Bombay High Court All India Federation Of Tax ... vs Union Of India on 22 February, 2001 Equivalent citations: 2001 116 TAXMAN 418 Bom Author: Shah JUDGMENT Shah, J. In these two writ petitions under article 226 of the Constitution of India, petitioners who are Associations of tax practitioners, Chartered Accountants and architects challenge the constitutional validity of section 116 of the Finance (No. 2) Act, 1998. The Act envisages service tax at the rate of 5 per cent of the value of taxable service provided to any person by the person responsible for collecting service tax. The persons providing service are liable to recover tax and pay the same to the Central Government under section 68 of the Act. The service tax was introduced by the Finance Act, 1994. The ambit of the Act was widened by the Finance Act, 1998 substituting section 66 of the Act thereby including service provided by the architects and practising chartered accountants, etc. 2. The challenge to the vires of the Act is on the grounds of lack of legislative competence and violation of rights under articles 14 and 19(1)(g) of the Constitution. Union of India seeks to sustain the legislative competence to enact the impugned law under article 248, read with Entry 97 of List I of the Seventh Schedule. 2. The challenge to the vires of the Act is on the grounds of lack of legislative competence and violation of rights under articles 14 and 19(1)(g) of the Constitution. Union of India seeks to sustain the legislative competence to enact the impugned law under article 248, read with Entry 97 of List I of the Seventh Schedule. 3. Writ Petition No. 142 of 1999 is concerning tax practitioners and the chartered accountants. The first petitioner therein is the All India Federation of Tax Practitioners which is said to be a representative body of 36 associations. The second petitioner is the Chamber of Income Tax Consultants having advocates, chartered accountants and tax practitioners as its members. The 3rd and 5th petitioners are also associations of chartered accountants and the 4th petitioner is a practising chartered accountant. The second petition, i.e., Writ Petition No. 1174 of 2000 is filed by the Indian Institute of Architects which is a registered society of architects. 3. Writ Petition No. 142 of 1999 is concerning tax practitioners and the chartered accountants. The first petitioner therein is the All India Federation of Tax Practitioners which is said to be a representative body of 36 associations. The second petitioner is the Chamber of Income Tax Consultants having advocates, chartered accountants and tax practitioners as its members. The 3rd and 5th petitioners are also associations of chartered accountants and the 4th petitioner is a practising chartered accountant. The second petition, i.e., Writ Petition No. 1174 of 2000 is filed by the Indian Institute of Architects which is a registered society of architects. 4. Brief legislative history is that the service tax was for the first time imposed by the Finance Act, 1994 pursuant to the report submitted by Chelliah Committee on tax reforms. The Finance Act, 1994 covered only three services, i.e., services provided by stock brokers, Telegraphic authority and general insurer. Chapter V thereof contains the scheme and provisions relating to the tax. By the Finance Act, 1997, section 65 was substituted so as to include a wide variety of services. Section 116 of the Finance Act, 1998 substituted section 66 of the Finance Act, 1994. While a few services covered by the 1997 Act were excluded from purview of the service tax,

a few more services were included. Services provided by the architects, interior decorators, chartered accountants and company secretaries were covered by the levy of tax. It appears that representations were made by the associations representing various professionals/callings. The Central Government thereafter issued notification dated 7-10-1998 and 16-11-1998 clarifying which services are exigible to service tax and exempting certain services provided by the practising chartered accountants/company secretaries/cost accountants in their professional capacity. 4. Brief legislative history is that the service tax was for the first time imposed by the Finance Act, 1994 pursuant to the report submitted by Chelliah Committee on tax reforms. The Finance Act, 1994 covered only three services, i.e., services provided by stock brokers, Telegraphic authority and general insurer. Chapter V thereof contains the scheme and provisions relating to the tax. By the Finance Act, 1997, section 65 was substituted so as to include a wide variety of services. Section 116 of the Finance Act, 1998 substituted section 66 of the Finance Act, 1994. While a few services covered by the 1997 Act were excluded from purview of the service tax, a few more services were included. Services provided by the architects, interior decorators, chartered accountants and company secretaries were covered by the levy of tax. It appears that representations were made by the associations representing various professionals/callings. The Central Government thereafter issued notification dated 7-10-1998 and 16-11-1998 clarifying which services are exigible to service tax and exempting certain services provided by the practising chartered accountants/company secretaries/cost accountants in their professional capacity. 5. The constitutional and statutory provisions which are required to be considered may now be set out. Article 276(1) of the Constitution provides that notwithstanding anything in article 245, no law of the Legislature of a State relating to taxes for the benefit of the State or of a Municipality, District Board, local Board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income. By clause (2) of that article, the total amount payable in respect of any one person to the State or to any one municipality, district Board, local Board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two thousand and five hundred rupees per annum. Sub-clause (3) then provides that the power of the Legislature of a State to make laws with respect to taxation on professions, trades, callings and employments, shall not be construed as limiting in any way the power of the Parliament to make laws with respect to taxation on incomes accruing from or arising out of professions, trades, callings and employments. 5. The constitutional and statutory provisions which are required to be considered may now be set out. Article 276(1) of the Constitution provides that notwithstanding anything in article 245, no law of the Legislature of a State relating to taxes for the benefit of the State or of a Municipality, District Board, local Board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income. By clause (2) of that article, the total amount payable in respect of any one person to the State

or to any one municipality, district Board, local Board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two thousand and five hundred rupees per annum. Sub-clause (3) then provides that the power of the Legislature of a State to make laws with respect to taxation on professions, trades, callings and employments, shall not be construed as limiting in any way the power of the Parliament to make laws with respect to taxation on incomes accruing from or arising out of professions, trades, callings and employments. 6. Article 248 of the Constitution which deals with residuary powers of the Union Legislature reads as follows : 6. Article 248 of the Constitution which deals with residuary powers of the Union Legislature reads as follows : "248. Residuary powers of legislation.(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists." 7. Entry 60 of List II of the Seventh Schedule is as follows: 7. Entry 60 of List II of the Seventh Schedule is as follows: "Taxes on professions, trades, callings and employments." Entry 97 of List I of Seventh Schedule is as follows: "Any, other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists." It is upon these two entries respectively that (the parties rely upon, the respondents contending that Entry 97 of the Union List, read with article 248(2) authorises and justifies levy of service tax, petitioners contending that so far as these provisions purport to impose a tax on the service are really in the nature of a tax on profession failing within Entry 60 of List II and, thus, beyond legislative competence of the Parliament. It is also the contention of the petitioners that the residuary power under Entry 97 of List I is not available to the Parliament, if the subject is covered by any of the items falling in the State List. 8. Section 66 of the Act is the charging section which, after its amendment in 1998 reads as follows: 8. Section 66 of the Act is the charging section which, after its amendment in 1998 reads as follows: "(1) On and from the date of commencement of this Chapter, there shall be levied a tax (hereinafter referred to as the service tax), at the rate of five per cent of the value of the taxable services referred to in sub-clauses (a), (b) and (a) of clause (48) of section 65 and collected in such manner as may be prescribed. (2) With effect from the date notified under section 85 of the Finance (No. 2) Act, 1996, there shall be levied a service tax at the rate of five per cent of the value of taxable services referred to in sub-clauses (c), (e) and (f) of clause (48) of section 65 and collected in such manner as may be prescribed. (3) With effect from the date notified under section 88 of the Finance Act, 1997 (26 of 1997), 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 (g), (h), (i), (j), (k), (l), (m), (n) and (l) of clause (48) of section 65 and collected in such manner as may be prescribed. (4) With effect from the date notified under section 116 of the Finance (No. 2) Act, 1998, 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 (p), (q), (r), (s), (t), (u), (v), (w), (x), (y) and (z) of clause (48) of section 65 and collected in such manner as may be prescribed." 9. The

