Gujarat Ambuja Cements Ltd.& Anr vs Union Of India & Anr on 17 March, 2005

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Author: Ruma Pal

Bench: Ruma Pal, Arun Kumar

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           CASE NO.:
Writ Petition (civil)  539 of 2000

PETITIONER:
Gujarat Ambuja Cements Ltd.& Anr.

RESPONDENT:
Union of India & Anr.

DATE OF JUDGMENT: 17/03/2005

BENCH:
Ruma Pal & Arun Kumar

JUDGMENT:
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J U D G M E N T With W.P) Nos. 411, 431, 432, 450, 466, 467, 493, 551, 564, and 573 of 2000.

W.P) Nos. 1, 122, 123, 209, 234, 283, 311 and 493 of 2001.

W.P) Nos. 606 of 2002 W.P.(C) Nos. 294, 584, 585 of 2003 W.P) Nos.26, 328, 329 of 2004 C.A. No. 9247 of 2003 RUMA PAL, J.

These writ petitions have been filed challenging the constitutional validity of Sections 116 and 117 of the Finance Act 2000 and Section 158 of the Finance Act, 2003 by which the decision of this Court in Laghu Udyog Bharati & Anr. Vs. Union of India & Ors. (1999) 6 SCC 418, striking down Rules 2(1)(d), (xii) and (xvii) of the Service Tax Rules, 1994 (as amended in 1997) was sought to be overcome.

The writ petitioners are the customers or clients of goods transport operators and forwarding and clearing agents. There are three main grounds on which they have based their challenge. They contend that the basis of the decision rendered in Laghu Udyog Bharati had not been removed or displaced by the impugned sections and could not therefore overrule, replace or override this Court's decision. The second ground of challenge is that Parliament was legislatively incompetent to enact the law. It is stated that the imposition of the impugned levy encroaches upon the State Government's power as defined in Entry 56 of List II of the Seventh Schedule to the Constitution which pertains to 'Taxes on goods and passengers covered by road or on inland waterways'. The submission is that Parliament could not by resorting to the residuary Entry 97 of List 1 of the Seventh Schedule circumvent Entry 56 of List II and in the guise of levying service tax in fact levy a tax on the transport of goods. The constitutional validity of the imposition has also been challenged on the ground that it operated in discriminatory manner by singling out only the customers of goods transport operators and clearing and forwarding agents to pay tax whereas the recipients of other kinds of similar services were not subjected to such imposition.

Service tax was introduced for the first time under Chapter V of the Finance Act, 1994. Section 66 of the Act was the charging section and provided for the levy of service tax at the rate of five per cent of the value of the taxable services provided to any person by the person responsible for collecting the service tax. In other words, the levy was on the provider of the taxable services. "Taxable service" was defined in Section 65 to include only three services namely any service provided to an investor by a stock broker, to a subscriber by the telegraph authority and to a policy holder by an insurer carrying on general insurance business. Section 68 required every person providing taxable service to collect the service tax at specified rates. Section 69 of the Finance Act, 1994 provided for the registration of the persons responsible for collecting service tax. Sub-sections (2) and (5) indicated that it was the provider of the service who was responsible for collecting the tax and obliged to get registered. These Sections viz., 65, 66, 68 and 69 are pivotal to the present issue. They were amended thrice. The remaining sections of the 1994 Act substantially continued as originally enacted with minor changes. Under Section 70 of the Finance Act, 1994, every person responsible for collecting the service tax must furnish or cause to be furnished to the Central Excise Officer in the prescribed form and verified in the prescribed manner, a quarterly return. Sections 71, 72, 73 and 74 deal with the filing of returns, provisions for assessment, reopening of assessments and rectification of mistakes of assessment orders. Section 75 provides for payment of interest at the rate of one-half per cent for every month or part of a month by which the person responsible for collecting the service tax, delays in paying the tax to the credit of the Central Government. Section 76 deals with the imposition of penalty for failure to collect the service tax. Section 77 deals with the penalty for failure to furnish the prescribed return. Section 78 deals with the penalty for suppressing the value of taxable service and Section 79 for penalty for failure to comply with notices. No other section is required to be noted except Section 94 of the Act which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act. Pursuant to such power, the Service Tax Rules, 1994 were framed.

