M/S.Ags Entertainment Private Limited vs Union Of India on 26 June, 2013

Bench: R.Banumathi, T.S.Sivagnanam

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.06.2013

CORAM :

THE HONOURABLE Mrs.JUSTICE R.BANUMATHI
and
THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM

Writ Petition Nos.29398 of 2010,
482, 483, 1361, 7887, 17245, 28040 of 2011
231, 832, 2138, 2947, 3144, 4904, 5777, 5900, 5902, 5904, 5906, 6220, 31291 of 2012
1676, 1777, 3362, 6575, 15259, 16461 and 17223 of 2013

W.P.No.29398 of 2010:

M/s.AGS Entertainment Private Limited,
Flat No.B-2, First Floor, Shoba Flats,
No.12, 10th Avenue,
Ashok Nagar, Chennai-600 083
rep. by its Director. .. Petit

vs.

1.Union of India,
Secretary Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110 001.

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

3.The Commissioner of Service Tax,

MHU Complex,
No.692, Anna Salai, Nandanam,
Chennai-600 035. .. Respo

W.P.No.482 of 2011:

Ananda Pictures Circuit
rep. by its Proprietor L.Suresh,
4th Floor, Raheja Complex,
834, Anna Salai, Chennai-2. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.

2.The Central Board of Excise and
Customs North Block,
New Delhi.

3.The Chief Commissioner of Service Tax,
"MHU" Complex,
692, Anna Salai,
Nandanam, Chennai-600 035.

4.K.N.Varadarajan,
Executive Director,
T.N.K.Govindaraju Chetty and Co. Pvt. Ltd.,
Proprietors: Devi, Devi Paradise, Devi Bala,
Devi Kala theatres,
Devi Cineplex, T.N.K. House,
48, Anna Salai, Chennai-2. .. Respo
(Respondent No. 5 impleaded as per order
in M.P.No.2 of 2012 in W.P.482/2012
dated 8.2.2012)

W.P.No.483 of 2011:

Sathya Jyothi Films,
rep. by its Partner T.G.Thyagarajan,

270/1, First Floor,
Veedeeyem Complex,
Lloyds Road, Chennai-14. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.

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

3.The Chief Commissioner of Service Tax,
"MHU" Complex,
Nandanam, Chennai-600 035.

4.The Superintendent of Service Tax
(S.I.R) - Group XI
O/o the Commissioner of Service Tax
SIR Cell, Service Tax Commissionerate,
MHU Complex, 629, Anna Salai,
Nandanam, Chennai-600 035.

5.K.N.Varadarajan,
Executive Director,
T.N.K.Govindaraju Chetty and Co. Pvt. Ltd.,
Proprietors: Devi, Devi Paradise, Devi Bala,
Devi Kala theatres,
Devi Cineplex, T.N.K. House,
48, Anna Salai, Chennai-2. .. Respo
(Respondent No. 5 impleaded as per order
in M.P.No.2 of 2012 in W.P.483/2012
dated 8.2.2012)

W.P.No.1361 of 2011:

Red Giant Movies,
rep. by its Partner S.Udhayanidhi,
180, Kodambakkam High Road,
Nungambakkam, Chennai-600 034. .. Petit

vs.

1.The Superintendent of Service Tax (Group XI)
O/o the Commissioner of Service Tax

SIR Cell, Service Tax Commissionerate,
MHU Complex, 692, Anna Salai,
Nandanam, Chennai-600 035.

2.The Union of India,
rep. by the Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.

3.The Central Board of Excise and
Customs, North Block,
New Delhi.

4.The Chief Commissioner of Service Tax,
"MHU" Complex,
692, Anna Salai,
Nandanam, Chennai-600 035. .. Respo

W.P.No.7887 of 2011:

M/s.Sun Pictures,
A Division of Sun TV Network Ltd.,
Murasoli Maran Towers,
MRC Nagar Main Road,
MRC Nagar, Chennai-600 028
rep. by Chief Operating Officer. .. Petit

vs.

1.Union of India,
Secretary Ministry of Finance,
Department of Revenue, North Block, New Delhi-110 001.

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

3.The Commissioner of Service Tax,
MHU Complex,
No.692, Anna Salai, Nandanam,
Chennai-600 035.

4.The Deputy Commissioner (SIR),
MHU Complex,
692, Anna Salai, Nandanam,
Chennai-600 035. .. Respo

W.P.No.17245 of 2011:

M/s.Geeta Arts
(A Division of Allu Entertainments Pvt. Ltd.)
No.98, Kamdhar Nagar,
Mahalingapuram,
Chennai-600 034
rep. by its Director. .. Petit

vs.

1.Union of India,
Secretary Ministry of Finance,
Department of Revenue, North Block,
New Delhi 110 001.

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

3.The Chief Commissioner of Service Tax,
"MHU" Complex,
692, Anna Salai,
Nandanam, Chennai-600 035.

4.The Superintendent, DGCEI
Zonal unit 3rd Floor,
NTC House, 15, NM Road,
Ballard Estate, Mumbai-400 001. .. Respo

W.P.No.28040 of 2011:

Studio Green
rep. by its Proprietor K.E.Gnanavel Raja,
Office at No.4, Flat No.2, Ramapuram Road,
Thiruvalluvar Salai,
Valasaravakkam, Chennai-600 087. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance, Dept. of Revenue,
New Delhi.

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

3.The Director General of Central
Excise Intelligence Cennai Zonal Unit,
C-3, 'C' Wing, II Floor, Rajaji Bhawan,
Besant Nagar, Chennai-600 090. .. Respo

W.P.No.231 of 2012:

IOF Entertainments Private Limited,
rep. by its Director Firoz Elias,
No.50/19, 2nd Floor, ABC Trade Centre,
Devi Theatre Compound,
Mount Road, Chennai-600 002. .. Petit

vs.

1.Union of India,
rep. by the Secretary,
Ministry of Finance, Department of Revenue,
New Delhi.

2.Central Board of Excise and
Customs North Block, Ministry of Finance,
Department of Revenue,
New Delhi-110 001.

3.The Chief Commissioner of Central Excise
and Service Tax Range III,
26/1, Mahathma Gandhi Road,
Chennai-600 034.

4.The State of Tamil Nadu,
rep. by its Secretary,
Commercial Taxes and Registration B1 Dept.,
Fort St. George, Chennai-9.

5.K.N.Varadarajan,
Executive Director,
T.N.K.Govindaraju Chetty and Co. Pvt. Ltd.,
Proprietors: Devi, Devi Paradise, Devi Bala,
Devi Kala theatres, Devi Cineplex, T.N.K. House,
48, Anna Salai, Chennai-2. .. Respo
(Respondents 4 and 5 impleaded as per order
in M.P.Nos.2 and 3 of 2012 in W.P.231/2012
dated 8.2.2012)

W.P.No.832 of 2012:

Indo Oversea Films,
rep. by its Partner Firoz Elias,
No.50/19, 2nd Floor, ABC Trade Centre,
Devi Theater Compound,
Mount Road, Chennai-2. .. Petit

vs.

1.Union of India,
rep. by the Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.

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

3.The Chief Commissioner of Central Excise
and Service Tax Range III,
26/1, Mahathma Gandhi Road,
Chennai-600 034. .. Respo

W.P.No.2138 of 2012:

Sri Rajeswari Theatre,
108, G.N.T. Road,
Gummidipoondi,
Thiruvallur District,
Tamil Nadu, rep. by its Partner
R.Sathyaseelan. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.The Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi,
The Under Secretary,
Tax Research Unit.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.2947 of 2012:

PL.Thenappan
Hony. Secretary
Tamil Film Producer's Council,
Film Chamber Building,
No.606, Anna Salai,
Chennai-600 006. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.The Under Secretary,
Tax Research Unit,
Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.3144 of 2012:

Mediaone Global Entertainment Ltd.,

A Company registered under the
Companies Act, 1956
Having its registered office at
No.59, Vijayaraghava Road,
T.Nagar, Chennai-600 017
rep. by its Managing Director
Surya Rajkumar. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.The Under Secretary,
Tax Research Unit,
Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.4904 of 2012:

T.Siva
Proprietor M/s.Amma Creations,
No.15, Third street,
Baskar Colony,
Virugambakkam, Chennai-600 092. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue, Ministry of Finance,
New Delhi.

2.The Under Secretary,
Tax Research Unit,
Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.5777 of 2012:

Tirrupathi Brothers Film Media Pvt. Ltd.,
rep. by its Director N.Subash Chandra Bose,
Having office at No.16, Lamach street,
Janaki Nagar, Valasaravakkam,
Chennai-600 087. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue, Ministry of Finance,
New Delhi.

2.The Under Secretary,
Tax Research Unit,
Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-34. .. Respo

W.P.No.5900 of 2012:

Salem, Tiraipada Viniyogasthargal Council
16,17, Cinema Nagar,
Salem-636 009
rep. by its Joint Secretary S.J.Shajahan. .. Petit

vs.

1.Union of India,

rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.
The Under Secretary,
Tax Research Unit.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.5902 of 2012:

Coimbatore, Erode, Nilgris, Tiruppur
District Film Exhibitors Association,
Aishwarya Complex,
Gopalapuram, Coimbatore-641 018
rep. by its President M.Subramanian .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.
The Under Secretary,
Tax Research Unit.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.5904 of 2012:

Coimbatore, Erode, Nilgiri & Tiruppur
District Film Distributors Association
No.10, Priya Complex,
Gopalapuram 2nd street,
Coimbatore-641 018
rep. by its Secretary G.Sivaraman .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.
The Under Secretary,
Tax Research Unit.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.5906 of 2012:

The Chennai Kanchipuram Thiruvallur
District Film Distributors Association
Old No.23, New No.32, Meeran Sahib street,
Mount Road, Chennai-600 002
rep. by its Secretary G.Sekaran. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.

The Under Secretary,
Tax Research Unit.

3.The Chief Commissioner of
Central Excise (Service Tax)
Uthamar Gandhi Salai,
Nungambakkam, Chennai-600 034. .. Respo

W.P.No.6220 of 2012:

Balaji Theatre,
118, Kamaraj Salai,
Pondicherry-605 001
rep. by its Managing Partner R.Perumal. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.
The Under Secretary,
Tax Research Unit.

3.The Commissioner of Central Excise (Service Tax)
(Survey Intelligence & Research) Unit,
1, Goubert Avenue (Beach Road)
Pondicherry-605 001.

4.The Superintendent of Central Excise
Range III-D,
64, Sringeri Madam street,
Sivaganga Nagar, Ellapillai Chavadi,
Pondicherry-605 005. .. Respo

W.P.No.31291 of 2012:

Sri Srvanthi Movies
rep. by its Proprietor Ravi Kishore P.V.,
No.28/21, Demonte Colony,
Alwarpet, Teynampet,
Chennai-600 018. .. Petit

vs.

1.Union of India,
Secretary Ministry of Finance,
Department of Revenue,
New Delhi 110 001

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

3.The Commissioner of Service Tax,
Newry Towers (Sonex)
4th Floor, No.2054-1, II Avenue,
Anna Nagar, Chennai-600 040.

4.The Superintendent of Service Tax (SIR),
Newry Towers (Sonex)
4th Floor, No.2054-1, II Avenue,
Anna Nagar, Chennai-600 040. .. Respo

W.P.No.1676 of 2013:

M/s.SPI Cinemas Private Limited,
rep. by its Authorised Signatory
Mamatha Complex, 5th Floor,
No.25, Whites Road, Royapettah,
Chennai-600 014. .. Petit

vs.

1.Union of India,
Secretary Ministry of Finance,
Department of Revenue, North Block,
New Delhi 110 001

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

3.The Commissioner of Service Tax,
MHU Complex,
692, Anna Salai, Nandanam,
Chennai-600 035.

4.The Superintendent (SIR-Gr.VIII),
Newry Towers (formerly called as Sonex Towers)
No.2054-1, II Avenue,
Anna Nagar, Chennai-600 040.

5.The State of Tamil Nadu,
rep. by its Secretary,
Commercial Taxes and Registration B1 Dept.,
Fort St. George, Chennai-600 009. .. Respo

W.P.No.1777 of 2013:

Vasans Visual Venture Pvt. Ltd.,
rep. by its Director K.S.Srinivasan
having office at No.10, 92nd street,
Ashok Nagar, Chennai-600 083. .. Petit

vs.

1.Union of India,
rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.The Under Secretary,
Tax Research Unit,
Central Board of Excise and Customs
Dept. of Revenue, Ministry of Finance,
153, North Block, New Delhi.

3.The Commissioner of Service Tax,
Commissionerate of Service Tax,
IV Floor, Newry Buildings,
No.2054-1, Second Avenue,
12th Main Road, Anna Nagar,
Chennai-600 040. .. Respo

W.P.No.3362 of 2013:

R.S.Infotainment Private Limited,
rep. by its Managing Director Mr.Elred Kumar
Office at No.14/15, Duraisamy Reddy street,
Tambaram West, Chennai-600 045. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance
Department of Revenue,
New Delhi.

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

3.The Superintendent (SIR),
O/o the Commissioner of Service Tax
Survey Intelligence and Research Unit
Newry Towers (formerly Sonex Towers)
No.2054-1, II Avenue,
Anna Nagar, Chennai-600 040. .. Respo

W.P.No.6575 of 2013:

M/s.ESCAPE ARTIST MOTION PICTURES
rep. by its Proprietor P.Madan,
Having office at No.69, Habibullah Road,
T.Nagar, Chennai-600 017. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance, Dept. of Revenue,
New Delhi.

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

3.The Superintendent (SIR)
O/o the Commissioner of Service Tax
Survey Intelligence and Research Unit,
Newry Towers (Formerly 'Sonex Towers')
No.2054-I, IInd Avenue, Anna Nagar,
Chennai-600 040. .. Respo

W.P.No.15259 of 2013:

M/s.Y NOT STUDIOS
rep. by its Proprietor S.Sashikanth,
Office at No.15, Palur Kanniyappan st.,
Mylapore, Chennai-600 004. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance, Department of Revenue,
New Delhi.

