals Limited v. State of Bihar* (*supra*) then proceeded to observe as under:

“76. It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. In *M.P.V. Sundararamier & Co. v. State of A.P. 1958 SCR 1422*, this Court dealt with the scheme of the separation of taxation powers between the Union and the State by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92-A deal with taxes. In List II, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz., the State’s exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz., sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play.”

28. The above observations were reiterated in *International Tourist Corporation v. State of Haryana* (*supra*), as under:

“6A.Before exclusive legislative competence can be

claimed for 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 and 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 Parliament such residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislature. That might affect and jeopardise the very federal principle. 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....”

29. In ***All India Federation of Tax Practitioners v. Union of India*** (*supra*), the Supreme Court explained the 'pith and substance' doctrine in the following words:

"As stated above, every entry in the Lists has to be given a schematic interpretation. As stated above, constitutional law is about concepts and principles. Some of these principles have evolved, out of judicial, decisions. The said test is also applicable to taxation laws. That is the reason why the entries in the Lists have been divided into two groups, one dealing with general subjects and other dealing with taxation. The entries dealing with taxation are distinct entries vis-a-vis the general entries. It is for this reason that the doctrine of pith and substance has an important role to play while deciding the scope of each of the entries in the three Lists in the Seventh Schedule to the Constitution. This doctrine of pith and substance flows from the words in Article 246(1), quoted above, namely, 'with respect to any of the matters enumerated in List I.' The bottom line of the said doctrine is to look at the legislation as a whole and if it has a substantial connection with the entry, the matter may be taken to be legislation on the topic. That is why due weightage should be given to the words 'with respect to' in

Article 246 as it brings in the doctrine of 'pith and substance' for understanding the scope of legislative powers."

30. If the 'pith and substance' doctrine is applied in the instant case, it is evident that while Entry 51 of List II envisages manufacture of alcoholic liquor for consumption it does not contemplate a situation of manufacture of alcoholic liquor by one person or entity for another. Importantly, the taxable event is the manufacture and it is amenable to state excise duty. However, when it comes to manufacture for another, in pith and substance it is a service performed by one for another and cannot therefore fall within the ambit of Entry 51 of List II.

Aspect doctrine

31. The matter could be approached by employing the 'aspect doctrine' as well. In the present case, to recapitulate the case of the Respondent, service tax on contract manufacturing of alcoholic beverage for human consumption can be legislated validly by the Parliament with respect to Entry 97 in List I. The case of the Petitioner on the other hand is that Parliament lacks the legislative competence to do so since the activity is essentially one of manufacture of alcoholic liquor for human consumption which is squarely and entirely covered by Entry 51 of the State List.

32. The aspect of performing a service emerges when the activity of manufacture is undertaken by one for another. As explained in ***Association of Leasing and Finance Services v. Union of India*** (*supra*) service tax is "a tax on an activity". It was further held that "service is a value added tax. The value addition is on account of the activity that provides value addition." In

a situation of 'job work' it is not difficult to envision such value addition as a result of the activity of manufacture being undertaken by one entity for another. It is this aspect of service involved in job work that is sought to be captured here and made amenable to service tax.

33. In ***Federation of Hotel and Restaurant Association of India v. Union of India (1989) 3 SCC 634*** the Supreme Court explained the concept in the following passages wherein:

“30.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....”

31. Indeed, the law ‘with respect to’ a subject might incidentally ‘affect’ another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping, but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. ...”

34. Therefore while facially it might seem that one and the same activity is made the subject of two imposts, in pith and substance what is made amenable to one of the imposts, in this case service tax, is the 'service' aspect of job work and not the activity of manufacture by an entity for and by itself per se.

35.1 In ***All India Federation of Tax Practitioners v. Union of India (supra)***, the Supreme Court was examining if there was an overlap between profession tax covered under Entry 60 of List II and service tax. To begin with, the Court explained that:

"..service tax is a value added tax 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..... Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property-based services and performance-based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas, etc. Performance based services are services provided by service providers like stockbrokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents, etc."