By the Finance Act, 1997 the first amendments to Section 65, of the Finance Act 1994 were made inter alia, by extending the meaning of 'taxable service' from three services to 18 different services categorized in Section 65(41), clauses (a) to

(r). We are only concerned with clauses (j) and (m) of sub- section (41) to Section 65. Clause (j) made service to a client by clearing and forwarding agents in relation to clearing and forwarding operations, a taxable service. Similarly, service to a customer of a goods transport operator in relation to carriage of goods by road in a goods carriage was, by clause (m), also included within the umbrella of taxable service. The phrases "clearing and forwarding agent" and "goods transport operator"

> were defined as follows:
>
> (j) "clearing and forwarding agent" means any person who is engaged in providing any service, either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent"

(m) "goods transport operator" means any commercial concern engaged in the transportation of goods but does not include a courier agency"

> The charge of service tax in respect of the services rendered by clearing and forwarding agents and goods transport operates remained on the person responsible for collecting the service tax under Section 66 (3).
>
> "66(3) With effect from the date notified under Section 84 of the Finance Act, 1997, there shall be charged a service tax at the rate of five per cent of the value of the taxable services referred to in sub-clauses (g), (h), (i), (j), (k), (l),
>
> (m), (n), (o), (p), (q),and (r) of clause (41) of Section 65 which are provided to any person by the person responsible for collecting the service tax."

The 'person responsible for collecting the service tax' under this Section was therefore the person providing the service. The phrase itself was also defined under sub-section (28) of Section 65 to mean "a person who is required to collect service tax under this chapter or is required to pay any other sum of money under this Chapter and includes every person in respect of whom any proceedings under this Chapter have been taken" and 'assessee' was defined in sub-section (5) of Section 65 as meaning "a person responsible for collecting the service tax and includes his agent". By the 1997 amendment under Section 68-1A the service tax in respect of taxable services from items (g) to (r) of Section 65 (41) was directed to be collected from "such person and in such manner as may be prescribed"

> and it was said that all provisions of Chapter V "shall" apply to such person as if he is the person responsible for collecting the service tax in relation to such services. However, Sub-sections (2) and (5) of Section 69 continued to refer to the persons responsible for collecting the service as the provider of the taxable service.

We are told that the goods transport operators as well as the clearing and forwarding agents went on an all India strike protesting against the imposition of service tax on them. Perhaps this might have

precipitated an amendment to the Service Tax Rules 1994. Rules 2(1)(d),(xii) and (xvii) of the Service Tax Rules, 1994 were amended by imposing the tax in effect on the customers of clearing and forwarding agents and goods transport operators. As far as clearing and forwarding agents were concerned the relevant amendments to the Rules were carried out and brought into effect by two notifications both dated 16th July 1997. As far as the levy of service tax on customers of goods and transport operators were concerned, the amendments were made and brought into effect with effect from 16th November, 1997.

The imposition of service tax on customers was challenged by many of the present petitioners in Laghu Udyog Bharati. During the pendency of writ petitions, on 2nd June 1998 notification No.49/98 was issued exempting services provided by goods transport operators from the levy of service tax altogether and by the Finance Act, 1998 all provisions in the Finance Act, 1994 including Section 65 (41) sub-clause (m) relating to the levy of service tax on services provided by goods transport operators were omitted with effect from 16th October, 1998. By the Finance Act (No. 2), 1998, Section 69 was also amended. The various sub-sections including sub sections (2) and (5) were omitted. The body of the sections now require every person liable to pay service tax to make an application for registration without indicating who was so liable. The Service Tax Rules, 1994 were consequently also amended by the Service Tax (Amendment) Rules, 1998 to delete the provisions relating to service by goods transport operators.

These facts were taken into account by this Court in Laghu Udyog Bharati but because the exemption granted on 2nd June 1998 was prospective and no exemption had been granted with regard to the period from 16th July, 1997 to 2nd June 1998 and also because customers of clearing and forwarding agents continued to be liable to pay service tax, the writ petitions were disposed of on merits.

In upholding the challenge to Rule 2(1)(d), (xii) and (xvii), this Court noted:

> "It is clear from the reading of these provisions that according to the Finance Act the charge of tax is on the person who is responsible for collecting the service tax. It is he, who by virtue of the provisions of Section 65(5) is regarded as an assessee. He is the person who provides the service."

It was held that in the circumstances " the definitions contained in Rule 2(d)

(xii) and (xvii), which seek to make the customers or the clients as the assessee, are clearly in conflict with Section 65 and 66 of the Act."

