IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 9-06-2009

Coram

THE HONOURABLE MR. JUSTICE A. KULASEKARAN
and
THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Writ Appeal No. 4119 of 2003
and
W.P. Nos. 14905, 15327, 15328, 15559 and 15560 of 2001
and
W.A.M.P. No. 6814 of 2003
-o-

WA No. 4119 of 2003

M/s. Madras Hire Purchase Association
represented by Mr. Nitin Sagan
220, N.S.C.Bose Road, Sowcarpet
Chennai - 600 079 .. Appellant

Versus

1. Union of India
   rep. by its Secretary
   Ministry of Finance
   Government of India
   North Block
   New Delhi - 110 001

2. Central Board of Excise & Customs
   North Block
   New Delhi - 110 001

3. Chief Commissioner of Central Excise
   121, Nungambakkam High Road
   Chennai - 600 034 .. Respondents

WP No. 14905 of 2001

Association of Leasing and Financial
Services Companies (Madras Chapter)
rep. by Chairman Mr. Farouk Irani
749, Anna Salai
Chennai - 600 002 .. Petitioner

Versus

1. Union of India
rep. by its Secretary
Government of India
Ministry of Finance
North Block
New Delhi - 110 001

2. Central Board of Excise and Customs
North Block
New Delhi - 110 001

3. Chief Commissioner of Central Excise
121, Nungambakkam High Road
Chennai - 600 034 .. Respondents

WP No. 15327 of 2001

M/s. South India Hire Purchase Association
rep. by its Chairman T.R. Achha
Desabandhu Plaza
No.47, Whites Road
Royapettah
Chennai - 600 014 .. Petitioner

Versus

1. Union of India
rep. by its Secretary
Ministry of Finance
Department of Revenue
Government of India
North Block
New Delhi - 110 001

2. Central Board of Excise and Customs
   North Block
   New Delhi - 110 001

3. Chief Commissioner of Central Excise
   121, Nungambakkam High Road
   Chennai - 600 034 .. Respondents

WP No. 15328 of 2001

M/s. Madras Hire Purchase Association
represented by its Secretary
Mr. Nitin Sagan
220 (Old No.128) N.S.C.Bose Road
Sowcarpet
Chennai - 600 079 .. Appellant

Versus

1. Union of India
   rep. by its Secretary
   Ministry of Finance
   Department of Revenue
   Government of India
   North Block
   New Delhi - 110 001

2. Central Board of Excise & Customs
   North Block
   New Delhi - 110 001

3. Chief Commissioner of Central Excise
   121, Nungambakkam High Road
   Chennai - 600 034 .. Respondents

WP No. 15559 of 2001

The Equipment Leasing Association (India)
rep. by its Chairman
having registered office at
5-C,. Century Plaza
Teynampet
Chennai - 600 002 .. Petitioner

Versus

1. Union of India
   rep. by The Secretary
   Ministry of Finance
   Department of Revenue
   Government of India
   North Block
   New Delhi - 110 001

2. The Commissioner of Central Excise
   Service Tax Cell, Chennai-II
   MHU Complex
   No.473, Anna Salai
   Chennai - 600 035 .. Respondents

WP No. 15560 of 2001

T.T. Srinivasaraghavan .. Petitioner

Versus

1. Union of India
   rep. by The Secretary
   Ministry of Finance
   Department of Revenue
   Government of India
   North Block
   New Delhi - 110 001

2. The Commissioner of Central Excise
   Service Tax Cell, Chennai-II
   MHU Complex
   No.473, Anna Salai
   Chennai - 600 035 .. Respondents

WA No. 4119 of 2003: Appeal under Clause 15 of Letters Patent against the Order dated 23.04.2003 made in W.V.M.P. No. 255 of 2002 in W.M.P. No. 22743 of 2001 in W.P. No. 15328 of 2001 on the file of this Court.