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

3.The Superintendent (SIR),
O/o the Commissioner of Service Tax
Survey Intelligence and Research Unit
Newry Towers (formerly Sonex Towers)
No.2054-1, II Avenue,
Anna Nagar, Chennai-600 040. .. Respo

W.P.No.16461 of 2013:

M/s.Company Productions,
rep. by its Proprietor M.Sasikumar,
Having office at
No.29/52, 2nd street, Velautham colony,
Saligramam, Chennai-600 093. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance, Department of Revenue,
New Delhi.

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

3.The Superintendent (SIR)
O/o the Commissioner of Service Tax
Survey Intelligence and Research Unit,
Newry Towers (Formerly 'Sonex Towers')
No.2054-I, IInd Avenue, Anna Nagar,
Chennai-600 040. .. Respo

W.P.No.17223 of 2013:

M/s.Light Box Entertainment
rep. by its Proprietor Thangaprabakar,
Office at No.13/6, 2nd Floor,
Thanigachalam Road, T.Nagar, Chennai-17. .. Petit

vs.

1.The Union of India,
rep. by the Secretary,
Ministry of Finance, Department of Revenue,
New Delhi.

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

3.The Superintendent (SIR)
O/o the Commissioner of Service Tax
Survey Intelligence and Research Unit,
Newry Towers (Formerly 'Sonex Towers')
No.2054-I, IInd Avenue, Anna Nagar,
Chennai-600 040. .. Respo

W.P.No.29398 of 2010 is filed under Article 226 of Constitution of India praying to issu

W.P.No.482 of 2011 is filed under Article 226 of Constitution of India praying to issue

W.P.No.483 of 2011 is filed under Article 226 of Constitution of India praying to issue

W.P.No.1361 of 2011 is filed under Article 226 of Constitution of India praying to issue

W.P.No.7887 of 2011 is filed under Article 226 of Constitution of India praying to issue

W.P.No.17245 of 2011 is filed under Article 226 of Constitution of India praying to issu

W.P.No.28040 of 2011 is filed under Article 226 of Constitution of India praying to iss

W.P.No.231 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.832 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.2138 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.2947 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.3144 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.4904 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.5777 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.5900 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.5902 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.5904 of 2012 is filed under Article 226 of Constitution of India praying to issu

W.P.No.5906 of 2012 is filed under Article 226 of Constitution of India praying to issue

W.P.No.6220 of 2012 is filed under Article 226 of Constitution of India praying to issu

W.P.No.31291 of 2012 is filed under Article 226 of Constitution of India praying to issu

W.P.No.1676 of 2013 is filed under Article 226 of Constitution of India praying to issue

W.P.No.1777 of 2013 is filed under Article 226 of Constitution of India praying to issue

W.P.No.3362 of 2013 is filed under Article 226 of Constitution of India praying to issue

W.P.No.6575 of 2013 is filed under Article 226 of Constitution of India praying to issue

W.P.No.15259 of 2013 is filed under Article 226 of Constitution of India praying to iss

W.P.No.16461 of 2013 is filed under Article 226 of Constitution of India to issue a Wri

W.P.No.17223 of 2013 is filed under Article 226 of Constitution of India to issue a Wri

For Petitioners in W.P.Nos.28040/2011, 3362, 6575, 15259 16461 & 17223 of 2013	:	Mr.M.Venkatachalapathy Senior Counsel for Mr.M.Sriram
For Petitioners in W.P.Nos.482, 483, 1361 of 2011, 231 & 832 of 2012	:	Mr.N.Prasad for Mr.N.Inbarajan
For Petitioners in W.P.Nos.29398/2010, 7887/2011, 17245/2011 31291/2012,1676/2013	:	Mr.K.Vaitheeswaran
For Petitioners in W.P.Nos.2138, 5900, 5902, 5904, 5906 & 6220 of 2012	:	Mr.Ravi for M/s.Gupta & Ravi
For Petitioners in W.P.Nos.2947, 3144, 4904 of 2012,5777/2012 and 1777 of 2013	:	Mr.T.T.Ravichandran
For Respondents	:	Mr.V.Sundareswaran CGSSC for Union
For Respondent No.4 in W.P.231/2012, R5 in W.P.1676/2013	:	Mr.S.Kanmani Annamalai Govt. Advocate (T)
For Respondent No.5 in W.P.231/2012, R4 in W.P.482/2011 & R5 in W.P.483/2011	:	Mr.R.Anand Kumar
For Respondent No.1 in W.P.28040/2011	:	Mr.Velayutham Pichaiya CGSC
For Respondent No.1 in W.P.17223/2013	:	Mr.N.Ramesh CGSC

COMMON ORDER

R.BANUMATHI,J Challenge in these writ petitions is the vires of the provision Section 65(105)(zzzzt) of the Finance Act bringing within the ambit of 'service tax' certain forms of income generated from "temporary transfer or permitting the use or enjoyment" of, any copyright as defined in the Copyright Act, 1957(14 of 1957) except the rights covered under Section 13(1)(a) of the said Act.

2. Introduction - Service Tax on Copyrights:

> When service tax was levied on 'Intellectual Property Services' namely trademarks, designs, patents or any other similar intangible property, with effect from 10.9.2004, copyright was specifically excluded from the definition of Intellectual Property Rights (IPRs). Copyright is nothing but intellectual property right which explicitly remained outside the scope of service tax just to encourage authors, artists, etc. The Finance Act, 2010 has levied service tax on transferring temporarily or permitting the use or enjoyment of any copyright except the rights covered under section 13(1)(a) of the Copyright Act, 1957.

3. Services of copyright are taxable with effect from 1.7.2010. With effect from 1.7.2010, sub-clause (zzzzt) of clause (105) of Section 65 defines the "Taxable Service" as under:

> "Taxable service" means any service provided or to be provided to any person, by any other person, for -
>
> (a) transferring temporarily; or
>
> (b) permitting the use or enjoyment of, any copyright defined in the Copyright Act, 1957, except the rights covered under sub-clause (a) of clause (l) of Section 13 of the said act."

4. At the time of introduction of Finance Bill, 2012, in his Speech, Finance Minister stated that the Year 2012 is the Centenary Year of Indian Cinema and proposed to exempt the Industry from service tax on Copyrights relating to recording of Cinematograph films. The Finance Act, 2012 introduced Section 66B as the new Charging Section with effect from 1.7.2012 for the levy of service tax on all services other than those services specified in the Negative list. Notification No.25 of 2012 provided for number of exemptions effective from 1.7.2012 and Entry No.15 of the said exemption is re-produced below:

> Temporary transfer or permitting the use or enjoyment of a copyright covered under clause (a) or (b) of sub-section (1) of Section 13 of the Indian Copyright Act relating to original literary, dramatic, musical, artistic works.

5. Notification No.25 of 2012 was amended by Notification No.3 of 2013 w.e.f. 1.4.2013 and Entry No.9 in the notification No.25/2012 is substituted as under:-

> Services provided by way of temporary transfer or permitting the use or enjoyment of copyright
>
> (a) covered under clause (a) of sub-section (1) of Section 13 of the Copyright Act, 1957, relating to original literary, dramatic, musical or artistic works; or
>
> (b) of cinematograph films for exhibition in a cinema hall or cinema theatre.

6. Thus the issue relates to the temporary transfer or permitting the use or enjoyment of copyright, except the rights covered under sub-clause (a) of sub-section (1) of Section 13 of the Indian Copyright Act for the period from 1.7.2010 to 31.06.2012 and the period from 01.4.2013 onwards since the levy of service tax on Copyright Services (Section 65(105)(zzzzt) is revived from 1.4.2013 with the exception of Section 13(1)(a) or Cinematograph films for exhibition in a cinema hall or a cinema theatre.

7. Writ Petitions and the averments thereon:-

> Contending that the levy of service tax on transfer of copyright, which is goods, is transfer of right to use the goods amounting to sale and no service element is involved and that temporary transfer of copyright is not exigible to service tax, writ petitions are filed challenging the vires of Section 65(105)(zzzzt) and to declare that the provisions of Section 65(105)(zzzzt) is beyond the legislative competence of the Union of India.

8. Case of writ petitioners is that Section 65(105)(zzzzt) is beyond the legislative competence of the Union of India. Under the constitutional scheme, for the demarcation of taxing powers between the Centre and the State, levy of sales tax/value added tax on goods, which includes the transfer of right to use any goods is the exclusvie taxing domain of the States and various States are currently trading intangibles like "Copyrights" as goods. Copyright is a form of intellectual property i.e., intangible property and State Legislature is levying value added tax on these transactions treating it as trading of goods or transfer of right to use. While on the one hand, assignment of these rights is treated as sale of goods by the State Legislature(s) and on the other hand it is treated as providing services, which is ultra vires the Constitution of India. From 2002, Parliament has amended Central Sales Tax Act to widen definition of "sale" to cover transfer of right to use the goods in exercise of powers under Entry 92A of the Union List and the Parliament cannot now treat the same transaction as "service" for levy of service tax. By enacting the new taxing entry to levy service tax, on the very same transaction of the transfer/exploitation of copyrights, the Parliament has acted beyond its taxing domain under the Constitution of India and transgressed the taxing domain of the State.

9. Further case of writ petitioners is that Entry 97 of List I, which itself mandates that "Union of India may legislate only in respect of any other matter not enumerated in List II or List III including

any tax not mentioned in either of those Lists". As per the Constitution, a sales tax on goods in the course of intra-State sales is the subject matter of sales in terms of Entry 54 of List II; Sales Tax on goods in the course of inter-State sale is the subject matter of Union in terms of Entry 92A of List I and having levied service tax by treating it as goods the Parliament cannot again call it a service for service tax levy. Since the tax on the transfer of the right to use copyright is covered under Entry 54 of List II, the Union is not competent to levy and/or collect service tax on the transaction under Section 65 of the Finance Act and is beyond the legislative competence of the Parliament. Contending that the provision of Section 65(105)(zzzzt) is beyond the legislative competence of the Union insofar as the levy of service tax on copyright, the writ petitioners seek for declaration that Section 65(105)(zzzzt) is unconstitutional and ultra vires Article 246 of the Constitution of India read with Entry 54 List II of Schedule VII.

10. Resisting the writ petitions, the respondents filed counter inter alia contending that with effect from 1.7.2010, temporary transfer or permission to use or enjoyment of copyright became a taxable service by insertion of Section 65(105)(zzzzt) in the Finance Act, 1994. While completing transfer or right to use any goods, "where the original owner completely foregoes the title of a copyright" may be considered the sale of goods, temporary transfer or right to use or enjoy copyright for specified purposes are not covered under Entry 54 of Listl II, which is certainly a service provided by the person, who is the holder of copyright. Service tax is a levy on the charges received from temporary transfer or for confirmation of right to use or enjoy copyright and Union of India is well within its rights to charge and collect service tax on transactions not amounting to sale.

11. Further, according to respondents, what is sought to be taxed is only the consideration of service charges received for value addition of assignment of temporary right or permission to use the copyright. Referring to various judgments of the Supreme Court, it is averred that Supreme Court upheld the legislative competence of the Parliament to levy service tax under residuary Entry 97 of List I of VII Schedule and necessary constitutional amendments were made giving authority to the Parliament to legislate all service taxes. The counter statement also refers to the nature of transactions to contend that they are only a temporary transfer of right or a mere transfer of right to use or enjoy the copyright for specified purposes, which according to the respondents, is a service provided by the person, who is the holder of the copyright.

12. Heard Mr.M.Venkatachalapathy, learned Senior Counsel; Mr.K.Vaitheeswaran; Mr.N.Prasad; Mr.Ravi and Mr.T.T.Ravichandran, learned counsels appearing for the wirt petitioners.

13. Onbehalf of Writ Petitioners the following contentions were raised:-

> Temporary transfer of Copyright is a "transfer of right to use goods" which is a sale in terms of Article 366(29A) read with Entry 54 of List II of the Constitution and therefore, it is not a service; that Value Added Tax/Sales Tax have been imposed on transaction of "transfer of right" to use in the context of feature film and VAT has domain over the transaction as a form of levy since copyright is considered as goods and therefore, such temporary transfer of copyright cannot be considered as goods .

"Temporary transfer of copyright" or "permitting use or enjoyment of copyright" amounts to sale of goods/deemed sale and intra-State sales is the subject matter in terms of Entry 54 of List II and sales tax on goods in the course of Interstate sale is the subject matter of Union in terms of Entry 92A and having levied sales tax by treating it as goods , the Parliament cannot resort to the residuary Entry 97 of List I for service tax levy.

There is no service at all and the question of imposition of service tax on such transaction is illegal and beyond the legislative competence of the Central Government.

14. An alternate submission was made that even if there is an element of service, the dominant intention of the parties/transaction is to be looked into and if the same is done, it is transfer of goods and such transaction cannot be construed as service. In any event, there is no power vested with the Parliament to dissect the transaction unlike works contract, catering service or hire purchase transactions, which have been enumerated in Clause (29A) of Article 366 of the Constitution.

15. Mr.V.Sundareswaran, learned Central Government Standing Counsel for Respondents submitted that Clause (29A) of Article 366 of the Constitution was inserted to give extended meaning to the definition of sale and that Parliament has not divested its power to levy service tax. It was submitted that service tax imposed by the Union under Entry 97 of List I was upheld by the Hon'ble Supreme Court. Learned counsel submitted that various transactions between the producer and the distributor and the distributor and sub-distributor or exhibitor (theatre owner) is the value addition to the movie and service tax imposed on those activities is only levy on the value addition. The learned counsel submitted that temporary transfer of copyright or permission to use or enjoyment are not covered by Entry 54 of List II or Entry 92A of List I. Placing reliance upon in the cases of Tamil Nadu Kalyana Mandapam Association case (2004) 5 SCC 632; Association of Leasing and Financial Services Companies case (2011) 2 SCC 352; All India Federation of Tax Practitioners case (2007) 7 SCC 527 and Gujarat Ambuja Cements Limited case (2006) 3 SCC 1, the learned counsel submitted that the Hon'ble Supreme Court upheld the levy of service tax under Entry 97 of List I. It was submitted that the impugned levy of service tax on temporary transfer of copyright or permission to use or enjoyment is within the legislative competence of Parliament with reference to Entry 97 of List I of Seventh Schedule of the Constitution of India and the same is constitutionally valid.

