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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1927 OF 2011

P. C. Joshi,
Indian Citizen, A practicing Advocate
Having its office at 3, Prospect House,
29, Raghunath Dadaji Street, Fort,
Mumbai-400 001. ...Petitioner

-*Versus*-

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

2) The Director of General of Service Tax,
Having his office at Piramal Chambers,
Jijibhoy Lane, Parel (East),
Mumbai-400 012.

3) The Central Board of Excise and Customs,
Through its Chairman,
Department of Revenue, Ministry
of Finance, Having its office at
North Block, New Delhi-110 001.

4) The Commissioner of Service Tax Mumbai-I,
Having his office at 5th floor, Central
Excise Building, Maharshi Karve Road,
Churchgate, Mumbai-400 020.

5) Ministry of Law and Justice,
Government of India through Law
Secretary having his address at
4th floor, Shastri Bhavan,
New Delhi-110001.

6) The Bar Council of Maharashtra & Goa,
Having their address at High Court
Extension, Fort, Mumbai-400 032.

7) All India Federation of Tax Practitioners,
an association registered under the
Bombay Public Trusts Act,
1950 having its office at
215, Rewa Chambers, 31,
New Marine Lines, Mumbai-400 020.

8) Sales Tax Tribunal Bar Association,
Room No.713/B, Vikrikar Bhavan,
Mazgaon, Mumbai-400 020. ...Respondents

WITH

WRIT PETITION (L) NO.1764 OF 2011

1) Bombay Bar Association,
an association of persons, with its
premises at Room No.57, 3rd floor,
High Court, Dr. M. Kane Marg,
Mumbai-400 032.

2) MPS Rao,
Honorary Secretary,
Bombay Bar Association, with his
address at Room No.57, 3rd floor,
High Court, Dr. M. Kane Marg,
Mumbai-4000 032. ...Petitioners

Versus

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

2) The Director of General of Service Tax,
Having his office at Piramal Chambers,
Jijibhoy Lane, Parel (East),
Mumbai-400 012.

3) Ministry of Finance,
Department of Revenue,
Government of India, North Block,
New Delhi-110 001.

4) The Central Board of Excise and Customs,
Having its office at
North Block, New Delhi-110 001.

5) The Adocates' Association of Western India,
an association of persons having its
office at Room No.36, 1st floor,
High Court, Mumbai-400 001,
through its President - Rajiv Patil.

6) The Bombay Incorporated Law Society,
an association of persons having its
office at 2nd floor, High Court, Annexe
Building, High Court, Mumbai-400 001,
through its President-Dibnsoo Zaiwala. ...Respondents

WITH
WRIT PETITION (L) NO.1808 OF 2011

1) Advocates Association of Western India,
an association of Persons through its
Secretary Mr. Anilkumar Patil,
Advocate, Having its address at
1st floor, Room No.36, High Court,
Bombay.

2) Shri Sanjeev M. Gorwadkar,
Advocate, Adult,
Indian Inhabitant, Having his
address at AAWI, Room No.36,
High Court, Mumbai.

3) Sadashiv Deshmukh,
Advocate, Adult,
Indian Inhabitant, having his
address at AAWI, Room No.36,
High Court, Mumbai. ...Petitioners

Versus

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

2) The Central Board of Excise and Customs,
Through its Secretary,
Having address at
North Block, New Delhi-110 001.

3) The Director General of Service Tax,
having his office at Piromal Chembers,
Jijibhoy lane, Parel, Mumbai-400 012.

4) Commissioner Service Tax,
Through its Secretary,
6th floor, 115, M.K. Road,
Churchgate, Mumbai-400 020. ...Respondents.

.....

Mr. Sushant Murthy i/b. N. S. Thacker for the Petitioner in W.P.No.1927/2011.
Mr. Rajiv Patil, Senior Counsel, with Mr. Amol Mhatre, for the Petitioner in W.P(L) No.1808/2011.
Mr. S. S.Pakale with Ms. Suchitra Kamble for the Respondent Nos.1 to 4.
Mr. Parag Vyas for the Respondent No.7.
Mr. Durgaprasad Poojary i/b. PDS Legal for the Respondent No.8 in W.P.No.1927/2011.
Mr. for the Respondent.

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CORAM: S.C. DHARMADHIKARI
AND
A.A. SAYED, JJ.

RESERVED ON : 11th NOVEMBER, 2014
PRONOUNCED ON :15th DECEMBER, 2014.

JUDGMENT (PER S. C. DHARMADHIKARI, J.)

Rule. Respondents waives service. By consent, Rule made returnable forthwith.

2] By this Writ Petition under Article 226 of the Constitution of India, the Petitioner, a practicing advocate prays for the following reliefs:-

> "(a) Declare the impugned provisions in section 65(105)(zzzzm) of the Finance Act, 1994 as inserted by the Finance Act, 2011 as null and void and ultra vires the Constitution of India and/or section 66 of the Finance Act, 1994 and/or be pleased to strike down the said provisions as ultra vires, arbitrary and violative of Articles 13, 14, 19(1)(g), 246, 265 and 268A of the Constitution of India.
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> (b) Issue a writ, order of direction in the nature of certiorari or any other writ, order or direction of like nature, quashing section 71(A)(5)(d) of the Finance Act, 2011.
>
> (c) Issue a writ of mandamus, or a writ in the nature of mandamus, or any other appropriate writ, order or direction, restraining the Respondents themselves, by their servants, agents and subordinates from, directly or indirectly giving effect to or acting upon the impugned amendment or collecting Service Tax on the basis of section 65(105)(zzzzm) read with section 66 as substituted by Finance Act, 2011.

(d) In case the High Court is of the view that service tax is leviable on Advocates hold that the provisions of Rule 4A of the Service Tax Rules, 1994, provisions relating to levy of penalty under section 77 of the Finance Act, 1994 and prosecution under section 89 of the Finance Act, 1994 to the extent they are made applicable to Advocates for non issue of invoices within 14 days of the completion of service are ultra vires the Finance Act, 1994 and Article 19(1)(g) of the Constitution of India."

3] The reliefs are claimed in the following factual background.

The Petitioner is an Indian citizen and a practicing Advocate. He claims to be affected by the levy of Service Tax on Advocates.