WP No. 14905 of 2001: Petition filed under Article 226 of The Constitution of India praying for a Writ of Declaration to declare Section 65 (10) and 67 of Chapter V of the Finance Act, 1994 (as amended) levying inter alia, service tax on leasing/hire purchase transactions as ultra vires the provisions of Article 14, 19 (1) (g), 265, 366

(29A), Entry 54, List-II, Schedule VII of the Constitution of India and also being beyond the legislative competence of Parliament in so far as the members of the petitioner is concerned.

WP No. 15327 & 15328 of 2001: Petition filed under Article 226 of The Constitution of India praying for a Writ of Declaration to declare Section 65 (10) and 67 of Chapter V of the Finance Act, 1994 (as amended) levying inter alia, service tax on leasing/hire purchase transactions as ultra vires the provisions of Article 14, 19 (1) (g), 265, 366 (29A), Entry 54, List-II, Schedule VII of the Constitution of India and also being beyond the legislative competence of Parliament in so far as the Corporate members of the petitioner is concerned.

WP No. 15559 of 2001: Petition filed under Article 226 of The Constitution of India praying for a Writ of Declaration to declare Section 137 of the Finance Act, 2001 and all other provisions in the said Act which affect the rights of the petitioners herein in relation to the business of Hire Purchase and finance leasing as unconstitutional without Legislative Competence and null and void so far as petitioner is concerned.

WA No. 4119 of 2003

For Appellants : Mrs. Meera Gupta
for M/s. Surana & Surana

WP No. 14905 of 2001

For Petitioner : Mr. Aravind P. Datar
Senior Counsel
for Mr. V.S. Jayakumar

WP Nos. 15327 & 15328 of 2001

For Petitioner : Mr. Chandran Karuppiah

WP Nos. 15559 & 15560 of 2001

For Petitioner : Mr. Satish Parasaran

For Respondents : Mr. M. Ravindran
Additional Solicitor General
assisted by
Mr. S. Yashwant
Senior Panel Counsel
in Writ appeal & all writ petitions

COMMON JUDGMENT

A. KULASEKARAN, J

The prayer in all the above writ petitions i.e., W.P. Nos. 14905, 15327, 15328, 15559 and 15560 of 2001 are identical, W.A. No. 4119 of 2003 was filed against the vacation of the interim order passed in WP No. 15328 of 2001, hence, all the writ petitions as well as the writ appeal are disposed of by this common judgment.

2. The learned senior counsel Mr. Aravind P. Datar appearing for the petitioners submitted that the writ petitioners are non banking financial companies engaged in the business of hire purchase and leasing; that 46th Amendment inserted Article 366 (29A), of the Constitution of India, in which clauses a to f, particularly clauses c & d, which are relevant to this case, explain the ambit of the expressions of tax on the delivery of goods on hire-purchase or any system of payment by instalment and also a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; that the said expression is also found in the Entry 54 of List II; that after the said 46th Amendment, hire purchase and leasing transactions are treated as deemed sales and the State had imposed sales tax, now called as VAT, on both transactions and the entire amount paid by way of installments are liable for sale tax; that the service tax is leviable if any element of service is involved; that hire purchase/leasing are transfer of movable where there is no service element is involved. For the said contention, the learned senior counsel relied on the invoices raised by the members of petitioners association; that the petitioners are not collecting any charges for service, hence, no service tax can be leviable; that when the constitution under Article 366 (29A) authorises levy of sales tax on hire purchase/leasing transaction and the State levied sales tax, Parliament has no authority to levy service tax; that introduction of Service Tax on hire purchase and leasing transaction by the Parliament is violative of Article 14 and 19 (1) (g), 265, 366 (29A), Entry 54 of List II of Schedule VII of the Constitution of India. All the other counsel appearing for the appellant/petitioners adopted the argument of the Senior Counsel Mr. Aravind P. Datar and all of them relied on the below mentioned decisions:-