16. We have also heard the submissions of Mr.Kanmani Annamalai, learned Government Advocate (T) appearing for State of Tamil Nadu and Mr.R.Ananda Kumar, learned counsel appearing for 4th Respondent in W.P.No.482 of 2011 and 5th Respondent in W.P.No.483 of 2011 and 231 of 2012.

17. Upon consideration of the rival contentions and averments in the Writ Petitions and counter statement, the following points arise for consideration in these Writ Petitions:-

1.Whether the taxable event provided under Section 65(105)(zzzzt) of the Finance Act, 1994 is covered by Article 366 (29A)(d), which is a "deemed sale of goods"?

2.Whether the Petitioners are right in contending that the levy of service tax on "temporary transfer or permitting the use or enjoyment of copyright" provided under Section 65(105)(zzzzt) of the Finance Act, 1994 is covered under Entry 54 of List II and whether it amounts to transgression by Parliament into the exclusive domain of the State Legislature?

3.Whether the Petitioners are right in contending that the copyright is goods and transfer of copyright of Cinematograph films is only delivery of goods for consideration and is absolute transfer and no service element is involved?

4.Even assuming that there is an element of service involved in the nature of transaction done by the Petitioners, should the dominant intention of the transaction being transfer of goods has to be only taken into consideration?

5.Whether the Petitioners are right in contending that Parliament has no authority to dissect a composite transaction as in the case of the Petitioners and levy service tax?

6.Whether Section 65(105)(zzzzt) levying service tax on the temporary transfer or permitting the use or enjoyment of copyright is ultra vires the Constitution?

18. Service Tax - an Introduction:-

Before, we proceed further on the submissions made on either side, it would be essential to first have an overall view of the concept of Service Tax.

19. Service Tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals etc. Services constitute heterogeneous spectrum of economic activities, covers wide range of activities, such as management, banking, insurance, hospitality, consultancy, communication, administration, entertainment, research and developmental activities forming part of retailing sector. Economics hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs. (See ALL INDIA FEDERATION OF TAX PRACTITIONERS AND OTHERS v. UNION OF INDIA AND OTHERS, (2007) 7 SCC 527 = [(2007) 9 VST 126 (SC)].

20. During 1994-95, a new concept of Service Tax was introduced by imposing tax on services of Telephones, General Insurance and Stock Broking and the list has increased since then. Chapter V of the Finance Act, 1994 defines "assessee" to mean the person responsible for collecting the service tax. The Service Tax was defined to mean tax chargeable under Chapter V. Taxable Service was defined to mean any service provided by stock brokers to an investor in connection with sale or purchase of securities listed by a recognised stock exchange; services rendered by the subscriber of the telegraph authority and services rendered by insurer to a policy holder. Section 66 stated that

Service Tax shall be levied at the rate of 5% of the value of the taxable services provided to any person by service provider who was responsible for collecting the service tax.

21. Finance Act, 1998, was also to the same effect as that of the 1994 Act and in the 1998 Act, the list of notified services were increased to include advertising agencies, travel agencies, architects, entrepreneurs, clearing and forwarding agencies, credit rating agencies, customs house agents, practising charted accountants, cost accountants, real estate agents, security agencies etc. The Finance Act has been amended year after year in order to bring more services into the tax net, as well as to insert certain new provision found necessary.

22. The legislative competence of the Parliament to levy service tax on Kalyana Mandapam on use of goods transport services, chartered Accountants and leasing and financial services, under Entry 97 of List I under various amendments have been upheld by the Hon'ble Supreme Court in various decisions (Vide Tamil Nadu Kalyana Mandapam Association Vs. Union of India and others, (2004) 5 SCC 632; Association of Leasing and Financial Services companies vs. Union of India and others, (2011) 2 SCC 352, All India Federation of Tax Practitioners and another Vs. Union of India and others, (2007) 7 SCC 527, Gujarat Ambuja Cements Ltd. And another Vs. Union of India, (2005) 4 SCC 214 and BSNL Vs. Union of India, (2006) 3 SCC 1).

23. Relevant Provisions of the Copyright Act, 1957:-

> Licensing or exploitation of other intellectual rights like trademarks, designs, patterns or any other similar intangible properties are within the ambit of service tax since 2004. However, Copyright was excluded till 1.7.2010. With effect from 1.7.2010, sub-clause (zzzzt) of clause (105) of Section 65 defines "taxable service" as under:
>
> "Taxable service" means any service provided or to be provided to any person, by any other person, for -
>
> (a) transferring temporarily; or
>
> (b) permitting the use or enjoyment of, any copyright defined in the Copyright Act, 1957, except the rights covered under sub-clause (a) of clause (l) of Section 13 of the said act."

Thus, the first category of copyright i.e., original literary, dramatic, musical and artistic works are out of the service tax.

24. Levy of service tax on the temporary transfer or permitting the use or enjoyment of the copyrights and the vires of sub-clause (zzzzt) of Section 65(105) is the contentious issue in these writ petitions. Now we have to examine as to whether the petitioners are right in contending that the service tax sought to be levied is a tax on deemed sale of goods leviable under Entry 54 of List I and the Parliament lacks power to levy service tax invoking the residuary Entry 97 of List I.

25. For proper appreciation of the arguments advanced, it is necessary to refer to the meaning of "copyright" with reference to Cinematograph films and also the definition of the relevant provisions in Copyright Act. Section 2(f) defines "Cinematograph Film" as under:

> (f) cinematograph film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films. Section 2(ff) deals with communication to the public , which reads as under:
>
> (ff) communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public direct ly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.
>
> Explanation. - For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

26. As per Section 2(uu), producer means producer in relation to a cinematograph film or sound recording, means a person who takes the initiative and responsibility for making the work.

27. As per Section 13, Copyright subsists in the following works:

> (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-
>
> (a) original literary, dramatic, musical and artistic works;
>
> (b) cinematograph films; and
>
> (c) sound recordings. In relation to the Cinematograph film, "copyright" means "Section 14. Meaning of copyright:- -For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-
>
> (a) ....
>
> (b) ....

(c) .....

(d) in the case of a cinematograph film, -

(i) to make a copy of the film including a photograph of any image forming part thereof;

(ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public.

28. Section 18 defines Assignment . Section 18 deals with Assignment of copyright i.e., the owner of copyright in an existing work or the prospective owner of the copyright in the future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof. Section 19 deals with Mode of Assignment . Section 30 deals with Licences by owners of copyright . Section 26 deals with Term of copyright in Cinematograph films , as per which copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the film is published.

29. Point No.1:-

Re.contention : That the taxable event under sub-clause (zzzzt) of Section 65 (105) is covered by Article 366 (29A) sub-clause (d):- Contention of petitioners is that Copyright is considered as transfer of right to use the goods , which is a sale in terms of Article 366(29A) read with Entry 54 and not a service . Mr.Prasad, learned counsel for the petitioner has invited our attention to the brief history of levy of tax on films and historical background of the Constitution 46th Amendment Act, 1982 inserting Clause (29A) to Article 366 of the Constitution to impose tax on the transfer of right to use any goods , thereby to avoid tax evasion by devices by way of lease adopted by the Producer and the Distributor.

30. Mr.K.Vaitheeswaran, learned counsel for the petitioners drawing our attention to the decision of this Court in A.V.Meyyppan Vs. Commissioner of Commercial Taxes, Board of Revenue, Madras and another, (20 STC 115) submitted that the temporary transfer of copyright is considered as a transfer of right to use goods , which is a deemed sale in terms of Article 366(29A). Learned counsel further submitted that the copyrights in the Cinematograph films have been considered as goods as the items are subject to sales tax (VAT) by the State Legislature in terms of Entry 54 of List II and while so, Parliament cannot resort to Entry 97 of List I to levy service tax on the temporary transfer or permitting the use or enjoyment of the copyright.

31. Brief history of taxation of films under Sales Tax Laws:-

In relation to taxation of films under Service Tax Act, there can be normal sale of film or sale by way of lease. In A.V.Meyyppan Vs. Commissioner of Commercial Taxes, Board of Revenue, Madras and another, (20 STC 115), the assessee, a producer of Cinematograph films, obtained the copyright of a story in "Hindi" and on the basis of that story produced a cinematography film. The assessee then entered into an agreement with a Limited Company/the lessee, under which the assessee made over to the lessee the outright lease of the world negative rights of the film for a period of 49 years and for a consideration amounting to the declared cost of production of the film plus 15% thereon as profit to the assessee , subject to a minimum price of Rs.10,00,000/- payable by the lessee to the assessee. The Sales Tax Authorities held that though the transaction was described as a lease for 49 years, the assessee had effected a sale of the negative print of the picture for a consideration and therefore the transaction was liable to sales tax under the Madras General Sales Tax Act. Applying the criteria laid down by the Supreme Court in State of Madras Vs. Gannon Dunkerley & Co., (Madras) Limited, 1959 SCR 379 = (1958) 9 STC 353, the Madras High Court held that even if copyright is regarded as a species of movable property, the transaction did not connote a sale at all and it was therefore not liable to sales tax. The Madras High Court held that the film was given to the lessee for exhibition for 49 years and there was no transfer of ownership in film to exhibitor. Therefore, the Madras High Court held that it is a leasing of film, but not sale, since there is no permanent transfer of ownership in the copyright in the film to the purchaser.

32. To overcome the above judgment as well as other judgments, where sale was held to have restricted meaning, the Constitution of India was amended in 1982 by the Constitution (46th Amendment) Act, 1982. From the statement of objects and reasons, we find that the concept of "deemed sale" is brought in by the Constitution (46th Amendment Act) in the context of imposition of sales tax and that the words "transfer, delivery or supply of goods" are referred to in the second limb of Clause (29A) of Article 366 of the Constitution to broaden the tax base. Clause (29A) of Article 366 reads as under:

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

(a) a tax on the transfer, otherwise than in pursuance of a contact, 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) invoked 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 cash, 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;

33. Contention of petitioners is that the transactions between the producer and the distributor and the distributor and the exhibitor involve delivery of tangible property as goods and in any event those transactions are covered within the extended meaning of sub-clause (d) of clause (29A) of Article 366 on the transfer of the right to use the goods". When the transaction could be brought within the extended meaning of Article 366(29A), Parliament cannot levy service tax by resorting to Entry 97 of List I.

34. On behalf of the petitioners, it was submitted that the deemed sale in various clauses of Article 366(29A) are incorporated in Section 2(33) of Tamil Nadu Value Added Tax Act and VAT Act of various States. It was further submitted that insofar as inter-State sales are concerned, Section 2(g) of Central Sales Tax Act has been amended by Finance Act,2002 inserting various clauses of deemed sale in terms of Article 366(29A). Contention of petitioners is that the temporary transfer of copyright or its use or enjoyment amounts to transfer of the right to use the goods . According to the petitioners, as per the Constitution, Sales tax on goods in the course of intra-State sales is the subject matter of the States in terms of Entry 54 of List II and Sales tax on goods in the course of inter-State sale is the subject matter of Union in terms of Entry 92A of List I and when the temporary transfer of copyright is treated as sale of goods and having levied sales tax, Parliament cannot again call it as a service for levying service tax and the Union of India has no competence to levy or collect sales tax on the transaction.

35. Article 366(29A) no doubt served to extend the meaning of the word "sale". The taxable event under Article 366(29A) is the transfer of right to use the goods regardless of whether the goods are delivered for use. Levy of tax is not on use of goods, but on the transfer of the right to use the goods. Article 366(29A) of the Constitution permits tax on sale of goods and within its ambit, transfer of right to use the goods . While completing transfer or right to use any goods (where the original owner relinquishes his copyright) may be considered as sale of goods , temporary transfer of right or a mere transfer of right to use or enjoy copyright for specified purpose(s) , is certainly a service provided by the person, who is the holder of copyright. As held by the Supreme Court in B.S.N.L. Case [(2006) 3 SCC 1], it is a nature of transaction that will determine the taxability in each case.

36. In 20th Century Finance Corporation Limited Vs. State of Maharashtra, (2000) 6 SCC 12 = (2000) 119 STC 182 (SC), the Hon'ble Supreme Court laid down the principles for determining the

situs of lease sale transaction. The Hon'ble Supreme Court has held that the situs of lease sale lies in the State where the agreement is executed if the goods are available for delivery. The Hon'ble Supreme Court further held that if the goods are not available for delivery or there is no written agreement, then the sale will be deemed to have taken place in the State where the delivery is given. While so holding, the Hon'ble Supreme Court elaborated upon the scope of Article 366 Clause 29A and observing that the taxable event under Article 366(29A) is the transfer of right to use the goods and elaborately considering the scope of Article 366(29A), the Hon'ble Supreme Court held as under:

> "26. Next question that arises for consideration is, where is the taxable event on the transfer of the right to use any goods. Article 366(29-A)(d) empowers the State Legislature to enact law imposing sales tax on the transfer of the right to use goods. The various sub-clauses of clause (29-A) of Article 366 permit the imposition of tax thus: sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services. The words and such transfer, delivery or supply ... in the latter portion of clause (29-A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. .....
>
> In our view, therefore, on a plain construction of sub-clause (d) of clause (29-A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. .....
>
> 27. Article 366(29-A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

37. Section 65(105)(zzzzt) seeks to tax viz., "temporary transfer or permitting the use or enjoyment" of copyright which is a service provided by the producer/distributor/exhibitor. Service Tax is a levy not on the "transfer of right to use the goods" as described under Article 366(29A) sub-clause (d); but on the temporary transfer" or "permitting the use or enjoyment" of the copyright as defined

under the Copyright Act, 1957. In the case of Sales Tax Act, there would be "transfer of right to use the goods". Whereas under the Service Tax Act what is levied is temporary transfer/enjoyment of the goods. The pith and substance of both enactments are totally different. "Temporary transfer" or "permitting the use or enjoyment of the copyright" is not within the State's exclusive power under Entry 54 of List II. Therefore, there is no merit in the contention that the taxable event provided under Section 65(105)(zzzzt) is covered by Article 366(29A).