expressions Architect, Practising Chartered Accountant and Taxable Service are some of the material expressions defined in section 65(5), (31) and (48) as follows : 9. The expressions Architect, Practising Chartered Accountant and Taxable Service are some of the material expressions defined in section 65(5), (31) and (48) as follows : "(5) Architect means any person whose name is for the time being entered in the register of architects maintained under section 23 of the Architects Act,1972 and also includes any commercial concern engaged in any manner, whether directly or indirectly, in rendering services in the field of architecture; (31) Practising chartered accountant means a person who is a member of the Institute of Chartered Accountants of India and is holding a certificate of practice granted under the provisions of the Chartered Accountants Act, 1949 and includes any concern engaged in rendering services in the field of chartered accountancy ; (48) Taxable service means any service provided, (p) to a client, by an architect in his professional capacity in any, manner; (s) to a client by a practising chartered accountant in his professional capacity, in any manner;" 10. Section 67 provides for determination of the value of taxable service, and clauses (o) and (r) thereof which are material for our purpose read as under : 10. Section 67 provides for determination of the value of taxable service, and clauses (o) and (r) thereof which are material for our purpose read as under : "(o) in relation to the service provided by an architect to a client, shall be the gross amount charged by such architect from the client for services rendered in professional capacity in any manner; (r) in relation to the service provided by an practising chartered accountant to a client, shall be the gross amount charged by such accountant from the client for services rendered in professional capacity in any manner;" 11. Section 68(1) provides that every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed. Sub-section (2) then provides that notwithstanding anything contained in sub-section (1) in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of Chapter VI shall apply to such person as if he is the person liable for paying the service tax in relation to such service. 11. Section 68(1) provides that everyperson providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed. Sub-section (2) then provides that notwithstanding anything contained in sub-section (1) in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of Chapter VI shall apply to such person as if he is the person liable for paying the service tax in relation to such service. 12. The procedure which is to be followed for collecting the service tax is prescribed by section 78, which, inter alia, requires the person responsible for collecting the tax to file return in the prescribed

form. The assessment is made under section 71 and there are other sections in the said Chapter which deal with the levy and collection of this tax and also provide for imposition of penalty, etc., in relation thereto. The incidence of tax is on the person who is responsible for collecting the service tax which includes practising chartered accountants and architects. The legislation, it is urged, is squarely within the Entry 60 of List II within the State power. The Act, it is contended, although ostensibly imposes service tax but in effect taxes the professions. Even if the Union can be said to be competent to levy service tax, it is said, has no rational basis. Persons similarly situated rendering similar services on the same basis are differentiated on the sole basis that they are not registered as chartered accountants or architects. Therefore, the impugned provisions are discriminatory, arbitrary and violative of article 14. The petitioners further contend that several provisions of the Act which impose certain statutory obligations of onerous nature, breach of which are visited with penal consequences rendering unreasonable restrictions on the petitioners fundamental rights under article 19(1)(g). 12. The procedure which is to be followed for collecting the service tax is prescribed by section 78, which, inter alia, requires the person responsible for collecting the tax to file return in the prescribed form. The assessment is made under section 71 and there are other sections in the said Chapter which deal with the levy and collection of this tax and also provide for imposition of penalty, etc., in relation thereto. The incidence of tax is on the person who is responsible for collecting the service tax which includes practising chartered accountants and architects. The legislation, it is urged, is squarely within the Entry 60 of List II within the State power. The Act, it is contended, although ostensibly imposes service tax but in effect taxes the professions. Even if the Union can be said to be competent to levy service tax, it is said, has no rational basis. Persons similarly situated rendering similar services on the same basis are differentiated on the sole basis that they are not registered as chartered accountants or architects. Therefore, the impugned provisions are discriminatory, arbitrary and violative of article 14. The petitioners further contend that several provisions of the Act which impose certain statutory obligations of onerous nature, breach of which are visited with penal consequences rendering unreasonable restrictions on the petitioners fundamental rights under article 19(1)(g). 13. The contentions urged in support of the petitions may be formulated in the following terms: 13. The contentions urged in support of the petitions may be formulated in the following terms: (a) the Act in its true nature and character is not one imposing service tax but is, in pith and substance, a tax on profession falling within Entry 60 List II of Seventh Schedule and is, thus, clearly outside the legislative competence of the Parliament; (b) that even if the Parliament is held to be competent the impugned provisions meet out discriminatory treatment, inasmuch as same services being rendered by the non-qualified persons are not submitted to tax but only services being rendered by the practising chartered accountants and architects are submitted to tax and, therefore, the Act is violative of article 14 inasmuch as the differentia on which the architects and chartered accountants are classified is arbitrary and unintelligible and

has no rational nexus with the taxing policy under the Act; (c) that the Act is violative of petitioners fundamental right under article 19(1)(g) as it imposes unreasonable onerous restrictions on their freedom of profession. Re : contention (a) : 14. Mr. Arvind Datar, the learned counsel appearing for the Indian Institute of Architects who addressed the leading arguments, contended that the appellation of service tax given to the impost is a misnomer as the impost envisaged by the Act in its true nature and character is no more and no less than a tax on profession under Entry 60 List II within the States exclusive power. The nomenclature to the tax, it is urged, is irrelevant in deciding its true nature and character. Entry 60 of List II refers to a tax on profession. Entry is used in wider sense and is not restricted to a particular aspect of profession. It is also not subject to any other entry/provision in List II or List III. The cardinal rule of interpretation is that in construing words in a constitutional enactment conferring legislative power should be given most liberal construction so that the same may have the effect in their widest amplitude. Mr. Datar referred to the following observations of the Supreme Court in the case of Navinchandra Mafatal v. CIT : 14. Mr. Arvind Datar, the learned counsel appearing for the Indian Institute of Architects who addressed the leading arguments, contended that the appellation of service tax given to the impost is a misnomer as the impost envisaged by the Act in its true nature and character is no more and no less than a tax on profession under Entry 60 List II within the States exclusive power. The nomenclature to the tax, it is urged, is irrelevant in deciding its true nature and character. Entry 60 of List II refers to a tax on profession. Entry is used in wider sense and is not restricted to a particular aspect of profession. It is also not subject to any other entry/provision in List II or List III. The cardinal rule of interpretation is that in construing words in a constitutional enactment conferring legislative power should be given most liberal construction so that the same may have the effect in their widest amplitude. Mr. Datar referred to the following observations of the Supreme Court in the case of Navinchandra Mafatal v. CIT : “As pointed out by Gwyer, CJ, in United Provinces v. Mt Atiqua Begum , none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is, therefore, clear and it is acknowledged by Chief Justice Chagla - that in construing an entry in a List conferring legislative powers the widest possible construction according to there ordinary meaning must be put upon the words used therein.” (p. 61) 15. Referring to the provisions of section 66, which seek to levy service tax on gross receipts for rendering professional service, Mr. Datar contended that whether the tax is levied on the gross receipts for rendering professional service or levied on the basis of registration or enrolment with a particular professional body, it remains a tax on the profession. Measure of the tax can be on the basis of registration or practice of the professional. It can also be based on the quantum of receipts of the professional. Therefore, the levy of tax on the service rendered is nothing but levy based on the quantum of gross receipts in the profession and, therefore, such a levy does not cease to be a tax on