4] The Respondent before us is the Union of India and Respondent Nos.2 and 4 are the officers of the Respondent No.1, for the administration of the provisions of the Finance Act, 1994 as amended. The 3rd Respondent is the Central Board of Excise and Customs whereas the 5th respondent is the Ministry of Law and Justice, Government of India. Respondent Nos.6, 7 and 8 are the Bar Council of Maharashtra and Goa, All India Federation of Tax Practitioners and Sales Tax Tribunal Bar Association. They claim to be affected by the imposition and levy of Service Tax on Advocates.

5] It is the case of the Petitioner that section 65(105) (zzzzm) of the Finance Act, 1994 as inserted by the Finance Act 2009 and substituted by Finance Act 2011, proceeds to levy Service Tax on the Advocates. The understanding of the Petitioner and the association of advocates supporting him is that the amendment to Finance Act as referred above levies, assesses and recovers Service Tax from Advocates and that would be violative of the constitutional guarantee of justice to all. It is theirp submission that justice cannot be secured unless a cause or a legal proceeding is represented properly and effectively before a Court. It is the duty of the Advocates to represent the cause of the litigant before the Court of law to the best of their ability. It is submitted that the Advocates are engaged not only for aid and advice but also for appearance and representation of a case in Court. It is not possible for litigants to argue their cases before the Court of law because they may involve complicated factual and legal issues. In such circumstances, when administration of justice is a sovereign and regal function of the State and Advocates are part of the same, then, they cannot be said to be rendering any service and of the nature envisaged by the Service Tax Act/Finance Act. Legal profession has not been understood from times immemorial as a profit making activity or venture. It is not a business or trade. It is a solemn duty which is performed for the litigants including the State who are

major stakeholders in the judicial system. If, therefore, Advocates are approached by litigants so as to properly, completely and effectively represent them in the Court of law, then, a tax cannot be levied by the State on them. That would amount to denying the litigant access to justice. The guarantee of cheap, effective and expeditious justice to the common man is, thus, defeated.

6] It is submitted that the levy of Service Tax imposes a heavy additional burden on litigants and also disables them from approaching the Court. It is in these circumstances, that it has been challenged by the Advocates. An Advocate is an officer of the Court. It is for this reason that the fees received by an Advocate is regarded as a mere honorarium and not as a matter of contractual right. It is also for this reason that it has been held by the Hon'ble Supreme Court that an Advocate cannot exercise any right of lien over his clients' papers and documents which are lying with him, for the purpose of compelling the client to pay the Advocate's fees.

7] The said Amendment violates Article 14 of the Constitution inasmuch as the said amendment discriminates between representation made on behalf of an individual and representation made on behalf of a

business entity. This makes it manifestly evident that the said amendment is highly oppressive, unjust and unreasonable and the same is palpably arbitrary and is accordingly violative of fundamental rights guaranteed Article 14, 19(1)(g) and 21 of the Constitution. The purpose to exempt representation and arbitration on behalf of individuals seems to be to cater to the need of Article 39A of the Constitution of India; however the legislature seems to have lost sight of the fact that eventually it is an individual who is affected economically even if Appearance, and Arbitration are on behalf of Corporations and Partnership firms. The said Amendment also runs contrary to the provisions of the Finance Act, 1994 which provide for levy of Service Tax on provision of taxable service. There cannot be any levy, in the absence of there being a service, the levy fails on this ground alone.

8] It is submitted that in view of the above, it is manifestly clear that the Advocates are officers of the Court, and they have a duty of assisting the Courts in a just and proper manner in the just and proper administration of justice. Thus, considering representation provided by an Advocate as a commercial service is highly unreasonable, absurd and arbitrary, merely because the Advocates receive consideration from clients. It is the duty of the State not to deny to any person equality before the law

or the equal protection of the laws within the territory of India. While the impugned amendment automatically creeps in inequality, as for instance in a case, Petitioner may be an individual/State and the respondent a business entity and the business entity to defend its rights and get protection of law will be required to pay Service Tax and not the individual/State even though the Petition may be frivolous and litigation may have been forced on the business entity. Similarly, the Advocate representing the business entity will have to bear the incidence of tax.

9] It is submitted that the said amendment also violates Article 268A of the Constitution and contravenes section 66 of the Finance Act, 1994, which is the charging section. It is further submitted that in order to attract the liability for payment of Service Tax, there should be a service provider and a recipient of service. In the case of the Petitioner, the relationship between the Advocate and the litigant before the Court is that of a representative of a litigant. Therefore, the amendment inserted is clearly ultra vires the Constitution of India. The impugned amendment brings within the purview of Service Tax appearances made by Advocates before Arbitral Tribunals also. Alternative Dispute Resolution is a well-recognized mechanism meant to aid to clear back logs of cases in the Courts. Hearing and adjudication by Arbitral Tribunal can, therefore,

never be “service” in law. It is an adjudication recognized by law as a decree in *personam*.

10] It is submitted that the Advocates appear in the Court to represent their clients, but in effect assist the Court to dispense justice. The fact that the assistance rendered by Advocates is to bring in harmony and peace in the society and resolve disputes between the parties, even by applying the fiction, to consider the representation provided by Advocates as service would be highly unreasonable and absurd.

11] It is also submitted that the Hon'ble Supreme Court in All India Federation of Tax Practitioners V/s. Union of India 2007 (7) SCC 527 has held that Service Tax is a value added tax which is levied on the value addition which is made as a result of rendition of a service. It flows directly from this judgment that merely the act of representing the litigant before the Courts can never amount to a service, for the simple reason that the representation before a Court does not result in any value addition. It is, therefore, submitted that levy of Service Tax in the present case is clearly illegal and contrary to the law as laid down by the Hon'ble Supreme Court and also the provisions of the Finance Act, 1994. The levy of Service Tax on Arbitration is unjustified as an Arbitral Tribunal acts in a

judicial capacity and by doing so is only performing the judicial function of the State and is, therefore, only assisting the State in performing its Judicial functions. Levy of Service Tax on Arbitration goes against the purpose of setting up the alternative remedy mechanism through arbitration as it makes arbitration that much more costlier for the litigating parties and amounts to a levy of Court Fees which is beyond the powers of the Central Government under List 1.

