Godfrey Phillips(I)Ltd.& Anr vs State Of U.P.& Ors on 20 January, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1103, 2005 (2) SCC 515, 2005 AIR SCW 613, 2005 ALL. L. J. 559, 2005 (2) SRJ 411, (2005) 5 JT 587 (SC), 2005 (1) SLT 601, 2005 (1) SCALE 465, (2005) 2 SCJ 15, (2005) 139 STC 537, (2005) 58 KANTLJ(TRIB) 171, (2005) 2 SUPREME 267, (2005) 1 SCALE 465, (2005) 194 CURTAXREP 257

Author: Ruma Pal

Bench: R.C.Lahoti, Ruma Pal, Arun Kumar, G.P.Mathur, C.K.Thakker

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           CASE NO.:
Writ Petition (civil)  567 of 1994

PETITIONER:
Godfrey Phillips(I)Ltd.& Anr.

RESPONDENT:
State of U.P.& Ors.

DATE OF JUDGMENT: 20/01/2005

BENCH:
R.C.LAHOTI CJI & RUMA PAL & ARUN KUMAR & G.P.MATHUR & C.K.THAKKER

JUDGMENT:
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JUDGMENT With W.P.(C) Nos. 568-569/94 and CA Nos. 123 -125/95 C. A. No. 6891/96, C.A. No. 7870/96, C.A. Nos. 2123-2127/99, C.A. Nos. 2552-2553/99, DELIVERED BY:

RUMA PAL, J.

RUMA PAL, J.

The assessees/appellants are either manufacturers, dealers or sellers of tobacco and tobacco products. They have challenged the imposition and levy of a luxury tax on tobacco and tobacco products by treating them as "luxuries" within the meaning of the word in Entry 62 of List II. Entry 62 of List II of the Seventh Schedule to the Constitution relates to the exclusive power of State Legislatures to make laws with respect to "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". Several States have enacted legislation which they claim are referable to the right to tax luxuries under this Entry. We are concerned with the

Uttar Pradesh Tax on Luxuries Act, 1955, the Andhra Pradesh Tax on Luxuries Act, 1987 and the West Bengal Tax on Luxuries Act, 1994. The legislative competence of these statutes was challenged by the assessees before different fora - in some cases partially successfully, in others not. To the extent the assessees were unsuccessful, they have challenged the decisions before us. In those cases in which the assessees were successful the concerned State has filed the appeals. The States have differed in their interpretation of the word "luxuries" of Entry 62 List II since they have argued in the context and from the point of view of the particular statute sought to be defended as legislatively competent. Thus although the principal question to be resolved would be the ambit of Entry 62 of List-II, the arguments require a determination of the nature of the tax sought to be levied by the three statutes in dispute before us, before we resolve the question.

Uttar Pradesh Tax on Luxuries Act 1995 On 14th May, 1994 an Ordinance known as the Uttar Pradesh Tax on Luxuries Act 1994 (being U.P. Ordinance No.8/94) was promulgated. The object of the Ordinance as stated in the preamble was to "provide for levy and collection of tax on supply of tobacco and matters connected therewith or incidental there to". It consisted of a few sections of which relevant ones are quoted.

Section 3 of the Ordinance which provided for the levy of luxury tax read as follows:-

"Levy of luxury tax. Every tobacconist shall be liable to pay luxury tax on his turnover of "receipts" at such rate, not exceeding twenty five per cent, as the State Government may, by notification, specify and different rates may be specified for different classes of tobacco:

Provided that a "tobacconist" who does not manufacture or receive tobacco from outside the State shall be liable to pay tax on his turnover of receipts from the date his turnover of receipts exceeds two lakh rupees:

Provided further that in a chain of supply of tobacco, the tax shall be realized from the earliest of the "tobacconists" in the State and a successive "tobacconist" shall be exempt from payment of tax if he furnishes, in the manner prescribed, proof of payment of tax on such tobacco."

(Emphasis supplied) The words "receipt" and "tobacconist" which have been emphasized in the section by us had been respectively defined in Section 2(e) and 2(h) as follows:-

2 (e) "receipt" means:-

(i) in respect of supply of tobacco by a tobacconist made by way of sale, the amount or valuable consideration received or receivable by him for such sale including any sum charged for anything done by him in respect of the tobacco so sold at the time of or before the delivery thereof and the price if charged separately, of any primary or

secondary packing, other than the cost of freight or delivery or the amount realized as luxury tax when such cost or amount is separately charged; and

(ii) in respect of supply of tobacco by a tobacconist made otherwise than by way of sale, the normal price at which the tobacco is sold, and the term "normal price" shall have the same meaning as assigned to it in Section 4 of the Central Excise and Salt Act, 1944;

2 (h) "tobacconist" means:-

(i) a manufacturer whose turnover of receipts in a year exceeds one lakh rupees who supplies tobacco by way of sale or otherwise and includes any person who for the purpose of business gets the manufacturing done from any other person, whether or not on job work basis, but does not include any person who manufactures tobacco only on job work basis without obtaining any proprietary right over it at any stage;

(ii) any person who for the purposes of business brings or causes to be brought tobacco in the State or to whom any tobacco is dispatched from any place outside the State and who supplies such tobacco by way of sale or otherwise;

(iii) any person who supplies tobacco from a place within the State to any place outside the State by way of sale or otherwise;

(iv) any person who does not buy or otherwise obtain unmanufactured tobacco under a brand name but supplies by way of sale or otherwise such unmanufactured tobacco in a sealed container under a brand name;

Explanation:- For the removal of doubts, it is clarified that a person:-

(1) who exclusively supplies unmanufactured tobacco whether or not in a sealed container but not under a brand name; or (2) not being a person referred to in sub-clause (iii) who exclusively obtains tobacco by way of purchase or otherwise from a registered tobacconist;

shall not be deemed to be a tobacconist for the purposes or this clause;

Briefly therefore the UP Act provides for the levy of luxury tax on the receipts from the supply of tobacco by a tobacconist. It is the act of supply which is the taxable event. Indeed the preamble of the UP Ordinance as it originally stood said that the object was to provide for "levy and collection of tax on the supply of tobacco". Here we may briefly indicate the core of the controversy between the parties : If the act is in pith and substance referable to Entry 54 of List II within the words "taxes on the sale or purchase of goods" in that entry as the assessees claim, then the tax would be subject to certain constitutional curbs on the power of the State to levy sales tax on tobacco. If on the other hand it is referable to Entry 62 of List II as a "tax on luxury" there would be no such restriction. Writ

petitions had been filed by the assessees in the High Court of Allahabad challenging U.P. Ordinance No.8/94 on the ground that it was ultra vires Articles 14, 19, 245, 286, 301 and 304 of the Constitution. At the same time writ petitions under Article 32 of the Constitution were filed in this Court for a declaration that U.P. Ordinance 8 of 1994 was ultra vires the Constitution, basically on the ground that the levy was in substance, a tax on sales.

During the pendency of the proceedings, U.P. Ordinance No.8 of 1994 was amended by U.P. Ordinance No.22 of 1994 which was published in the Official Gazette on 28th September, 1994. The preamble and the definition of 'tobacconist' were altered. As far as the preamble was concerned, the phrase tax on supply of tobacco was changed to read " luxury tax on tobacco". But despite the change in the preamble there was no corresponding change in the taxable event in the body of the statute which continued to remain a tax on supply. The Explanation to the definition of tobacconist was also substituted after deleting the earlier explanation. The substitution is not material.

On 2nd November, 1994, the High Court allowed the writ petitions impugning the levy of luxury tax. The High Court held that the levy was intra vires the Constitution and was legislatively competent. Following the decision of this Court in A.B. Abdul Kadir and Ors. vs. State of Kerala (1976) 2 SCR 690 it was held that tobacco was an article of luxury and a tax on tobacco would be a luxury tax within the meaning of Entry 62 of List II. According to the High Court, tobacco included all forms of tobacco as provided under the Ordinance and could be taxed within the State whether it was sent from outside the State or sent outside the State and every person dealing in luxury goods such as tobacco would be liable to luxury tax irrespective of where the tobacco may be consumed. However, the High Court held that the imposition of luxury tax impeded the freedom of trade and commerce and intercourse and was violative of Article 301 of the Constitution and since no prior assent of the President had been obtained under Article 304(b), it was held that the State could not levy the tax. The argument of the State that tobacco was hazardous to health and, therefore, there was no fundamental right to trade in it was negatived. It was held that tobacco could not be put on par with liquor which had been held by this Court to be "res extra commercium". It was also held that the impugned levy was not in any way a regulatory measure. The High Court also came to the conclusion that classification for the purpose of levy of the tax in respect of products of tobacco had been made on an arbitrary basis. The Writ petitions were accordingly allowed and the levy of luxury tax was struck down on the ground that it violated Articles 14 and 301 of the Constitution. Special Leave Petitions have been filed from the decision of the Allahabad High Court both by the writ petitioner (to the extent that the High Court held that the levy was legislatively competent) as well as the State of Uttar Pradesh which assailed the ultimate conclusion of the High Court. Leave was granted in the several special leave petitions on 2nd January, 1995. The appeals were directed to be tagged with the writ petitions under Art. 32. Interim relief was granted to the effect that the dealers (tobacconists) would file their returns with the competent authority in accordance with the impugned Ordinance. No action on the returns so filed would be taken by the authorities during the pendency of the appeal. In the event the challenge of the dealers failed, the dealers would be liable for payment of the amounts due in accordance with the assessment made on the basis of the returns so filed.