profession. Mr. Datar referred to the observations of the Supreme Court in Union of India v. Bombay Tyre International Ltd. : 15. Referring to the provisions of section 66, which seek to levy service tax on gross receipts for rendering professional service, Mr. Datar contended that whether the tax is levied on the gross receipts for rendering professional service or levied on the basis of registration or enrolment with a particular professional body, it remains a tax on the profession. Measure of the tax can be on the basis of registration or practice of the professional. It can also be based on the quantum of receipts of the professional. Therefore, the levy of tax on the service rendered is nothing but levy based on the quantum of gross receipts in the profession and, therefore, such a levy does not cease to be a tax on profession. Mr. Datar referred to the observations of the Supreme Court in Union of India v. Bombay Tyre International Ltd. : " . . . . . It has long been recognised that the measure employed for assessing a tax must not be confused with the nature of the tax. In Ralla Ram v. Province of East Punjab the federal court held that a tax on buildings under section 3 of the Punjab Urban Immovable Property Tax Act, 1940 measured by a percentage of the annual value of such buildings remained a tax on buildings under that Act even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income Tax Act. It was pointed out that although the same standard was adopted as a measure for the two levies, the levies remained separate and distinct imposts by virtue of their nature. In other words, the measure adopted should not be identified with the nature of the tax. . . ." (p. 429) 16. Mr. Datar also referred to the passage from Serves Constitutional Law of India, Second Edition, Vol. 2, at page 1258 which was cited with approval by the Supreme Court in Bombay Tyre International Ltd. (supra): 16. Mr. Datar also referred to the passage from Serves Constitutional Law of India, Second Edition, Vol. 2, at page 1258 which was cited with approval by the Supreme Court in Bombay Tyre International Ltd. (supra): " Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements: the person, them, or activity on which the tax is imposed, and the amount of the tax. The amount may be measured in many ways; but decided cases established a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax." (p. 430) 17. Mr. Datar sought to demonstrate that looking from any angle service tax must be said to be covered under Entry 60 of List II. He stated that the tax on building can be a one time tax, unrelated to the annual rental value, but it can also be based on the total area, age of the building, location, etc. In both the cases, it is a tax on building. Applying the same analogy Mr. Datar submitted that levy of professional tax without reference to remuneration or levy with reference to the remuneration/professional receipts would only be a tax on profession. 17. Mr. Datar sought to demonstrate that looking from any angle service tax must be said to be covered under Entry 60 of List II. He stated that the tax on building can be a one time tax, unrelated to the annual rental value, but it can also be based on the total area, age of the building, location, etc. In both the

cases, it is a tax on building. Applying the same analogy Mr. Datar submitted that levy of professional tax without reference to remuneration or levy with reference to the remuneration/professional receipts would only be a tax on profession. 18. The second limb of the argument of Mr. Datar is that the Union Legislature does not get power to levy tax with reference to residuary power under Entry 97 of List I unless it is shown that the State Government is incompetent to levy tax. It is only when the tax cannot be levied by the State Government that the Parliament is empowered to levy tax under Entry 97, List I. It was submitted that recourse to residuary power under article 248, read with Entry 97 of List I should be the very last refuge and would be available if and only if the other entries in the State and Concurrent Lists do not cover the topic. Reliance was placed on the observations of the federal court in Subrahmanyan Chettiar v. Muttuswami Goundan it was held : 18. The second limb of the argument of Mr. Datar is that the Union Legislature does not get power to levy tax with reference to residuary power under Entry 97 of List I unless it is shown that the State Government is incompetent to levy tax. It is only when the tax cannot be levied by the State Government that the Parliament is empowered to levy tax under Entry 97, List I. It was submitted that recourse to residuary power under article 248, read with Entry 97 of List I should be the very last refuge and would be available if and only if the other entries in the State and Concurrent Lists do not cover the topic. Reliance was placed on the observations of the federal court in Subrahmanyan Chettiar v. Muttuswami Goundan it was held : "But resort to that residual power should be the very last refuge. It is only when all the categories in the three Lists are absolutely exhausted that one can think of falling back upon a non-descript." 19. Reliance was also placed on the following words of caution sounded by Chinnappa Reddy, J., in International Tourist Corporation v. State of Haryana : 19. Reliance was also placed on the following words of caution sounded by Chinnappa Reddy, J., in International Tourist Corporation v. State of Haryana : "... 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 or List III and in the case of a tax if it is not mentioned in either of those Lists. In a Federal Constitution like ours where there is a division of legislative subjects but the residuary power is vested in 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. . . ." (p. 777) 20. Mr. Datar submitted that the service tax on professionals is, in pith and substance, only a tax on profession. All the definitions and charging section as well as valuation in the Finance Act, 1998 consistently refer to taxation of the architects, chartered accountants only as professionals or in the context of

their professional functions. The notification issued for chartered accountants expressly excludes remuneration from nonprofessional activities from the purview of service tax. If the service tax has a substantial connection with tax on profession, it can well be taken to be a legislation on the topic covered by Entry 60. He drew our attention to the observations of Sen, J, in para 12 of the judgment in Southerm Pharmaceuticals & Chemicals v. State of Kerala : It is the charging section which gives true index to a real character of tax. . . ." Again in para 13 the Supreme Court observed "In determining whether an enactment is a legislation with respect to a given power, what is relevant is not the consequence of the enactment on the subject-matter or whether it affects it, but whether, in pith and substance, it is the law upon the subject-matter in question". He also invited our attention to the observations of the Supreme Court in Ujagar Prints v. Union of India : 20. Mr. Datar submitted that the service tax on professionals is, in pith and substance, only a tax on profession. All the definitions and charging section as well as valuation in the Finance Act, 1998 consistently refer to taxation of the architects, chartered accountants only as professionals or in the context of their professional functions. The notification issued for chartered accountants expressly excludes remuneration from nonprofessional activities from the purview of service tax. If the service tax has a substantial connection with tax on profession, it can well be taken to be a legislation on the topic covered by Entry 60. He drew our attention to the observations of Sen, J, in para 12 of the judgment in Southerm Pharmaceuticals & Chemicals v. State of Kerala : It is the charging section which gives true index to a real character of tax. . . ." Again in para 13 the Supreme Court observed "In determining whether an enactment is a legislation with respect to a given power, what is relevant is not the consequence of the enactment on the subject-matter or whether it affects it, but whether, in pith and substance, it is the law upon the subject-matter in question". He also invited our attention to the observations of the Supreme Court in Ujagar Prints v. Union of India : "23. . . The expression with respect to in article 246 brings in the doctrine of pith and substance in understanding of the exertion of legislative power and whether the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially with respect to a particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may will be taken to be the legislation on the topic." (p. 529) 21. Mr. Dwarkadas, the counsel appearing for the tax practitioners and chartered accountants, adopted the submissions of Mr. Datar. He also referred to a decision of the Division Bench of the court in Kisan Supdu Ingle v. Bhusawal Borough Municipality AIR 1966 Bom 15. In that case, the Bhusawal Municipality decided to impose tax on professions, trades, callings and employments by virtue of the powers conferred by the Bombay Municipal Borough Act, 1925. An employee of the municipality challenged the levy of the said tax on the ground that the municipality was not competent to levy a tax on any employment in the nature of any service, in which a person is employed to work for another. His contention was that the word employments should be construed ejusdem genesis with the other words mentioned in