This Court construed Section 68(1-A) to hold that "Section 68(1-A) cannot be so interpreted as to make a person an assessee even though he may not be responsible for collecting the service tax". What the Court in effect said was that since the charging section (Section 66) provided for the tax to be paid by the provider, Section 68-1A, which was merely the section which laid the machinery for collecting the tax, would not change the nature of the tax.

Finally this Court said that Sections 70 and 71 clearly showed "that the return which has to be filed pertains to the payment which are received by the person rendering the service in respect of the value of the taxable services. Surely, this is a type of information which cannot, under any circumstances, be supplied by the customer. Moreover the operative part of sub-section (1) of Section 70 clearly stipulates that it is a person responsible for collecting the service tax who is to furnish the return".

In the circumstances it was concluded that "by rules which are framed, the person who is receiving the services cannot be made responsible for filing the return and paying the tax. Such a position is certainly not contemplated by the Act".

Striking down the Service Tax Rules 2(1)(d) (xii) and (xvii), this Court directed that any tax which had been paid by the customers or clients of the clearing and forwarding agents or of the goods transporters should be refunded within 12 weeks from their making a demand for refund. Consequently, the present writ petitioners made applications for refund of the tax paid by them. In some cases, the tax was refunded. In certain cases the refund was not made on the ground that the petitioners had failed to prove that the tax paid had not been passed on to other persons. In some case as in W.P. No. 563 of 2000 the customer deducted service tax from the freight charges payable to the transporters/petitioner. After the decision in Laghu Bharati Udyog, the customer refunded the money to the transporter in question.

At this stage on 12th May 2000, the Finance Act 2000 sought to amend Finance Act of 1994 in the manner indicated in Section 116:

> "116 Amendment of Act 32 of 1994. During the period commencing on and from the 16th day of July, 1997 and ending with the 16th day of October, 1998, the provisions of Chapter V of the Finance Act, 1994 shall be deemed to have had effect subject to the following modifications, namely:-
>
> (a) In section 65.--
>
> (1) for clause (6), the following clause had been substituted namely:-
>
> (6) "assessee" means a person liable for collecting the service tax and includes
>
> (i) his agent; or
>
> (ii) in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent; or
>
> (iii) in relation to services provided by a goods transport operator, every person who pays or is liable to pay the freight either himself or through his agent for the transportation of goods by road in a goods carriage;

(ii) after clause (18), the following clauses had been substituted, namely:-

'(18A) "goods carriage" has the meaning assigned to it in clause (14) of section 2 of the Motor Vehicles Act, 1988;

(18B) "goods transport operator" means any commercial concern engage in the transportation of goods but does not include a courier agency; :

(iii) in clause (48), after sub-clause (m), the following sub-clause had been inserted namely:-

"(ma) to a customer, by a goods transport operator in relation to carriage of goods by road in a goods carriage;

(b) in section 66, for sub-section (3), the following sub-section had been substituted namely:-

"(3) On and from the 16th day of July, 1997, there shall be levied a tax at the rate of five per cent, of the value of taxable services referred to in sub-clauses (g), (h), (i),(j),(k) (l),

(m), (ma), (n) and (o) of clause (48) of section 65 and collected in such manner as may be prescribed,";

(c) in section 67, after clause (k), the following clause had been inserted, namely:-

"(ka) in relation to service provided by goods transport operator to a customer, shall be the gross amount charged by such operator for services in relation to carrying goods by road in goods carriage and includes the freight charges but does not include any insurance charges;".

Section 117 of the Finance Act, 2000 seeks to retrospectively validate the taxes earlier collected under the Service Tax Rules which this court had directed to be refunded. It reads:-

117. Validation of certain action taken under Service Tax Rules.-- Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, sub-clauses (xii) and (xvii) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994 as they stood immediately before the commencement of the Service Tax (Amendment)Rules, 1998 shall be deemed to be valid and to have always been valid as if the said sub-clauses had been in force at all material times and accordingly,-

(i) any action taken or anything done or purported to have been taken or done a any time during the period commencing on and from the 16th day of July, 1997 and

ending with the day, the Finance Act, 2000 receives the assent of the President shall be deemed to be valid and always to have been valid for all purposes, as validly and effectively taken or done;

(ii) any service tax refunded in pursuance of any judgment, decree or order of any court striking down sub-clauses (xii) and (xvii) of clause

(d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994 before the date on which the Finance Act, 2000 receives the assent of the President shall be recoverable within a period of thirty days from the date on which the Finance Act 2000 receives the assent of the President, and in the event of non payment of such service tax refunded within this period, in addition to the amount of service tax recoverable, interest at the rate of twenty-four per cent, per annum shall be payable, from the date immediately after the expiry of the said period of thirty days, till the date of payment.