On 14th May, 1995, U.P. Ordinance No.22/94 was repealed and replaced by the Uttar Pradesh Luxury Tax Act 1995 which came into force on the said date. The Act reproduced Ordinance 22/94 without any material changes. The pleadings before this Court were suitably amended. On 17th September, 1995, the U.P. Tax on Luxuries Act 1995 was repealed by U.P. Ordinance No.39 of 1995. Therefore, there has been no luxury tax in the State of U.P. since 1995 and as far as the State of U.P is concerned, the issue is of relevance for the period 14th May, 1994 to 17th September, 1995.

The Andhra Pradesh Tax on Luxuries Act, 1987 The Act is broadly similar to the UP Act both as to the scope and operation with regard to the levy of luxury tax on the sale and supply of commodities and in particular tobacco. The Act initially provided for the levy of luxury tax on "luxuries provided in a hotel and in a corporate hospital". In 1996 the Act was amended by the AP Act No. 28 of 1996 by which luxury tax was sought to be levied on specified commodities "

> for enjoyment over and above the necessities of life" (S.2 (ggg)) The commodities specified are chewing tobacco in the different forms and cigarettes. The tax is leviable at the first point of supply of the tobacco in the State " by sale or otherwise". Section 3-A which was introduced in 1996 provides for "Tax on tobacconist". It reads:
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> "3-A Tax on Tobacconist - (1) Subject to the provisions of this Act, there shall be levied and collected a tax, on the turnover of receipts of a tobacconist relating to the supply of luxuries, namely, tobacco products, specified in the schedule by way of sale or otherwise, at the rate of tax and at the point of levy specified in the schedule".
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> "Receipt" has been defined in Section 2(jj) as "Receipt" in relation to a tobacconist means,-
>
> (a) in respect of supply of the Luxuries, like tobacco products made by him or by others by way of sale, the amount of valuable consideration received or receivable by him for such sale including any sum charged for anything done by him in respect of the tobacco products so sold at the time of or before the delivery thereof and the price, if charged separately, of any primary or secondary packing; and
>
> (b) in respect of the supply of luxuries of tobacco products made by him otherwise than by way of sale, the normal price at which such tobacco products are sold".

A tobacconist has been defined in S.2(kkk) as "Tobacconist" means a person who supplies whether by way of sale or otherwise luxuries, like, tobacco products manufactured by him or purchased from other States or from other persons in this State and includes any person who for the purpose of Business gets the manufacturing done from any person whether or not on job work basis".

Several writ petitions were filed before the A.P. High Court challenging the amendment to the Act claiming that the tax was a tax on the sale of goods and insofar as it violated the constitutional discipline of Art. 286, 301, Art. 246 read with Entry 52 List I and Art. 14, was ultra vires. These were dismissed by a common judgment dated 12th November, 1998. The High Court upheld the validity

of the AP Act and held that the State was competent to enact the Act under Entry 62 of List II. The High Court held that the Act was a tax on the supply of luxury goods namely; tobacco and tobacco products, and it was not a tax on sale as had been contended by the writ petitioners. It was held that the incidence of sale was adopted as a measure for the purpose of assessment and did not alter the essential character of the levy. It was held that the State had not encroached upon the field occupied by Parliament under Entry 52 of the List by the Tobacco Board Act, 1975 and that there was no violation of Article 301 because under the Act inter-state transactions were exempted from the levy of luxury tax. The challenge to the tax on the ground of Article 14 was also negatived.

Leave was granted in several special leave petitions which were filed from the decision of the AP High Court on 1st April, 1999 and an interim order was granted in the same terms as had been granted in matters arising out of the decision of the Allahabad High Court.

The West Bengal Luxury Tax Act, 1994 Section 2(C) of the Act, defines luxuries as meaning "The commodities, as specified in the schedule, for enjoyment over and above the necessaries of life". Initially, the scheduled items related to tobacco and tobacco products as well as pan masala. The schedule has been amended from time to time and now contains 34 items, under the headings "luxuries". The original items are covered by items 1 to 5 of the Schedule. Items 6 and 8 to 21 deal with mill-made textile fabrics, footwear, trousers and jeans, shirts and T-shirts, coat jackets, blazer and suit, watches, bath-room fittings, electric switches, sun-glasses, fountain pens and dot pens, home theatre equipment, music system and Video camera. Each of these items are classed as luxury if their values exceed particular rates specified against each item. Items 22 to 34 relate to items not manufactured or made in India. These items which do not refer to any value are silk yarn, foreign liquor, toys, electrical and electronic goods, cosmetics, umbrellas, tea, glassware and crockery, soaps, chocolate and confectionery , readymade garments, motorcycles and motor vehicles. Section 4 which is the charging Section provides:

> "4. Incidence of luxury tax.-- Every stockist shall be liable to pay a luxury tax on his turnover of stock of luxuries at such rate, not exceeding twenty per centum, as the State Government may by notification fix in this behalf, and different rates may be fixed for different class or classes of luxuries.
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> "Stockist" has been defined in Section 2(i) as:-
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> " "stockist" means a person who has, in customary course of business, in his possession of, or control over, a stock of luxuries whether manufactured, made or processed by him in West Bengal, or brought by him into West Bengal, either on his own account or on account of others, from any place outside West Bengal, for stocking, vending, supplying or distributing such luxuries in West Bengal";
>
> The other relevant definition is contained in Section 2(h) which defines 'stock of luxuries' as meaning:-

"the quantity of luxuries that a stockist receives in, or procures for, his stock, or records or accounts for in his books of account, in West Bengal during any prescribed period for stocking, vending, supplying or distributing to a wholesaler, dealer, retailer, distributor or any other person, but shall not include any quantity or such luxuries held by him in stock on the first day of such prescribed period;"

The luxury tax payable by a stockist under the Act is to be levied under Section 5:

"Levy of luxury tax. - The luxury tax payable by a stockist under this Act shall be levied on that part of his turnover of stock of luxuries during any prescribed period which remains after deducting therefrom his such turnover during that period representing

(a) the value of such stock of luxuries as shown to the satisfaction of the prescribed authority to have been dispatched to places outside West Bengal;

(b) the value of stock of luxuries of such class or classes or description as may be prescribed".

"Value of stock or luxuries" has been defined in Section 2 (m) as follows:

""value of stock of luxuries" means.

(i) in respect of any stockist, being a manufacturer of any of the luxuries, the value of such luxuries calculated at the ex-factory price at the time of receipt or entry thereof in his stock, and ;

(ii) in respect of any stockist, being an importer of any of the luxuries, the value of such luxuries calculated at the price thereof as per consignor's bill, invoice or consignment note or other document of like nature.

And shall include (A) excise duty and central sales tax, if any, paid or payable on such luxuries by the manufacturer or importer thereof , as the case may be, and (B) transport charges and insurance charges, if any, for carrying such luxuries to any premises, godown, warehouse or any other place for delivery to a wholesaler, dealer, retailer, distributor or any other person;

The remaining Sections are not material for the purposes of our decision in these appeals.

The W.B. Act was challenged before the West Bengal Taxation Tribunal inter alia on the grounds that it trespassed into fields exclusively reserved for Parliament under Entries 83 and 84 of List I and was legislatively incompetent, that it contravened Art. 301 of the Constitution and on other grounds similar to those raised by the petitioners before the High Courts of Allahabad and Andhra Pradesh. However, the applicants conceded that in view of the decision of this Court in Abdul Kadir (supra), cigarettes could be treated as "luxuries" under Entry 62 of List II. The challenge of the

applicants to the Act was negatived by a majority of 2:1 on 20th December, 1995. In two matters special leave petitions were filed from the decision of the Tribunal. Leave was granted and the matters tagged with pending Appeals and Writ Petitions arising out of the decision of the Allahabad High Court. No stay was granted. One applicant challenged the decision of the Tribunal before the Calcutta High Court under Art. 226 of the Constitution. The High Court, by its judgment dated 29th September, 2000, dismissed the writ petition and upheld the validity of the Act. The decision of the High Court is also impugned before us and is listed as Civil Appeal No. 6365 of 2000.