Entry 60 in List II and, therefore, it should mean such employments which are akin to or in the nature of professions, trades and callings. The Bench rejected the contention relying upon the decision of the Punjab High Court in Waliati Ram Nathu Ram v. Municipality Committee Rupar AIR 1960 Punj 669. The learned counsel sought to rely on the following observations of the Bench : 21. Mr. Dwarkadas, the counsel appearing for the tax practitioners and chartered accountants, adopted the submissions of Mr. Datar. He also referred to a decision of the Division Bench of the court in Kisan Supdu Ingle v. Bhusawal Borough Municipality AIR 1966 Bom 15. In that case, the Bhusawal Municipality decided to impose tax on professions, trades, callings and employments by virtue of the powers conferred by the Bombay Municipal Borough Act, 1925. An employee of the municipality challenged the levy of the said tax on the ground that the municipality was not competent to levy a tax on any employment in the nature of any service, in which a person is employed to work for another. His contention was that the word employments should be construed ejusdem genesis with the other words mentioned in Entry 60 in List II and, therefore, it should mean such employments which are akin to or in the nature of professions, trades and callings. The Bench rejected the contention relying upon the decision of the Punjab High Court in Waliati Ram Nathu Ram v. Municipality Committee Rupar AIR 1960 Punj 669. The learned counsel sought to rely on the following observations of the Bench : "If Entry 60 was intended to include every occupation other than service, it is difficult to see why the word employments was used at all. The words are used in any entry in the Constitution. Every word must, therefore, be deemed to have been used with some object and no word can be held to be redundant. The words profession, trade and calling are also general words, which according to the dictionary have wide meanings. Profession as defined in the Oxford English Dictionary means a business or profession that one publicly avows; the occupation which one professes to be skilled in and to follow; a vocation in which a professed knowledge of some department of learning or science is used in its application to the affairs of others or in the practice of art founded upon it; in a wider sense; any calling or occupation by which a person habitually earns his living. . . ." (p. 17) According to Mr. Dwarakadas, the above observations support the case of the petitioners that Entry 60 should be construed widely and so construed it would comprehend within its scope the levy of tax, based on the service rendered by a professional. 22. The learned Attorney General on the contrary, submitted that the law in pith and substance, is not one with respect to the provisions under Entry 60 List II but a service tax as the Legislature has chosen to conceive it, is referable to the residuary power under Entry 97 of List I. The learned Attorney General submitted that the professional tax is a tax for privilege of belonging to the profession and being a member of the profession. A tax on profession is distinct from and unrelated to whether the professional earns income or remuneration from actual practice of the profession. A tax on profession can be imposed if a person carry on a profession. Such a tax on profession is irrespective of the question of income. The pith and substance of levy of service tax on professional service actually rendered for remuneration

is fundamentally different from levy of tax on a professional who may or may not render services for remuneration. The charging of taxable event and the incidence of the service tax are totally different from the levy of professional tax on a professional by State Legislation which is a one time tax unrelated to actual services rendered for remuneration. Thus, professional tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so. 22. The learned Attorney General on the contrary, submitted that the law in pith and substance, is not one with respect to the provisions under Entry 60 List II but a service tax as the Legislature has chosen to conceive it, is referable to the residuary power under Entry 97 of List I. The learned Attorney General submitted that the professional tax is a tax for privilege of belonging to the profession and being a member of the profession. A tax on profession is distinct from and unrelated to whether the professional earns income or remuneration from actual practice of the profession. A tax on profession can be imposed if a person carry on a profession. Such a tax on profession is irrespective of the question of income. The pith and substance of levy of service tax on professional service actually rendered for remuneration is fundamentally different from levy of tax on a professional who may or may not render services for remuneration. The charging of taxable event and the incidence of the service tax are totally different from the levy of professional tax on a professional by State Legislation which is a one time tax unrelated to actual services rendered for remuneration. Thus, professional tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so. 23. The learned Attorney General referred to the decision in Union of India v. H.S. Dhillon the Supreme Court dealt with the scope of the residuary power under Entry 97 of List I. In H.S. Dhillons case (supra), the validity of the Central legislation, namely, the Gift Tax Act, 1958 was challenged on the ground that the Legislature encroached upon the States legislative power under Entries 18 and 49 of the State List. The test formulated to determine this question was as follows : 23. The learned Attorney General referred to the decision in Union of India v. H.S. Dhillon the Supreme Court dealt with the scope of the residuary power under Entry 97 of List I. In H.S. Dhillons case (supra), the validity of the Central legislation, namely, the Gift Tax Act, 1958 was challenged on the ground that the Legislature encroached upon the States legislative power under Entries 18 and 49 of the State List. The test formulated to determine this question was as follows : " Therefore, either the pith and substance of the Gift Tax Act falls within Entry 49 of State List or it does not. If it does, then Parliament will have no power to levy the tax even under the residuary powers. If it does riot, then Parliament must undoubtedly possess that power under article 268 and Entry 97 of the Union List." (p. 803) Relying on this principle, the learned Attorney General submits that the service tax having regard to its true nature and character, in pith and substance is not covered by Entry 60, List II. Consequently, it falls within Entry 97 List I, read with article 248 of the Constitution. The learned Attorney General submits that the Supreme Court has consistently held that the professional tax envisaged by Entry 60

of List I is a tax for the privilege to carry on the profession unrelated to the income or receipts received by the professional. He referred to the judgments of the Supreme Court in Western Indian Theatres v. Cantonment Board , Kamata Prasad Aggarwal v. Executive Officer Ballabgarh and R.R. Engg. Co. v. Zila Parishad, Bareilly . We shall discuss these judgments little later. 24. The learned Attorney General contended that the legislative practice is also instructive. He pointed out that professional tax levied by different States and local authorities have been varying sums not exceeding the limit imposed by article 276(2) of the Constitution. The limit prescribed under article 276(2) has been increased from 250 rupees to 2,500 rupees at present. He submitted that if the petitioners submissions were to be accepted it would mean that levy of service-tax on professional services actually rendered for remuneration cannot exceed the normal limit prescribed under article 276(1). This, he said, is totally unwarranted. It would mean that article 276 of the Constitution would have to be amended if the impugned service tax is to be considered as a tax on profession falling within Entry 60 of List II. He submitted that the service tax on the gross receipts received by the professionals is totally different from a tax on profession and does not fall within the scope of Entry 60 of State List and in absence of any referability to any other Entry of List II, it will be covered by Entry 97 of List I. The learned Attorney General referred to an unreported judgment of the Division Bench of the Gujarat High Court in Special Civil Application Nos. 469 of 1999 and 7220 of 1999 dated 27-12-2000 wherein the Division Bench has overruled almost identical challenge to the vires of the Finance (No. 2) Act, 1998. The Division Bench of the Gujarat High Court has held that the Parliament has legislative competence to levy service tax under Entry 97 of List I, read with article 248 of the Constitution and that the Act is not violative of article 14 and article 19(1)(g) of the Constitution. 24. The learned Attorney General contended that the legislative practice is also instructive. He pointed out that professional tax levied by different States and local authorities have been varying sums not exceeding the limit imposed by article 276(2) of the Constitution. The limit prescribed under article 276(2) has been increased from 250 rupees to 2,500 rupees at present. He submitted that if the petitioners submissions were to be accepted it would mean that levy of service-tax on professional services actually rendered for remuneration cannot exceed the normal limit prescribed under article 276(1). This, he said, is totally unwarranted. It would mean that article 276 of the Constitution would have to be amended if the impugned service tax is to be considered as a tax on profession falling within Entry 60 of List II. He submitted that the service tax on the gross receipts received by the professionals is totally different from a tax on profession and does not fall within the scope of Entry 60 of State List and in absence of any referability to any other Entry of List II, it will be covered by Entry 97 of List I. The learned Attorney General referred to an unreported judgment of the Division Bench of the Gujarat High Court in Special Civil Application Nos. 469 of 1999 and 7220 of 1999 dated 27-12-2000 wherein the Division Bench has overruled almost identical challenge to the vires of the Finance (No. 2) Act, 1998. The Division Bench of the Gujarat High Court has