12] The levy of Service Tax on advisory, consultancy and assistance services to the extent it relates to levy of Service Tax on legal advice by Advocates is invalid as a Lawyer is merely advising or opining on the position of law and is only assisting the State in making the public aware about what the law on a particular subject is and, therefore, is only rendering a service to the State. The levy of Service Tax on legal services goes against the principle of Article 39A of the Constitution of India which amongst other things states that the State has to secure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Levy of Service Tax would be a disability which would restrict the opportunity of securing justice as the same makes legal services that much costlier economically. Even the Ministry of Law and Justice in Rajiv Gandhi Adhivakta Prashikshan Yojana of the Government

of India have stated that: Constitution of India reflects the quest and aspiration of the mankind for justice. Its preamble speaks of justice in all forms; social, economic and political. Article 39A which was inserted by way of 42nd Amendment to the Constitution, recognizes equal justice and free legal aid. It imposes a duty on the State to secure that the operation of the legal system promotes justice on a basis of equal opportunity and in particular, provides that the State shall provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Access to justice is recognized as a fundamental right. Hence levy of Service Tax on Legal Services violates the fundamental rights and is, therefore, violative of the Constitution of India.

13] It is submitted that the levy of Service Tax after the Constitutional 88th Amendment Act whereby section 92C was inserted in List 1 to provide for Levy of Taxes on Services by the Central Government can only be under Entry 92C and not under Entry 97 of List 1 which is a residual entry. Since the Constitutional 88th Amendment Act has not yet been brought into force there is no power with the Central Government to levy any tax on Services before such Notification and therefore levy of Service Tax under sub-clause (zzzzm) can only be after such Notification by the

Central Government but presently is beyond the jurisdiction of the Parliament under Article 246(1).

14] It is submitted that without prejudice to the above assuming that Service Tax is leviable on the legal profession, the requirement of issuing invoices within 14 days of completion of service as per the Service Tax Rules 1994 serves no purpose as under the point of Taxation Rules 2011 services covered under clause 5(105)(zzzzm) are taxable only on receipt basis. Hence to the extent of activities covered under section 65(105)(zzzzm), the provisions of Rule 4A of the Service Tax Rules to the extent they require invoices to be issued within 14 days of completion of the legal assistance is ultra vires the Finance Act 1994. Requirement to issue invoice within 14 days of rendering of legal assistance unnecessarily distracts professional time towards avoidable compliance. Also most counsel do not follow the system of issuing invoices and merely dockets are marked. Requirement to issue invoices in the view of certain counsel may be disrespectful to the profession. The requirement of issuing invoices as per Rule 4A for Advocates, the requirement of issuing such invoices within 14 days of completion of services, the provisions of section 77 of the Finance Act 1994 and the provisions of section 89 of the Finance Act 1994 as inserted by the Finance Act 2011 to the extent they require

Advocates to issue invoices at all, to issue invoices within 14 days of the completion of assistance, relating to levy of penalty under section 77 of the Finance Act 1994 for not issuing of invoices and prosecution provisions under section 89 of the Finance Act 1994 to the extent they relate to requirement of issuing invoice within 14 days of completion of rendering of service are ultra vires the Finance Act 1994 and Article 19(1)(g) of the Constitution of India.

15] It is submitted that without prejudice even if it is held that service tax is leviable on lawyers the provisions of Rule 4A of the Service Tax Rules 1994 requiring invoices to be issued within 14 days of completion of the rendering of legal assistance, levy of penalty under section 77 of the Finance Act 1994 and prosecution provisions under section 89 of the Finance Act 1994 to the extent they relate to issue of invoice within 14 days of completion of legal assistance are ultra vires the Finance Act 1994 and Article 19(1)(g) as no practical purpose is served by requiring Advocates to issue invoices within 14 days of rendering legal assistance since such activities under the point of taxation rules are taxable only on receipt basis.

16] In the grounds raised in the Writ Petition, the same pleas are

canvassed. There the elaboration of the above as made by the counsel appearing before us, is set out.

17] It is in the aforesaid facts and circumstances that the reliefs in terms of the prayers above, have been prayed. An affidavit in reply has been filed by the Deputy Commissioner of Service Tax and which is on behalf of Respondent No.4. In that affidavit, the stand of the Respondent No.4 is as under;--

> *"The main ground of the Petitioner is that Advocates are officers of the Court and not service providers. It is contended by the Petitioner that providing assistance to the Court cannot be regarded as 'service' and therefore service tax cannot be levied on lawyers. It may be pointed out that not only lawyers but also other professionals like chartered accountants, cost and work accountants and company secretaries also provide representational services before the statutory authorities like Tribunals etc. They were earlier exempted from paying service tax on representational services vide Notification No.25/2006-ST, dated 13.07.2006. The said Notification has since been rescinded vide Notification No.32/2011-ST, dated 25.04.2011 and now even such professionals are required to pay service tax on their representational services. Lawyers/Advocates provide assistance in administering justice by putting forth the facts of the case in a true manner, but to say that they do not render any service to their clients is not correct. They do in fact provide services to their clients and are duly compensated in the form of fees which are charged from the clients.*
>
> *I further say that, representational services provided to individuals have been kept out of the service tax net so that the burden is not felt by the common man. Only the representational services provided to business entities are covered by the levy. I say*

that the Hon'ble Supreme Court has repeatedly held that reasonable classification is allowed if it is founded on intelligible differentia. It has been held that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then, such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution. This principle is well-settled. In the present case there is intelligible basis for differentiation. Whether the same result or better result could have been achieved and better basis of differentiation evolved is within the domain of legislatures and must be left to the wisdom of the legislature. Moreover, there is a greater latitude in classification that is allowed in matters of taxation. It is well settled that in matters of taxation, Courts permit greater latitude to pick and choose objects and rates for Taxation and Parliament/Legislature has a wide discretion with regard thereto. The State is allowed to pick and choose objects, persons, methods and even rates for taxation.

Hence I state that the Legislature or the Parliament is competent to identify and reasonably differentiate between various services and service recipients for the purpose of taxation and that there is no ground to challenge the levy on the grounds of discrimination. This is more so considering the public interest basis for the classification i.e. not to impose an unnecessary burden on individuals.