According to Mr. Harish Salve, appearing for some of the assessees, the word "luxuries" could not be construed to mean goods and the State's power to legislate in respect of luxuries under Entry 62 of List II of the Seventh Schedule to the Constitution did not extend to tax the sale, manufacture, or import of any goods. It is submitted that a tax on goods would have to mean a tax on some facet of the goods commencing with its manufacture and ending with its consumption. Taxation on each and every facet of goods had been specifically provided for in the legislative lists in the Seventh Schedule. For example excise duty on the manufacture of goods is covered under Entry 84 of List I, tax on the sale of goods is covered by Entries 92-A and 92-B of List I and Entry 54 of List II and duties on import and export of goods were referable to Entry 83 of List I. In each of these cases higher rates of tax were charged or duty levied when the commodities in question were of higher value. According to Mr. Salve if the word 'luxuries' in Entry 62 were construed to include goods, then it would allow the State to legislate on all these several facets merely by describing the goods as luxuries. Similarly if the word 'luxuries' was to be understood as descriptive of goods it would mean that the entry would give the State over-riding power to levy tax on all goods and would disturb the scheme of distribution of power on taxation and collection of revenue envisaged under the Constitution. It is submitted that there is no over-lapping in fields of taxation. There may be an over-lapping on the subject matter of the taxation but the taxable event must be different. It is contended that a luxury tax on items of luxury would fail this test unless the taxable event was the intangible act of providing luxury. Therefore, Mr. Salve contends, the word 'luxuries' as used in Entry 62 of List II has been used in the sense of an activity or service namely, the providing of luxury and what could be taxed by the State under that entry would be such service but not the goods themselves. Both the U.P. and A.P. Acts have been challenged on the ground that the luxury tax imposed under the two Acts was in fact a tax on the sale of tobacco which was beyond the legislative powers of the States and was also violative of Articles 286 and 301 of the Constitution. It is the further submission of Mr. Salve that the U.P. and the A.P. Luxuries Tax Acts were a fraud on the Constitution and a device to avoid operation of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (referred hereafter as the ADE Act) under which a State Government which levies sales or purchase tax on specified goods including tobacco is to be denied its share in the proceeds of additional excise duties levied under the ADE Act of 1957. It is stated that both the States of U.P. and A.P., while taking full advantage of the enactment of the ADE Act of 1957 and availing of the benefit thereunder had sought to levy sales tax under the guise of luxury tax in order to continue to reap such benefit.

Mr. K.K. Venugopal also appearing for the assessees submitted that the language in Entry 62 List II read "taxes on luxuries including entertainment etc." It is submitted that the word "including" should, in the context, be interpreted as illustrative. Therefore, on the principle of noscitur a sociis, "luxury" would have to mean something in the nature of entertainments, amusements, betting and

gambling. The argument is also that Entry 62 of List II uses two phrases, namely, 'tax on luxury' and 'tax on entertainment, amusements, betting and gambling'. There are, therefore, two kinds of taxes envisaged under the entry. The clubbing together of these two kinds of taxes would indicate that this was done because of a common element in the nature of the taxes to be imposed, the link being that both referred to a kind of activity. Mr. Venugopal also submitted that the tax sought to be imposed under the West Bengal Luxury Tax Act was in certain applications in fact a duty of excise insofar as it sought to levy tax on goods manufactured in India, it was in fact a tax on the import of goods insofar as it sought to levy a tax on goods manufactured outside India and brought into the State and it was a sales tax insofar as it sought to tax the dispatch of goods. The mere fact that there is a provision for refund in respect of interstate sales did not according to Mr. Venugopal, change the character of the impost.

Mr. R. Nariman also representing the assesses, submitted that the State Acts are violative of Art. 301 of the Constitution. It is submitted by Mr. Nariman, that the only exception to the right to free trade, commerce and intercourse throughout the territory of India provided for under Article 301 related to articles which were res extra commercium. This exception did not apply to tobacco. The decision in State of Punjab Vs. M/s. Devans Modern Breweries 2003(10) Scale 202, which held that liquor was res extra commercium was sought to be distinguished on the ground that tobacco, unlike liquor, was not the subject matter of any privilege, but was the subject matter of ordinary trade or commerce. It is submitted that it was recognized by Parliament that the trade in tobacco was of national importance, and had been declared to be of national importance in interstate trade and commerce under Article 286 (3) read with Section 14 of the Central Sales Tax Act 1956. Reliance was placed on the recent decision of this Court in Godawat Pan Masala Products vs. Union of India 2004 (6) Scale Page 388, which has held that tobacco was not res extra commercium. The further contention is that Articles 301 and 286 form part of a common constitutional scheme to preserve the economic unity of the country and that although Article 286 was limited to sales but nevertheless since there was a declaration under that Article in respect of tobacco, it meant that imposition of any tax on the commodity over and above the outer limit provided under Section 15 of the Central Sales Tax Act would ipso facto amount to a contravention of Article 301. Any tax which would result in a declared commodity, such as tobacco, being subjected to higher taxes in a particular State would, according to Mr. Nariman, contravene Article 301 since it would lead to a regional economic imbalance. The only way that such a State law could be validated would be through Article 304 (b). It is the accepted position that none of the State Acts have received any Presidential assent under Article 304 of the Constitution.

Mr. M. Parasaran, representing the Union of India, supported the contentions of the assesses and has submitted that the luxury tax in U.P., A.P. and W.B was in fact a tax on the sale and purchase of tobacco and that the levy of the tax was contrary to the scheme of collection and distribution of taxes under which the Centre alone may levy taxes on goods declared to be of special importance.

Mr. S. Gupta representing the State of Uttar Pradesh has submitted that the word 'luxury' has been defined authoritatively in Abdul Kadir (supra) as, "something which conduces enjoyment over and above the necessaries of life. It denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves". It is submitted that this

definition should not be cast aside since it had held the field for several decades. According to Mr. Gupta, the object of a luxury tax is the occurrence or event of luxury which itself means, "the happening of indulgence, extravagance, pleasure, comfort, gratification of the senses etc.". It is submitted that the word 'luxury' was applicable both to commodities and services and that this has been expressly held in Express Hotels vs. State of Gujarat (1989) 3 SCC

677. It is said that luxury tax is an indirect tax and is ultimately collected from and its burden directly or indirectly falls on the consumers who enjoy the luxury. Responding to the argument regarding the use of the word 'including' in Entry 62 of List II, it is submitted that tax on luxury has been recognized for a long time as a separate and distinct kind of tax and the principle of noscitur a sociis would not apply. As far as the U.P. Act is concerned, it is submitted that it was limited to tobacco and other such products. It is said that tobacco was inherently luxurious in the sense that it could not be said to be necessary to a person's health. On the other hand, it was recognized as having a harmful effect on health. It is said that it is not a tax on sale but on the article, tobacco, and articles made out of tobacco both of which give rise to luxuries in the sense that they are taken for pleasure and enjoyment and are wholly unnecessary for human health and sustenance. It is said that the luxury 'aspect' or 'component' which inheres in and arises on account of the article tobacco, and the activity of supply of tobacco is by itself a 'matter' under Article 246(3) which was distinct and independent of other aspects of 'tobacco' such as its manufacture, sale etc. It is said that the U.P. Act targets at the entire chain of supply of tobacco and aims at making its presence felt at the point of supply by the earliest tobacconist in the State. The mere fact of the tobacconist even the first tobacconist in the State facilitating the act of consumption of tobacco by his act of supply of tobacco, that is to say, by bringing about a state of affairs which has the potential of the act and element of luxury, namely, the act of consumption of tobacco is sufficient to provide the requisite nexus between the levy and the subject matter of the tax. Apart from this, it is said that the tax was not a tax on sale. The reference to sale consideration etc. in the Act was only for the purposes of fixing the value of the element of luxury for the purposes of taxation. This was also supported by the use of phrase "or otherwise" in the charging section of the Act. It is submitted that it is not a tax on the sale of goods within the meaning of Article 366 (29A)(f) nor a tax on supply. It is drawn to our attention that the amendment to Article 366 (29A) (f) extending the definition of sale of goods occurred subsequent to the incorporation of luxury tax as a specific field of legislation by the States. Therefore, what was taxable as luxury by the States under Entry 62 List II from before remained so taxable even after the amendment to Article 366(29A). Thus the UP Act which was framed within the legislative parameters of Entry 62 of List II was not a tax on the aspect 'supply'. It would follow that if the tax imposed by the State was not actual sale or deemed sale, there was no question of the infringement of Article 286 nor was there any question of the Act being a device to avoid the consequence of the ADE Act.