38. Point No.2:- Re.contention : Temporary transfer or use or enjoyment of the copyright is a sale of goods falling under Entry 54 of List II:-

> On behalf of the petitioners, learned counsel submitted that the agreements entered into between the producer and the distributor and the distributor and exhibitors (theatres) is patterned on different lines based on commercial exigency and the arrangement involves delivery of goods. Drawing our attention to various patterns of agreements in film industry, the learned counsel contended that such agreements involve delivery of goods for which sales tax is levied. On behalf of the petitioners, it was contended that in the course of inter-State sale, under Entry 92A of List I, Union of India levies sales tax and the sale in the course of intra-State is the subject matter of the States falling under Entry 54 of List II and in the case of intra-State sale, State Government has the exclusive power to levy tax and Union is not permitted to levy and/or collect service tax on the transaction that is subjected to VAT. It was submitted that exercising powers in terms of Entry 54 of List II of Seventh Schedule of the Constitution, State enacted Tamil Nadu Value Added Tax Act, 2006. It was further submitted that as per section 2(33) of Tamil Nadu Value Added Tax Act and section 3 of the Act read with Sl.No.70 of Part B of the First Schedule to the Act, the State Government levies value added tax on the sale or transfer of right to use the copyright and while so, parliament cannot levy service tax on the same, which is subject to VAT.

39. List I of the Seventh Schedule enumerates the subjects to which Union may inter alia legislate for tax levy. Entry 92A List I reads as under:

> 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. Residuary Entry - Entry 97 of List I reads as under:
>
> Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists. Entry 54 of List II to the Seventh Schedule reads as under:
>
> Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I By legislating under Entry 54 of List II, various States have enacted legislation in terms of VAT/Sales Tax Act. States have exercised their powers to levy a tax on the intra-State sale of goods in terms of Entry 54 of List

II of the Seventh Schedule and the Government of Tamil Nadu has also enacted Tamil Nadu Value Added Tax Act.

40. Goods is defined in Section 2(7) of Sale of Goods Act, 1930 and in number of decisions, Supreme Court held that the goods used in Entry 54 of List II has to be interpreted liberally. Contention of learned counsel Mr.Prasad is that under the provisions of Tamil Nadu Value Added Tax Act, when the State Government levies VAT, Union of India cannot resort to residuary powers of Legislation under Entry 97 of List I to legislate for the levy of taxes on service and the residuary power to Entry 97 is available only if such power is inter alia not reserved in favour of the States under any Entry enumerated in List II.

41. Reiterating the same submissions, Mr.Vaitheeswaran, learned counsel submitted that Copyrights are classified as intangible property and are accordingly treated as goods for levying VAT on the transfer of copyrights . The learned counsel further submitted that many States like Andhra Pradesh, Delhi, Maharashtra, Karnataka and West Bengal have exercised their powers to levy tax on sale of goods in terms of Entry 54 of List II to the Seventh Schedule of the Constitution and the Parliament cannot levy service tax on the goods, which are already subjected to VAT.

42. The learned Senior counsel Mr.M.Venkatachalapathi also submitted that the transfer of copyright is only sale of intangible goods and that it is only a temporary transfer of copyright and no service is provided and therefore levy of the service tax and the amendment - 65(105)(zzzzt) having resort to Entry 97 of List I are ultra vires the Constitution.

43. In short, the submission of all the writ petitioners is that temporary transfer of copyright or use or permit of a copyright in a cinematograph film is only a transfer of right to use the goods , which is a sale/deemed sale for which legislating under Entry 54 of List II, States have enacted legislation in terms of VAT/Sales Tax Acts. It is their submission that in a case of inter-State sales, in terms of Entry 92A of Union List, Sales Tax is levied under Central Sales Tax Act and while so it is not open to the Parliament to treat the transaction as service for levy of sales tax. Further contention of petitioners is that Entry 97 mandates that Union of India may legislate only in respect of any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists. and having levied Sales Tax by treating it as goods , the Parliament cannot call it as service for levy of service tax.

44. For considering the submissions, we need to keep in mind the doctrine of pith and substance and the rule of interpretation of legislative entries. We need to point out that on four occasions, the Hon'ble Supreme Court upheld the levy of service tax with reference to Entry 97 of List I in the light of challenges to the competence of the Parliament. Having regard to the contentions raised it is necessary to refer to the judgments of the Supreme Court, upholding the levy of service tax and the principles laid thereon.

45. In Tamil Nadu Kalyana Mandapam case (2004) 5 SCC 632, in respect of tax on catering services provided by Kalyan Mandap keeper, similar contentions were raised contending (i) that it amounts

to tax on land and therefore by reason of Entry 49 of List II, only the State Government is competent to levy such tax; (ii) it amounts to tax on sale and purchase of goods and therefore is beyond the competence of Parliament, particularly in view of the definition of tax on sale and purchase of goods contained in Article 366(29A)(f) of the Constitution. Observing that in the matters of taxation laws, the Court permits greater latitude to pick and choose objects for rates on taxation and has a wide discretion with regard thereto and upholding the levy of tax on catering services provided by Mandap keepers, in the case of Tamil Nadu Kalyana Mandapam Association v. Union of India and others (2004) 5 SCC 632, the Hon'ble Supreme Court held as under:

> 1. Taxable services, therefore, could include the mere providing of premises on a temporary basis for organising any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels, etc. which provide limited access to property for specific purpose.
>
> 52. It may be noted that in recent times the service sector has grown phenomenally all over the world and, therefore, it was recommended by Dr. Raja Chelliah Committee in the early nineties that it should be taxed. Pursuant thereto, service tax was first levied in 1994 by way of the Finance Act. The power to levy such tax can be traced to Sl. No. 97 of List I of the Seventh Schedule and this Court in Laghu Udyog Bharati v. Union of India (1999) 6 SCC 418 found no lack of legislative competence as far as the levy of service tax was concerned.
>
> 53. It is also emphasised that a tax cannot be struck down on the ground of lack of legislative competence by enquiring whether the definition accords with what the layman's view of service is. It is well settled that in matters of taxation laws, the court permits greater latitude to pick and choose objects and rates for taxation and has a wide discretion with regard thereto. We may in this context refer to the decision of Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536(SCC para 343, at pp. 740-41):
>
> In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters.
>
> 54. Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word service so long as it does not transgress any specific restriction contained in the Constitution.
>
> 55. In fact, making available a premises for a period of a few hours for the specific purpose of being utilised as a mandap whether with or without other services would itself be a service and cannot be classified as any other kind of legal concept. It does not certainly involve transfer of movable property nor does it involve transfer of

movable property of any kind known to law either under the Transfer of Property Act or otherwise and can only be classified as a service.

56. In fact, mandap-keepers provide a wide variety of services apart from the service of allowing temporary occupation of mandap. As per Section 65(19) of the Finance Act, 1994, mandap means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and includes any furniture, fixture, light fittings and floor coverings therein let out for consideration for organising any official, social or business function. A mandap-keeper apart from proper maintenance of the mandap, also provides the necessary paraphernalia for holding such functions, apart from providing the conditions and ambience which are required by the customer such as providing the lighting arrangements, furniture and fixtures, floor coverings, etc. The services provided by him cover method and manner of decorating and organising the mandap. The mandap-keeper provides the customer with advice as to what should be the quantum and quality of the services required keeping in view the requirement of the customer, the nature of the event to be solemnised, etc. In fact the logistics of setting up, selection and maintenance is the responsibility of the mandap-keeper. The services of the mandap-keeper cannot possibly be termed as a hire-purchase agreement of a right to use goods or property. The services provided by a mandap-keeper are professional services which he alone by virtue of his experience has the wherewithal to provide. A customer goes to a mandap-keeper, say a star hotel, not merely for the food that it will provide but for the entire variety of services provided therein which result in providing the function to be solemnised with the required effect and ambience. Similarly the services rendered by outdoor caterers is clearly distinguishable from the service rendered in a restaurant or a hotel inasmuch as, in the case of outdoor catering service the food/eatables/drinks are the choice of the person who partakes of the services. He is free to choose the kind, quantum and manner in which the food is to be served. But in the case of a restaurant, the customer's choice of foods is limited to the menu card. Again in the case of outdoor catering, customer is at liberty to choose the time and place where the food is to be served. In the case of an outdoor caterer, the customer negotiates each element of the catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalised service provided to the customer. Clearly, the service element is more weighty, visible and predominant in the case of outdoor catering. It cannot be considered as a case of sale of food and drink as in a restaurant. Though the service tax is leviable on the gross amount charged by the mandap-keeper for services in relation to the use of a mandap and also on the charges for catering, the Government has decided to charge the same only on 60% of the gross amount charged by the mandap-keeper to the customer. .....

58. A tax on services rendered by mandap-keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities. Section 65 clause (41) sub-clause (p) of the Finance Act, 1994, defines taxable service (which is the subject-matter of levy of service tax) as any service

provided to a customer by a mandap-keeper in relation to the use of a mandap in any manner including the facilities provided to [a customer] in relation to such use and also the services, if any, rendered as a caterer . The nature and character of this service tax is evident from the fact that the transaction between a mandap-keeper and his customer is definitely not in the nature of a sale or hire-purchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well-established judicial principle that so long as the legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the legislature (Prafulla Kumar v. Bank of Commerce, AIR 1947 PC 60). Article 246(1) of the Constitution specifies that Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (State List). In respect of matters enumerated in List III (Concurrent List) both Parliament and State Governments have powers to make laws. The service tax is made by Parliament under the above residuary powers.

46. In GUJARAT AMBUJA CEMENT LTD v. UNION OF INDIA [(2005) 4 SCC 214], the Writ Petitioners were customers or clients of Goods Transport Operators and Forwarding and Clearing Agents. One among the contention was that the levy of service tax on goods transport operators and forwarding and clearing agents, encroaches upon the State Government's power as defined in Entry 56 of List II of the seventh schedule to the Constitution and the Parliament could not by resorting to residuary Entry 97 of List I 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. Noting that there is distinction between the object of tax, the incidence of tax and machinery for the collection of tax and legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery, the Hon'ble Supreme Court held as under:-

7. 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. v. State of U.P, (2005) 2 SCC 515, 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 waterways 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 Ramkrishna v. State of Bihar ((1964) 1 SCR 897 = AIR 1963 SC 1667), where it was said in language which we cannot better: (SCR p. 908) 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 authorised 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. (See also Sainik Motors v. State of Rajasthan, ((1962) 1 SCR 517 = AIR 1961 SC 1480.)

28. 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 summarised 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 ancillary effect may be [Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.,AIR 1947 PC 60, 65, A.S. Krishna v. State of Madras, 1957 SCR 399 = 1957 CriLJ 409, State of Rajasthan v. G. Chawla, 1959 Supp. (1) SCR 904 = 1959 CriLJ 660, Katra Educational Society v. State of U.P, (1966) 3 SCR 328 = AIR 1966 SC 1307, D.C. Johar & Sons (P) Ltd. v. STO, 1971 (27) STC 120 (SC) and Kannan 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, (1957 SCR 399 = 1957 CriLJ 409, A.B. Abdul Kadir v. State of Kerala, (1976) 3 SCC 219 at p. 232 = 1976 SCC (Tax) 270 and Federation of Hotel & Restaurant Assn. of India v. Union of India, ((1989) 3 SCC 634 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 v. Union of India, ((2004) 1 SCC 712 = (2003) 10 Scale 141).

(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 Poppatlal Shah v. State of Madras, (1953) SCR 677).

29. 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 have been defined, as we have already noted, in Section 65(41). Each of the sub-clauses of that clause 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 clearing and forwarding agents has been dealt with under clause (j) and service provided by goods transport operators has been provided under clause (l) [subsequently renumbered as clause (m-a)]. These clauses read respectively as under:

7. (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; 7. (m-a) in relation to service provided by a 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;

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

31. It is clear therefore that Section 66 read with Sections 65(41)(j) and 67(m-a) in 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 Assn. of India v. Union of India, (1989) 3 SCC 634 : (SCC pp. 652-53, paras 30-31) 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.

32. Since service tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within the States' 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.

33. Incidentally a similar challenge to the legislative competence of Parliament to levy service tax was negatived in T.N. Kalyana Mandapam Assn. v. Union of India, ((2004) 5 SCC 632 = (2004) 167 ELT 3) which was a case where the levy of service tax was challenged by the owners of kalyana mandapams/mandap-keepers. By virtue of the 1997 amendment service provided to a client by mandap-keepers including the services if any rendered as a caterer was treated as a taxable service. The challenge, inter alia, was that service tax on mandap-keepers was colourable legislation as the said tax was not on service but was in pith and substance only a tax on the sale of goods and/or a tax on land. The writ petition filed before the Madras High Court was rejected and the constitutionality of the levy was upheld. It was then urged before this Court by the appellants that Entries 18, 14 and 54 of List II covered the levy in question and, therefore, resort could not be had to Entry 97 in List I of the Seventh Schedule of the Constitution. It was held by this Court that although certain items of the service might have been referable to any other entry, the service element was the more weighty, visible and predominant . Therefore, the nature and character of the levy of the service tax was distinct from a tax on the sale or hire-purchase of goods and from a tax on land.