Explanation. For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

While the writ petitions challenging the validity of the amendments made by the Finance Act 2000 to Chapter V of the Finance Act, 1994 were pending, the Finance Act, 2003 was assented to by the President on 14th May 2003. By Section 158 of that Act, Sections 68(1), 71 and Section 94 of the 1994 Act were further amended. Section 158 provides:

"During the period commencing on and from 16th day of July, 1997 and ending with the 16th day of October 1998, the provisions of Chapter V of Finance Act, 1994, as modified by Section 116 of the Finance Act, 2000, shall have effect subject to the following further modifications, namely: -

(a) in section 68, in sub-section (I), the following proviso shall be inserted at the end and shall be deemed to have been inserted on and from the 16th day of July, 1997, namely, : -

Provided that

(i) in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent for the period commencing on and from the 16th day of July, 1997 and ending with the 16th day of October, 1998; or

(ii) in relation to services provided by goods transport operator every person who pays or is liable to pay the freight, either himself or through his agent for the transportation of goods by road in good carriage for the period commencing on and

from the 16th day of November, 1997 and ending with the 2nd day of June, 1998.

shall be deemed always to have been a person liable to pay service tax, for such services provided to him, to the credit of the Central Government."

In addition, Section 71 which provides for the filing of returns was amended to provide, with retrospective effect, for the insertion of Section 71A. Under the newly inserted section, the provisions of Sections 69 and 70 do not apply to a person referred to in the proviso to sub-section (1) of Section 68 as far as the filing of returns in respect of service tax for the period commencing from 16th July 1997 was concerned. It seeks to provide that "such persons shall furnish return to the Central Excise Officer within six months from the day on which the Finance Bill, 2003 receives the assent of the President in the prescribed manner on the basis of the self assessment of the service tax and the provisions of Section 71 shall apply accordingly". This period was extended by this Court by order dated 17.11.2003 for a period of two weeks with effect from the date of the order. Section 94 as originally enacted for the rule making power of the Central Government was amended to read with effect from 16th July 1997, that the Central Government would also have the power to frame rules relating to the manner of furnishing returns under Section 71A.

There cannot be any doubt that the object of these sections is to nullify the effect of this Court's decision in Laghu Udhyog Bharati by retrospectively amending and validating provisions held to be illegal. It is a well settled principle that validation of a tax declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal (vide Prithvi Cotton Mills Ltd. vs. Broach Borough Municipality : 1970 1 SCR 388 Indian Aluminum Co. & Ors Vs. State of Kerala (1996) 7 SCC 637, K. Sankaran Nair V. Devaki (1996) 11 SCC 428; R.Krishna Bhat v. State of Karnataka (2001) 4 SCC 227; N.A. Cooperative Mkg. Federation v. Union of India AIR 2003 SC 1329). As a proposition of law this cannot be and is not disputed. The question is whether by enacting Sections 116 and 117 of the Finance Act, 2000 and Section 158 of the Finance Act 2003, the bases on which this Court struck down Rule 2(1)(d), (xii) and (xvii) of the Service Tax Rules, 1994 had been displaced or removed.

As we read the decision in Laghu Udhyog Bharati, the basis was the patent conflict between Sections 65, 66 , 68(1) and 71 of the Finance Act, 1994 as amended in 1997 on the one hand and Rules 2(1) (d) (xii) and (xvii) of the Service Tax Rules 1994 on the other. Each of these sections of the Finance Act 1994 as amended in 1997 proceeded on the basis that the tax was imposable on the person providing the service. All the other sections regarding the liability to furnish returns, assessments, penalties etc. flowed from that. It was because unamended Section 66 spoke of the liability to pay tax in respect of services "which are provided to any person by the person responsible for collecting the service tax" and Section 65(5) defined "assessee" as meaning "a person responsible for collecting the service tax", that this Court held that clauses (xii) and (xvii) of Rule 2(1) (d) of the Service Tax Rules were illegal. As is apparent from Section 116 of the Finance Act, 2000, all the material portions of the two Sections which were found to be incompatible with the Service Tax Rules were themselves amended so that now in the body of the Act by virtue of the amendment to the word "assessee" in Section 65(5) and the amendment to Section 66(3), the liability to pay the tax is not on the person providing the taxable service but, as far as the service provided by clearing and forwarding agents