The State of West Bengal was represented by Mr. R. Dwivedi . He endorsed the stand of the U.P. Government on the scope of Entry 62 of List II and has said that the word 'luxuries' must be construed to include not only services but also goods. According to Mr. Dwivedi, the legislative history of the Entry starting with the Government of India Act, 1919 would show that betting, gambling, amusements and luxury tax had been treated as distinct and separate items. We were referred to Schedule I to the Tax Rules, 1920 and in particular to Entry 6 which related to luxury tax

and was the subject matter of a report of the Tariff Commission of 1924-25. The question of imposition of tax on tobacco had been considered in connection with this Entry. All these Entries were clubbed together under the Government of India Act, 1935 in Entry 52 of List II of that Act. It is said that this Court had repeatedly construed the word "luxury". In 1959, the decision in Western India Theatres vs. Cantonment Board AIR 1959 SC 582, 585 this Court had said that that the ordinary meaning was to be given to the word "luxury". The decision in Abdul Kadir in 1976 also proceeded on the basis that the word 'luxury' in Entry 62 List- II referred to goods. Finally, in 1989 Express Hotels had construed the Entry to hold that the word 'luxuries' covered goods both corporeal and incorporeal and services. It is submitted that there was no reason why this Court should deviate from a well established series of precedents which had held the field for over five decades. It is also submitted that the word 'including' in the Entry indicated an expansion and was not illustrative and that neither the principle of noscitur a sociis nor abundante cautela could be invoked in construing the objects of tax under Entry 62. As far as tobacco is concerned, it is submitted that there has never been a dispute that it constitutes an article of luxury. It is further argued that reference to several entries in List II which are subject to entries in either List I or List III, that while certain aspects of a particular subject matter of taxation may be taken out from List II nevertheless a taxing power in respect of that subject remained with the State Governments under List II. Reference has been made to Entries, 26,27, 50, 53 and 60 of List II. According to Mr. Dwivedi, the constitutional scheme showed that certain aspects in respect of the same subject matter would fall in List II whereas other aspects would fall in either List I or List III. The further submission is that luxury tax is a tax directly on goods whereas customs duty, excise duty and sales tax are in respect of goods. Thus excise duty is a levy on the manufacture or production of goods but was not a tax directly on goods. It is argued that the fact that the tax was levied on luxury goods with reference to the manufacture or sale of goods would not mean that it was a tax on the manufacture or sale of the goods. The manufacture or sale are only measures of the luxury tax leviable. With particular reference to the West Bengal Act, it was submitted that the tax was on luxury goods or commodities although it was with reference to the value of the commodities as stocked or as imported. The tax is merely levied when the commodity is stocked. In response to the assessees' arguments that the excise duty, sales tax, custom duty etc. all provide for higher rates in respect of luxury goods is that the same did not detract from the fact that those taxes remained taxes on activities in respect of goods and were not taxes on the goods themselves.

Mr. Gopal Subramanium appearing for the State of Andhra Pradesh has submitted that Entry 62 of List II should be construed bearing in mind that there were no restrictive words in the entry itself nor was there any restrictive content in any other entry which would modify or impact on Entry 62. It is submitted that the word 'consumption' used elsewhere in the Constitution had not been used in the Entry. This indicated that the Entry was not limited to the 'consumption' aspect of luxuries, entertainment etc. It is said that Entry 62 can be read harmoniously with Entry 54 and Entry 54 is the aggregate Entry and that Entry 62 relates to an element/component of such aggregation. The substance of Entry 62, according to Mr. Subramanium, is luxury, the form of the luxury either as goods or services is immaterial. It is finally submitted that tobacco squarely falls under Entry 62. It is further submitted that the actual presence of a consumer is inessential to the concept of luxury tax. It is also submitted that the Constitution provides for legislation in respect of taxation of different taxable events in respect of the same subject and for taxation in respect of different aspects

of the subject itself. It is said that unless the aspect was common for two entries, there was no question of harmonious construction nor of federal supremacy. The expression, 'luxuries' refers to goods and services which foster 'luxury', a sense of abundance, enjoyment and gratification. There are two aspects of luxury, the first being objects and services which are intrinsically capable of fostering a sense of luxury and second, the recipient of such articles or services who consumes or experiences such gratification. The argument is that the capacity to foster 'luxury', which labels goods as 'luxuries' within Entry 62, is an aspect of the goods entitling the objects to be taxed and that this is relatable to Entry 62 which aspect is distinct from taxes on manufacture or sale per se. Since 'luxuries' can be both goods and services, what is relevant is the common denominator of the luxury element/potential of goods and services. According to Mr. Subramanium since the tax under Entry 62 is on luxuries, it can legitimately be levied even where there is no actual consumption of the luxury. Coming to the Andhra Pradesh Act, it is submitted that the primary purpose of the Act was to levy tax on tobacco and not on the sale or manufacture of it. On Article 301, it is submitted that the levy does not impact on the movement of tobacco or trade in tobacco as interstate transactions were exempt.

In this background, the competing contentions as to the meaning of the word "luxury" in Entry 62 of List II are considered:

> a) According to the learned counsel for the assessees the word 'luxury' is distinct from an article of luxury and for the purpose of Entry 62 of List II means the activity of indulgence, comfort, enjoyment.
>
> b) The argument of learned counsel for the State of U.P. and A.P. as to the meaning of 'Luxury' is somewhat ambivalent. On the one hand it was contended that 'luxury' is a component and aspect of the goods and that Entry 62 relates to the exclusive jurisdiction of the State to levy a tax on such component or aspect of the goods.

On the other hand it was contended that luxury may arise from the use or consumption of certain kinds of goods or services or indulgence in certain kind of activities which are luxurious in nature.

c) According to counsel for the State of West Bengal, 'luxuries' comprehends both goods and services which have an element of enjoyment, extravagance and which are not necessaries. Therefore, the State can tax goods which are per se "luxury goods in the absolute sense like tobacco, liquor, jewellery etc. or other goods by imposing a sufficiently high price limit, the sufficiency being determined according to standards of the middle class".

The word luxury may possibly be susceptible of all three meanings. According to the Oxford English Dictionary (2nd Edn; Vol. IX) 'luxury' could among other meanings be defined as (1) abundance, sumptuous enjoyment (2) the habitual use of, or indulgence in what is choice or costly (3) refined and intense enjoyment; means of luxurious enjoyment; (4) in a particularized sense: something which conduces to enjoyment or comfort in addition to what are accounted the necessaries. Hence, in recent use, something which is desirable but not indispensable and (5) as an attribute as luxury coach, cruise duty, edition, flat, liner, shop, tax, trade". The High Courts and the West Bengal

Taxation Tribunal have accepted the fourth meaning that the tax is on luxury goods or articles on the basis of the decision in Abdul Kadir vs. State of Kerala (supra), in which this Court had upheld the constitutional validity of the Kerala Luxury Tax on Tobacco (Validation) Act, 1964. The Act had sought to validate the collection of licence fees by the State under a statutory provision which had been struck down as unconstitutional. The invalidated Rules had required licences to be taken out for storage and sale of tobacco and for payment of licence fee in respect thereof. This Court had in A.B. Abdul Kadir vs. Union of India (1962) 2 SCR 741 held the Rules were law corresponding to the provisions of the Central Excise & Salt Act, 1944 and were superseded by the Finance Act, 1950. Consequent upon the invalidation of the Rules, applications were filed by the erstwhile licensees for refund of the fees collected. The Act was then passed by the States to validate the levy as luxury tax. The Act was challenged on the ground that it was in fact a duty of excise referable to the exclusive power of the Union under Entry 84 of List I. This was negatived on the ground that there was no provision in the impugned Act which was concerned with the production or manufacture of tobacco. The next argument was that tobacco was not an article of luxury. The argument was negatived. It was in that context that this Court held that the Act was referable to Entry 62 of List II and said:-

> "According to that entry, the State legislatures can make laws in respect of 'taxes on luxuries, including taxes on entertainments, amusements, betting and gambling".

Question therefore, arises as to whether tobacco can be considered to be an article of luxury. The word 'luxury' in the above context has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature of being an article of luxury. The connotation of the word 'luxury' is something which conduces enjoyment over and above the necessaries of life. It denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves."(p. 227) It appears to have been assumed that the phrase "tax on luxuries" in Entry 62 of List II meant a tax on articles of luxury and the only question was whether tobacco was such an article. The assessees in the present case do not dispute that tobacco is an article of luxury but contend that articles of luxury are not covered by Entry 62. That was an argument neither raised nor considered in Abdul Kadir.