held that the Parliament has legislative competence to levy service tax under Entry 97 of List I, read with article 248 of the Constitution and that the Act is not violative of article 14 and article 19(1)(g) of the Constitution. 25. We have given our careful consideration to these contentions raised by the respective parties. The principal question is whether the tax envisaged by the impugned law is within the competence of the Union Parliament. In interpreting the scope of legislative entries in the three Lists, we have to keep in mind that while, on the one hand, it is desirable that each entry in each of the List should receive broadest interpretation, it is quite important, on the other hand, that three Lists should be read together harmoniously. Wherever legislative powers are distributed between the Union and the States situation may arise where the two legislative fields might apparently overlap. It is the duty of the courts to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each Legislature and to define, in any particular case before them, the limits of respective powers. The Judicial Committee in Prafulla Kumar Mukherjee v. Bank of Commerce AIR 1947 FC 60 referred with approval following observations of Gwyer, C.J., in Subrahmanyan Chettiars case (supra), 25. We have given our careful consideration to these contentions raised by the respective parties. The principal question is whether the tax envisaged by the impugned law is within the competence of the Union Parliament. In interpreting the scope of legislative entries in the three Lists, we have to keep in mind that while, on the one hand, it is desirable that each entry in each of the List should receive broadest interpretation, it is quite important, on the other hand, that three Lists should be read together harmoniously. Wherever legislative powers are distributed between the Union and the States situation may arise where the two legislative fields might apparently overlap. It is the duty of the courts to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each Legislature and to define, in any particular case before them, the limits of respective powers. The Judicial Committee in Prafulla Kumar Mukherjee v. Bank of Commerce AIR 1947 FC 60 referred with approval following observations of Gwyer, C.J., in Subrahmanyan Chettiars case (supra), "It must inevitably happen from time-to-time that legislation, though purporting to deal with a subject on one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely inter-wind that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence, the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its `true nature and character, for the purpose of determining whether it is legislation with respect to matters in this Act or in that." 26. The decision of the Supreme Court in Federation of Hotel & Restaurant v. Union of India in the same vein. In that case, the challenge is to the levy of tax under the Expenditure Tax Act, 1987, enacted by the Parliament.`

The Act envisaged a tax at 10 per cent ad valorem on chargeable expenditure incurred in the class of hotels wherein room charges for any unit of residential accommodation are over Rs. 400 per day per individual. The chargeable expenditure included expenditure incurred on payments made in such class of hotels in connection with the provisions of accommodation, residential or otherwise, food or drink, etc. The challenge was on the ground that Entry 62 in List II conferred exclusive power on the State Legislature to levy tax on luxuries and Entry 54 in List II empowered the State to levy tax on the sale of goods. Since the expenditure tax and tax on the sale of goods were covered by the entries in the State List; there was nothing left for the Parliament to tax. In the context of the said controversy, which was akin to the present one, the Supreme Court observed : 26. The decision of the Supreme Court in Federation of Hotel & Restaurant v. Union of India in the same vein. In that case, the challenge is to the levy of tax under the Expenditure Tax Act, 1987, enacted by the Parliament. The Act envisaged a tax at 10 per cent ad valorem on chargeable expenditure incurred in the class of hotels wherein room charges for any unit of residential accommodation are over Rs. 400 per day per individual. The chargeable expenditure included expenditure incurred on payments made in such class of hotels in connection with the provisions of accommodation, residential or otherwise, food or drink, etc. The challenge was on the ground that Entry 62 in List II conferred exclusive power on the State Legislature to levy tax on luxuries and Entry 54 in List II empowered the State to levy tax on the sale of goods. Since the expenditure tax and tax on the sale of goods were covered by the entries in the State List; there was nothing left for the Parliament to tax. In the context of the said controversy, which was akin to the present one, the Supreme Court observed : "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, Lord Simonds in Governor General in Council v. Province of Madras (1945) FCR 179 at p. 193 : in the context of concepts of Duties of Excise and Tax on Sale of Goods said: . . . The two taxes the one levied on a manufacture 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 separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to

impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale ....." (p. 648) 27. The Supreme Court referred to the Lefroys Canadas Federal System wherein the learned author referring to the aspects of legislation under sections 91 and 92 of the Canadian Constitution, i.e., British North America Act, 1867 observed that one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that 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. The learned author said: 27. The Supreme Court referred to the Lefroys Canadas Federal System wherein the learned author referring to the aspects of legislation under sections 91 and 92 of the Canadian Constitution, i.e., British North America Act, 1867 observed that one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that 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. The learned author said: ". . . . 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". (p. 1648) It was observed by the Supreme Court that the true nature and character of the legislation must be determined with reference to a question of the power of the Legislature. The consequences and effects of the legislation are not the same thing as the legislative subject matter. It is the true nature and character of the legislation and not its ultimate economic results that matters. 28. The subject matters of taxation available to the Parliament are enumerated in Entries 82 to 97 of List I, those available to the State Legislature in Entries 45 to 68 of List II and those available to both in Entry 44 of List II. Under article 246(1) the Parliament has exclusive power to make laws with respect to any of the matters and those included the power to impose tax-enumerated in List I. If a tax does not fall either in State List or Concurrent List, the Parliament has residuary power under Entry 97 List I. In H.S. Dhillons case (supra). Sikri, CJ. speaking for the Bench observed as follows: 28. The subject matters of taxation available to the Parliament are enumerated in Entries 82 to 97 of List I, those available to the State Legislature in Entries 45 to 68 of List II and those available to both in Entry 44 of List II. Under

article 246(1) the Parliament has exclusive power to make laws with respect to any of the matters and those included the power to impose tax-enumerated in List I. If a tax does not fall either in State List or Concurrent List, the Parliament has residuary power under Entry 97 List I. In H.S. Dhillons case (supra). Sikri, CJ. speaking for the Bench observed as follows: "If this is the true scope of residuary powers of Parliament, then we are unable to see why we should not, when dealing with a Central Act, enquire whether it is the legislation in respect of any matter in List II for this is the only field regarding which there is a prohibition against Parliament, if a Central Act does not enter or invade these prohibited fields, there is no point in trying to decide as to under which entry or entries of List I or List III a Central Act would rightly fit in". 29. It was further observed by the learned Chief Justice: 29. It was further observed by the learned Chief Justice: ". . . we are definitely of the opinion, as explained a little later, that the scheme of our Constitution and the actual terms of the relevant articles, namely, article 246, article 248 and Entry 97 List I, show that any matter, including tax, which has not been allotted exclusively to the State Legislature under List II or concurrently with Parliament under List III, fall within List I, including Entry 97 of that list read with article 248." 30. The moot question, therefore, is whether there is tenable and true distinction between the tax on service levied by the Act and a tax on profession envisaged by Entry 60 of the State List. Are the Parliament and the State Legislatures dealing with the same matter and taxing one and the same thing, though describing it differently-or are they taxing two different matters or things? The learned Attorney General says that the pith and substance of the Act is service rendered by the professionals and it is distinct from tax on profession envisaged by Entry 60 of State List. According to the learned Attorney General, the professional tax is a tax for privilege of belonging to a profession, or being a member of a profession irrespective of whether the professional earns income or remuneration from practice of the profession. We find merit in the submission of the learned Attorney General. In the case of Western India Theatres case (supra), the question was whether a tax levied by the Cantonment Board on the lessee of a cinema theatre on each show of the film exhibited by him was a valid tax. Under section 100 of the Government of India Act, 1935, read with Entry 50 in Schedule VII thereto the provincial Legislature had power to make law with respect totaxes on luxuries, including taxes on entertainments, amusements, betting and gambling. It was argued that the impugned tax is not covered by this entry at all. This entry, according to the appellants, contemplated a law imposing taxes on persons who receive or