47. In ALL INDIA FEDERATION OF TAX PRACTITIONERS v. UNION OF INDIA, (2007) 7 SCC 527, the appeal was against the Division Bench Judgment of the Bombay High Court upholding the legislative competence of Parliament to impose Service Tax under Article 246 (1) read with Entry 97 of List I of the Seventh Schedule to the Constitution on practising Charted Accountants and Architects. On behalf of the Appellant Association therein it was contended that tax on profession was a State subject, and therefore, Entry 97 of List-I, cannot be invoked and that Parliament had no legislative competence to levy Service Tax. After analysing the object of enacting the Finance Act and interpreting the Taxing entries in the Seventh Schedule to the Constitution, it was held as follows:

> 3. Applying the above tests laid down in the aforestated judgments to the facts of the present case, we find that Entry 60 of List II, mentions 'Taxes on professions, trades, callings and employments'. Entry 60 is a taxing entry. It is not a general entry. Therefore, we hold that tax on professions etc. has to be read as a levy on professions, trades, callings etc., as such. Therefore, Entry 60 which refers to professions cannot be extended to include services. This is what is called as an Aspect Theory. If the argument of the appellants is accepted, then there would be no difference between interpretation of a general entry and interpretation of a taxing entry in List I and List

> II of the Seventh Schedule to the Constitution. Therefore, 'professions' will not include services under Entry 60. For the above reasons, we hold that Parliament had absolute jurisdiction and legislative competence to levy tax on services. While interpreting the legislative heads under List II, we have to go by schematic interpretation of the three Lists in the Seventh Schedule to the Constitution and not by dictionary meaning of the words 'profession' or 'professional' as was sought to be argued on behalf of the appellants otherwise the distinction between general entries and taxing entries under the three Lists would stand obliterated. The words 'in relation to' and the words 'with respect to' are no doubt words of wide amplitude but one has to keep in mind the context in which they are used.
>
> 44. ..... A legislation like Finance Act can be supported on the basis of a number of Entries. In the present case, we are concerned with the Constitutional status of the levy, namely, service tax. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of Parliament and State Legislatures are subject to Constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two Groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to taxes on professions, trades, callings etc. Therefore, Entry 60 of List II and Entry 92C/97 of List I operate in different spheres.

48. In ASSOCATION OF LEASING AND FINANCIAL SERVICES COMPANIES VS UNION OF INDIA AND OTHERS (2011) 2 SCC 352, the controversy pertained to the validity of section 65 (12) and 65 (105) (zm) of the Finance Act 1994 as amended in so far as it seeks to levy service tax on leasing and hire purchase transactions. It was contended that it was beyond the legislative competence of the Parliament by virtue of Article 366 (29A) of the Constitution. In fact, identical contentions as raised in these Writ Petitions were raised before the Hon'ble Supreme Court, contending that hire purchase/leasing is deemed to be a sale and any attempt to levy service tax on the same transaction will amount to colourable exercise of power and when sales tax is paid for transfer of right to use the goods, particularly, when such transfer is a deemed sale under Article 366 (29A), it is not open to the Parliament to impose service tax on the sale transaction once again. Further it was contended that there is no rendition of service in a hire purchase/ leasing transaction. The Hon'ble the Supreme Court while analysing the scope of Article 366 (29A), held as follows:

> "Scope of Article 366(29-A)

49. If one examines Article 366(29-A) carefully, one finds that Clause (29A) provides for an inclusive definition and has two limbs. The first limb says that the tax on sale or purchase of goods includes a tax on transactions specified in Sub-clauses (a) to (f). The second limb provides that such

transfer, delivery or supply of goods referred to in the first limb shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made. Now, in K.L. Johar's case, (AIR 1965 SC 1082 = (1965) 2 SCR 112) this Court held that the States can tax hire-purchase transactions resulting in sale but only to the extent to which tax is levied on the sale price. This led Parliament to say, in the Statement of Objects and Reasons to the Constitution (Forty-sixth Amendment) Act, "though practically the purchaser in a hire-purchase transaction gets the goods on the date of entering into the hire-purchase contract, it has been held by the Supreme Court in K.L. Johar's case (AIR 1965 SC 1082 = (1965) 2 SCR 112) that there is a sale only when the purchaser exercises the option to purchase which is at a later date and therefore only the depreciated value of the goods involved in such transaction at the time the option is exercised becomes assessable to sales tax which position has resulted in avoidance of tax in various ways."

Thus, we find from the Statement of Objects and Reasons that the concept of "deemed sale" is brought in by the Constitution (Forty-sixth Amendment) Act, only in the context of imposition of sales tax and that the words "transfer, delivery or supply" of goods is referred to in the second limb of Article 366(29-A) to broaden the tax base and that as indicated in the Report of Law Commission prior to the judgment of this Court in Gannon Dunkerley's case, (AIR 1958 SC 560 = 1959 SCR 379) works contract was always taxed by the States as part of the word "sale" in Entry 48/54 of List II.

50. The object behind enactment of Article 366(29-A) is to tax the composite price so that the full value of the hire-purchase price is taxed and to avoid the judgment in K.L. Johar's case whose implication was to narrow the tax base resulting in seepage of sales tax revenue. It is in that sense "splitting" of the contract needs to be understood. Thus, it cannot be said that Parliament divested itself of the power to levy service tax vide enactment of the Constitution (Forty-sixth Amendment) Act. Even in the Report of the Law Commission, it has been observed that "if a hire-purchase transaction results in a sale, sales-tax is undoubtedly leviable by the States. No doubt, it is difficult to determine the "sale price" for the purpose of the sales tax law but this has no bearing on the question of legislative competence" (p.26).

51. Thus, reliance placed by the appellant(s) on the expression "splitting up" in K.L. Johar's case is misconceived because the "splitting up" referred to in K.L. Johar's case was, as stated above, in regard to valuation and not in regard to legislative competence."

49. On the question whether State legislature has exclusive competence to levy tax on financial leasing services, under Entry 54 List II, it was held as follows:

> 2. On behalf of the appellant(s) it was submitted that the State Legislature has the exclusive competence to levy a tax on hire-purchase and financial leasing by reason of Entry 54, List II read with Article 366(29A). It was submitted that, as held by this Court in the case of Bharat Sanchar Nigam Limited (supra) [vide para 44], splitting was permissible under Article 366(29A) only in two cases indicated in Sub-clauses (b) and (f) and that in no other service (including hire-purchase).

53. For answering the above, we need to keep in mind the doctrine of "pith and substance" and the rule of interpretation of legislative entries. These have to be applied to what is stated hereinabove in the earlier part of our judgment in which we have dealt with the concept of "banking and other financial services" and the nature and character of "service tax" as a tax on activities. We may reiterate that Equipment Leasing and Hire-Purchase Finance are activities of long term financing and they fall within the ambit of "banking and other financial services". As stated above, a financial lease is a lease that transfers substantially all risks and rewards incident to ownership. In the said lease, the lessor (NBFC) merely finances the equipment/asset which the lessee is free to select, order, take delivery and maintain. The lessor (NBFC) arranges the funding. It accepts the invoice from the vendor (supplier) and pays him. The income which the lessor earns is by way of finance/interest charges in addition to the management fees or documentation charges, etc. It is this income which constitutes the measure of tax for the purposes of calculating the value of taxable services under Section 67 of the Finance Act, 1994. Thus, a financial lease would come within "financial leasing services" in terms of Section 65(12)(a)(i).

54. There are different types of financial leases, namely, a tax-based financial lease, a leverage lease and an operating lease. In the present case, there is no adjudication of the matter. The appellant(s) approached the High Court directly without proper adjudication by the competent authority under the Finance Act, 1994. Even in the matter of allocation between the principal and finance/interest charges, adjudication under the Act was warranted which has not been done. One must also bear in mind that Article 366(29A) is essentially sales tax specific. It was brought in to expand the tax base which stood narrowed down because of certain judgments of this Court. That is the reason for bringing in the concept of "deemed sale" under which tax could be imposed on mere "delivery" on hire-purchase [See Clause (c)] which expression is also there in the second limb of the said article."

50. As regards the power of the Parliament under Entry 97 List I, it was held as follows:

8. Now coming to the main point whether the whole field is covered by Entry 54 and that the levy of service tax is incompetent, it is important to note the language of Entry 97, List I and Article 248 except for the word "other" in Entry 97. This is because when one reads Entry 97 of List I with Article 246(1) it confers exclusive power first, to make laws in respect of matters specified in Entries 1 to 96 in List I and, secondly, it confers the residuary power of making laws by Entry 97. Article 248 does not provide for any express powers of Parliament but only for its residuary power. Article 248 adds nothing to the power conferred by Article 246(1) read with Entry 97, List I. In the context of an exhaustive enumeration of subjects of legislation what does the conferment of residuary power mean? Entry 97, List I which confers residuary powers on Parliament provides "97. Any other matter not enumerated in List II and List III including any tax not mentioned in either of those lists".

The word "other" is important. It means "any subject of legislation other than the subject mentioned in Entries 1-96". Lastly, we must keep in mind a clear distinction between the subject and measure of tax. [See Goodricke Group Ltd. v. State of West Bengal: (1995) Supp 1 SCC 707

59. Applying the above decisions to the present case, on examination of the impugned legislation in its entirety, we are of the view that the impugned levy relates to or is with respect to the particular topic of "banking and other financial services" which includes within it one of the several enumerated services, viz., financial leasing services. These include long time financing by banks and other financial institutions (including NBFCs). These are services rendered to their customers which comes within the meaning of the expression "taxable services" as defined in Section 65(105)(zm). The taxable event under the impugned law is the rendition of service. The impugned tax is not on material or sale. It is on activity/service rendered by the service provider to its customer. Equipment Leasing/Hire-Purchase finance are long term financing activities undertaken as their business by NBFCs. As far as the taxable value in case of financial leasing including equipment leasing and hire-purchase is concerned, the amount received as principal is not the consideration for services rendered. Such amount is credited to the capital account of the lessor/hire-purchase service provider. It is the interest/finance charge which is treated as income or revenue and which is credited to the revenue account. Such interest or finance charges together with the lease management fee/processing fee/documentation charges are treated as considerations for the services rendered and accordingly they constitute the value of taxable services on which service tax is made payable.

60. In fact, the Government has given exemption from payment of service tax to financial leasing services including equipment leasing and hire-purchase on that portion of taxable value comprising of 90% of the amount representing as interest, i.e., the difference between the installment paid towards repayment of the lease amount and the principal amount in such installments paid (See Notification No. 4/2006 - Service Tax dated 1.3.2006). In other words, service tax is leviable only on 10% of the interest portion. (See also Circular F. No. B.11/1/2001-TRU dated 9.7.2001 in which it has been clarified that service tax, in the case of financial leasing including equipment leasing and hire-purchase, will be leviable only on the lease management fees/processing fees/documentation charges recovered at the time of entering into the agreement and on the finance/interest charges recovered in equated monthly installments and not on the principal amount). Merely because for valuation purposes inter alia "finance/interest charges" are taken into account and merely because service tax is imposed on financial services with reference to "hiring/interest" charges, the impugned tax does not cease to be service tax and nor does it become tax on hire-purchase/leasing transactions under Article 366(29A) read with Entry 54, List II. Thus, while State Legislature is competent to impose tax on "sale" by legislation relatable to Entry 54 of List II of Seventh Schedule, tax on the aspect of the "services", vendor not being relatable to any entry in the State List,

> would be within the legislative competence of the Parliament under Article 248 read with Entry 97 of List I of Seventh Schedule to the Constitution.
>
> ...
>
> 66. .... The service tax in the present case is neither on the material nor on sale. It is on the activity of financing/funding of equipment/asset within the meaning of the words "financial leasing services" in Section 65(12)(a)(i).
>
> 67. Lastly, we may state that this Court has on three different occasions upheld the levy of service with reference to Entry 97 of List I in the face of challenges to the competence of the Parliament based on the entries in List II and on all the three occasions, this Court has held that the levy of service tax falls within Entry 97 of List I. The decisions are in the case of T.N. Kalayana Mandapam Association, (2004) 5 SCC 632, Gujarat Ambuja Cements Ltd.(2005) 4 SCC 214 and All-India Federation of Tax Practitioners, (2007) 7 SCC 527.

51. On a careful analysis of the decisions of the Hon'ble Supreme Court referred above, it is seen that the Hon'ble Supreme Court on four occasions, upheld the levy of service tax with reference to Entry 97 of List I and in all the four cases, which have been quoted above, the Hon'ble Supreme Court held that the levy of service tax falls within Entry 97 of List I. Therefore, any challenge on this aspect by the petitioners must necessarily fail.

52. As per Section 14(d) of Copyright Act, in the case of Cinematograph film. Copyright means the exclusive right, subject to the provisions of the Act:- (i) to make a copy of the film including a photograph of any image forming part thereof; (ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions; (iii) to communicate the film to the public.

53. The Sales Tax Law applies when there is sale/purchase of goods . Therefore to attract Value Added Tax, whether as normal sale or deemed sale , the transaction should be in relation to goods . The legislative competence is to be seen with reference to the object of the levy viz., temporary transfer of copyright or permitting the use or enjoyment. All the writ petitioners are producers/distributors of Cinematograph film. Producer transfers the copyright of the film to the distributor or exhibitor. The distributor in turn transfers copyright to the sub-distributor/area-distributor/ exhibitor. There are various modes of transaction in the film industry. It is therefore required to be seen whether those transactions between the producer and the distributor, distributor and sub-distributor or exhibitor are normal sale or deemed sale or temporary transfer of copyright, permitting to use or enjoyment of the copyright.

54. According to Petitioners, the transactions between producer and the distributor, distributor and sub-distributor or exhibitor involves delivery of goods i.e. positive prints or cubes of the picture, which amounts to sale within the meaning of Section 2(7) of the Sale of Goods Act, 1930. Article 366(12) of the Constitution has defined the word goods for the purpose of the Constitution as

including all materials, commodities, and articles . The word goods has also been defined in Section 2(7) of the Sales of Goods Act, 1930 as meaning every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The State sales tax legislations have, subject to minor variations, adopted substantially a similar definition of goods for the purpose of their Sales Tax Acts.