I) K. Damodarasamy Naidu & Bros. v. State of Tamil Nadu 2000 (1) SCC Page No.521 in which Para Nos. 12, 13 and 23 are relevant, which are extracted below:-

> "12. It was not disputed by learned counsel for the State of Maharashtra that the tax on food and drink could be imposed only upon that component of the composite charge for lodging and boarding at a residential hotel as related to the supply of food and drink. But, in his submission, no rules in this behalf were necessary; the Sales Tax Officers would make assessments depending upon the facts of each individual case.
>
> 13. There are several hundred residential hotels in the State of Maharashtra. They provide lodging and boarding to several thousands of customers in every assessment year. It is in practical terms impossible for

the Sales Tax Authorities to make assessments upon the basis of the facts relevant to each individual customer in each individual hotel. Generalisations are, therefore, inevitable and there is every likelihood that the basis of the generalisation made by one Sales Tax Officer would differ from the basis of the generalisation made by another, leading to unacceptable arbitrariness. Rules that indicate to Sales Tax Officers how to treat composite charges for lodging and boarding would eliminate substantial differences in their approach and, thus, arbitrariness.

23. Writ Petition No. 9901 of 1983 is made absolute to this extent:

The State of Maharashtra is directed henceforth not to make assessments of the tax on the supply of food and drink on hotel-owners who provide lodging and boarding for a composite sum until it frames rules that set out for such assessment which take account of the fact that residential hotels may provide lodging and full or part-board. If the rules are framed by 1-6-2000 the assessments that are not completed only by reason of this order may be proceeded with. If the rules are not framed by the said date, these assessments shall lapse. No proceedings for assessments shall be commenced hereafter until the rules have been framed. At the same time, completed assessments as of today shall not be affected by this order and the assessees would be entitled to adopt proceedings thereagainst, subject to the law."

ii) Bharat Sanchar Nigam Ltd. v. Union of India, (2006 (3) SCC 1 wherein the Honourable Supreme Court in Para Nos. 42, 44 and 45 held thus:-

"42. All the sub-clauses of Article 366(29-A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in Gannon Dunkerley Ltd. (sic modified). The amendment especially allows specific composite contracts viz. works contracts [sub-clause (b)]; hire-purchase contracts [sub-clause (c)], catering contracts [sub-clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does

pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29-A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract . We will, for the want of a better phrase, call this the dominant nature test."

iii) Imagic Creative (P) Ltd. v. Commissioner of Commercial Tax, 2008 (2) SCC 614 wherein in Para Nos. 28, 32 and 34, it was held thus:-

"28. We have, however, a different problem at hand. The appellant admittedly is a service provider. When it provides for service, it is assessable to a tax known as service tax. Such tax is leviable by reason of a parliamentary statute. In the matter of interpretation of a taxing statute, as also other statutes where the applicability of Article 246 of the Constitution of India, read with the Seventh Schedule thereof is in question, the Court may have to take recourse to various theories including aspect theory , as was noticed by this Court in Federation of Hotel & Restaurant Assn. of India v. Union of India.

32. Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct.

34. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. No costs."

iv) Unreported judgment of Division Bench of Delhi High Court in WP (C) No. 1659/2008 etc., batch dated 18.04.2009 wherein in Para Nos. 34 and 35, it was held thus:-

"34. From the above discussion, it is apparent that service tax is a value added tax; It is a tax on value addition provided by a service provider. It is obvious that it must have connection with a service and, there must be