Further, I say that it is well established that the legislature in order to tax some, need not tax all. It can adopt a reasonable classification of persons and things in imposing tax liabilities. The mere fact that a tax falls more heavily on certain goods or persons will not result in its invalidity. The Courts lean more readily in favour of upholding the constitutionality of taxing laws in view of the complexities involved in the social and economic life of the community.

In light of the aforegoing, I say that the reasonable classification for taxation purpose is well within powers of the Parliament. The classification within a broader group into sub-groups based on reasons like capacity to pay and comply with

taxing provisions, and lessening the tax burden on individual litigants cannot be held as legally discriminating.

With reference to paras 4, 5 and 6 of the Writ Petition, the Respondent states that the legislative competence of the Parliament to levy service tax under Entry 97 has been upheld by the Hon'ble Apex Court in several judgments. In the case of All India Federation of Tax Practitioners V/s. Union of India [2007(7) S.T.R. 625 (S.C.)] it has been held that Parliament has legislative competence to levy service tax by way of impugned Finance Acts of 1994 and 1998 under Entry 97 of List I and accordingly imposition of service tax on professionals upheld in that case. The assertion that this legislation is an attempt to collect tax without the authority of law and is, therefore, violative of Article 265 of the Constitution, is wrong and misplaced. Service tax is levied under the residuary power of Parliament as Entry 92C of List 1 has not come into force. The Hon'ble Supreme Court has emphasized that a tax cannot be struck down on the ground of lack of legislative competence by enquiring whether the definition accords with the layman's view of service. It is well settled that in matters of taxation laws, the Court permits greater latitude to pick and chose objects and rates for taxation and has a wide discretion with regard there to. I further say that the right to justice is available to all. The amendment does not seek to place any restriction on the same. Further, individuals seeking the representational services of lawyers/advocates are not required to pay any service tax to the lawyers.

With reference to paras 7 and 8 of the Writ Petition, I reiterate that the legislative competence of the Parliament to levy service tax under Entry 97 has been upheld by the Hon'ble Supreme Court in a number of judgments. Since the business entity uses the services of advocates for representation, service tax is leviable. Further, I say that 'value addition' does not necessarily mean that certain intrinsic changes must occur, in what is being offered as goods or services. In the case of services provided by the advocates, it is their skill, knowledge and expertise in legal matters which is availed of by the clients for monetary consideration on which service tax has been sought to be levied.

With reference to paras 9, 10 and 11 of the Writ Petition, the Respondent states that no fundamental right of any persons has been violated. Equality before law and equal protection of laws and freedom to practice any profession is still provided. The imposition of Service Tax on lawyers does not take away or abridge the rights conferred by the Constitution and thus, no violation of Articles 14 and/or 19 has been committed. The impugned levy is reasonable, fair and legal. I say that the Parliament enacted the said provision to levy Service Tax on the Advocates in proper exercise of its legislative competence. I say that the claim of Petitioner that there is a discrimination made between the Law Firms and an individual providing Legal Services, is unsustainable. I say that the Constitution of India allows for reasonable classification for the purpose of Legislation, as stated above.

With reference to paras 12, 13 and 14 of the Writ Petition, the Respondent states that these case laws referred to by the Petitioners are on the duties of a lawyer towards his client and also to maintain the decorum of the Hon'ble Courts. The said judgments merely speak of the duties of a lawyer to the Courts before whom they appear. The propositions laid down in the said judgments is undisputed, but the same has no application to, or bearing on the issues at hand, namely, levy of service tax on legal services provided by a lawyer to his client. I say that it is the lawyer's skill and expertise which is the service he provides to the litigants, which makes a difference to the representation of his client's case before the Court of law and assists the Court in arriving at the proper interpretation of law.

With reference to paras 15 and 16 of the Writ Petition, the Respondent states that no restriction has been imposed on the practice of the profession of law. The Parliament has levied service tax on representational services provided to business entities after careful consideration. Representational services to individuals have been deliberately kept out of the tax net so that a financial burden is not cast upon them. For business entities the amount will be cenvatable and thus a set off is available. The said amendment does not violate Article 268A of the Constitution

and does not contravene section 66 of the Finance Act, 1994. No discrimination has been made. This has been a conscious attempt to exclude representational services provided to individuals. The intention is to cover those where the new levy can be imposed and it can be collected without much hardship to tax payers.

With reference to paras 18, 19, 20 and 21 of the Writ Petition, I say that an Arbitrator is a private person appointed by parties to render the service of adjudicating their disputes, and is hence correctly exigible to service tax. However, vide Notification No.45/2011-Service Tax, dated 12/09/2011, services in respect of arbitration by an Arbitrator Tribunal are exempt from levy of service tax (annexed is a copy of notification marked as 'A'). Further, I reiterate that not only lawyers but also other professionals like chartered accountants, cost and work accountants and company secretaries provide representational services before the statutory authorities like Tribunals etc. They were earlier exempted from paying service tax on representational services vide notification No.25/2006-ST, dated 13.7.2006 (now rescinded vide notification No.32/2011-ST, dated 25.4.2011). Lawyers/Advocates provide assistance in administering justice by putting forth the facts of the case in a true manner; so do other professionals representing their clients before the authorities. To say that they do not render any service to the clients is not correct. They are duly compensated in the form of fee which is charged from the clients. Accountability to courts for their actions is no doubt an important aspect of the profession but it does not affect the service relationship of a lawyer with his client with respect of levy of service tax. The nature of services rendered by different service providers cannot be compared, say with a consulting engineer or a doctor. A lawyer provides the service of representing his client before the judicial forum presenting his client's case for which he is compensated by the client who has availed of his services. Even chartered accountants/company secretaries/cost accountants are similarly placed. They are also prohibited from entering into some professions/activities. That in itself does not exclude them from the category of service providers in respect of the services provided by them.

With reference to paras 22, 23 and 24 of the Writ Petition, the Respondent states that 'value addition' does not necessarily mean that certain intrinsic changes must occur in what is being offered as goods or services. In the case of services provided by the advocates, it is their expertise in legal matters which is availed of the clients for monetary consideration on which service tax has been sought to be levied. It is submitted that in law a transaction can, depending on its nature attract two taxes,and thus, while the income of a lawyer is subject to income tax, service tax is leviable on the services provided by the lawyer to this client. Moreover, the nature of income tax and service tax is different, the former being a direct tax and the latter being an indirect tax. The incidence in the former is on the professional or entity rendering the service whereas the incidence in latter is on the client. This situation is not peculiar to advocates only. All service providers are also subject to Income Tax. There is therefore, no violation of Article 19(1)(g).