enjoy the luxuries or the entertainments or the amusements and, therefore, no law made with respect to matters covered by this entry can impose a tax on persons who provide the luxuries, entertainments or amusements. The second argument advanced before the Supreme Court was that the impugned law was really one with respect to matters specified in Entry 46, namely, taxes on professions, trades, callings and employments and, therefore, cannot exceed Rs. 100 per annum under section 142A of the Government of India Act, 1935 and Rs. 250 per-annum under article 276(2) of the Constitution. 30. The moot question, therefore, is whether there is tenable and true distinction between the tax on service levied by the Act and a tax on profession envisaged by Entry 60 of the State List. Are the Parliament and the State Legislatures dealing with the same matter and taxing one and the same thing, though describing it differently-or are they taxing two different matters or things? The learned Attorney General says that the pith and substance of the Act is service rendered by the professionals and it is distinct from tax on profession envisaged by Entry 60 of State List. According to the learned Attorney General, the professional tax is a tax for privilege of belonging to a profession, or being a member of a profession irrespective of whether the professional earns income or remuneration from practice of the profession. We find merit in the submission of the learned Attorney General. In the case of Western India Theatres case (supra), the question was whether a tax levied by the Cantonment Board on the lessee of a cinema theatre on each show of the film exhibited by him was a valid tax. Under section 100 of the Government of India Act, 1935, read with Entry 50 in Schedule VII thereto the provincial Legislature had power to make law with respect to `taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. It was argued that the impugned tax is not covered by this entry at all. This entry, according to the appellants, contemplated a law imposing taxes on persons who receive or enjoy the luxuries or the entertainments or the amusements and, therefore, no law made with respect to matters covered by this entry can impose a tax on persons who provide the luxuries, entertainments or amusements. The second argument advanced before the Supreme Court was that the impugned law was really one with respect to matters specified in Entry 46, namely, taxes on professions, trades, callings and employments and, therefore, cannot exceed Rs. 100 per annum under section 142A of the Government of India Act, 1935 and Rs. 250 per-annum under article 276(2) of the Constitution. 31. The Supreme Court repelling the challenge to the Constitutional validity observed : 31. The Supreme Court repelling the challenge to the Constitutional validity observed : "As pointed out by this court in Navinchandra Mafatlal v. CIT following certain earlier decisions referred to therein, the entries in the legislative list should not be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to

be comprehended in it. It has been accepted as well-settled that in construing such an entry conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein. In view of this well-established rule of interpretation, there can be no reason to construe the words taxes on luxuries or entertainments or amusements in Entry 50 as having a restricted meaning so as to confine the operation of the law to be made thereunder only to taxes the persons receiving the luxuries, entertainments, or amusements. The entry contemplates luxuries, entertainments, and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to the tax. It is true that economists regard an entertainment tax as a tax on expenditure and, indeed, when the tax is imposed on the receiver of the entertainment, it does become a tax on expenditure, but there is no warrant for holding that Entry 50 contemplates only a tax on moneys spent on luxuries, entertainments or amusements. The entry, as we have said, contemplates a law, with respect to these matters regarded as objects and a law which imposes tax on the act of entertaining is within the entry whether it falls on the giver or the receiver of that entertainment. Nor is the impugned tax a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show there is no tax. A lawyer. has to pay a lax or fee to take out a licence irrespective of whether of not he actual practices. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out/he licence chooses to do. The impugned tax is a tax on the act of enterfainment resulting in a show. In our opinion, therefore, section 73 is a law, with respect to matters enumerated in Entry 50 and not Entry 46 and the Bombay Legislature had ample power to enact this law." (Emphasis here italicised in print, supplied) 32. It is apparent from the above observations that the tax envisaged by Entry 60 List II is a tax imposed for the privilege of carrying on any profession. A professional has to pay tax or a fee to take out the licence irrespective of whether or not he actually carries on profession. Thus, it is a tax for having the right to practice the profession if and when the person by taking out the licence chooses to do. This position was explained further in the case of Kamata Prasad Aggarwals case (supra). In this case, it was the contention of the appellant that the maximum limit of Rs.

250 mentioned in article 276 applies to the totality of the tax recovered by all the authorities mentioned in the article taken together. It was argued that each authority could not levy tax up to a limit of Rs. 250. It was argued that the opening and the concluding portions of articles 276(2) should be construed conjunctively to represent the total amount payable in respect of any one person to the authorities enumerated in the article by way of taxes on professions, trades, callings and employments exceeding Rs. 250 per annum. The Supreme Court overruled the above submission and observed as under: 32. It is apparent from the above observations that the tax envisaged by Entry 60 List II is a tax imposed for the privilege of carrying on any profession. A professional has to pay tax or a fee to take out the licence irrespective of whether or not he actually carries on profession. Thus, it is a tax for having the right to practice the profession if and when the person by taking out the licence chooses to do. This position was explained further in the case of Kamata Prasad Aggarwals case (supra). In this case, it was the contention of the appellant that the maximum limit of Rs. 250 mentioned in article 276 applies to the totality of the tax recovered by all the authorities mentioned in the article taken together. It was argued that each authority could not levy tax up to a limit of Rs. 250. It was argued that the opening and the concluding portions of articles 276(2) should be construed conjunctively to represent the total amount payable in respect of any one person to the authorities enumerated in the article by way of taxes on professions, trades, callings and employments exceeding Rs. 250 per annum. The Supreme Court overruled the above submission and observed as under: "9. The contention of the appellants that the imposition of tax by the Panchayat Samiti amounts to double taxation and is, therefore, illegal is unsound. A tax on profession is not necessarily connected with income. This is clear from the tax on professions imposed by several municipal authorities at certain rates mentioned in the relevant statutes. A tax on income can be imposed if there is income. A tax on profession can be imposed if a person carries on a profession. Such a tax on profession is irrespective of the question of income." (Emphasis, here italicised in print, supplied) (p. 686) 33. In R.R. Engg. Co.s case (supra), validity of circumstances and property tax levied under section 119 of the U.P. Kshetra Samitis and Zila Parishads Act was challenged before the Supreme Court. It was held that the tax on circumstances and property is not a tax on income but a tax on mans financial position, his status as a whole depending upon his income from trade or business. The contention that the tax on circumstances and property amounts to a tax on profession, trades, callings, and employments