some value addition by that service. If there is no value addition, then there is no service. With this in mind, it would be instructive to analyse the provisions of Section 65 (105) (zzzz). It has reference to a service provided or to be provided to any person, by any other person in relation to "renting of immovable property for use in the course or furtherance of business or commerce". The wordings of the provision are so structured as to entail a servi ce provided or to be provided to "A" by "B" in relation to "C" is the subject matter. As pointed out above by Mr. Ganesh, the expression 'in relation to' may be of widest amplitude, but it has been used in the said Act as per its context. Sometimes, 'in relation to' would include the subject matter following it and on other occasions it would not. As in the case of the service of dry cleaning, the expression 'in relation to dry cleaning' also has reference to the very service of dry cleaning. On the other hand, the service referred to in Section 65 (105) (v), which refers to a service provided by a real estate agent 'in relation to real estate' does not, obviously include the subject matter as a service. This is so because real estate by itself cannot by any stretch of imagination be regarded as a service. Going back to the structured sentence i.e., - service provided or to be provided to 'A' by 'B' in relation to 'C', it is obvious that 'C' can either be a service (such as dry cleaning, hair dressing etc.,) or not a service by itself, such as real estate. The expression ' in relation to' would therefore, have different meanings depending on whether "C" is a service or is not a service. If "C": is a service, then the expression 'in relation to' means the service 'C' as well as any other service having connection with the service 'C'. Where 'C' is not a service, the expression 'in relation to' would have reference only to some service which has a connection with 'C'. But, this would not imply that 'C' itself is a service.

35. From this analysis, it is clear that we have to understand as to whether renting of immovable property for use in the course or furtherance of business or commerce by itself is a service. There is no dispute that any service connected with the renting of such immovable property would fall within the ambit of Section 65 (105) (zzz) and would be exigible to service tax. The question is whether renting of such immovable property by itself constitutes a service and, thereby, a taxable service. We have already seen that service tax is a value added tax. It is a tax on the value addition provided by some service provider. Insofar as renting of immovable property for use in the course or furtherance of business or commerce is concerned, we are unable to discern any value addition. Consequently, the renting of immovable property for use in the course or furtherance of business or commerce by itself does not entail any value addition, and, therefore, cannot be regarded as a service. Of course, if there is some other service, such as air conditioning service provided along with the renting of immovable property, then it would fall within Section 65 (105) (zzzz)."

3. The learned Additional Solicitor General Mr. M. Ravindran for the respondents has submitted that the Honourable Supreme Court has upheld the legislative competence of Parliament to levy service tax under residuary Entry 97 to List I of VII Schedule to the Constitution in the decisions reported in (Tamil Nadu Kalyana Mandapam Association vs. Union of India) (2004) 167 ELT 3 (SC); (C.K. Jidheesh vs. Union of India) (2008) (1) STR 3 (SC) and (Gujarat Ambuja Cements vs. Union of India) (2005) 4 SCC 214 and constitutional amendment to Entry 92-C to List I of VII Schedule under Article 268-A are introduced giving authority to the parliament to legislate on service tax ; that Section 65(12) of the Finance Act, 1994 defines Banking and other financial services' as "financial leasing services including equipment leasing and hire-purchases". The learned Additional Solicitor General further submitted that Section 65 (14) of the Finance Act defines body corporate, which has the same meaning assigned to it in Clause 7 of Section (2) of the Companies Act, 1956. Section 65 (105) defines taxable service, which means any services provided or to be provided. Section 65 (zm) means any person, by banking or a financial institution, including a non-banking company, or any other body corporate or commercial concern, in relation to banking and other financial services. The charging Section 65 of the Finance Act, amended to cover tax on value of taxable service refers to clause (zm) of Section 65 (105). In view of the above sections, the petitioners are liable to pay service tax for leasing and hire purchase transactions so far as service element is concerned and VAT is payable for sale to State Government. The government of India issued a circular dated 4/06-ST dated 01.03.2006 granting exemption of 90% interest income earned on leasing and hire purchase. It is further submitted by the learned Additional Solicitor General that the banking companies, which are carrying on leasing and hire purchase are paying service tax without any protest, since it is well known fact that in the said transaction, service element is involved. In support of his contention, the learned Additional Solicitor General relied on the following decisions:-

i) All-India Federation of Tax Practitioners v. Union of India, 2007 (7) SCC 527 wherein in Para No.22 and 33, it was held thus:-

> 22. As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of service industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of the Finance Act, 1994, the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268-A in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92-C was also introduced in the Union List for the levy of service tax. As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide the Constitution (Eighty-eighth

Amendment) Act, 2003. Further, it is important to note, that service tax is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client.