55. States have exercised their power to levy a tax on the sale of goods and Tamil Nadu Value Added Tax Act, 2006 charges transaction of sale or transfer of use of copyright under Section 3 of the Act read with Serial No.70 of Part-B of the First Schedule to the Act. Our attention was drawn to the definition of sale under Section 2(33) of Tamil Nadu VAT Act which reads as under:-

> Section 2(33) 'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes,-
>
> (i)a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
>
> (ii)a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (iii)a delivery of goods on hire-purchase or any system of payment by instalments;
>
> (iv)a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (v)a supply of goods any un-incorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (vi)a 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 of 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. .....

To the same effect, is the definition of sale under Section 2(g) of Central Sales Tax Act.

56. State of Tamil Nadu charges transaction of sale or transfer of use of copyright under Section 3 of Tamil Nadu Value Added Tax Act read with Serial No.70 of Part-B of First Schedule to the Act. Serial No.70 in Part-B reads as under:-

PART B [See sub-section (2) of Section 3] (Goods which are taxable at the rate of 4 per cent)

Sl. No. Description of the goods Commodity Code Number

---

70. Intangible goods like Copyright, Patent, REP licence 2070

---

57. There have been several decisions of the Hon'ble Supreme Court on the interpretation of the word goods in the context of different State sales tax enactments. In number of decisions, the Hon'ble Supreme Court held that the word goods for the purpose of sale tax may be tangible or intangible property. In Tata Consultancy Services Vs. State of Andhra Pradesh, (2001) 4 SCC 629, the Hon'ble Supreme Court held as Under:-

> A 'goods', may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customised or non-customised satisfies these attributes, the same would be goods.

58. To contend that goods may be tangible property or intangible one, reliance was also placed upon (2004) 137 STC 117 (S.P.S.Jayam and Co. v. Registrar, Tamil Nadu Taxation Special Tribunal and others) where the transfer of trademark, an intangible property was held to be goods as per Tamil Nadu General Sales Tax Act, 1959. Division Bench of this Court held that the Trademark is the property right and it exclusively belongs to the party who has registered it and transfer of right to use the trademark is an intangible and transfer of right to use for trademark for consideration is deemed sale and therefore, the consideration is taxable under Tamil Nadu General Sales Tax Act, 1959.

59. Whether temporary transfer of copyright or permission to use or enjoyment amounts to sale of goods or deemed sale within the meaning of Article 366(29A) of the Constitution, as contended by the Petitioners is to be examined, keeping in view the normal business practice in the film industry and in the light of the principles laid down by the Hon'ble Supreme Court in various decisions upholding the levy of service tax.

60. The producer of the film, who owns the intellectual property rights of the film temporarily transfers the rights to a person (normally Distributor or any other person), who in turn directly or indirectly enters into an agreement with sub-distributor, area distributor, exhibitor or theatre owner. Exploitation activities of the cinematograph film normally takes place in the following way:

Film Producer/Copyright Holder | | | \./ Distributor | | | \./ Sub-Distributor | | | \./ Exhibitor | | | \./ Theatre-owner There are various modes of transactions in the film industry.

61. The distributor purchases the theatrical distribution rights from the producer for exhibiting the film in a defined territory. The distributor performs functions such as:

1.part-financing of film (in case of minimum guarantee/ advance based purchase of film rights)

2.localised marketing of film

3.selection of exhibition halls

4.managing the logistics of physical print distribution.

62. Mr.Sundareswaran, the learned counsel for respondents submitted that there are three popular approaches to transfer distribution rights via distribution contracts as under:

. Minimum Guarantee + Royalty Here, the producer sells the distribution rights for a defined territory for a minimum lump sum irrespective of the box office performance of the film. Any surplus is shared between the producer and distributor, in a pre-set ratio (typically 1:2) after deducting entertainment tax, show rentals, commission, print costs and publicity costs. Effectively, the distributor becomes a financier in the eyes of the market. This is the most common channel available to high budget producers.

2. Commission Here, the distributor pays the producer the entire box office collection after deducting commission. So, the entire risk of box office performance of the film remains with the producer. This is the most common channel available to low budget producers.

3. Outright Sale Here, the producer sells all distribution and theatrical rights for a defined territory exclusively to a distributor. Effectively, the distributor becomes a producer in the yes of the market. So, the entire risk of box office performance of the film remains with the distributor.

63. In the Writ petitions, the petitioners have enumerated certain modes of business transactions between the Producer and the Distributor as between the Distributor and exhibitor. We feel it appropriate to briefly refer to those transactions.

a. Outright Assignment: Outright assignment is made of either of the totality of the rights or specific rights such as satellite rights, broadcasting rights, cable television rights, territorial rights and internet rights. The assignment may be perpetual. The agreement is accompanied by delivery of

the goods being the master or CD tapes of the assigned film.

b. Lease: The producer leases the distribution/exhibition rights for a specific territory for consideration. The lease is for a given period, which is normally 5 years from the date of first release of the picture. The producer provides prints at the cost of the lessee and on being informed, the lessee takes delivery of the prints and make arrangements for exhibition of the film in the theatres. The lessee has no right to sell or make available the prints by subsequent lease and bound to return the prints at the expiry of the lease.

c. Percentage of Share:- The producer gives exclusive distribution rights for a period of 5 years or so. In consideration, the distributor is entitled to share at a certain percentage, say, 20% of the net realisation throughout the run of the movie. Immediately, setting off the share against any distribution advance, statement of accounts is rendered to the producer each month showing the theatres, place of screening, period of run and share amount. The prints have to be returned at the expiry of the agreement. If the producer chooses to sell his lease rights, the entire profits should first be appropriated towards the advance given by the distributor in the event of sale. The distributor is guaranteed on 10% realization or such percentage of the sale amount.

d. Profit Share:- There are agreements in which the producer and the distributor operate on profit sharing basis in which the distributor is entitled to a specific percentage of the realization, in lieu of which the distributor provides upfront advance to the producer (to be adjusted) and looks to the exhibition arrangements.

64. Even if the exhibitor/theatre owner merely lets out the premises to the distributor or sub-distributor or area distributor, there are other business support services rendered by the theatre owner. The definition of business support service has been amended in 2011 by means of a Circular bearing No.148/17/2011-ST dated 13.12.2011 (bearing F.No.354/27/2011-TRU) issued by the Central Board of Excise and Customs, New Delhi to include operational or administrative assistance in any manner in its definition. The said Circular is under challenge in W.P.No.3948 of 2012, etc., batch.

65. Even though it was contended that the transaction is between the producer and the distributor and the distributor gets the absolute right over the cinematograph film, in reality, the distributor does not get the absolute rights. The distributor only gets few positive prints or cubes of the picture for the exhibition of the picture in the specified area. In otherwords, it is a temporary transfer of the copyright or permission to use or enjoyment for the limited period in the specified area. As rightly contended by the respondents, exclusive right of copyright ordinarily vests with the producer of the film. Even in outright assignment, the transfer is not absolute. In the case of a lease, it is for a given period. The levy of tax on any transaction is based on the criterion whether the transfer of right is permanent or temporary. So long as the producer does not fully relinquish his right over the copyright held by him, transfer of the right to use is purely temporary and in those cases, levy of service tax for such transfer of copyright would apply. The Service Provider is the Producer,who is the owner of the Intellectual Property and the service receiver is the person who temporarily gets the right to use the Intellectual Property who is the Distributor and service tax is leviable on such

temporary transfer of copyright.

66. Normally, producer of a movie exploits the film in many ways i.e., assigning copyrights to distributor(s) for exhibition in threatres; or the producer himself exhibits the film by engaging theatres; exploitation of satellite rights, T.V. channels, audio/video, etc. The right given to the distributor is restricted to exploiting the contents of the film through a film/digital format through exhibition in theatres in a specific area and for specified time. Even though the copyright of the film is assigned to a distributor for a specific area for a limited period, the producer reserves his right to exploit the film in other media. So long as the transaction does not amount to sale or permanent transfer, it is only a temporary transfer of copyright or permit its use by another person for a consideration. The Service Provider is the Producer who owns the copyright of the film and Service receiver is the Distributor who temporarily owns the copyright of the film for consideration.

67. The learned counsel for petitioner Mr.Prasad produced copies of various agreements and deeds of assignments entered into between the producers and distributors and exhibitors and contended that the transaction is only delivery of goods for consideration and therefore service tax cannot be levied on such transaction.

68. We perused the 'Distribution Agreement' dated 21.8.2008 executed in favour of Jupiter Films (in respect of Tamil movie - "Jeyam kondaan" for a consideration of Rs.35,00,000/-), produced by Sathya Jyothi Films, petitioner in W.P.No.483 of 2011. Though we are required to decide the vires of Section 65(105)(zzzzt), we refer to the said agreements for reference as a sample. By perusal of the said Distribution Agreement, it is seen that the Distribution Agreement is not mere delivery of positive prints but there are following mutual activities to be performed both by the Producer and the Distributor.

Producer:

> Producer shall supply free of cost 10 number of colour and scope positive prints or cubes of the picture, DTS disc, blowups, photocards, audio cassettes, etc., for exhibition purposes in the said area.
>
> Producer shall announce the general release of the said picture in advance.
>
> Distributor:
>
> Distributor shall exhibit the prints of the film only in the areas covered under the agreement and shall not allow exhibition of the prints in any other areas.
>
> Distributor shall book good theatres at best possible terms and shall take prior consent of the producers and the booking of screening centres will be on terms basis or on minimum Guarantee basis.

> Distributor shall carry out the local and theatre publicities for promotion of the picture and the Distributor has to take prior written sanction and the budget approval from the Distributor.
>
> The Distributor shall surrender the rights with prints and publicities at the end of the Agreement period or in the event of sale to third party.

69. The above mutual activities would show that notwithstanding the distribution agreement, the producer retains the right to deal with and dispose of the rights of the agreement to any third parties. The Producer also retains the right to screen the picture over the satellite channels, Doordarshan channels, etc., at any time after certain period (six months from its first and general release of the picture). Various clauses in the distribution agreement would clearly show that the distribution agreement is only a temporary transfer of copyright or permission to use or enjoyment of the film by exhibiting the film in a specified area for a specific period of time. While the producer retains his right to exploit the film , there is no transfer of right to use the goods amounting to sale within the meaning of Article 366(29A). On the otherhand, it is a temporary transfer of copyright or permitting its use or enjoyment by the lessee. The Producer is the Service Provider and the lessee is the recipient of the service and service tax is leviable on such temporary transfer or permitting use or enjoyment.

70. We have also perused the "lease agreement" between M/s.Vikatan Publishing Solutions Private Limited and Ms/.Ananda Pictures Circuit (Petitioner in W.P.No.482 of 2011) (in respect of film 'Siva Manasula Sakthi' for a period of five years for a consideration of Rs.1,01,50,0000/-). By perusal of the said lease agreement, it is seen that the lease was for exhibition of the film in a specific area for a limited period. Though lease right was given to the lessee for a specific area, Producer of the film/lessor reserved his right to exhibit the film in few theatres/complexes located in the area covered under the lease itself. That apart, the Producer retains his right to exploit through satellite, T.V. Channels, digital rights, audio rights, DVD rights, song sequences and all other rights to any of the T.V.channels. When the producer continued to retain his ownership of the film, it cannot be said that the lease amounts to transfer of right to use the goods amounting to sale within the meaning of Article 366(29A).

71. Agreement between the Distributor and Exhibitor (theatre owner):-

> It was submitted that agreements are also entered into between the Distributor and an Exhibitor (theatres) and the business is patterned on different lines based on commercial exigency. The distributor transfers the copyrights to sub-distributor, area distributor, exhibitor or theatre owner. This agreement can be of different types. It is necessary to examine different types of arrangements and in order to determine whether the activities undertaken by a theatre owner and a distributor is sale of goods or transfer of right to use the goods.

72. Mr.Sundareswaran, the learned counsel for respondents has submitted that by and large there are following four popular approaches to transfer exhibition rights via exhibition contracts:

1.Theatre Hire Here, the exhibitor pays the distributor the entire box office collection after deducting entertainment tax and show rentals. So, the entire risk of box office performance of the film remains with the distributor. This is the most common channel for low-budget films, causing rank newcomers, with unproven track record.

2.Fixed Hire Here, the exhibitor pays the distributor a maximum lump sum irrespective of the box office performance of the film. Rental is not chargeable per show. Any surplus after deducting entertainment tax is retained by the exhibitor. Effectively, the exhibitor becomes a producer in the eyes of the market. So, the entire risk of box office performance of the film remains with the exhibitor. This is the most common channel for high budget films, casting established front-runners, with proven track record.

3.Minimum Guarantee + Royalty Here, the exhibitor pays the distributor a minimum lump sum irrespective of the box office performance of the film. Any surplus after deducting entertainment tax and show rental is shared in a pre-set ratio (typically 2:1) between the exhibitor and distributor. But risk of deficit remains with the exhibitor. This is the most common channel preferred by single screens.

4.Revenue Share Here, the exhibitor shares with the distributor, in a pre-set ratio (typically 1:2), the entire box office collection of the film after deducting entertainment tax. Rental is not chargeable per show. So, the entire risk of box office performance of the film is shared between the exhibitor and distributor. This is the most common channel preferred by multiplex screens. In the first category, the profit or loss from exhibiting the film is borne by the Distributor. In such a case, the theatre owner provides the taxable service within the meaning of Section 65(105)(zzzz) - renting of the immovable property for furtherance of business or commerce (vires of Section 65(105)(zzzz) is under challenge in a batch of writ petitions). Depending upon the terms of the agreement, the theatre owner also renders operational or administrative assistance and is liable to pay service tax in respect of renting of immovable property and also other operational and administrative assistance , (Circular dated 13.12.2011 clarifying the levy of service tax on distributors/sub-distributors of films and exhibitors) is the subject matter of challenge in W.P.No.3948 of 2012 etc., batch). Another type of arrangement is where the contract between the theatre owner and the Distributor is on the revenue sharing basis i.e., a fixed and pre-determined, i.e., a percentage of revenue earned from selling the tickets goes to the theatre owner and the balance goes to the Distributor. The two contracting parties act on the basis of the agreement and depending on the terms of the agreement, service is provided by either side. This kind of arrangement revenue sharing arrangement between the distributor/sub-distributor/area distributor and the theatre owner is the subject matter of clarification in the impugned Circular which is under challenge in another batch. Suffice to note that the said arrangement does not fall under "delivery of goods" amounting to sale/transfer

of right to use the goods to attract sale tax.