With reference to para 25 of the writ petition, the Respondent states that no fundamental right, including Article 39A, has been violated. Equality before law and equal protection of laws and freedom to practice any profession is still provided. The State has not made any law which has taken away or abridged the rights conferred by the Constitution and thus, no violation of Article 14 or 39A has been committed. The impugned levy is reasonable, fair and legal. I say that the Article 14 of Constitution of India forbids class Legislation but it does not forbid reasonable classification for the purpose of Legislation.

With reference to paras 27 and 28 of the Writ Petition, the Respondent states that Parliament has legislative competence to levy service tax under Entry 97 of List 1. The submission that the Constitutional 88th Amendment Act has not yet been brought into force are untenable in the eyes of law. I say that this point is not longer res integra.

With reference to para 29 and 31 of the Writ Petition, the respondent states that Rule 4A of Service Tax Rules 1994 applies to all taxable service providers and not merely legal service. It is

submitted that this rule is in operation since 10/09/2004 and is suitably amended from time to time within the service tax frame work. The invoice is the basis of availment of cenvat credit under Cenvat Credit Rules 2004. It enables the service recipient to obtain cenvat credit of service tax paid/payable on the taxable service availed. This prevents the cascading effect. Thus, it is one of the key documents on the basis of which the service tax is administered. Further there is a need to prescribe a time limit for compliance with any provision regarding issuance of invoice. Any dispensation of the same would affect the efficiency and effective need of the tax administration.

By imposing a provision for timely issuance of invoices, the right to practice any profession or to carry on any occupation, trade or business as provided under the Constitution has not been violated. It is further submitted that provision of penalty under section 77 and prosecution under section 89 of the Finance Act, are also not ultra vires of the Finance Act 1994 read with Article 19(1)(g) of the constitution. Further notification 25/2011-ST dated 31/03/2011 has defined the point of taxation in respect of certain services, including legal services, as the date on which payment is received or made as the case may be. (Annexed is copy of the Notification No.25/2011-Service Tax, dated 31/03/2011 marked as Exhibit B)."

18] There is further affidavit in reply filed by respondent No.4 on 13th January, 2012. In para 5 and 9 of the same this is what is stated:-

"5. I say that while elaborating the above said contention it has been stated that advocates are governed by rules and regulations formed by the bar council, to sub-serve the cause of justice. An advocates work under severe constraints, restrictions and public duties, cast by law under peculiar statutory provisions governing the profession and therefore they are entitled to remain out of the net of service tax. I respectfully say and submit that the said contention is also equally misconceived and not tenable in the eyes of law.

I say that it is true that functioning of his profession is controlled, governed and regulated by the Central and State Government. It is also true that the bar council of India is the monitoring and governing authority for the conduct of the profession and the professional advocates etc., as elaborately set out in para 7 of his affidavit, however, that itself is not enough to claim an extra ordinary privilege of a constitutional functionaries. I say and submit that, firstly no restrictions has been imposed on the practice of the profession of law. The Parliament has levied service tax on representation services provided to business entities after careful consideration. Representational services to individuals have been deliberately kept out of the tax net so that a financial burden is not cast upon them. For business entities the amount will be cenvatable and thus a set off is available. The said amendment does not contravene section 66 of the Finance Act, 1994. No discrimination has been made. This has been a conscious attempt to exclude representational services provided to individuals. The intention is to cover those where the new levy can be imposed and it can be collected without much hardship to tax payers.

9. *I say that this issue has already been examined by the Hon'ble Apex Court in favour of this Respondent. It is further submitted that the impugned notification does not impose any restrictions on the legal profession nor it altered, mofidied or amended the provisions of the Advocates Act 1961 or any other relevant statute to their disadvantage. It is well settled principle of law that in matters of taxation laws, the Court permits greater latitude to pick and chose objects and rates for taxation and has a wide discretion with regard thereto. I further say that right to justice is available to all. The amendment does not seek to place any restriction on the same. Further, individuals seeking the representational services of lawyers/advocates are not required to pay any service tax to the lawyers.*

10. I further say and submit that no fundamental right of any person has been violated equality before law and equal protection of laws and freedom to practice any profession is

provided and available. The imposition of service tax on lawyers does not take away or abridge the rights conferred by the Constitution and, thus, no violation of Article 14 and/or 19 has been committed. The impugned levy is reasonable fair and legal. I say that the Parliament enacted the said provision to levy service tax on the advocates in proper exercise of its legislative competent and that there is no discrimination as alleged by Respondent No.8."

19] It is on the above material that we have heard the counsel appearing for the parties. Mr. Thacker, learned advocate, appearing for the Petitioner submitted that a lawyers office or an advocates chamber is not a commercial or business establishment. The advocate does not carry on any business or profit making venture. In the present case, by imposing a tax for the services rendered by the advocates/lawyers, it is ultimately the litigant or a client who will suffer. He submits that though the controversy is narrowed down to some extent still, what the Petitioner is aggrieved by is a step or measure of recovering service tax from the advocate and for a period prior to the amendment.

20] It is in that regard Mr. Thacker invites our attention to Notification No.30/2012 dated 20th June, 2012 and submits that by this Notification and which is issued under exercise of the powers conferred by section 68(2) of the Finance Act, 1994 (Act 32 of 1994) and in supersession of clause (i) of Notification of the Government of India in the Ministry of

Finance (Department of Revenue) No.15/2012-Service Tax, dated 17th March 2012, published in the Gazette of India, Extraordinary, Part-II, section 3 sub-section (i) and (ii) Notification of the Government of India, in the Ministry of Finance (Department of Revenue) No.36/2004-Service Tax dated 31st December, 2004 except as respects things done or omitted to be done before such supersession, the Central Government notified the taxable services and the extent of the service tax payable by the person liable to pay service tax for the purposes of the said sub-section. In that regard, Mr. Thacker invites our attention to clause (i) of this Notification and submits that the taxable services provided or agreed to be provided by an Arbitral Tribunal or an individual advocate or a firm of advocates by way of support services to any business entity located in the taxable territory would be taxable. Now, the service tax and of the description given in the table will be liable to tax in the hands of the recipient and to the extent of 100%. Meaning thereby, in respect of services provided or agreed to be provided by an Arbitral Tribunal, Service Tax to the extent of 100% by the recipient of the service and in respect of services provided or agreed to be provided by individual advocate or firm of advocates by way of legal services would be liable to Service Tax and the recipient accordingly will have to bear it in its entirety.