and goods transport operators are concerned, on the person who pays for the services. As far as Section 68(1A) is concerned by virtue of the proviso added in 2003, the persons availing of the services of goods transport operators or clearing and forwarding agents have explicitly been made liable to pay the service tax. As we have said, Rule 2(1)(d) (xii) and (xvii) had been held to be illegal in Laghu Udhyog Bharati only because the charging provisions of the Act provided otherwise. Now that the charging section itself has been amended so as to make the provisions of the Act and the Rules compatible, the criticism of the earlier law upheld by this Court can no longer be availed of. There is thus no question of the Finance Act, 2000 overruling the decision of this Court in Laghu Udhyog Bharati as the law itself has been changed. A legislature is competent to remove infirmities retrospectively and make any imposition of tax declared invalid, valid. This has been the uniform approach of this Court. Such exercise in validation must of course also be legislatively competent and legally sustainable. Those issues are considered separately. On the first question, we hold that the law must be taken as having always been as is now brought about by the Finance Act, 2000. The statutory foundation for the decision in Laghu Udhyog Bharati has been replaced and the decision has thereby ceased to be relevant for the purposes of construing the present provisions (vide Ujagar Prints vs. Union of India) . Therefore subject to our decision on the question of the legislative competence of Parliament to enact the law, and assuming the amendments in 2003 to be legal for the time being, we reject the submission of the writ petitioners that by the amendments brought about by Sections 116 and 117 of the Finance Act 2000, the decision in Laghu Udhyog Bharati has been legislatively overruled.

The next question is whether the levy of service tax on carriage of goods by transport operators was legislatively competent. Laghu Udhyog Bharati did not consider the question of legislative competency. Before we consider the scope of the impugned Act, it is necessary to determine the scope of the two Legislative Entries namely Entry 97 of List I and Entry 56 of List II. It has been recognized in Godfrey Phillips (supra) that there is a complete and careful demarcation of taxes in the Constitution and there is no overlapping as far as the fields of taxation are concerned. This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the Court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field.

Undisputedly, Chapter V of the Finance Tax Act, 1994 was enacted with reference to the residuary power defined in Entry 97 of List I. But as has been held in International Tourist Corporation vs. State of Haryana (1981) 2 SCC 319;

> "before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State legislature must be clearly established. Entry 97 itself is specific in that a matter can be brought under that Entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those Lists".

In that case Section 3(3) of the Punjab Passengers and Goods Taxation Act, 1952 was challenged by transport operators. The Act provided for the levy of the tax on passengers and goods plying in the State of Haryana. According to the transport operators, the State could not levy tax on passengers and goods carried by vehicles plying entirely along the national highways. According to them this was solely within the power of the Centre under Entry 23 read with 97 of List I. The submission was held to be patently fallacious by this Court. It was held that Entry 56 of List II did not exclude national highways so that the passengers and goods carried on national highways would fall directly and squarely within Entry 56 of List II. It was said that the State played a role in the maintenance of the national highway and there was sufficient nexus between the tax and passengers goods carried on the national highway to justify the imposition.

The writ petitioners in this case have, relying on this judgment, argued that the Act falls squarely within Entry 56 of List II and therefore could not be referred to Entry 97 of List I. We do not agree.

There is a distinction between the object of tax, the incidence of tax and the machinery for the collection of the tax. The distinction is important but is apt to be confused. Legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery. There is a further distinction between the objects of taxation in our constitutional scheme. The object of tax may be an article or substance such as a tax on land and buildings under Entry 49 of List II, or a tax on animals and boats under Entry 58 List II or on a taxable event such as manufacture of goods under Entry 84 of List-I, import or export of goods under Entry 83 of List-I, entry of goods under Entry 52 of List II or sale of goods under Entry 54 List II to name a few. Theoretically, of course, as we have held in Godfrey Phillips India Ltd. Vs. State of U.P. & Ors. 2005 Scale Page 367, ultimately even a tax on goods will be on the taxable event of ownership or possession. We need not go into this question except to emphasise that, broadly speaking the subject matter of taxation under Entry 56 of List II are goods and passengers. The phrase "carried by roads or natural water ways"