The concept of "luxuries" in Entry 62 of List II was also considered in the Federation of Hotel & Restaurant vs. Union of India (1989) 3 SCC 634. In that case the hotel industry challenged the constitutional validity of the Expenditure Tax Act 1987 (Central Act 35 of 1987). The Union of India sought to sustain the legislative competence to enact the impugned law under Article 248 read with Entry 97 of List I of the Seventh Schedule. The hoteliers urged that the legislation was squarely within Entry 62 of List II since it imposed a tax on 'Luxuries". Counsel for the hoteliers argued on the basis that a tax on luxuries was a tax on the price paid for the sale of goods (vide para 29 of the report). This Court rejected the challenge to the Act and upheld it saying that the subject matter of the impugned Act was in pith and substance a tax on expenditure and not on luxuries or sale of goods.

Another decision on the words 'tax on luxuries' in Entry 62 is the case of Express Hotels vs. State of Gujarat: (1989) 3 SCC 677. In that case Legislations of different States, namely, the States of

Gujarat, Tamil Nadu, Karnataka and West Bengal which imposed a tax on 'luxuries' was challenged as being constitutionally invalid. The Acts provided for levy of 'tax on luxuries provided in Hotels'. The argument of the appellants in that case was that the taxation entry in Entry 62 of List II provided for taxes on "Luxuries" and took within its sweep, a tax on goods and articles like jewellery perfumes, liquor, tobacco etc. in their aspect and character as articles of luxuries and did not include "services" or "activities". The argument was rejected and it was held that the levy was valid. In this case also arguments proceeded on the basis that Entry 62 of List II covered articles of luxury. In none of these decisions therefore was this Court called upon to address the question whether Entry 62 did not cover articles of luxury and ought to be restricted to things incorporeal such as enjoyment or indulgence in what is either choice or costly. It appears that 'luxury' has been defined by courts in the United States of America as " An entirely relative term; a free indulgence in costly food, dress, furniture or anything expensive which gratifies the appetites or tastes; also a mode of life characterized by material abundance and gratification of expensive tastes'. (Corpus Juris Secundum Vol- IV p.887). According to this definition, American Courts appear to have opted for the definition of the word as submitted by the assessees and have held that it is an activity. However we have also been referred by counsel for the States to other authoritative works such as Black's Law Dictionary (6th Edition) in which a 'luxury tax' is said to be a generic term for excise imposed on purchase of items which are not necessaries e.g. tax on liquor or cigarettes. This definition is inconclusive as it merely defines what may have in fact been the subject matter of tax in a particular statute.

But theoretically 'luxuries' is capable of covering each of the several meanings ascribed to the word. The question is how the word is to be construed in the Constitutional entry. Neither the dictionary meaning nor the meaning ascribed to the word judicially (for the reasons stated) resolve the ambiguity. The solution must be found in the language of the Entry taking into consideration the Constitutional scheme with regard to the imposition of taxes and the collection of revenues. Before we proceed further we would like to clear the ground. Whatever be the similarities between the Constitutions of other countries with similar federal structures as this Country such as the United States, Canada or Australia, this Court has, as a general rule held that the opinions expressed by the Courts of those countries may not be helpful in construing the allocation of legislative heads in our Constitution. [See : Chhotabhai Hethabhai Patel vs. The Union of India (1962) Supp. 2 SCR 1; Province of Madras vs. M/s. Boddu Paidanna (supra); State of Bombay vs. Chamarbaugwala :

> (1957) SCR 874; Atiabari Tea Co. vs. The State of Assam :
>
> (1961) 1 SCR 809; The Automobile Transport (Rajasthan) vs. The State of Rajasthan (1963) 1 SCR 491] although they may be of some relevance in determining the true character of particular legislation (Subrahmanyan Chettiar vs. Muthuswami Gounder 1940 FCR 188; Union of India vs. H. S. Dhillon (1971) 1 SCC 779, 801-803). Given the wealth of authority on the question of interpretation of legislative heads in this country, we deem it sufficient to restrict our opinion based on the views expressed by this Court.

The Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This mutual exclusivity is reflected

in Article 246 (1) and has been noted in H.M. Seervai's Constitutional Law of India. Fourth Edition, Volume 1 at page 166 in paragraph 1A 25 where, after commenting on the problems created by the overlapping powers of taxation provided for in other countries with federal structures such as the United States, Canada and Australia, the learned author opined :-

> "The lists contained in the Schedule VII to the G.I. Act, 35, provided for distinct and separate fields of taxation and it is not without significance that the concurrent legislative list contains no entry relating to taxation but provides only for "fees" in respect of matters contained in the list but not including fees taken in any court. List I and List II of Schedule 7 thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the G.I. Act,
>
> 35. This scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results".

This view has also been reiterated in Hoechst Pharmaceuticals Ltd. and anr. vs. State of Bihar and Ors. (1983) 3 SCR 130 :-

> "A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation . Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise."

(See also The State of West Bengal vs. Kesoram Industries Ltd., And Ors. JT 2004 (1) 375).

Therefore, taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass.

Classically, a tax is seen as composed of two elements:

> the person, thing or activity on which the tax is imposed and the incidence of tax. Thus every tax may be levied on an object or an event of taxation. The distinction between the two may not, ultimately, be material in the context of the Indian Constitution as we will find later. But for the time being we may note that both these elements are distinct from the incidence of taxation. For example the tax may be

> imposed on goods on the event of their manufacture, sales, import etc. The law imposing the tax may also prescribe the incidence or the manner in which the burden of the tax would fall on any person and would take within itself the amount and measure of tax. The importance of this distinction lies in the fact that in India, the first two have been given a Constitutional status, whereas the incidence of tax would be a matter of statutory detail. The incidence of tax would be relevant in construing whether a tax is a direct or an indirect one. But it would be irrelevant in determining the subject matter of the tax. [See: M/s. Chhotabhai Jethabhai Patel & Co. vs. Union of India & Another : AIR 1962 SC 1006] An illustration of this distinction is nicely brought out in State of Karnataka v. Drive-in-Enterprises [(2001) 4 SCC 60] . Entertainment tax was levied by the Karnataka Cinemas (Regulations) Act, 1964 and the Rules framed thereunder by the State in respect of a film show. A higher rate of tax was levied on persons who drove their cars in to view the film from the comfort of their cars. The challenge to the Act was that entertainment tax could be levied only on human beings and not on any inanimate object, namely motor vehicles. The challenge was negatived on the ground that the State was competent to levy tax on entertainment under Entry 62 List II.

That was the subject matter of the tax. The incidence of the tax was on the persons entertained. Clearly the manner in which the burden would fall viz. on persons either with or without motor vehicles would not affect either the object or the nature of the tax. Motor vehicles were neither the object of taxation nor the taxable event but were part of the incidence of the tax. Under the three lists of the Seventh Schedule to the Indian Constitution a taxation entry in a legislative list may be with respect to an object or an event or may be with respect to both. Article 246 makes it clear that the exclusive powers conferred on the Parliament or the States to legislate on a particular matter includes the power to legislate with respect to that matter. Hence where the entry describes an object of tax, all taxable events pertaining to the object are within that field of legislation unless the event is specifically provided for elsewhere under a different legislative head. Where there is the possibility of legislative overlap, courts have resolved the issue according to settled principles of construction of entries in the legislative lists.

The first of such settled principles is that legislative entries should be liberally interpreted, that none of the items in the list is to be read in a narrow or restricted sense and that each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it (United Provinces vs. Mt. Atiqa Begam : AIR 1941 FC 16, Western India Theatres ltd. vs. The Cantonment Board Poona (1959) Suppl. (2) SCR 63, 69 and ELEL Hotels & Investments Ltd., & Ors. vs. Union of India (1989) 3 SCC 698).