21] Mr. Thacker, therefore, submits that first of all no Service Tax is liable to be paid on legal services or services rendered by an advocate, individually or collectively. Assuming that Service Tax is leviable and recoverable, yet, the burden to collect and pay the same should not be on the service provider and the amendment made by the above Notification should be given retrospective effect. Mr. Thacker submits that the Petitioner wants to assert that no Service Tax is liable to be levied, assessed and recovered from an advocate or the legal profession. Our attention is invited to section 65 (105) (zzzzm) and a speech given by the then Finance Minister while presenting the Union Budget of 2009-2010 dated 6th July, 2009. It is submitted by Mr. Thacker that the Minister proceeds on the footing that service provided by chartered accountants, cost accountants and company secretaries as well as engineering and management consultants, and legal consultants, is identical or similar. Therefore, he proceeds to levy Service Tax on advice, consultancy or technical assistance provided in the field of law. The clarification given that the tax would not be applicable in case the service provider or the service receiver is an individual, is a misnomer. That does not remove the basic and fundamental anomaly in equating the services of lawyers, legal consultants and advocates with the cost accountant, chartered accountant, company secretaries and other consultants. They essentially concentrate

on advisory and consultancy services and to corporates or business concerns or entities. The advocates do not either individually or collectively cater only to business entities. The term is hopelessly vague. Even a sole proprietary concern and which is an individual business activity can be termed as a business entity. Small and petty traders carrying on business individually or collectively in the name or nomenclature of a firm are not cash rich or financially powerful to bear the burden of any additional taxation. Therefore, the services provided by individual advocates or firms both too individuals as also business entities cannot be brought within the net of service tax. Mr. Thacker therefore submits that equating legal profession with chartered accountants and cost accountants, engineering and management consultants, is ultra vires Article 14 of the Constitution of India. Mr. Thacker submits that unequals cannot be treated equally and that also violates the constitutional mandate. He further submits that the amendments to section 65(105) (zzzzm) would reveal that the emphasis is on service provided and to any person by a business entity, in relation to advice, consultancy or assistance in any branch of law, in any manner. Thereafter to any business entity, by any person in relation to representational service before any Court, Tribunal or authority and service provided to any business entity by an Arbitral Tribunal in respect of arbitration.

22] It is submitted that the budget speech of the then Finance Minister while presenting the union budget of 2011-12 indicates as to how the State wishes to expand the scope of legal services to include services provided by business entities to individuals as well as representational and arbitration services by individuals to business entities. If in the light of this budget speech, the notification of 20th June, 2012 is perused, then, according to Mr. Thacker the constitutional guarantee of equal justice and equal opportunity to secure justice, guaranteed by Article 21 and 39A of the Constitution of India is defeated. The duty of the State is to render and promote justice. Any hindrance or obstacle in the promotion of justice would be defeating the constitutional guarantee. He submits that the State has to guarantee equal opportunity so as to remove economic, social and other disabilities. No disability or obstacle can be placed in the path of access to justice. If an advocate is a means to secure justice, then, by limiting the advocates' capacity the state is indirectly acting contrary to the constitutional mandate. An impartial and independent judiciary equally requires an impartial, independent and fearless officer to assist it. An advocate being an officer of the Court and the profession being different from a chartered accountant or cost accountant that imposing Service Tax is unconstitutional. Mr. Thacker has also relied upon entry 92C in the union list (list-I of schedule VII of the Constitution of India) he

submits that this entry inserted by 88th Amendment to the constitution has not been brought into effect. This is a specific entry and in relation to Service Tax. Therefore, the levy of Service Tax cannot be said to be permissible under entry 97 of this list. For these reasons, he submits that the levy is bad in law.

23] The compilation of the Notifications and relevant statutory provisions has been handed over by Mr. Thacker. That is taken on record. Mr. Thacker placed reliance upon the following judgments:-

1) ***D. P. Chadha V/s. Triyugi Narain Mishra and others reported in (2001) 2 Supreme Court Cases 221;***

2)All India Federation of Tax Practitioners and others V/s. Union of India and Others reported in (2007) 7 Supreme Court Cases 527;

3)Tamil Nadu Kalyana Mandapam Assn. V/s. Union of India reported in 2004(167) E.L.T. (S.C.);

4)The Bar Council of Maharashtra V/s. M. V. Dabholkar and Others reported in (1976) 2 Supreme Court Cases 291;

5)State of Maharashtra V/s. Manubhai Pragaji Vashi and others reported in (1995) 5 Supreme Court Cases 730;

6)Manoharan V/s. Sivarajan and others reported in (2014) 4 Supreme Court Cases 163;

7)All India Sainik Schools Employees' Association V/s. Defence Minister-cum-Chairman Board of Governors, Sainik Schools Society, New Delhi and others reported in 1989 Supp (1) Supreme Court Cases 205;

8)Uttar Pradesh Power Corporation Limited V/s. Ayodhya Prasad Mishra and another reported in (2008) 10 Supreme Court Cases 139; and

9)Premchand Somchand Shah and another V/s. Union of India and another reported in (1991) 2 Supreme Court Cases 48.