> carves out the kind of goods or passengers which or who can be subjected to tax under the Entry. The ambit and purport of the entry has been dealt with in Rai Ramakrishna & Ors. Vs. State of Bihar 1963(1) SCR 897 where it was said in language which we cannot better:-
>
> "Entry 56 of the Second List refers to taxes on goods and passengers carried by road or on inland waterways. It is clear that the State Legislatures are authorized to levy taxes on goods and passengers by this entry. It is not on all goods and passengers that taxes can be imposed under this entry; it is on goods and passengers carried by road or on inland waterways that taxes can be imposed. The expression "carried by road or on inland waterways" is an adjectival clause qualifying goods and passengers, that is to say, it is goods and passengers of the said description that have to be taxed under this entry. Nevertheless, it is obvious that the goods as such cannot pay taxes, and so taxes levied on goods have to be recovered from some persons, and these persons must have an intimate or direct connection or nexus with the goods before they can be called upon to pay the taxes in respect of the carried goods. Similarly, passengers

> who are carried are taxed under the entry. But, usually, it would be inexpedient, if not impossible, to recover the tax directly from the passengers and so, it would be expedient and convenient to provide for the recovery of the said tax from the owners of the vehicles themselves".

(p.908) (See also: Sainik Motor Jodhpur Vs. The State of Rajasthan 1962(1) SCR 517).

Having determined the parameters of the two legislative entries the principles for determining the constitutionality of a Statute come into play. These principles may briefly be summarized thus:

> a) The substance of the impugned Act must be looked at to determine whether it is in pith and substance within a particular entry whatever its ancilliary effect may be.

(Prafulla Kumar Mukerjee vs. Bank of Commerce Ltd. & Ors. AIR 1947 PC 60,65; A.S. Krishna Vs. State of Madras 1957 SCR 399; State of Rajasthan v. G. Chawla 1959 Supp. (1) SCR 904; Katra Education Society v. State of U.P. 1996 (3) SCR 328; D.C. Johar & Sons (P) Ltd. v. STO Ernakulam 1971 (27) STC 120; Kanan Devan Hills Produce v. State of Kerala (1972) 2 SCC

218).

b) Where the encroachment is ostensibly ancillary but in truth beyond the competence of the enacting authority, the statute will be a colourable piece of legislation and Constitutionally invalid (A.S. Krishna v. State of madras (supra); A.B. Abdul Kadir v. State of Kerala (1976) 3 SCC 219, 232; Federation of Hotel & Restaurant v. Union of India (supra at p.651). If the statute is legislatively competent the enquiry into the motive which persuaded Parliament or the State legislature into passing the Act is irrelevant. (Dharam Dutt & Ors. v. Union of India & Ors. 2004(1) SCALE 425).

c) Apart from passing the test of legislative competency, the Act must be otherwise legally valid and would also have to pass the test of constitutionality in the sense that it cannot be in violation of the provisions of the constitution nor can it operate extraterritorially. (See: Poppat Lal Shah v. State of Madras 1953 SCR 677).

The provisions relating to service tax in the Finance Act, 1994 make it clear under Section 64(3) that the Act applies only to taxable services. Taxable services has been defined, as we have already noted, in Section 65(41). Each of the clauses of that sub section refers to the different kinds of services provided. Most of the taxable services cannot be said to be in any way related to goods or passengers carried by road or waterways. For example, Section 65(41) (g) provides for service rendered to a client by a consulting engineer, Section 65(41)(k) refers to service to a client by a manpower recruitment agency, Section 65(41) (o) refers to service by pandal or shamiana contractors and so on. The rate of service tax has been fixed under Section 66. Section 67 provides for valuation of taxable service for the purposes of charging tax. The provision for valuation of service rendered by collecting and forwarding agents has been dealt with under sub-clause (j) and service provided by goods transport operators has been provided under clauses (l). (subsequently renumbered as clause (ma)). These clauses read respectively as under:-

> "(j) in relation to service provided by a clearing and forwarding agent to a client, shall be the gross amount charged by such agent from the client for services of clearing and forwarding operations in any manner."
>
> "(ma) in relation to service provided by goods transport operator to a customer, shall be the gross amount charged by such operator for services in relation to carrying goods by road in a goods carriage and includes the freight charges but does not include any insurance charges".