33. Applying the above tests laid down in the aforestated judgments to the facts of the present case, we find that Entry 60 of List II, mentions taxes on professions, trades, callings and employments. Entry 60 is a taxing entry. It is not a general entry. Therefore, we hold that tax on professions, etc. has to be read as a levy on professions, trades, callings, etc., as such. Therefore, Entry 60 which refers to professions cannot be extended to include services. This is what is called as an Aspect Theory. If the argument of the appellants is accepted, then there would be no difference between interpretation of a general entry and interpretation of a taxing entry in List I and List II of the Seventh Schedule to the Constitution. Therefore, professions will not include services under Entry 60. For the above reasons, we hold that Parliament had absolute jurisdiction and legislative competence to levy tax on services. While interpreting the legislative heads under List II, we have to go by schematic interpretation of the three Lists in the Seventh Schedule to the Constitution and not by dictionary meaning of the words profession or professional as was sought to be argued on behalf of the appellants, otherwise the distinction between general entries and taxing entries under the three Lists would stand obliterated. The words in relation to and the words with respect to are no doubt words of wide amplitude but one has to keep in mind the context in which they are used."

ii) Gujarat Ambuja Cements Ltd. v. Union of India 2005 (182) E.L.T. 33 (S.C.) wherein in Para Nos. 33, 34 and 35, it was held thus:-

33. Since service tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within the States exclusive power under Entry 56 of List II. What the Act ostensibly seeks to tax is what it, in substance, taxes. In the circumstances, the Act could not be termed to be a colourable piece of legislation. It is not the case of the petitioners that the Act is referable to any other entry apart from Entry 56 of List II. Therefore the negation of the petitioners submission perforce leads to the conclusion that the Act falls within the residuary power of Parliament under Entry 97 of List I.

34. Incidentally a similar challenge to the legislative competence of Parliament to levy service tax was negatived in T.N. Kalyana Mandapam Assn. v. Union of India which was a case where the levy of service tax was challenged by the owners of kalyana mandapams/mandap-keepers. By virtue of the 1997 amendment service provided to a client by mandap-keepers including the services if any rendered as a caterer was treated as a taxable service. The challenge, inter alia, was that service tax on mandap-keepers was colourable legislation as the said tax was not on

service but was in pith and substance only a tax on the sale of goods and/or a tax on land. The writ petition filed before the Madras High Court was rejected and the constitutionality of the levy was upheld. It was then urged before this Court by the appellants that Entries 18, 14 and 54 of List II covered the levy in question and, therefore, resort could not be had to Entry 97 in List I of the Seventh Schedule of the Constitution. It was held by this Court that although certain items of the service might have been referable to any other entry, the service element was the more weighty, visible and predominant. Therefore, the nature and character of the levy of the service tax was distinct from a tax on the sale or hire-purchase of goods and from a tax on land.

35. 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.

iii) T.N. Kalyana Mandapam Assn. v. Union of India, 2004 (5) SCC 632 wherein in Para Nos. 43, 44, 45, 46 and 47, it was held thus:-

43. As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. The legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law.....

44. In regard to the submission made on Article 366(29-A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods. In other words, the operative words of the said sub-article are supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.