In Express Hotels vs. State of Gujarat (supra) it was noted that the view of the Bombay High Court in State of Bombay vs. RMD Chamarbaugwala AIR 1956 Bom. 1 that what was contemplated in Entry 62 was "a tax on certain articles or goods constituting luxuries and not legislation controlling an activity which may not be a necessary activity", was overruled by this Court in State of Bombay vs. RMD Chamarbaugwala ((1957) SCR 874). The view of the Calcutta High Court in Spences Hotel Private Ltd., vs. State of West Bengal 1975 Tax LR 1890 (Cal) to the effect that A tax levied under

Entry 62 cannot be restricted to certain articles only but may also be extended to things incorporeal" was affirmed, it was said :-

> "The concept of a tax on 'luxuries' in Entry 62, List II cannot be limited merely to tax things tangible and corporeal in their aspect as 'luxuries'. It is true that while frugal or simple food and medicine may be classified as necessities; articles such as jewellery, perfume, intoxicating liquor, tobacco, etc., could be called articles of luxury. But the legislative entry cannot be exhausted by these cases, illustrative of the concept. The entry encompasses all the manifestations or emanations, the notion of 'luxuries' can fairly and reasonably (sic) can be said to comprehend the element of extravagance of indulgence that differentiates 'luxury' from 'necessity' cannot be confined to goods and articles. There can be elements of extravagance or indulgence in the quality of services and activities." (p.690).
>
> It was also held that :-
>
> "The concept of 'luxuries' in the legislative entry takes within it everything that can fairly and reasonably be said to be comprehended in it so long as the legislation has reasonable nexus with the concept of 'luxuries' in the broad and general sense in which the expressions in legislative tests (sic lists) are comprehended, the legislative competence extends to all matters 'with respect to' that field or topic of legislation." (p-692).
>
> But as we have already noted and as is abundantly clear from the passages quoted, the decision was given on the assumption that articles of luxury are covered by Entry 62 List II and cannot be held to be an authority for the proposition that articles or goods are, as a matter of construction, fairly and reasonably includible in that entry. The argument of Mr. Salve is in fact that the breadth of an entry is curtailed by the second principle of construction. The second principle is that competing entries must be read harmoniously. The proper way to avoid a conflict would be to read the entries together and to interpret the language of one by that of the other (Governor General in Council vs. Province of Madras (1945) FCR 179 at pg. 191-192); State of Bombay vs. Narottamdas Jethabhai 1951 SCR 51; Bar Council of U.P. vs. State of U.P. & Anr. (1973) 1 SCC 261; D.G. Ghose & Co. (Agents) (P) Ltd. vs. State of Kerala & Anr. (1980) 2 SCC 410; Federation of Hotel and Restaurant vs. Union of India (1989) 3 SCC 634, 657, 667-668; State of West Bengal vs. Kesoram Industries 2004 (1) SCALE 425, 462; in the matter of Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938; AIR (1939) FC 1,8,40).
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> The argument of the assessees is that the tax leviable under Entry 62 List II cannot be a tax on goods as that would not only allow the State to levy sales tax in contravention of Art. 286 but would permit trespass onto the Union's Legislative fields under Entries 83 and 84 of List I. Indeed the contention of the assesses is that the States have by the impugned legislations, done just that. Entry 83 demarcates the Union's

> power to legislate with respect to "Duties of customs including export duties". Entry 84 speaks of "Duties of excise on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption (b) opium, Indian hemp and other narcotic drugs and narcotics but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry".

The States have countered this by contending that Entry 62 List II envisaged a tax on luxury goods. Whereas duties of Excise, Customs and Sales Tax are not directly on the goods but with reference to goods and that the taxes are leviable on the events of manufacture, import/export and sale. According to the States this Court has held so while construing Article 289 (1) in Re : The Bill to Amend Section 20 of the Sea Customs Act, (1964) 3 SCR 787. In the language of the Court:

> "The taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income.
>
> Similarly in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves"

Therefore according to the States, the argument of the assessees that the existing entries on taxation indicated that Entry 62 of List II could not cover goods was without substance. The submission of the assessees proceeds on two premises : the first that taxation of an object can only be with reference to a taxable event and second that all taxable events have been covered by the legislative entries. As far as the first premise is concerned, it may be that a tax on a thing or goods can only be with reference to a taxable event, but there is a distinction between such a tax and a tax on the taxable event. In the first case the subject matter of tax is the goods and the taxable event is within the incidence of the tax on the goods. In the second the taxable event is the subject matter of tax itself.

The first premise paraphrased is that even a tax on goods is really a tax on a taxable event. The decision in the Sea Customs Act case (supra) which was rendered by this Court in its advisory capacity under Art. 143 was concerned with the construction of Art. 289 of the Constitution. The

nature and incidence of the taxation entries in the legislative tests was directly in issue and it was on the determination of this issue that the power of the Union to levy tax on property of the States under Art. 289 was considered (p. 822-823 of the report). A tax on property was described as a direct tax and taxes on the taxable events in respect of property as indirect taxes based on the impact on the property. However even in respect of 'direct taxes" (in the sense used by the Court in that decision) it was held by Ayyangar, J. in his concurring opinion, that it was ultimately a question of degree of impact. He said (at pg. 917 of the report) "for in the ultimate analysis the distinction between a direct and an indirect tax is a distinction based upon the difference in impact which is also expressed as a distinction based upon its being not on property but on a taxable event in relation to property. If the taxable event is merely the ownership of the property and on the beneficial interest therein, it would be a direct tax, whereas if the connection between the property and the tax payer is not merely ownership but something else such as a transaction in relation to it, then it would be an indirect tax." In other words it is the taxable event of ownership which survives for taxation in all entries levying tax on goods, articles or objects. It is true that this Court in The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938; AIR 1939 FC 1 has held the excise duty is a tax on goods. This was because ordinarily the power to impose a tax on goods would, by virtue of Article 246 encompass the power to levy a tax in respect of goods. Thus there appears to be no doubt that the first premise contended for by Mr. Salve is correct. The logical corollary of holding that taxes are imposed only on taxable events is that even when an entry speaks of a levy of a tax on goods it does not include the right to impose taxes on taxable events which have been separately provided for under other taxation entries. The tax in respect of goods has sometimes been referred to as a tax on an aspect of the goods and sometimes as the taxable event (See : Federation of Hotel & Restaurants vs. Union of India (1989) 3 SCC 634). Whatever the terminology, because there can be no overlapping in the field of taxation, such a tax if specifically provided for under one legislative entry effectively narrows the fields of taxation available under other related entries. It is also natural 'when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation of the former at the expense of the latter'. (Madras Province vs. Boddu Paidanna AIR 1942 FC 33,37 per Gwyer C.J.). For example the State cannot under the garb of luxury tax under Entry 62 List II impinge on the exclusive power of the Union under Entries 83 and 84 of List I by merely describing an article as a luxury. Ofcourse the States do have the exclusive power under Entry 54 of List II to legislate with respect to "Taxes on the sale and purchase of goods other than newspapers", but that power has been explicitly made "subject to the provisions of Entry 92A of List I".

Entry 92A of List I speaks of "Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce "

> Apart from this limitation on the States' jurisdiction to levy sales tax, are the restrictions placed by Article 286. Article 286(1) prohibits the States from imposing or authorizing the imposition of tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State, or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. In addition Article 286 (3) provides that :

"Any sale of a State shall, in so far as it imposes, or authorizes the imposition of

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce;

or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause

(b), sub-clause (c) or Sub-clause (d) of clause (29A) of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify".

Thus Parliament has been given the overriding power to limit the rates of sales taxes which are otherwise within the exclusive competence of the States in respect of certain items of sale and purchase. The relevant clause for our purpose is clause (a) of Art. 286(3) which allows Parliament to enact a law declaring goods to be of special importance in inter-state trade or commerce.

In exercise of this power, Section 14 of the Central Sales Tax Act. 1956 has declared certain goods to be of special importance in inter-state trade or commerce. This includes tobacco both in un-manufactured and manufactured form. The States have been restricted from imposing or authorizing the imposition of tax on the sale or purchase of the declared goods within the State upto a maximum limit of 4 per cent of the sale or purchase price under Section 15 of the Central Sales Tax Act, 1956.

In December, 1956, the National Development Council, Planning Commission, Government of India, and the States agreed that the sales tax in respect of inter alia tobacco should be replaced by a surcharge on the Central Excise Duties, the income derived there from being distributed amongst States on the basis of consumption, subject to the income from the States being assured. Pursuant to this and the recommendation of the Finance Commission in its report dated 30th September, 1957, the Additional Duties of Excise (Goods of Special Importance) Act 1957 was passed by Parliament. The object of the Act was to impose additional duties of excise in replacement of the sales tax levied by the Union and the States on sugar, tobacco and millmade textiles and to distribute the net proceeds of these taxes, except the proceeds attributable to Union territories, to the States. Provision was made that the State which levy a tax on the sale or purchase of these commodities after the 1st April, 1958 could not participate in the distribution of the net proceeds of the additional levy under the ADE Act. Provision was also being made in the Act for including specified goods in the category of goods declared to be of special importance in inter-State trade or commerce so that, following the imposition of uniform duties of excise on them, the rates of sales tax if levied by any State were subject from 1st April, 1958 to the restrictions in Section 15 of the Central Sales Tax Act, 1956.

Section 3 of the ADE Act is the charging section under which additional excise duties are leviable on specified goods manufactured or lying in stock. Sub-section (1) of Section 3 reads :-

"3. Levy and collection of additional duties (1) There shall be levied and collected in respect of the following goods, namely, sugar, tobacco, cotton fabrics, rayon or artificial silk fabrics and woolen fabrics produced or manufactured in India and on all such goods lying in stock within the precincts of any factory, warehouse or other premises where the said goods were manufactured, stored or produced, or in any premises appurtenant thereto, duties of excise at the rate of rates specified in the First Schedule to this Act."

(Emphasis added).