As far as clause (j) is concerned it does not speak of goods or passengers, nor to carriage of goods nor is it limited to service by road or inland waterways. Clause (ma) shows that the valuation of the service tax includes the freight charges, but is not limited to it.

It is clear therefore that Section 66 read with Section 65(41)(j) and (ma) Chapter V of the Finance Act 1994 do not seek to levy tax on goods or passengers. The subject matter of tax under those provisions of the Finance Act 1994 is not goods and passengers, but the service of transportation itself. It is a levy distinct from the levy envisaged under Entry 56. It may be that both the levies are to be measured on the same basis, but that does not make the levy the same. As was held in Federation of Hotel and Restaurant Association of India etc. v. Union of India & Ors., (1989) 3 SCC 634:

> "..subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power . Indeed, the law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects."

(pg.652-653) Since service Tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within the States exclusive power under Entry 56 of List II. What the Act ostensibly seeks to tax is what it, in substance, taxes. In the circumstances, the Act could not be termed to be a colourable piece of legislation. It is not the case of the petitioners that the Act is referable to any other entry apart from Entry 56 of List II. Therefore the negation of the petitioners submission perforce leads to the conclusion that the Act falls within the residuary power of Parliament under Entry 97 of List I. Incidentally a similar challenge to the legislative competence of Parliament to levy service tax was negatived in Tamil Nadu Kalyana Mandapam Assn. V. Union of India 2004 (167) ELT 3 (S.C) which was a case where the levy of service tax was challenged by owners of Kalayan Mandapam/ Mandap Keepers. By virtue of the 1997 amendment service provided to a client by Mandap keepers including the services if any rendered as a caterer was treated as a taxable service. The challenge, inter-alia, was that service tax on Mandap keepers was colourable legislation as the said tax was not on service but was in pith and substance only a tax on the sale of goods and/or a tax

on land. The writ petition filed before the Madras High Court was rejected and the constitutionality of the levy was upheld. It was then urged before this Court by the appellants that Entries 18, 14 and 54 of List II covered the levy in question and, therefore, resort could not be had to Entry 97 in List I of the Seventh Schedule of the Constitution. It was held by this Court that although certain items of the service might have been referable to any other entry, the service element was the "more weighty, visible and predominant". Therefore, the nature and character of the levy of the service tax was distinct from a tax on the sale or hire purchase of goods and from a tax on land. The point at which the collection of the tax is to be made is a question of legislative convenience and part of the machinery for realization and recovery of the tax. The manner of the collection has been described as "an accident of administration; it is not of the essence of the duty" . It will not change and does not affect the essential nature of the tax. Subject to the legislative competence of the Taxing Authority a duty can be imposed at the stage which the authority finds to be convenient and the most effective whatever stage it may be. The Central Government is therefore legally competent to evolve a suitable machinery for collection of the service tax subject to the maintenance of a rational connection between the tax and the person on whom it is imposed. By Sections 116 and 117 of the Finance Act 2000, the tax is sought to be levied from the recipients of the services. They cannot claim that they are not connected with the service since the service is rendered to them.

In a similar fact situation under an Ordinance the Central Government was authorized to levy and collect a duty of excise on all coal and coke dispatched from collieries. Rules framed under the Ordinance provided for collection of the excise duty by the railway administration by means of a surcharge on freight recoverable either from the consignor or the consignee. The imposition of excise duty on the consignee was challenged on the ground that the consignee had nothing to do with the manufacture or production of the coal. Negativing this submission this Court in R.C. Jall V. Union of India AIR 1962 SC 1281, 1286 said:-

> "The argument confuses the incidence of taxation with the machinery provided for the collection thereof ".

In Rai Ramakrishna (supra) the tax under Entry 56 of List II was held to be competently levied on the bus operators or bus owners even though the object of levy was passengers (which they were not) because there was a direct connection between the object of the tax viz., goods and passengers and the owners of the transport carrying the goods or passengers. There is thus nothing inherently illegal or unconstitutional to provide for service tax to be paid by the availer or user.

The writ petitioners have relying upon the decision in Dwarka Prasad v. Dwarka Das Saraf 1976 (1) SCC 128, contended that the amendment to section 68 by the introduction of a proviso in 2003, was invalid. It is submitted that as the body of the section did not cover the subject matter, there was no question of creating an exception in respect thereto by a proviso. According to the writ petitioners, the proviso cannot expand the body by creating a separate charge. It is submitted that by merely amending the definition of the word "assessee" it could not be understood to mean that thereby all customers of the services in question were liable.