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. Mr Mohan Parasaran, learned Senior for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of Federation of Hotel and Restaurant Assn. of India v. Union of India1 ought to have appreciated that in that matter Article 366(29-A) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel and Restaurant and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

46. It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter.

47. The legislative competence of Parliament also does not depend upon whether in fact any services are made available by the mandap-keepers within the definition of taxable service contained in the Finance Act. Whether in the given case taxable services are rendered or not is a matter of interpretation of the statute and for adjudication under the provisions of the statute and does not affect the vires of the legislation and/or the legislative competence of Parliament. In fact, a wide range of services is included in the definition of taxable services as far as mandap-keepers are concerned. The said definition includes services provided in relation to use of mandap in any manner and includes the facilities provided to the client in relation to such use and also the services rendered as a caterer . The phrase in relation to has been construed by this Court to be of the widest amplitude."

4. This Court considered the submission of counsel on both sides. The relevant Articles in the Constitution of India and the provisions of Law are extracted below:-

"Section 65 (12) of Finance Act- Banking and other financial services' means

(a) the following services provided by a bankign company or a financial institution including a non-banking financial company or any other body corporate or commercial concern namely:-

(1) financial leasing services including equipment leasing and hire-purchase:-

Explanation: For the purpose of this item, financial leasing means a lease transaction where-

(i) Contract for lease is entered into between two parties for leasing of a specific asset:

(ii) such contract is for use and occupation of the asset by the lessee:
(iii) the lease payment is calculated so as to cover the full cost of the asset together with interest charges: and
(iv) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;

S.65(14) body corporate has the meaning assigned to it in clause (7) of Section 2 of the Companies Act, 1956.

S.65 (105) taxable service means any service provided or to be provided:-

....

(zm) to any person by a banking company or a financial institution including a non-banking company, or any other body corporate or commercial concern, in relation to banking and other financial services.

Section 66: Charge of service tax:- (1) On and from the date of commencement of this chapter, there shall be levied a tax (hereinafter referrred to as the service tax), at the rate of five percent of the value of the taxable services referred to in sub-clauses (a), (b) and (d) of clause (72) of section 65 and collected in such manner as may be prescribed.

(2) .....

(3) .....

(4) ......

(5) With effect from the date notified under Section 137 of the Finance Act, 2001, there shall be levied a service tax at the rate of five per cent, of the value of the taxable services referred to in sub-clauses (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn) and (zo) of clause 72 of Section 65 and collected in such manner as may be prescribed.

Article 14: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 19: Right to Freedom

(1) All citizens shall have the right--

(g) to practise any profession, or to carry on any occupation, trade or business.

Article 265: No tax shall be levied or collected except by authority of law.

Article 268A: (1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States in the manner provided in clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be--

(a) collected by the Government of India and the States;

(b) appropriated by the Government of India and the States,

in accordance with such principles of collection and appropriation as may be formulated by Parliament by law.

Article 366 (29A) tax on the sale or purchase of goods includes
....
(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments:

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Entry 54 of List II of VII Schedule: Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.

5. The appellant/petitioners are engaged in the business of hire purchase/leasing transaction. The hire purchase and leasing are more or less identical. In leasing, the lessee selects the goods with the manufacturer and thereafter, approach the financier to lend loan and after executing the agreement, the amount is paid to the dealer or manufacturer and invoice is raised in the name of the financier, however, goods are being used by the lessee on payment of installments, and later after paying the entire installments, the lessee exercise option to purchase the same. In hire purchase, after agreement with the hirer, the financier purchases the goods from the manufacturer or dealers in the name of the hirer, thereafter the financier name is endorsed in the documents, thereby creating a charge on it. On payment of intallments i.e., the principal and interest, the hirer become the owner of the goods after cancelling the endorsement in the documents.

6. The clauses (c) and (d) of Article 366 (29-A) permit the State legislatures to levy sales tax on the sale of purchase of goods/on the delivery of goods on hire purchase or any system of payment by instalments/on the transfer of the right to use any goods for any purpose for cash deferred payment or other valuable consideration and widen the scope of Entry 54 of List II of Schedule VII of the Constitution of India. It is contended by the appellant/petitioners that levy of sales tax on sale comes within the exclusive domain of the State legislature, the hire purchase/leasing transactions have already suffered sales tax and service tax cannot be levied thereon as no service element is involved. Hence, the relevant provisions in the Finance Act levying interalia service tax on leasing/hire purchase transaction is ultra vires the provisions of Article 14 and 19 (1) (g), 265, 366 (29A), Entry 54 List II Schedule VII of the Constitution of India.