24] On the other hand, Mr. Pakale appearing on behalf of the union of India relied upon the affidavits filed and a chart which has been handed over. Mr. Pakale submits that a comparison of the provisions of Finance Act, 2005 brought into effect from 16th June, 2005 and Finance Act, 2011 which has been brought into effect from 1st May, 2011 would indicate as to how the complaint made by the interested parties that individual advocates rendering service to individuals would suffer immensely is redressed. The levy of service tax would affect them adversely and consequently the constitutional mandate of free and fair opportunity to secure and guarantee justice. Therefore, that hardship has been removed. Mr. Pakale has laid special emphasis on the fact that prior to the amendments made in 2011 service provider and recipient both were included. However, after the amendments made in the relevant Notification having been brought into effect, the provider has been relieved and the burden falls on the recipient. In such circumstances, the Notifications have to be read accordingly. Mr. Pakale submits that by

Notification No.12/2012 dated 17th March, 2012 and particularly clause (6) services provided to any person other than a business entity by an individual as an advocate or a person represented on and as Arbitral Tribunals came to be exempted from the service tax. Thus, the service provided by an individual advocate to any person other than a business entity came to be exempted. The term "Arbitral Tribunal" is defined. By Notification No.15/2012 dated 17th March, 2012 services provided or agreed to be provided by Arbitral Tribunal or an individual to any business entity located in the taxable territory is what is dealt with. Then, there is a Notification issued on 20th June, 2012 being notification no.25/2012-S.T. styled as a Mega Notification. Thereunder service provided by any person other than a business entity or a business entity having a turn over upto Rs.10 lakhs in the preceding financial year came to be exempted from payment of Service Tax. Here also, both the terms advocate and Arbitral Tribunal are defined.

25] By Notification No.30/12 which is also issued on 20th June, 2012 the position is further clarified.

26] Mr. Pakale submits that as explained in the affidavit in reply there is absolutely no substance in the challenge raised by the Petitioners.

Mr. Pakale submits that by the constitutional provision, namely, Article 19(1)(g) there is a right to practice any profession, or to carry on any occupation, trade or business, however, this is subject to the reasonable restriction which has been prescribed by Article 19(6). Nothing in sub-clause (g) of clause (1) of Article 19 shall affect the operation of any existing law insofar as it imposes or prevents making of any law in the interest of general public to impose reasonable restrictions on the exercise of the right conferred by the said sub-clause and particularly the restrictions of the nature specified therein. Therefore, it is not a absolute right but subject to reasonable restrictions. The imposition of a tax including Service Tax does not restrict a person from exercising his right to carry on any profession, trade or occupation. In the present case an advocate is not prevented or prohibited from carrying on his professional activities simply because he is required to pay taxes. The advocates are paying taxes on their income (income tax, paying taxes on their profession/professional tax). They are also paying tax to statutory authorities and public bodies such as the Municipalities, Panchayat. Therefore, different types of taxes and which are levied, assessed and recovered does not impair the exercise of the right conferred by Article 19(1)(g) of the Constitution of India. This fundamental right being subjected to a reasonable restriction by the constitution itself, none of the

Petitioners can complain. The tax cannot be said to be unconstitutional. In this regard, Mr. Pakale relies upon a prescription to obtain a license or permit to carry on business. Therefore, it is futile to complain that the restrictions which are guaranteeing economic stability for the country will in any way hamper the exercise of the right. Mr. Pakale points out that a restriction in public interest cannot be said to be unreasonable merely because in a given case it operates harshly on a person or some persons. It is submitted that there is nothing unreasonable, unfair, illegal or discriminatory in the imposition and levy of service tax. There is a policy to tax and in larger public interest that would override the business interest of an individual. Mr. Pakale brings to our notice several aspects and which could be said to be part and parcel of a reasonable restriction. Relying upon a judgment of the Hon'ble Supreme Court in the case of ***M.A. Rehman V/s. State of Andhra Pradesh reported in AIR 1961 SC 1471***, Mr. Pakale submits that the restriction to pay tax cannot be said to be unreasonable. It is in these circumstances that the challenge must fail. Mr. Pakale also relies upon the judgment of the Hon'ble Supreme Court in the case of ***M/s. K. M. Mohamad Ahdul Khader Firm V/s. State of Tamil Nadu reported in AIR 1985 Supreme Court 12*** and other decisions to urge that a tax unless it is confiscatory in nature cannot be said to be a unreasonable restriction upon the freedom of business. It cannot be said

to be unreasonable even if the dealer who is liable to pay service tax cannot pass on the burden to the purchaser.

27] So long as the tax is imposed with legal authority it does not violate the mandate of Article 286 of the Constitution of India. That cannot be held to be a unreasonable restriction on the fundamental right guaranteed by Article 19(1)(g) of the Constitution of India. The tax cannot be said to be excessive.

28] Mr. Pakale also submits that retrospective operation of a taxing statute is not necessarily unreasonable and the Petitioners have failed to point out any particular circumstances in which the same could be said to be so. Hence the challenge based on Article 14 of the Constitution of India must fail.

29] According to Mr. Pakale equally baseless is the challenge based on the Entry 92C of list I of Schedule VII of the Constitution of India. The argument that Constitution (88th Amendment) Act has not been brought into force or effect, will not help the Petitioners by any means. There is no bar for taxation and Mr. Pakale heavily relies upon Article 245, Article 246 and Article 248 of the Constitution of India in that regard. By heavily

relying upon Article 248, Mr. Pakale submits that by sub-Article(1) of that Article Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List and further such power shall include the power of making any law imposing a tax not mentioned in either of those Lists. Therefore, this Article read with entry 97 of List I of schedule VII of the Constitution of India grants and confers a residuary power of legislation in the Parliament and which it has exercised in the present case. In such circumstances, merely because entry 92C is not brought into effect will not make any difference.

30] Mr. Pakale also submits that Petitioner cannot insist on the Notification No.30/2012 operating retrospectively. Now, the burden is not on the Petitioners. The burden is on the recipient. If the burden is on the recipient and no recipient has come forward to complain about lack of opportunity to secure justice or the imposition of Service Tax defeating the guarantee of equal justice, then, all the more, this Writ Petition must fail.

31] Mr. Pakale has relied upon the provisions in the Finance Act insofar as the levy of service tax on advocates and legal practitioners. He also relies upon the Constitution Bench judgment of the Hon'ble Supreme Court of India in the case of ***Federation of Hotel and Restaurant V/s.***

Union of India and others reported in AIR 1990 SC 1637.

32] For properly appreciating the rival contentions, we would firstly refer to the provision in the Finance Act enabling the levy of Service Tax on advocates and the amendments made thereto.