35.2 The Court then explained the "aspect theory" with reference to the tax on profession, calling etc. in terms of Entry 60 of List II in the following passage:

"... 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."

36. Consequently, even applying the aspect doctrine it is possible to recognise the legislative competence of Parliament in seeing to bring within the service tax net the activity of job work involved in the manufacture of alcoholic liquor for human consumption.

37. Although several types of arrangements by which the job work undertaken by one entity for another were referred to, the case involving KBL and UBL appears to be one of contract manufacturing. In any event, this need not by itself detain the Court as that should be the task of the adjudicating authority called upon to adjudicate the SCN issued. Suffice it to note that as rightly pointed out by Mr. Jain that, if the brand owner itself is also manufacturing the product, the question of collection of service tax cannot arise. It is submitted that only where the manufacturing is undertaken, not by the brand owner, but its outsourced license holder, the question of rendering service for another person as defined under Section 65B (44) of the FA 1994 would arise.

38. The essential feature as far as Section 65B (44) of the FA 1994 is concerned is the rendering of a service i.e. any activity carried out by a person for another person for consideration. Therefore, a manufacturing activity undertaken by an entity for itself cannot be said to be a service provided to anyone and definitely not to itself. Therefore, that activity of manufacture by the brand owner who is also a licence holder could not be said to be amenable to service tax. However, where manufacturing of alcoholic liquor for human consumption is not manufactured by the entity holding licence/brand owner, but by another entity holding such licence and

the cost of manufacture is to be reimbursed by the principal manufacturer/brand owner and that activity by one person for another would therefore be 'service' within the meaning of Section 65B (44) of the FA 1994. For these reasons, the challenge to the validity of Section 113(A) (1) of the FA, 2009 by which Section 65(19) of the FA 1994 stood amended and whereby the expression 'business auxiliary service' did not exclude the activity of manufacture of alcoholic liquor for human consumption, when undertaken by one entity for another, is negated.

39. There is a marked change in the position that the FA 2015 and the amendment it brought about to Section 65B of the FA 1994. Under Section 107 (f) of FA 2015, Clause (40) of Section 65B of FA 1994 would no longer contain the word 'alcoholic liquors for human consumption'. Section 109 (2) of FA 2015 further substitutes clause (f) of Section 66D of FA 1994 with "services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption." In other words this commodity was removed from the negative list.

40. As already noticed, by the Notification dated 19th May 2015 the appointed date on which the abovementioned provisions of FA 2015 would become effective was 1st June 2015. On that said date the manufacture of alcoholic beverage for human consumption on contract basis has to be viewed as services rendered by one party to another and therefore, amenable to service tax. It is traceable to Entry 97 of List I as it does not fall within the ambit of any of the taxing entries in List II.

Failed challenges to levy of service tax

41.1 It is of interest, and perhaps not a mere coincidence, that the challenges to the constitutional validity of service tax levy in different contexts have by and large failed. In ***Gujarat Ambuja Cements Limited v. Union of India*** (*supra*) the legislative competence of Parliament to impose service tax on transport of goods was challenged. It was contended that under Entry 56 of List II which pertained to “tax on goods and passengers carried by roads or inland waterways’ was fully covered and therefore, the Parliament has no legislative power to levy tax on the transport of those goods. The Court explained there is a distinction between the object of tax, the incidence of tax and the machinery of the collection of the tax. The legislative competence is to be determined “with reference to the object of the levy and not with reference to its incidence or machinery.” It is explained that the subject matter of the tax, as far as the provision of the FA 1994 is concerned, was 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.”

41.2 The Supreme Court in ***Gujarat Ambuja Cements Limited v. Union of India*** (*supra*) concluded as under:

“32. 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 tax is what is, 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."

42.1 In ***T.N. Kalyana Mandapam Association v. Union of India*** (*supra*), an amendment was made in 1997 to the FA 1994 to the effect that the services provided by mandap-keepers including services, if any, rendered as a caterer were exigible to tax. This was challenged on the ground that in its pith and substance, the provision sought to levy tax on "goods" and/or "land". The Court first concluded that if no entry is found in List II and III of the Seventh Schedule, which would cover the tax levied, the question of Parliament lacking legislative competence to do so would not arise. The Court then observed as under:

"45. The concept of catering, admittedly, includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. ..."