7. The appellant/petitioners produced invoices, which contains the headings of installments due date, installment amount, principal, interest, VAT and total rental amount. Pointing out the same, the learned senior counsel for the petitioners has advanced arguments that they have not charged any amount towards service charges, as no service element is involved. However, the petitioner/appellant have admitted that they collect 1% service charge for preparation of documents and other incidental activities. The specific contention of the petitioners/ appellants is that the particular impost under the impugned law, having regard to its nature and incidents, is really not a service tax at all and in pith and substance, really one imposing a tax on the price paid for the sale of goods.

8. Service tax is evolved on account of service industry becoming a major contributor to the GDP of an economy. Union derive its authority from the residuary entry 97 of the Union list for levying tax on services. Article 268-A of the Constitution of India empowers the Union to levy tax on service. Entry 92 (c) was also introduced in the Union list for the levy of service tax.

9. In the amended Act 32 of 1994 in the Finance Act, 1994, Section 65 (12) (a) (i) defines "finance leasing service including equipment leasing and hire purchase"

10. The subsequent amendments made in the Finance Act, 1994, Section 65 (105) (zm) was introduced which defines "to any person by a banking company or a financial institution including a non-banking company, or any other body corporate or commercial concern, in relation to banking and other financial services."

11. The case of the respondents is that service tax on financial leasing services/hire purchase is not a tax on sale of goods, but it is a tax on the services rendered in relation to the said transactions and the Parliament has legislative competence to levy service tax under the impugned Act.

12. The State legislature cannot enlarge the definition of sale to bring the 'service' which could not be sale in law. The petitioners/appellant admit that in hire purchase/leasing, they collect 1% of service charges which details are not furnished by them. Admittedly, the petitioners/appellant are rendering service and collecting charges therefor. The tax on sale of goods involved in the said service does not mean that no service tax be levied on the service aspect. The ratio laid down in (Federation of Hotel and Restaurant Association of India vs. Union of India) AIR 1990 SC 1637 and aspect theory applies in this case.

13. In Lefroy's Canada's Federal System, the learned author refers "that by 'aspect must be understood the aspect or point of view of the legislator in legislating the object, purpose and scope of the legislation that the word is used subjectively of the legislator rather than objectively of the matter legislated upon'.

14. In (Imagic Creative (P) Ltd. v. CCT) (2008) 2 SCC 614, wherein Para No. 28, it was held thus:-

> "28. We have, however, a different problem at hand. The appellant admittedly is a service provider. When it provides for service, it is assessable to a tax known as service tax. Such tax is leviable by reason of a parliamentary statute. In the matter of interpretation of a taxing statute, as also other statutes where the applicability of Article 246 of the Constitution of India, read with the Seventh Schedule thereof is in question, the Court may have to take recourse to various theories including aspect theory , as was noticed by this Court in Federation of Hotel & Restaurant Assn. of India v. Union of India."

Thus, In the matter of interpretation of a taxing statute, as also other statutes, when the applicability of Article 246 read with seventh schedule thereof is in question, the Court may have to take recourse to various theories including aspect theory.

15. It is trite that the true nature and character of the legislation must be determined with reference to a question of the power of the legislature. The consequences and effects of the legislation are not the same thing as the legislative subject matter.

16. In (Governor General in Council vs. Province of Madras) AIR 1945 PC 98 it was held that "....The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because of taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable articles leaves the factory or workshop for the first time on the occasion of its sale".