No State can levy luxury tax on items covered by Section 3 of the ADE Act in respect of goods for the same taxable event i.e. goods stored on manufacture, just by describing the goods as luxury goods. The overlapping of the powers exercised under Entry 84 of List I and Entry 62 of List II would then be evident. Similarly storage or stocking of imported goods is covered by Entry 83 of List I and cannot be made the subject of levy by the States.

By the Constitution (Forty-sixth Amendment) Act, 1982 the phrase "tax on the sale or purchase of goods" was extensively defined by the introduction of Clause 29A in Article

366. It reads :-

"(29A) 'tax on the sale or purchase of goods' includes

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(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 each, deferred payment or other valuable consideration';

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom

such transfer delivery or supply is made";

However while widening the scope of Entry 54 of List II, the powers of the State to levy such tax are subjected to a corresponding restriction as a consequence of the constitutional curbs imposed on sales tax under Article 286 read with Sections 14 and 15 of the Central Sales Tax Act, 1956 and the ADE Act, 1957. "The tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. The position is the same when we look at Article 286 of the Constitution. If any declared goods which are referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in clause (29-A) of Article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned Section 15 of the Central Sales Tax Act, 1956.

No State can therefore by describing an item as a luxury, seek to levy tax on its supply. It cannot be disputed that as far as UP and AP are concerned, were it not for their Interpretation of Entry 62 of List II, the tax would be referable only to Entry 54 List II. If Entry 62 List II does not allow the taxation of goods, the levy would not be constitutionally sustainable. In our opinion to read Entry 62 List II as including articles of luxury cannot allow all these constitutional restrictions to be by-passed allowing States to levy tax on the supply of goods by describing them as luxury goods. As has been rightly contended by Mr. Parasaran appearing for the Union of India, the supply of luxury is nothing but the supply of goods since the goods themselves constitute the luxury.

So even if tobacco is an article of luxury, a tax on its supply is within the exclusive competence of the State but subject to the constitutional curbs prescribed under Article 286 read with Sections 14 and 15 of the Central Sales Tax Act, 1956 and most importantly the ADE Act of 1957 under which no sales tax can be levied on tobacco at all if the State was to take the benefits under that Act.

Despite the subtraction of the rights to levy excise or customs duties and the restraint on the States to levy sales tax in cases when the states can levy tax on goods we still have to determine whether Entry 62 of List II covers taxes on goods at all.

In view of the decision in the Sea Customs Act case, the second premise propounded by Mr. Salve is unacceptable. As we have seen, in that case this Court held that the taxable event of ownership is implicit in the concept of taxes on goods. That the entries on taxable events in the legislative lists are not exhaustive is also recognised and provided for in Art. 248 (2) which provides for the power of Parliament to make any law imposing a tax not mentioned in either the Concurrent or State lists. This residuary power is reflected in Entry 97 of List I. Furthermore if an article or goods are taxable only with respect to a taxable event, and if, as contended by Mr. Salve, all taxable events have been provided for in the different legislative heads, then by that token no object or goods could be taxable. This would render the various entries in the State List including entries 57 and 58 contentless. As we cannot accept that the taxation entries exhaustively enumerate all taxable events, it does not follow that Entry 62 of List II does not cover goods. It is not possible therefore to hold merely on such a construction of the legislative lists and the taxation entries therein, that Entry 62 List II does not permit the States to levy tax on articles of luxury.

Having rejected the second premise contended for by Mr. Salve, the next question is whether the language of Entry 62 List II would resolve the issue. The juxtaposition of the different taxes within Entry 62 itself is in our view of particular significance. The entry speaks of "taxes on luxuries including taxes on entertainments, amusements, betting and gambling". The word "including" must be given some meaning. In ordinary parlance it indicates that what follows the word "including" comprises or is contained in or is a part of the whole of the word preceding. The nature of the included items would not only partake of the character of the whole, but may be construed as clarificatory of the whole.

It has also been held that the word 'includes' may in certain contexts be a word of limitation (South Gujarat Roofing Tiles Manufacturers vs. State of Gujarat (1976) 4 SCC 601). In the context of Entry 62 of List II this would not mean that the word 'luxuries' would be restricted to entertainments, amusements, betting and gambling but would only emphasise the attribute which is common to the group. If luxuries is understood as meaning something which is purely for enjoyment and beyond the necessities of life, there can be no doubt that entertainments, amusements, betting and gambling would come within such understanding. Additionally, entertainments, amusements, betting and gambling are all activities. 'Luxuries' is also capable of meaning an activity and has primarily and traditionally been defined as such. It is only derivatively and recently used to connote an article of luxury. One can assume that the coupling of these taxes under one entry was not fortuitous but because of these common characteristics.

Where two or more words are susceptible of analogous meaning are clubbed together, they are understood to be used in their cognate sense. They take, as it were, their colour from and are qualified by each other, the meaning of the general word being restricted to a sense analogous to that of the less general. As said in Maxwell on the Interpretation of Statues 12th Edn. P.289.

> "Words, and particularly general words, cannot be read in isolation; their colour and their content are derived from their context ."

Put in other words the included words may be clarificatory or illustrative of the general word. Thus in U.P. State v. Raja Anand; (1967) 1 SCR 362, while construing Art. 31A (2) as enacted by the Constitution (Seventeenth Amendment) Act, 1964 the relevant excerpt of which read as:-

> "31A(2) In this article
>
> (a) the expression 'estate' shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include
>
> (i) xxx xxx xxx xxx xxx
>
> (ii) xxx xxx xxx xxx xxx

> iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agriculture labourers and village artisans;

this Court said:-

> "In our opinion the word "including"

is intended to clarify or explain the concept of land held or let for purposes ancillary to agriculture. The idea seems to be to remove any doubts on the point whether waste land or forest land could be held to be capable of being held or let for purposes ancillary to agriculture."

In the present context the general meaning of 'luxury' has been explained or clarified and must be understood in a sense analogous to that of the less general words such as entertainments, amusements, gambling and betting, which are clubbed with it. This principle of interpretation known as 'noscitur a sociis' has received approval in Rainbow Steels Ltd. vs. C.S.T.: (1981) 2 SCC 141,145 although doubted in its indiscriminate application in State of Bombay vs. Hospital Mazdoor Sabha : AIR 1960 SC 610. In the latter case this Court was required to construe Section 2(j) of the Industrial Disputes Act which read:

> "Section 2(j) provides that 'industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen".

It was found that the words in the definition were of very wide and definite import. It was suggested that these words should be read in a restricted sense having regard to the included items on the principle of 'noscitur a sociis'. The suggestion was rejected in the following language:

> "It must be borne in mind that noscitur a sociis is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the Legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the Legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service". (p.614) We do not read this passage as excluding the application of the principle of noscitur a sociis to the present case since it has been amply demonstrated with reference to authority that the meaning of the word "luxury" in Entry 62 is doubtful and has been defined and construed in different senses. In Black Diamond Beverages vs. Commercial Tax Officer (1998) 1 SCC 458, the definition of 'sale price' with respect to notified commodities under Section 2(d) of the West Bengal Sales Tax Act, 1954 was sought to be restricted with reference to the specific inclusion of sums charged for containers etc. The argument was that

since freight charges were not expressly included they must be taken to have been excluded from the 'sale price'. In that context this Court said that the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning and that according to the natural meaning 'sale price' included freight charges. It was said that by the inclusion sale price was extended to mean something which would not ordinarily come within its definition. The decision is not of relevance as it is nobody's contention that luxuries in the sense of enjoyment would not naturally cover entertainments, amusements, betting and gambling. We are aware that the maxim of noscitur a sociis may be a treacherous one unless the 'societas' to which the 'socii' belong, are known. The risk may be present when there is no other factor except contiguity to suggest the 'societas'. But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as 'including' is sufficiently indicative of the societas. As we have said the word 'includes' in the present context indicates a commonality or shared features or attributes of the including word with the included.

Furthermore where articles have been made the object of taxation, either directly or indirectly, the entries in the legislative lists have specifically said so or the impost is such that the subject matter of tax follows by necessary implication. In List II itself, the State legislature has been given the right to levy taxes on the entry of goods under Entry 53, on 'carriage of goods and passengers' under Entry 56, on 'vehicles' under Entry 57 and on 'animals and boats under Entry 58. There is no instance in any of the legislative lists of a tax being leviable only with reference to an attribute. An attribute as an object of taxation without reference to the object it qualifies would lead to legislative mayhem, blur the careful demarcation between taxation entries and upset the elaborate scheme embodied in the Constitution for the collection and distribution of revenue between the Union and the States. For example would a luxury vehicle be subjected to tax under Entry 62 or Entry 57 of List II? In the latter case, the levy would be subject to provisions of Entry 35 of List III and hence capable of being over-ridden by Parliament. If it is referable to Entry 62 there would be no such concurrent power in Parliament. Hence on an application of general principles of interpretation, we would hold that the word 'luxuries' in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognized as being beyond the necessary requirements of an average member of society and not articles of luxury.