42.2 The Court further observed as under:

"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 a 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."

42.3 The Court then concluded as under:

"58. A tax on services rendered by mandap-keepers and

outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities. ...”

43. Reliance by the Petitioner on the decision of the Supreme Court in ***Bharat Sanchar Nigam Limited v. Union of India*** (*supra*) appears to be misplaced. The question involved in that case was whether the providing of telephone connection may be a composite contract of service and sale. While there may be a transfer of a right to use ‘goods’ in the providing of access or a telephone connection by the telephone service provider to a subscriber, at the same time there was also the provision of the service itself. It was pointed out that the decision in ***BSNL v. Union of India*** (*supra*) recognises the aspect doctrine. The Court did not permit the State to levy taxes on the service aspect and upheld the levy of service tax on the provisions of telephone service. It was concluded in that case that there was no element of sale of goods involved.

44. In ***Sat Pal and Co. v. Lt. Governor of Delhi*** (*supra*) it was held that even if the legislation fell in one entry partly, either in List I or List III, and was partly governed by the residuary entry i.e. Entry 97 of List I, it would nevertheless be immune from attack.

45. The decision of Madhya Pradesh Full Bench in ***Maa Sharda Wine Traders v. Union of India*** (*supra*) was dealing with Section 65(19) and Section 65(76b) of the FA 1994 as it existed prior to September 2009. There was no question of considering whether service tax on contract manufacturing which has now been clearly defined by way of amendment to Section 66D(f) could be subject to service tax. With the negative list coming

into effect from 1st July 2012, the two entries that were considered in ***Maa Sharda Wine Traders v. Union of India*** (*supra*) were removed from the ambit of the service tax. Consequently, the said decision is again of no assistance to the Petitioners.

46. Again the reliance on ***Empire Industries Ltd. V. Union of India*** (*supra*) or ***Ujagar Prints*** (*supra*) is of no assistance to the Petitioners. There the only question was whether excise duty could be validly levied even on the job work. The Court isolated the job work element which forms part of the process of manufacture and upheld the levying insofar as the job work element is concerned. There was no question of different aspect of the same activity being subject to service tax.

47.1 The decision in ***Association of Leasing and Finance Services v. Union of India*** (*supra*) dealt with financing and leasing services undertaken by banks and financial institutions. The challenge was to the validity of Section 65(12) and Section 65 (105) (zm) insofar as they seek to levy service tax on leasing and hire purchase. It was contended that insofar it also related to finance and leasing services including equipment leasing and hire purchase, it was beyond the legislative competence of Parliament by virtue of Article 366(29A) of the Constitution. A distinction was drawn between the two kinds of services. It was pointed out that the funding activity undertaken by the financing party could be in the form of loan or equipment leasing or hire purchase financing. In that process two distinct and different transactions take place, namely the financing transaction and the equipment leasing/hire purchase transaction. The former was eligible to service tax whereas the

latter would be eligible to local sales tax/VAT. It was pointed out that financing as an activity was different and distinct from lease/hire purchase in the essence. It was held:

"...the activities undertaken by NBFCs of equipment leasing and hue-purchase finance are facilities extended by NBFCs to their customers; that, they are financial services rendered by NBFCs to their customers and that they fall within the meaning of the words 'banking and other financial services' which is sought to be brought within the service tax net under Section 66 of the Finance Act, 1994.the impugned tax is levied on these services as taxable services. It is not a tax on material or sale. The taxable event is rendition of service. Hence, the impugned tax is different and distinct from tax on sale of goods under Entry 54, List II of the Seventh Schedule to the Constitution."

47.2 It was observed that "the taxable event is the service which is rendered by the finance company to its customer(s). The value of taxable service under Section 67 is income by way of interest/finance charges (measures of tax) which is not determinative of the character of the levy. Thus Section 67 of the Finance Act, 1994 seeks to tax financial services rendered by the appellant(s) with reference to the income which the appellant(s) earns by way of interest/finance charges." The challenge was, therefore, negatived.