17. In Larsen & Toubro vs. Union of India, it has expressly been laid down that the effect of amendment by introduction of clause 29-A in Article 366 is that by legal fiction, certain indivisible contracts are deemed to be divisible into contract of sale of goods and contract of service. It has been held in para 47 thus:-

> "47. Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services."

18. In Bharat Sanchar Nigam Ltd. v. Union of India,(2006) 3 SCC 1, in Para No. 88 and 89, it was held thus:-

> 88. No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India: (SCC p.395, para 47)
>
> The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is

relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods.

89. For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements Ltd. v. Union of India, SCC at p.228, para 23:

This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field.

19. The respondents submitted that notification No.4/2006-ST dated 01.03.2006 was issued granting exemption on 90% representing interest income. The petitioners/appellant argued to the extent that granting such exemption would not save legislative competence, if there is no competence, the provision has to be struck down. Both sides not furnished any details relating to the exemption or consequences to the exemption. In view of the said position, this Court not go into the details of the said notification.

20. In (Tamil Nadu Kalyana Mandapam Association vs. Union of India) (2004) 167 ELT 3 (SC); (Gujarat Ambuja Cements vs. Union of India) (2005) 4 SCC 214; All-India Federation of Tax Practitioners v. Union of India, 2007 (7) SCC 527and (C.K. Jidheesh vs. Union of India) (2008) (1) STR 3 (SC) the Honourable Supreme Court upheld the legislative competence of the parliament to levy service tax under a residuary entry 92 to List I of VII Schedule of the Constitution and necessary constitutional amendments were made and Entry 92 (c) was introduced to List I giving authority to the Parliament to legislate on service tax.

21. The Honourable Supreme Court in Larsen & Toubro v. Union of India as well as Bharat Sanchar Nigam case extracted above considered the transaction relating to supply of goods and rendering service and held that the State cannot encroach upon the Union List and tax services by including the same in the value of goods involved. Similarly, the Centre cannot include the value of the goods involved in the cost of the service.

22. The Hire Purchase/Leasing transactions admittedly includes the concept of rendering service. Service tax is an indirect tax and it is to be paid on all the services notified by the Government of India. Service tax is levied on service not on sale or purchase of goods. The said tax is on service and not on the service provider. Service tax is made by Parliament under Entry 92C of List I and Article 268-A, which has legislative competence to levy service tax by way of the impugned Act and Entry 54 of List II and Entry 92C of List I operate on different areas.

23. Hence, the plea of the appellant/petitioners that service tax relating to leasing and hire purchase transaction is contrary to Article 265 and 366 (29A) of Entry 54 List II of VII Schedule of the Constitution is rejected.

24. It is well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy, legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc., for taxation. If there is equality and uniformity within each group, the law would not be discriminatory. The learned Additional Solicitor General for the respondents submitted that all the banking companies, which are carrying on similar hire purchase/leasing transactions are paying service tax without any protest as service element is involved.

25. A taxing statute is not per se, a restriction of the freedom under Article 19 (1) (g). The policy of a tax, in its effectuation, might, of course, bring in some hardship in some individual cases. But that is inevitable, so long as law represents a process of abstraction from the generality of cases and reflects the highest common factor. Every cause, it is said, has its martyrs. Then again, the mere excessiveness of a tax, or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per se, and without more, constitute violation of the rights under Article 19 (1) (g). In (Sonia Bhatia vs. State of Uttar Pradesh) (1981) 2 SCC 585, it was held that "The Act seems to implement one of the most important constitutional directives contained in Part IV of the Constitution of India. If, in this process a few individuals suffer severe hardship that cannot be helped, for individual interests must yield to the larger interests of the community or the country as indeed every noble cause claims its martyr."

26. For the said reasons, the averments that levying of service tax on hire purchase/leasing transaction is violative of Article 14 and 19 (1) (g) of the Constitution is also rejected.

27. In fine, the writ appeal as well as the writ petitions are dismissed. No costs. Connected miscellaneous petition is closed.

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To

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