Lest we be accused of a blind adherence to a strictly verbal interpretation we may note that the legislative history behind Entry 62 of List-II does not militate against the conclusion reached by us on a pure question of interpretation. The Government of India Act, 1915 Act (as amended by the Government of India Acts 1916 and 1919) provided for the division of the country into provinces including the two Presidencies of Bengal and Madras (Section 46). The local legislature of each province was empowered to make laws under S. 80-A of the 1915-19 Act "for the peace and good government" of that province. On 16th December, 1920 the Scheduled Taxes Rules

were made which permitted the Legislative Council of a province for the purpose of the local government to impose taxes listed in Schedule I to the Rules. These included inter alia:

S.No.3 . A tax on any form of betting or gambling permitted by law.

Sl.No.5 A tax on amusements Sl.No.6. A tax on any specified luxury.

It was noted by the Indian Taxation Enquiry Committee in its report in 1924-25 that tobacco was not subjected to tax. It was recommended that a regular excise system should be put in place on the manufacture of tobacco products or a levy of sales tax or licensing fee on retail vendors of tobacco. It is of significance that there was no suggestion of a levy being imposed on tobacco under List I Sl.No.6. Between the Government of India Act 1915-1919 and the Government of India Act, 1935, these lists underwent a change. Under the 1915-1919 Act there was indication only of the provincial powers of legislation thereby leaving every other subject within the legislative powers of the Centre. In 1921, the Devolution Rules came into force. Schedule I to the Rules contained two parts. Part I of Schedule I contained the subjects which could be legislated or by the Indian Legislature. Provincial subjects were classified under Part II. The sources of provincial revenue included in the Schedules to the Scheduled Taxes Rules were retained in Part II with the provinces.

Schedule VII of the Government of India Act, 1935 which repealed the 1915-1919 Act also classified the legislative powers between the Federation and the Provinces. It contained two exclusive lists and one concurrent list. List I of the Schedule was the Federal Legislative List and comprised matters exclusively assigned to the Federation. Entry 45 read "Duties on excise on tobacco and other goods manufactured or produced in India". List II which was the Provincial Legislative List contained an Entry No. 48 "Taxes on the sale of goods"

and on advertisements. Entry 50 read: "Taxes on luxuries including tax on entertainment, amusement, betting and gambling". Here too there is no evidence of any tax being imposed by the State under this entry on any goods. On the other hand the imposition of tax on tobacco was brought under Entry 45 of List I. Entry 50 of the Provincial List (now Entry 62 of List II) was resorted to impose entertainment tax on cinema houses under the Cantonments Act, 1924 by the State of Bombay. The tax was upheld on the ground that the entry contemplated a law which imposed tax on the act of entertaining Western India Theatres Ltd. vs. The Cantonment Board, Poona (1959) Supp. (2) SCR 63, 69.

Prior to the framing of the present Constitution the debates in the Constituent Assembly show that the suggestion that Entry 62 of List II should read as "taxes on entertainments, amusements, betting and gambling, racing and other such luxuries" was negatived on the ground that it would cut down the scope of the entry. The example of a tax on servants which "should probably be within the unamended entry" was cited as being possibly excluded by the amendment. In fact "a tax on menials

and domestic servants" was, under Schedule II of the Taxes Rules framed under the 1915-1919 Act, within the competence of the Provincial Legislative Council to impose, or with the authority of the State Legislative Council within the competence of any local authority. It was an entry distinct from the authority conferred on the State Legislative Council to impose a 'tax on any specified luxury' under Schedule I of the Taxation Rules. In any event 'servants and menials' could hardly be equated with "goods". It was probably their employment which was considered as a possible luxury. It is again to be emphasized that the rejection of the suggestion was not because of the possible exclusion of luxury goods. After the Constitution came into force, except for the decision of this Court in A.B. Abdul Kadir vs. State of Kerala (supra), in 1976, Entry 62 of List II was not invoked save for the purpose of levying a tax on gambling and betting (State of Bombay vs. R.M.D. Chamarbaugwala (1957) SCR 874) or for levying tax on the provisions of enjoyment or indulgence of facilities in hotels and restaurants (Express Hotels vs. State of Gujarat (1989) 3 SCC 677; ELEL Hotels & Investments Ltd. & Ors. vs. Union of India (1989) 3 SCC 698; East India Hotels Ltd. vs. State of West Bengal (1990) Supp. SCC 755; Spences Hotels Pvt. Ltd. and Anr. vs. State of West Bengal and Ors.. (1991) 2 SCC 154 and East India Hotels Ltd, Srinagar vs. State of J & K. and Anr. (1994) Supp. 2 SCC

580).

Thus the constitutional history of Entry 62 of List II would show that despite the existence of an entry pertaining to 'luxury tax' in all the Constitutional Acts, from 1915 onwards, the tax was never sought (save in the case of Abdul Kadir) to be imposed on goods till 1993. The method of taxing luxury goods invariably was by subjecting them to the extant fiscal regimes of excise duties, sales tax, customs duties etc. at heavier rates. No distinction is made in Article 366 (29A) or Article 286 or Entries 83 and 84 of List I as to the nature of the goods which may be the subject matter of sale excise or import be they articles of necessity or articles of luxury. This is also the sense in which States have all along understood the word as indicated in their evidence given in response to the question posed by the Taxation Enquiry Commission with reference to the levy of sales tax in 1953-54 . The question was "should there be special rates of levy, higher than the ordinary rate for certain articles ? If so, for which types of articles?". The response to this question by all the States was in the affirmative. It would suffice for our purposes to note the response of the two States whose statutes are impugned viz. AP and UP. Andhra Pradesh said:

> "In this State, special rates of tax at a higher rate are levied on articles mentioned in Section 3(2) of the Act, which are luxury goods. It is proposed to increase the number of articles in this list by incorporating certain other items brought to notice by the lists of the other States."

Similarly Uttar Pradesh said:

> "Special rates of levy, higher than the ordinary rates are justified in respect of many luxury goods, needs on which unduly high profits are being made by the producers or dealers and goods of which are consumption should be discouraged."

Historically therefore the tax on luxury goods was seen as a part of Entry 54 of List II or Entries 83 and 84 of List I but not as a tax leviable under Entry 62 of List II. The only exception was the Kerala Validating Statute which was the subject matter of Abdul Kadir where the assessee did not question that Entry 62 related to goods and articles and the sole point of protest was that tobacco was not an article of luxury. It was only in 1993 the State of Maharashtra enacted the Bombay Luxury Tax Act, 1993 directly imposing luxury tax on goods. This was withdrawn in 1994 but the other states soon followed suit culminating in a rash of such legislation some of which are now impugned before us where the question as to the leviability of Luxury tax on goods is squarely raised.

Given the language of Entry 62 and the legislative history we hold that Entry 62 of List II does not permit the levy of tax on goods or articles. In our judgment, the word "luxuries" in the Entry refers to activities of indulgence, enjoyment or pleasure. In as much as none of the impugned statutes seek to tax any activity and admittedly seek to tax goods described as luxury goods, they must be and are declared to be legislatively incompetent. However following the principles in Somaiya Organics (India) Ltd. vs. State of U.P. (2001) 5 SCC 519 while striking down the impugned Acts we do not think it appropriate to allow any refund of taxes already paid under the impugned Acts. Bank guarantees if any furnished by the assessees will stand discharged.

It was stated on behalf of the State Governments that after obtaining interim orders from this Court against recovery of luxury tax, the appellants continued to charge such tax from consumers/customers. It is alleged that they did not pay such tax to respective State Governments. It was, therefore, submitted that if the appellants are allowed to retain the amounts collected by them towards luxury tax from consumers, it would amount to "unjust enrichment" by them.

In our opinion, the submission is well founded and deserves to be upheld. If the appellants have collected any amount towards luxury tax from consumers/customers after obtaining interim orders from this Court, they will pay the said amounts to the respective State Governments.

In view of our opinion on the scope of Entry 62 List II, we do not think it necessary to answer the other issues raised in these appeals which are left open.

Accordingly, W.P. No. 567 of 1994; W.P. Nos. 568-569 of 1994 are allowed. C.A Nos. 123-125 of 1995 are dismissed albeit for different reasons. C.A. No. 2123 of 1999, C. A. Nos. 2124-25 of 1999, C.A. No. 2126 of 1999, C.A. No. 2127 of 1999 and C.A. Nos. 2552-2553 of 1999, C.A.No.7870 of 1996, C.A. No. 6891 of 1996, and C.A. No. 6365 of 2000 are allowed. There will be no order as to costs.