48. Learned counsel for the Petitioners sought to draw a distinction between the type of activity in each of the above cases, which according to him involved more than one distinct aspect and the present case which did not. It was submitted that in *T.N. Kalyana Mandapam Association v. Union of India* (*supra*) service tax was sought to be levied on 'letting out of mandap' and incidental services traceable to Entry 97 of List I whereas the competing entries that were distinct were tax on sale of food (Entry 54 List II), and tax on land (Entry 49 List II). In *Gujarat Ambuja Cements Limited v. Union of*

India (supra) service tax was sought to be levied on the 'transportation service' and the competing entry was 'tax on goods or passengers' under Entry 56, List II. In *All India Federation of Tax Practitioners v. Union of India (supra)* service tax was on the rendering of professional service and the competing entry was tax on profession, based on status under Entry 60 of List II. In *Association of Leasing and Finance Services v. Union of India (supra)* the identified service was that of financial leasing and the competing entry was a deemed sale traceable to Article 366 (29A) read with Entry 54 List II. According to the learned counsel for the Petitioners in the present case there was only one activity i.e. manufacture of alcoholic liquor for human consumption which was entirely covered by Entry 51 of List II with there being no other activity or even 'an aspect' of that activity that remained outside Entry 51 of List II and thereby attracted any other levy including a service tax.

49. It is not possible to agree with the above submission when a clear distinction is discernible between manufacture of such alcoholic liquor by oneself and for another. The latter partakes the character of rendition of a service which is not possible to be accommodated within the act of manufacture by oneself. The act of manufacturing for another by way of job work answers the plain definition of service under Section 66B (44) of the FA which begins with: "'service' means any activity carried out by a person for another for consideration and includes a declared service, but shall not include...". Therefore it is a fallacy to equate the two activities viz., manufacture of such alcoholic liquor by and for oneself and undertaking manufacture for another. The changes brought about in 2015 was intended

to capture the latter aspect which is unique to job work for the purposes of levy of service tax. In his budget speech on 28th February 2015, the Finance Minister explained, *inter alia*, that service tax was "to be levied on service by way of carrying out any processes as job work for production or manufacture of alcoholic liquor for human consumption" It is significant that the Respondents in their written submissions have confirmed that "service tax is only being imposed on the value of the services provided by the job worker/contract manufacturer and not on the whole sale price of alcohol."

Conclusion

50. Consequently, in the present case the Court is satisfied that what is sought to be made amenable to service tax is the activity of contract manufacturing of alcoholic liquors fit for human consumption by one entity for another. Such provision of service which is in pith and substance not covered under Entry 51 of List II of the Seventh Schedule to the Constitution of India is certainly amenable to levy of service tax by Parliament which is competent to legislate on that aspect with reference to Entry 97 of List I.

51. The Court, therefore negatives the challenge to the validity of Section 113(A) (1) of the FA, 2009 by which Section 65(19) of the FA 1994 stood amended. It also negatives the challenge to the validity of Section 66B of the FA 1994 read with 65B(40) and Section 66D of the FA 1994 as amended by Clause (f) of Section 107 and Clause (2) of Section 109 of FA 2015. The validity of the notification appointing the commencement date of the above

amendment as 1st June 2015 as the date on which the above provision would come into force is also, therefore, upheld.

52. The Court finds no reason therefore to interfere with the SCN issued to CPIL or answer at this stage whether the service rendered by KBL to UBL could be validly termed as a business auxiliary service and amenable to service tax. The respective contentions of the parties on these aspects is left open to be urged in the adjudication proceedings. The challenge to the Notification No.14/2015/-ST dated 19th May 2015 and the SCN is, therefore, negatived leaving it open to the Petitioner to urge all contentions available to it on merits before the adjudicating authority.

53. For the aforementioned reasons, the writ petitions are dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 05, 2016

mg/rk/dn