The submission is misconceived for several reasons. Section 68 is a machinery section in that it provides for the incidence of taxation and is not the charging section which is Section 66. The amendments to Section 66 brought about in 2000 changed the point of collection of tax from the provider of the service to 'such manner as may be prescribed'. Section 68(1A) as it stood in 1997 provided for the collection and recovery of service tax in respect of the services referred in clauses (g) to (r) of Section 65(41), which included both the services with which we are concerned, from such person and in such manner as may be prescribed. The 1998 Finance Act maintained this. Now the Service Tax Rules 1994 provided for the collection and recovery of tax from the user or payers for the services. This was the prescribed method. All that the proviso to Section 68(1A) did was to prescribe the procedure for collection with reference to services of goods transport operators and clearing agents which services had already been expressly included under the Finance Act 2000 into the definition of taxable service.

The decision in Dwarka Prasad vs. Dwarka Das Saraf (supra) relied upon by the writ petitioner does not in any way forbid a proviso from supplementing the enacting clause. All that the decision says is that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or an independent enactment. The introduction of the proviso to Section 68(1)(A) by the Finance Act, 2003 does not seek in any manner seek to expand that sub-section. In fact it gives effect to it.

The final challenge to the 2000 amendment to the Service Tax Act, 1994 is that it operated in a discriminatory manner in that it chose the recipient of the services to be the assessee only in the case of services rendered by goods transport operators and clearing and forwarding agents. We are unable to accept the submission. Because of the inherent complexity of fiscal adjustments of diverse elements in the field of tax, the legislature is permitted a large discretion in the matter of classification to determine not only what should be taxed but also the manner in which the tax may be imposed. Courts are extremely circumspect in questioning the reasonability of such classification but after a "judicial generosity is extended to legislative wisdom, if there is writ on the statute perversity, madness in the method or gross disparity, judicial credibility may snap and the measure may meet with its funeral". (Vide: Ganga Sugar Corporation vs. State of U.P.) The same judicial wariness was expressed in Federation of Hotel and Restaurant Association of India etc. v. Union of India & Ors., (1989) 3 SCC 634 where it was said:

> "It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory.

Decisions of this Court on the matter have permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes." (pg.659) (Emphasis added) In the case before us the discrimination is not, even according to the writ petitioners, by reason of the subject matter of tax. It is also not the writ petitioners' case that within the separate classes of services covered by the different clauses in Section 65(41), there is any discrimination or that the law operates unequally within the classes. According to them the discrimination lies in the method of collection of the tax followed. But as we have said this is not of the essence of the tax and the mere difference in the machinery provisions between the different classes of service cannot found a challenge of discrimination . If the legislature thinks that it will facilitate the collection of the tax due from such specified traders on a rationally discernible basis, there is nothing in the said legislative measure to offend Article 14 of the Constitution . It is therefore outside the judicial ken to determine whether the Parliament should have specified a common mode for recovery of the tax as a convenient administrative measure in respect of a particular class. That is ultimately a question of policy which must be left to legislative wisdom. This challenge also accordingly fails.

Although the challenge to the constitutional validity and legality of the levy of service tax is rejected, the writ petitioners have some subsidiary complaints. They say that although the levy of service tax from the users of the services rendered by the goods transport operators was introduced with effect from 16th November, 1997, the levy was exempted for the period subsequent to 2nd June, 1998 in view of the notification dated 2nd June, 1998 which is still operative. Yet the respondents had raised demands for service tax for periods subsequent to 2nd June, 1998. It has been conceded by the Union of India that the amendments made in the Act would have to be read along with the notifications so that the levy and collection of service tax would be only in respect of services rendered by goods transport operators between the period from 16th November, 1997 to 2nd June, 1998. Similarly there can be no tax liability on users of the services of the clearing and forwarding agents beyond 1.9.1999 when by notification No. 7/99 dated 23.8.99, the levy of service tax on the services provided by clearing and forwarding agents were exempted. Furthermore the liability to pay interest or penalty on outstanding amounts will arise only if the dues are not paid within the period of two weeks from the order passed by this Court on 17th November, 2003. In those cases in which the tax may have been paid but not refunded to the writ petitioners, for whatever reason, there is no question of levy of any interest or penalty at all.

With these clarifications, the writ petitions are dismissed without any order as to costs.