73. No transfer of right to use:- As held by the Supreme Court in the decision of B.S.N.L. Vs. Union of India, (2006) 3 SCC 1, to constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

a. There must be goods available for delivery;

b. There must be a consensus ad idem as to the identity of the goods;

c. The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the right to use" and not merely a licence to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

74. To satisfy the parameters/attributes as laid down in B.S.N.L. Vs. Union of India, (2006) 3 SCC 1, the goods must be available for delivery, there should be consensus as regards identity of goods, transferee should have a legal right to use the goods, and such legal right has to be to the exclusion of the transferor and having transferred the right to use, during the period the owner cannot again transfer the same rights to others. The characteristics noted above are available in the case of assignment/lease/transfer of copyright and so subjected to VAT.

75. In our opinion, none of these attributes are present in the agreement between the producer and the distributor and the distributor and the theatre owner. Even while the films were in use by the distributor/exhibitor, the same are under the effective control of the producer. The distributor is not free to make use of the same for other works like satellite rights, T.V. Channels, exploitation of song, audio/video, D.V.D. etc., The distributor cannot make use of the film according to his wishes, but there is only temporary transfer or permission to use or enjoyment for consideration as per the terms of the agreement.

76. Re.contention: Assignment agreement in perpetuity:- Mr.Prasad, learned counsel for petitioner drew our attention to Absolute Assignment Agreement of television, satellite, broadcasting rights between Sathya Jothi Films and M/s.Sun T.V.Net Work dated 5.7.2010 (in respect of the film Baana Kaathadi for a consideration of Rs.95,00,000/-) and contended that in such type of assignment agreements in perpetuity right is permanently transferred and no right is retained by the Producer and such rights certainly amounts to sale/ transfer of right to use the goods for which VAT is levied and in such type of transaction no service tax could be levied. Under the said

agreement, the assignor assigned to the assignee exclusive copyright in respect of Satellite Television Broadcast, DTH, Direct Satellite Service, Terrestrial Television Broadcast and all other rights connected therewith for exhibition of the film through Television Broadcast for the entire world. The learned counsel for petitioner has drawn our attention to certain clauses and submitted that in respect of satellite television, DTH and all other connected rights, the Assignor/producer of the film relinquished his rights over others rights and the assignment in favour of the assignee is in perpetuity.

77. Of course, the nature of transaction in each case determines leviability of service tax. Each transaction should be considered individually to find out as to whether it is a sale or service . In this regard, it is pertinent to note that in these batch of writ petitions, when the Department sent communications to the producers informing them of the introduction of the said taxable service in the Union Budget 2010, the Producers were requested to furnish documents/ particulars relating to the rendering of said service for verification. As details called for were not furnished, reminder letters were sent and without complying with the Department's request for submission of the documents, the Producers approached the Court by filing writ petitions. Therefore, the nature of transaction in respect of assignment agreement dated 5.7.2010 could not have been examined by the Department. In any event, any one such transaction cannot be a ground to hold that the impugned provision is unconstitutional.

78. In INFO TECH SOFTWARE DEALERS ASSOCATION Vs. UNION OF INDIA 2010 (20) STR 289, (Madras), the challenge was to the legislative competence of the Parliament to impose service tax on software supplied to a customer pursuant to a end user licence agreement under section 65 (105)(zzzze). In the said case, identical contention, as raised in these Petitions, were raised stating that Software is goods and all transactions would amount to sale. The said writ petition was dismissed holding that software is goods and whether the transaction would amount to sale or service would depend upon individual transaction and for the reason of that challenge, the amended provision cannot be held to be unconstitutional so long as the Parliament has legislative competency to enact law in respect of service under Entry 97 of List-I.

79. Exclusion of permanent transfer of copyrights:- It is also pertinent to note that permanent transfer of rights is excluded from service tax. At the time of levy of service tax on taxable service of Intellectual Property Rights (IPRs) as defined in sections 65(105)(zzr) of the Act, the Department clarified as follows:

> A permanent transfer of intellectual property right does not amount to rendering of service. On such transfer, the person selling these rights no longer remains a 'holder of intellectual property right' so as to come under the purview of taxable service. Thus, there would not be any service tax on permanent transfer of IPRs. (Circular No.80/10/2004-ST, dated 17-9-2004 para 9.2) The same proposition applies to copyright which is another form of intellectual property right. Thus, permanent transfer of copyright will not amount to rendering of service and therefore, will be excluded from the purview of service tax.

80. Re.contention : Levy of service tax amounts to Double Taxation:-

> Learned counsel submitted that considering the import of feature films as goods , Customs duty is levied under Customs Act,1962 and Chapter 37 of the Customs Tariff Covers every type of Cinematograph film. The learned counsel submitted that excise duty can be levied only on goods. It was also contended that cinematograph films have been considered as excisable goods through Chapter 37 of the Central Excise Tariff Act. The learned counsel further submitted that Excise and Customs, which are wings of Ministry of Finance, have treated films as goods only and while so the same Ministry of Finance cannot levy service tax calling it as service. Therefore, it is the attempt of the petitioner to demonstrate before this Court that in respect of the same transaction if Service Tax is leviable or charged, it would amount to double taxation and the same would be not valid in law.

81. Sofar as the levy of Central Excise Duty, the taxable event is manufacture goods and so far as Value Added Tax, the taxable event is the sale of the goods. Since, both these duties are payable, it cannot be generally stated that double taxation is not permissible under Law. Further, it is to be noted that the taxable event in the case of Central Excise Duty is not directly on the goods, but it is on the manufacture of the goods, whereas the Sales Tax/Value Added Tax is imposed with specific reference to the goods, which are sold and sale is the taxable event, sofar as Sales Tax/ Value Added Tax, whereas Service Tax is a value added tax.

82. The Hon'ble Supreme Court in BSNL vs. UOI, explained the "aspect doctrine" by observing that the doctrine merely deals with legislation competence. As held in Federation of Hotel & Restaurant vs. UOI, 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 the another legislative power. It was further held that there may be overlapping, but the overlapping must be in law and the transaction may involve two or more taxable events in different aspects, but the fact that there is overlapping does not detract from the distinctiveness of the aspects.

83. Considering the nature of various arrangements between the producer and the distributor, distributor/sub-distributor and theatre owner, we are of the view that there is only temporary transfer or permission to use or enjoyment for consideration on certain terms and conditions in a specified area. Irrespective of the arrangement of rights to the distributor to a specific area for a limited period, the Producer retains the original copyrights. The sale of goods can be said to have taken place only when the producer relinquishes his right and title over the goods; but when he keeps grip over the goods transferred for temporary use or enjoyment on certain terms and conditions. When the transactions are not sale or deemed sale , the same cannot be brought under Entry 54 of List II or Entry 92A of List I.

84. Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State Legislative must be clearly established. Entry 97 itself is specific 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 tax, if it is not mentioned in either of these two Lists.

[INTERNATIONAL TOURIST CORPORATION AND OTHERS v. STATE OF HARYANA (AIR 1981 SC 774)].

85. The impugned levy is a tax on service and in terms of the definition of taxable service under section 65 (105)(zzzzt), it means any service provided or to be provided to any person by any other person and two types of such services are contemplated one being transferring temporarily and the other being permitting the use or enjoyment of copyright. Therefore, the impugned levy is not a levy of tax on the "transfer of the right to use the goods", but, on the service provided or to be provided for transferring temporarily or permitting the use or enjoyment of any copyright, except the rights covered under section 13(1)(a) of the Copyright Act. It is a levy which is distinct from the levy under Entry 54 of List II or Entry 92A of List I. Therefore, there is nothing wrong for Parliament to claim taxing power under Entry 97 of List I and all that is required to be shown is that that tax is not mentioned in List II or List III. Resorting to Entry 97 of List I. The Parliament brought out the amendment Section 65(105)(zzzzt) bringing the activity of temporary transfer or permission to use or enjoy the copyright for consideration under the ambit of service tax net on the service provided by resorting to Entry 97 of List I and the same cannot be said to be ultra vires the Constitution.

86. Service Tax - Value Addition on activities:- As held by the Hon'ble Supreme Court, service tax is a tax on activity, is a value added tax and the value addition is on account of the activity, which provides value addition. It gives value addition to the goods manufactured or produced or sold on account of activities the film exhibited. Thus, service tax is imposed every time service is rendered. The taxable event in each exercise/activity undertaken by the service provider and each time, service tax gets attracted.

87. Elaborating upon the value addition and observing that value addition comes in an account of activity undertaken by the professional, in (2011) 2 SCC 352 [Association of Leasing and Financial Services Companies v. Union of India and others], the Hon'ble Supreme Court held as under:-

> Nature and character of service tax
>
> 38. In All India Federation of Tax Practitioners' case (2007) 7 SCC 527, this Court explained the concept of service tax and held that service tax is a value added tax (VAT , for short) which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer. That, service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a sale from service . That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stand consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore tax on an activity. That, service tax is a value added tax. The value addition

> is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation, etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of section 65(105)(zm) of the Finance Act, 1994 (as amended). Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted."

Same is the view taken earlier by the Constitution Bench of Hon'ble Supreme Court in the case of Godfrey Phillips India Limited v. State of U.P. (2005) 2 SCC 515, in which, the Supreme Court observed that in the classical sense a tax is composed of two elements : the person, thing or activity on which tax is imposed. Thus, every tax may be levied on an object or on the event of taxation. Service tax is, thus a tax on activity whereas sales tax is a tax on sale of a thing or goods.

88. Film produced by the producer does not fetch any value unless it passes through various commercial activities including the distribution agreements and gets exhibited. As held by the Supreme Court, service tax is a "value added tax , which in turn, is a general tax , which applies to all commercial activities involving production of goods cinematograph films and provision of services from the stage of production negative of the films are made till it gets exhibited in theatre or exploited through other media. Lot of economic/commercial activities are involved. Those commercial activities amounting to temporary transfer of copyright or permitting use or enjoyment of copyright, Parliament is well within its competence to levy service tax . Transfer of right to use the goods or permission to use the copyright or enjoyment of copyright operate in different fields. There may be overlapping. The impugned legislation cannot be held to be vitiated merely because there is overlapping and that both sales tax and service tax becomes leviable.

89. Point No.3 : Re.contention No element of service is involved:-

> Contention of Petitioners is that tax is leviable only on services provided i.e. on the value addition and there is no service or element of service in the act of temporary transfer or permitting use or enjoyment of a copyright to another for his business. Further contention of Petitioners is that in Tamil Nadu Kalyana Mandapam Association case (2004) 5 SCC 632, the Hon'ble Supreme Court pointed out various services rendered by Mandap keepers. It was contended in Association of Leasing and Financial Services Companies case (2011) 2 SCC 352 also, the Hon'ble Supreme Court pointed out number of financial services rendered by Non-Banking Financial Companies in respect of hire purchase agreements and in the act of temporary transfer or permitting use or enjoyment of copyright of cinematographic film to another, no services are rendered by the producer/ distributor or cinema theatre owner (exhibitor) and therefore, levy of service tax on those acts is not maintainable.

90. The term service cannot be understood in a layman's point of view. In Tamil Nadu Kalyana Mandapam Association case, (2004) 5 SCC 632, the Hon'ble Supreme Court held that levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word service so long as it does not transgress any specific restriction contained in the Constitution.

91. It has to be borne in mind the distinction pointed out by the Hon'ble Supreme Court in the case of Gujarat Ambuja Cement Ltd v. Union of India (2005) 4 SCC 214 i.e. (i) object of tax; (ii) instances of tax and (iii) machinery for collection of tax. The legislative competence is to be determined with reference to the object of levy and not with reference to its incidence or machinery. In Gujarat Ambuja Cement Limited case, the Hon'ble Supreme Court at Paragraph No.28 of the Judgment, summarized the principles for determining the constitutionality of statute as under:-

> "(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 ancillary effect may be [Prafulla Kumar Mukherjee v. Bank of Commerce Ltd. and others (AIR 1947 PC 60, at p. 65, A.S. Krishna v. State of Madras 1957 SCR 399, State of Rajasthan v. G. Chawla (1959 Supp. (1) SCR 904, Katra Educational Society v. State of U.P. 1996 (3) SCR 328, D.C. Johar & Sons (P) Ltd. v. STO 1971 (27) STC 120 and Kannan 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 1957 SCR 399, , A.B. Abdul Kadir v. State of Kerala (1976) 3 SCC 219, SCC at p. 232 and Federation of Hotel & Restaurant Assn. of India v. Union of India , SCC 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 v. Union of India 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 Poppatlal Shah v. State of Madras 1953 SCR 677S.)"

92. The legislative competence of the Parliament does not depend upon whether any services are made available within the definition of taxable services contained in Finance Act, and in a given case, taxable services are rendered or not is a matter of interpretation of the statute and for adjudication under the provisions of the Statute and the same cannot affect the vires of the legislation and/ or the legislative competence of the Parliament. Therefore, the Supreme Court held that the levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to common understanding of the word service so long as it does not transgress any specific restriction contained in the Constitution.

93. At this juncture, it is to be noted that the Hon'ble Supreme Court in MAFFTALAL INDUSTRIES LTD.,v UNION OF INDIA [(1997) 5, SCC 536], held that in the matter of taxation laws the Court permits a great latitude to the discretion of the legislature and the State is allowed to pick and choose objects, persons, methods, and even rates for taxation, thereby having wide discretion.