and, therefore, total amount of tax in respect of one person could not by reason of article 276(2) of the Constitution exceed Rs. 250 per annum was also rejected by the Supreme Court. The Supreme Court observed : 33. In R.R. Engg. Co.s case (supra), validity of circumstances and property tax levied under section 119 of the U.P. Kshetra Samitis and Zila Parishads Act was challenged before the Supreme Court. It was held that the tax on circumstances and property is not a tax on income but a tax on mans financial position, his status as a whole depending upon his income from trade or business. The contention that the tax on circumstances and property amounts to a tax on profession, trades, callings, and employments and, therefore, total amount of tax in respect of one person could not by reason of article 276(2) of the Constitution exceed Rs. 250 per annum was also rejected by the Supreme Court. The Supreme Court observed : "16. It may be, and is often so, that the tax on circumstances and property is levied on the basis of income which the assessee receives from his profession, trade, calling or property. That is, however, not conclusive on the nature of the tax. It is only as a matter of convenience that income is adopted as a yardstick or measure for assessing the tax. As pointed out in Re a reference under Government of Ireland Act, 1936 AC 352 the measure of the tax is not a true test of the nature of the tax. Therefore, while determining the nature of a tax, though the standard on which the tax is levied may be a relevant consideration, it is not a conclusive consideration. One must have regard in such matters, as stated by the Privy Council in Governor General in Council v. Province of Madras (1945) 72 Ind App. 91, at p. 99, not to the name of the tax but to its real nature, its pith and substance, which must determine into what category it falls. Applying these tests, the tax on circumstances will fall in the category of a tax on a mans financial position, his status taken as a whole and includes what may not properly be comprised under the term property and at the same time ought not to escape assessment. This quotation finds place in the judgment of Malik, C.J., in the Full Bench decision in District Board of Farrukhabad. The formulation, which the learned Chief Justice would appear to have extracted form another source, since he has put it within quotes, is in similar terms as that of this court in Ram Narain v. The State of UP 1956 SCR 664 at p 673. In that case, an assessee challenged his liability to pay the tax on circumstances and property under section 14(1)(f) of the U.P. Town Areas Act, 1914, on the ground. that he did not reside within the jurisdiction of the Town Area Committee of Karhal and that rule 3 framed under section 39(2) of the Act was invalid. This court, after referring approvingly to the decision in District Board of Farrukhabad, particularly to the statement

therein that the name given to a tax did not matter and that what had to be considered was the pith and substance of it, observed: A tax on circumstance and property is a composite tax and the wordcircumstances means a mans financial position, his status as a whole depending, among other things, on his income from trade or business. 17. The Full Bench decision under appeal in the instant case, R.R. Engg. Co. (supra) has taken the same view of the nature of the tax on circumstances and property by holding that it is not a tax on income but is a tax on a mans financial position, his status as a whole, depending upon his income from trade or business. Earlier, another Full Bench of the Allahabad High Court had held in Zilla Parishad, Muzaffarnagar v. Jugal Kishore , that the tax on circumstances and property is fundamentally distinct from and cannot be equated with income-tax, that it is not coverer by Item 82, List I, Schedule 7, of the Constitution and that it is essentially a tax on status or financial position combined with a tax on property. These decisions correctly describe the nature of the tax on circumstances and property. We affirm the view taken therein, especially that the aforesaid tax is not a tax on income." (p. 1092) 34. In the light of the relevant entries and decisions we feel that the learned Attorney General is right in urging that merely because 1998 Act as well as State Acts levy a tax which have the ultimate impact on the persons who are carrying on profession, the pith and substance of both cannot be considered to be the same. The object of 1998 Act is to levy service tax on professionals for the service actually rendered by the professionals for remuneration. If the professional does not render any service then there will be no service tax. On the other hand, professional tax is a tax of privilege of belonging to a profession or being a member of the profession. Such a tax is irrespective of the fact whether he does or does not render professional service for remuneration. For instance, a practising chartered accountant, or architect may not render any service but he will be liable to pay professional tax as the said tax is for the privilege of being a member of the profession. We are in agreement with the learned Attorney General that chargeable event or the incidence of the services tax is totally different from levy of professional tax on professionals by the State Legislatures which is a one time tax unrelated to actual service rendered for remuneration. The fact that there would have been some overlapping will be of no consequence. The distinction between the two taxes is not obliterated merely because both legislations have chosen to attack the same area as the pith and substance of the two taxes is entirely different. 34. In the light of the relevant entries and decisions we feel that the learned Attorney General is right in urging that merely because 1998 Act as well as State Acts levy a tax which have the ultimate impact on the persons who are carrying on profession, the pith and substance of both cannot be considered to be the same. The object of 1998 Act is to levy service tax on professionals for the service actually rendered by the professionals for remuneration. If the professional does not render any service then there will be no service tax. On the other hand, professional tax is a tax of privilege of belonging to a profession or being a member of the profession. Such a tax is irrespective of the fact whether he does or does not

render professional service for remuneration. For instance, a practising chartered accountant, or architect may not render any service but he will be liable to pay professional tax as the said tax is for the privilege of being a member of the profession. We are in agreement with the learned Attorney General that chargeable event or the incidence of the services tax is totally different from levy of professional tax on professionals by the State Legislatures which is a one time tax unrelated to actual service rendered for remuneration. The fact that there would have been some overlapping will be of no consequence. The distinction between the two taxes is not obliterated merely because both legislations have chosen to attack the same area as the pith and substance of the two taxes is entirely different. 35. We may now refer to the decision of the Gujarat High Court wherein challenge to Act, 1998 was raised by the Associations of Chartered Accountants, Architects and Consulting Engineers and was repelled by the Division Bench of the Gujarat High Court. The Bench observed: 35. We may now refer to the decision of the Gujarat High Court wherein challenge to Act, 1998 was raised by the Associations of Chartered Accountants, Architects and Consulting Engineers and was repelled by the Division Bench of the Gujarat High Court. The Bench observed: "An analysis of the aforesaid decisions cited by either side makes it clear that even though there may be some overlapping between profession and service as sought to be suggested by the learned counsel for the petitioners, tax on services rendered by a professional is quite different and distinct from the tax on the profession. To elaborate, the professional tax which an architect, consulting engineer or a practising chartered accountant pays is a tax for the privilege of having the right to exercise that particular profession. However, the service tax which each of the aforesaid professional pays is the tax which he has to pay each time he renders services for remuneration. The tax is, thus, on the services rendered for remuneration. On the other hand, the professional tax is required to be paid for the privilege of having the right to exercise the profession whether or not the person actually chooses to exercise the profession in a given year or not. The liability to pay professional tax would remain irrespective of the fact whether a person actually renders services or not or whether the services are rendered for remuneration or not. On the other hand, the service tax is to be levied only when the services are rendered by a concerned person for remuneration. The entire edifice of the petitioners case that the service tax is a tax on the profession must, therefore, fail. Consequently, the reliance on Entry 60 in State List must also fail. There being no other entry in the State List or Concurrent list which could possibly be referred to for the purpose of levying service tax. The legislative competence for enacting this law must be traced to article 248, read with Entry 97 in the Union List." 36. We are in respectful agreement with the view expressed by the Division Bench of the Gujarat High Court. The submission of the learned Attorney General that the tax is essentially based on service and not on profession falling within the State power must, in our opinion, be accepted. 36. We are in respectful agreement with the view expressed by the Division Bench of the Gujarat High Court. The submission of the learned Attorney General that the tax is essentially based on service