94. Point Nos 4 and 5 - Parliament cannot dissect the transaction:-

> Contention of Petitioners is that transfer of copyrights/agreements are composite in form i.e. sale/transfer of right to use goods , coupled with services and Parliament has no competence to dissect such composite transaction. Petitioners contended that unless the transaction in truth represents two distinct and separate contracts and the contracts are discernible and that the State would not have power to separate the agreement to sell merely agreement to render service and impose tax on service. Placing reliance upon (2006) 3 SCC 1 [BSNL and another v. Union of India], it was contended that dominant nature test is the vital test to determine the nature of transaction. It was further submitted that in the light of the principles laid down by the Hon'ble Supreme Court, adopting dominant nature test, the temporary transfer of copyright is only a deemed sale within the meaning of Article 366(29A) and Parliament cannot dissect the element of service from dominant nature of transaction .

95. Reliance was also placed upon yet another decision of Supreme Court in (1989) 3 SCC 634 (Federation of Hotel & Restaurant v. Union of India and others). In the said case, challenge was to the levy of tax under the Expenditure Tax Act, 1987 enacted by Parliament. The Act envisaged a tax at 10 percent ad valorem on chargeable expenditure incurred in the class of hotels, wherein room charges for any unit of residential accommodation are over Rs.400/- per day per individual. The chargeable expenditure included expenditure incurred on payments made in such class of hotels in connection with the provision of accommodation, residential or otherwise, food or drink etc. The challenge was on the ground that Entry 62 in List II conferred exclusive power on the State Legislature to levy tax on luxuries and Entry 54 in List II empowered the State to levy tax on the sale of goods . The contention was that since the expenditure tax and tax on the sale of goods were covered by the Entries in the State List, there was nothing left for Parliament to tax. In the context of the said controversy, the Hon'ble Supreme Court held as under:-

> 4. ..... Indeed, the law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in Governor General in Council v. Province of Madras, 1945 FCR 179 at p.193 : (AIR 1945 PC 98 at p. 101) in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

> ..... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact the overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale ..... Upholding the levy of Expenditure Tax the Hon'ble Supreme Court held as under:-
>
> 9. ..... The object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which the legislature wishes to impose a curb. The idea is to encourage society to cater better to the needs of those who cannot afford them. ..... The object of an expenditure tax and, that, conceptually, there can be an expenditure tax is borne out by Azam Jah's case (AIR 1972 SC 2319) is to discourage expenditure which the legislature considers lavish or ostentatious. The object of the first would be to discourage certain types of living or enjoyment while that of the second would be to discourage people from incurring expenditure unproductive or undesirable channels. ..... The Hon'ble Supreme Court held that there is no overlapping at all and the pith and substance of the central tax could well be described as expenditure and not luxuries and the distinction is not obliterated merely because of the circumstance that both legislatures have chosen to attract the same area of vulnerability, one with a view to keep a check on luxuries and the other with a view to curb undesirable 'expenditure'.

96. In fact, an identical contention was raised before the Supreme Court in the case of ASSOCIATION OF LEASING AND FINANCIAL SERVICES v UNION OF INDIA, contending that Hire purchase and leasing is constitutionally characterised as a sale (deemed sale) by the Constitution (46th amendment) Act, and the said subject matter can be taxed only under Entry 54, list II, and it cannot be taxed under Entry 97- List I. Reliance was placed on the decision in BHARAT SANCHAR NIGAM LTD., (2006) 3 SCC 1, to contend that of all the different kinds of composite transactions the drafters of the 46th amendment chose three specifications, works contract, hire purchase contract and catering contract to bring within the fiction of deemed sale and of these three, the first and third involve a kind of service and sale at the same time and hire purchase does not involve a sale and service and therefore, service tax cannot be levied on the interest / finance charges, which was sought to be done.

97. Rejecting the contention it was held that financial leasing services are sought to be taxed under section 65(12)(a)(i), the taxable event is indicated in section 65 (105)(zm) and the provision operates qua an activity of funding/financing of equipment/ asset under equipment leasing under which a lessee is free to select, order, take delivery and maintain the asset. It was held that the taxable event is a service which is rendered by the finance company to its customer and thus section 67 of the Finance Act, 1994, seeks to tax financial services rendered with reference to the income earned by way of interest / finance charges. In such circumstances, the question of splitting up of transactions does not arise as the service tax in such case is neither on the material nor on sale, but it is on the

activity of financing/funding of equipment/asset within the meaning of the words, financial leasing services in section 65 (12)(a)(i).

98. It is to be stated permission to use and transferring temporarily or enjoy the intangible goods such as designs, patents and trademarks were subject matter of levy to service tax from 2004. Though copyright is also once such intangible item, it was excluded from the scope vide section 65 (55a). Now copyright service has been brought under the category of taxable service, by virtue of section 65 (105)(zzzzt). Therefore, the respondents may be justified in stating that when temporary transfer of other categories of intellectual property such as designs, patents and trademarks are liable to service tax, there is no justifiable reason to exclude copyright services from such category.

99. Re.contention Aspect Principle :-

> The learned counsel appearing for the petitioner submitted in the matter of levy of tax by the State, treating the services as sale or levy of service tax treating sale as service, caution has been uttered by the Hon'ble Supreme Court in the Court of Bharat Sanchar Nigam Limited vs. Union of India (2006) 3 SCC 1, wherein the Hon'ble Supreme Court stated that the State cannot entrench upon Union List to tax by including the cost of services in the value of the goods. Likewise, centre cannot include the value of goods in the cost of services and matters must be decided by the dominant character of the transaction in respect of composite contracts of goods and services. It is further stated that to apply the "Aspect Principle" a single transaction has to have two separate economic events and only then the Parliament and the State Legislature can impose tax. Therefore, the respondents have to find a separate aspect and in the nature of transaction done by the petitioners, there are no two economic events and there is only one i.e., deemed sale.

100. In Kerala State Electricity Board vs. Indian Aluminium Company, [AIR 1976 SC 1031 at 1044], a reference has been made to the 'aspect of legislation', wherein the Hon'ble Supreme Court held a legislature while legislating with regard to matters within its competence should be deemed to know its limits and its legislative authority and should not be deemed to be legislating beyond its jurisdiction. One thing that has always got to be kept clear in once mind is that there may be more than one aspect with regard to a particular subject matter.

101. Therefore, in the light of the legislative entries with which we are concerned in these batch of cases, two different activities could properly be regarded as two different matters for taxation. In other words, there could be two enactments each in one aspect conferring the power to impose a tax upon goods. Therefore, the impugned legislation cannot be held to be vitiated, merely because there is an element of overlapping in that both Sales Tax and Service Tax becomes leviable on the same assessee in respect of the same goods. We have discussed about the various aspects of the transaction between the parties, which were culled out from copies of the agreements, which were filed along with the writ petitions. From the terms and conditions of the agreements, it is evidently clear that there are two aspects, namely the transfer of the right to use the goods or the permission to use the goods or enjoyment, which operate in different field and merely because there is

overlapping on certain aspects, it would not loose the distinctiveness of each of the aspects. As observed earlier, the measure of tax or the economic results cannot be the basis for deciding the vires of the impugned enactment.

102. Re.contention Computation is not possible:-

> Learned counsel for Petitioners submitted that even assuming that there is service element, Legislature has not identified the nature of services and there is no mechanism in the legislation to identify and quantify the taxes. The learned counsel for the petitioners by relying upon the decision of the Hon'ble Supreme Court in COMMSSIONER V. SRINIVASA SETTY (1981) 2 SCC 460 = [(1981) 128 ITR 0294], submitted that charging section and computation provision together constitute an integrated Code and when there is a case to which computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section.

103. Learned counsel for Petitioners submitted that in respect of catering services, notification is issued for computing the value of taxable service . Learned counsel further submitted that in respect of leasing transaction 10% of the value of lease is taken for computing the value of taxable service. In respect of works contract, Rule 2A of Valuation Rules provides for determination of computation of value of taxable service. Contention of Petitioners is that no such mechanism is provided for identifying the nature of service quantifying the value of the taxable service. Placing reliance upon (2008) 12 VST 14 (SC) (State of Chhattishgarh and others v. VTP Constructions), it was submitted that if there is no mechanism to discern the services rendered and computation thereon, the levy cannot be sustained.

104. As held by the Supreme Court, in GUJARAT AMBUJA CEMENTS LTD, the legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery. The substance of the impugned provision must be looked at to determine whether it is in pith and substance within a particular entry, whatever its ancillary effect may be. Hence, the decision relied on by the learned counsel does not support the petitioners' case.

105. Mr.Sundareswaran, learned counsel for Respondents submitted that to test the validity of the provision, mode of computation is not relevant and that it has to be tested on the parameters of S for Subject; P for Person; R for Rate and M for Measure of Tax . As rightly contended by the learned counsel for Respondents, basis of computation and ultimate economic results cannot be a ground to challenge the vires of the impugned provision.

106. Economic concept of service tax:-

> The source of the concept of service tax lies in economics. It is an economic concept. It was evolved on account of service industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of Finance Act, 1994, the Central Government derived its authority from the residuary

Entry 97 of the Union List for levying tax on services.

107. Learned counsel for Respondents submitted that huge money is involved in film industry and host of commercial activities are involved right from the box to theatrical exhibition and service tax is a value added tax on those commercial activities. Drawing our attention to National Industrial Classification (All Economic Activities) , the learned counsel submitted that motion picture, video and television programme activities are classified under head Service (transport, commerce, administration, etc.) and is one of the important field for contribution of all economic activities towards National Wealth and for planned development.

108. Learned counsel for Respondents has also drawn our attention to the materials and statistics showing that huge money is involved in the distribution of the films and submitted that levy of service tax is value addition. Learned counsel for petitioners raised objection for looking into the statistical datas (National Industrial Classification and also other materials produced by the learned counsel for respondents).

109. We do not propose to go into the details of the money involved. Suffice it to note that driven by series of movies and with more multiplexes and single theatres on rise right from Cities to Moffusil, there is a huge rise in business overall. Apart from theatrical exhibition, there are other revenue streams in Satellite rights, Television Channels rights, Music, Audio and Video rights. New media rights are no longer insignificant and they account for substantial percentage of the total revenues. As consistently held by the Hon'ble Supreme Court, service tax is on the commercial activities involving production/temporary transfer of copyright or permission to use or enjoyment and provision of services service tax is on the host of commercial activities and provision of services involved.

110. Conclusion:- We hold that the variant modes of business transactions between the producer and distributor, distributor and sub-distributor or area distributor or exhibitor (theatre owner) are not sale of goods to fall under Entry 54 List II or Entry 92A List I. By resorting to Entry 97 of List I Residuary Entry to levy service tax, the Parliament is within its legislative competence and Section 65(105)(zzzzt) is not ultra vires the Constitution. From the production of the cinematograph film till it is exhibited, there are host of commercial activities. Service tax is the value added tax, which applies to the business transactions for consideration involving commercial activities. Over all, there is a huge rise in business of film industry and huge money is involved. The temporary transactions of copyrights or the permission to use or enjoyment of the copyright cannot be brought either under Entry 54 of List II or Entry 92A of List I. Applying the ratio of the decisions of the Supreme Court, we hold that the Parliament is well within its legislative competence in levying service tax resorting to Entry 97 of List I.

111. In the result, the writ petitions are dismissed. However, there is no order as to costs. Interim stay granted in various writ petitions stands vacated. Consequently, all the connected miscellaneous petitions are closed.

usk/bbr To

1. Secretary Ministry of Finance, Department of Revenue, Union of India, North Block, New Delhi-110 001.

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

3. The Chief Commissioner of Service Tax, "MHU" Complex, 692, Anna Salai, Nandanam, Chennai-600 035.

4.The Superintendent of Service Tax (S.I.R) - Group XI O/o the Commissioner of Service Tax SIR Cell, Service Tax Commissionerate, MHU Complex, 629, Anna Salai, Nandanam, Chennai-600 035.

5.The Deputy Commissioner (SIR), MHU Complex, 692, Anna Salai, Nandanam, Chennai-600 035.

6.The Superintendent, DGCEI Zonal unit 3rd Floor, NTC House, 15, NM Road, Ballard Estate, Mumbai-400 001

7.The Director General of Central Excise Intelligence Cennai Zonal Unit, C-3, 'C' Wing, II Floor, Rajaji Bhawan, Besant Nagar, Chennai-600 090.

8. The Chief Commissioner of Central Excise and Service Tax Range III, 26/1, Mahathma Gandhi Road, Chennai-600 034.

9. The Secretary, Commercial Taxes and Registration B1 Dept., State of Tamil Nadu, Fort St. George, Chennai-9.

10.The Under Secretary, Tax Research Unit, Central Board of Excise and Customs Dept. of Revenue, Ministry of Finance, 153, North Block, New Delhi,

11. The Chief Commissioner of Central Excise (Service Tax) Uthamar Gandhi Salai, Nungambakkam, Chennai-600 034.

12.The Commissioner of Central Excise (Service Tax) (Survey Intelligence & Research) Unit, 1, Goubert Avenue (Beach Road) Pondicherry-605 001.

13. The Superintendent of Central Excise Range III-D, 64, Sringeri Madam street, Sivaganga Nagar, Ellapillai Chavadi, Pondicherry-605 005.

14. The Commissioner of Service Tax, Newry Towers (Sonex) 4th Floor, No.2054-1, II Avenue, Anna Nagar, Chennai-600 040.

15. The Superintendent of Service Tax (SIR), Newry Towers (Sonex) 4th Floor, No.2054-1, II Avenue, Anna Nagar, Chennai-600 040.

16. The Superintendent (SIR-Gr.VIII), Newry Towers (formerly called as Sonex Towers) No.2054-1, II Avenue, Anna Nagar, Chennai-600 040.

17.The Secretary, Commercial Taxes and Registration B1 Dept., State of Tamil Nadu, Fort St. George Chennai 600 009