and not on profession falling within the State power must, in our opinion, be accepted. Re: Contention (b): 37. It is urged that there are large number of services provided by the chartered accountants which are also provided by others who are not chartered accountants. The accounts is not the exclusive domain of the chartered accountants. Many graduates, post graduates and even under graduates can also carry out most of the accounting work. Even audit is not an exclusive domain of operation of the chartered accountants only. In case of cooperative societies audit can be done by the persons who are not necessarily chartered accountants but those who are empanelled. Under the impugned provisions a service becomes taxable service when it is provided by a chartered accountant and becomes a non-taxable service when it is provided by another person. It is submitted that the classification is not founded on any intelligible differentia. Similar contention is also raised on behalf of the architects. It is submitted that apart from the architects there are other qualified persons who are also rendering similar service to their clients, e.g., contractors, diploma holders, registered valuers, etc. Therefore, it is contended that the levy of service tax on the architects alone is violative of article 14. 37. It is urged that there are large number of services provided by the chartered accountants which are also provided by others who are not chartered accountants. The accounts is not the exclusive domain of the chartered accountants. Many graduates, post graduates and even under graduates can also carry out most of the accounting work. Even audit is not an exclusive domain of operation of the chartered accountants only. In case of cooperative societies audit can be done by the persons who are not necessarily chartered accountants but those who are empanelled. Under the impugned provisions a service becomes taxable service when it is provided by a chartered accountant and becomes a non-taxable service when it is provided by another person. It is submitted that the classification is not founded on any intelligible differentia. Similar contention is also raised on behalf of the architects. It is submitted that apart from the architects there are other qualified persons who are also rendering similar service to their clients, e.g., contractors, diploma holders, registered valuers, etc. Therefore, it is contended that the levy of service tax on the architects alone is violative of article 14. 38. It is now well-settled that the 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. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. If there is equality and uniformity within each group, the law would not be discriminatory. The courts have permitted the Legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. 38. It is now well-settled that the 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. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. If there is equality and uniformity within each group, the law would not be discriminatory. The courts have permitted the Legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. 39. In Jaipur Hosiery Mills (P) Ltd. v. State of Rajasthan , a notification under the Rajasthan Sales Tax Act, 1950 exempting from tax the sale of garments which did not exceed Rs. 4 per piece was assailed. The Supreme Court found the classification permissible. It was held: 39. In Jaipur Hosiery Mills (P) Ltd. v. State of Rajasthan , a notification under the Rajasthan Sales Tax Act, 1950 exempting from tax the sale of garments which did not exceed Rs. 4 per piece was assailed. The Supreme Court found the classification permissible. It was held: "It has to be borne in mind that in matters of taxation the Legislature possesses the large freedom in the matter of classification. Thus, wide discretion can be exercised in selecting persons or objects which will be taxed and the statute is not open to attack on the mere ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally and cannot be justified on the basis of a valid classification that there would be a violation of article 14." (p.1330) 40. In Sri Krishna Das v. Town Area Committee , the Supreme Court observed: 40. In Sri Krishna Das v. Town Area Committee , the Supreme Court observed: "It is for the Legislature or the taxing authority to determine the question of need, the policy and to select the goods or services for taxation. Courts cannot review the wisdom or advisability or expediency of a tax as the court has no concern with the policy of legislation, so long as they are not inconsistent with the provisions of the Constitution. It is only where there is abuse of its powers and transgression of the legislative function in levying a tax, it may be corrected by the judiciary and not otherwise. Taxes may be and often are oppressive, unjust, and even unnecessary but this can constitute no reason for judicial interference. When taxes are levied on certain articles or services and not on others it cannot be said to be discriminatory. Every tax must discriminate and only the authority that imposes it can determine how and in what directions." (p. 647) 41. In the present case also it is for the Legislature to identify qualified professionals and to tax service rendered by them as against the difficulty in tracing non-qualified persons rendering service in the similar fields. It is not possible to hold that the classification between qualified professionals like chartered accountants and architects on the one hand and non-qualified persons rendering similar services is unreasonable or that the classification has no reasonable nexus with the object sought to be achieved in collection of revenue. We, therefore, hold that the contention (b) is liable to be rejected. 41. In the present case also it is for the Legislature to identify qualified professionals and to tax service rendered by them as against the difficulty in tracing non-qualified persons rendering

service in the similar fields. It is not possible to hold that the classification between qualified professionals like chartered accountants and architects on the one hand and non-qualified persons rendering similar services is unreasonable or that the classification has no reasonable nexus with the object sought to be achieved in collection of revenue. We, therefore, hold that the contention (b) is liable to be rejected. Re. : Contention (c) : 42. It is alleged that the provisions of the Act imposes unreasonalble restrictions on the petitioners fundamental rights under article 19(1)(g). It is averred in the petition that the provisions of the Act seek to impose liability on the architects and chartered accountants to pay service tax irrespective of whether fees are paid by the client or not. Like lawyers, chartered accountants and architects face malady of high incidence of defaulting clients who do not pay their fees after availing professional services. In several cases where companies have serious financial difficulties, the first casuality are the unsecured creditors and professionals like lawyers, architects, chartered accountants and so on. Thus, if an architect or chartered accountant charges fees and the client does not pay the same, he would not only lose fee but he also becomes liable to pay the service tax thereon as well as interest and penalty. 42. It is alleged that the provisions of the Act imposes unreasonalble restrictions on the petitioners fundamental rights under article 19(1)(g). It is averred in the petition that the provisions of the Act seek to impose liability on the architects and chartered accountants to pay service tax irrespective of whether fees are paid by the client or not. Like lawyers, chartered accountants and architects face malady of high incidence of defaulting clients who do not pay their fees after availing professional services. In several cases where companies have serious financial difficulties, the first casuality are the unsecured creditors and professionals like lawyers, architects, chartered accountants and so on. Thus, if an architect or chartered accountant charges fees and the client does not pay the same, he would not only lose fee but he also becomes liable to pay the service tax thereon as well as interest and penalty. 43. The apprehension of the petitioners that they would be required to pay service tax even if their clients do not pay their fees is completely misplaced. It is pointed out by the respondents that as per section 68 of the Finance Act, 1998, and rule 6 of Service Tax Rules, 1994, in case the clients pay amount less than that billed to them, the assessee has to only amend the bill, either by modifying the existing bill or by issuing a revised bill and by properly endorsing such change in the billed amount to the extent of such non-payment by the client. In fact, rule 6(3) even provides a facility for suo mottu adjustment of excess payment of service tax by an assessee. The Act is introduced to cover service sector which constitute 40 per cent of the GDP. If in this process even if it is assumed that a few individuals suffer hardship it cannot be helped and in any event cannot be a ground for declaring the Act as violative of article 19(1)(g) of the Constitution. Thus, contention (c) is also liable to be rejected. 43. The apprehension of the petitioners that they would be required to pay service tax even if their clients do not pay their fees is completely misplaced. It is pointed out by the respondents that as per section 68 of the Finance Act, 1998, and rule 6 of Service Tax Rules, 1994, in case

the clients pay amount less than that billed to them, the assessee has to only amend the bill, either by modifying the existing bill or by issuing a revised bill and by properly endorsing such change in the billed amount to the extent of such non-payment by the client. In fact, rule 6(3) even provides a facility for suo mottu adjustment of excess payment of service tax by an assessee. The Act is introduced to cover service sector which constitute 40 per cent of the GDP. If in this process even if it is assumed that a few individuals suffer hardship it cannot be helped and in any event cannot be a ground for declaring the Act as violative of article 19(1)(g) of the Constitution. Thus, contention (c) is also liable to be rejected. 44. In the result, for the foregoing reasons, these petitions fail and are dismissed. However, on the facts and in the circumstances of the case, there will be no order as to costs. 44. In the result, for the foregoing reasons, these petitions fail and are dismissed. However, on the facts and in the circumstances of the case, there will be no order as to costs. At this stage, the learned counsel for the petitioners pray that since the interim stay was operating in favour of the petitioners and the petitions are dismissed today, members of the petitioner-association may be given some time to pay up the amount of service tax and to comply with the other formalities prescribed by or under the statute without the respondents taking any penal action for the delay in compliance or in payment. It appears that stay was operating only in one of the two writ petitions, i.e., writ petition No. 142 of 1999 and there was no stay in writ petition No. 1174 of 2000. It also appears that stay was granted in similar petitions filed before some other High Courts. On the facts and in the circumstances of the case, we are inclined to grant the request made by the petitioners, counsel. We, accordingly, direct the respondents that if the members of the petitioner-associations comply with the requisite formalities prescribed by or under the statute and pay the arrear of service tax on or before 22-4-2001 with interest as per the provisions of the Act, the respondents shall not take any penal action.