33] Admittedly, there is no separate legislation styled as Service Tax Act. Section 64 to 98 inserted in Chapter V and VA of the Finance Act, 1994 provide for Service Tax. Section 64 sub-section (1) indicates that the Chapter applies to the whole of India except the State of Jammu and Kashmir. The Chapter shall come into force on such date as the Central Government may appoint. Further, it has been clarified that the Chapter shall apply to taxable services provided on or after the commencement of this Chapter. Section 65 contains the definitions. The section opens with the words, in this Chapter, unless the context otherwise requires and by section 65(105) the term "taxable services" is defined to mean any service provided or to be provided, and we are concerned in this case with sub-clause (zzzzm) which reads as under:-

> *"(zzzzm)(i) to any person, by a business entity, in relation to advice, consultancy or assistance in any branch of law, in any manner;*
> *(ii) to any business entity, by any person, in relation to representational services before any court, tribunal or*

authority;
(iii) to any business entity, by an arbitral tribunal, in respect of arbitration.
Explanation:- For the purposes of this item, the expressions "arbitration" and "arbitral tribunal" shall have the meanings respectively assigned to them in the Arbitration and Conciliation Act, 1996 (26 of 1996)."

34] Thus, the taxable service means any service provided or to be provided to any person, by a business entity, in relation to advice, consultancy or assistance in any branch of law, in any manner. The other part of this definition is in relation to representational services before any Court, Tribunal or Authority and to any business entity by an Arbitral Tribunal in respect of arbitration. The explanation defines the expressions 'arbitration' and 'arbitral Tribunal'.

35] This was the provision as substituted by section 74 of the Finance Act 2011 (8 of 2011) with effect from 1st May, 2011.

36] Then, our attention has been invited to the Notifications in the field. In that regard, Mr. Thacker has traced the definition of the above term and as appearing in the Chapter V of Finance Act 1994 as amended by Finance Act, 2010 (Act No.64 of 2010) dated 8th May, 2010 with effect from 1st July, 2010, that time the definition read as under:

> *"(105) taxable service means any service provided or to be provided;*
> *(a) any person, by a stock-broker in connection with the sale or purchase of securities listed on a recognised stock exchange;*
> *(b) and (c) x x x.*
> *(zzzzm) to a business entity, by any other business entity, in relation to advice, consultancy or assistance in any branch of law, in any manner;*
> *PROVIDED that any service provided by way of appearance before any court, tribunal or authority shall not amount to taxable service.*
> *Explanation: For the purposes of this sub-clause, "business entity" includes an association of persons, body of individuals, company or firm, but does not include an individual."*

37] Mr. Thacker had placed reliance upon this amendment to urge that there was no intention to proceed against the Advocates because the taxable services provided or to be provided to a business entity by a business entity in relation to advice, consultancy or assistance in any branch of law alone were within the purview of the law. A explanation appeared at the relevant time below the sub-clause(zzzzm) and the expression business entity was defined to include an association of persons, body of individuals, company or firm, but not an individual. The argument, therefore, is that taxable service as defined is a service provided or to be provided to a business entity, by any other business entity, in relation to advice, consultancy or assistance in any branch of law, and in any manner. However, any service provided by way of appearing before

any Court, Tribunal or Authority was excluded and it shall not amount to taxable service. Thus, Mr. Thacker would urge that the Central Government intended to levy Service Tax on advice, consultancy or technical assistance provided in the field of law and the tax would not be leviable in case the service provider or the service receiver is an individual. Mr. Thacker, therefore, submits that the "advocates" covered by the Advocates Act, 1961 were not included in this definition. The intention was not to burden those who are rendering services of acting, pleading and appearing in the Courts for litigants and legal services rendered by a business entity to another business entity and in relation to advice, consultancy or assistance in any branch of law, alone were brought within the purview of this definition and the Service Tax.

38] However, Mr. Thacker has fairly brought to our notice the amendment made to the Finance Act by virtue of a Notification and which also has been relied upon by Mr. Pakale. That Notification No.12/2012-S.T. dated 17th March, 2012 sets out the list of services exempted from Service Tax after Finance Act No.12 of 2012, which is termed as a negative list.

39] In this Notification it has been provided that the Central

Government is satisfied that it is necessary in the public interest to exempt the taxable services from the whole of the service tax leviable thereon under section 66B of the Finance Act and at clause (6) the services provided to any person other than a business entity by an individual as an advocate or a person represented on and as a Arbitral Tribunal is inserted. Therefore, such taxable services were exempted from the whole of the service tax. Mr. Thacker submits that for the first time the term advocate is appearing in the Finance Act, 1994 and that would mean that services provided to any person other than a business entity by an individual as an Advocate or a person represented on and as Arbitral Tribunals were exempted. It has been also set out in this Notification by inserting definitions that an "advocate" has the same meaning assigned to it under clause (a) of sub-section (1) of section 2 of the Advocates Act, 1961 (25 of 1961).

40] Mr. Thacker, therefore, submits that this Notification and other Notification superseding all prior Notifications being Notification No.15/2012-S.T. dated 17th March, 2012 would denote that at one time there was a decision to exempt the services rendered by individual as an advocate to any person other than a business entity or a person represented on and as an Arbitral Tribunal but by the further Notification

of the same date services provided or to be provided by an Arbitral Tribunal or an individual advocate to any business entity located in the taxable territory is brought within the purview of service tax. This would indicate as to how the advocates have been treated unfairly and unequally. They have been brought within the net although exempted earlier from Service Tax. Broadly, the argument is that advocate render services which cannot be said to be commercial or business like. They cannot be equated with the service providers mentioned in the Finance Act 1994. Advocacy is not a business but a profession and a noble one. An advocate is a part and parcel of the administration of justice and which is a sovereign or regal function and hence providing for a Service Tax on advocates would mean that their services will no longer be available or accessible to those seeking justice from a Court of law. That would defeat the constitutional guarantee of free, fair and impartial justice, is his submission.

41] We cannot agree with him and for more than one reason. The legislature by inserting such provision has neither interfered with the role and function of an advocate nor has it made any inroad and interference in the constitutional guarantee of justice to all. The services provided to a individual client by a individual advocate continues to be exempted from the purview of the Finance Act and consequently Service Tax but when an

individual advocate provides service or agrees to provide services to any business entity located in the taxable territory, then, he is included and liable to pay Service Tax. That is because the legislature was aware that poor and needy section of the population requires advice, consultancy or assistance in any branch of law, if he requires legal advice, aid and assistance, then, that should be available to him at times immediately and cheaply. He should not be burdened with a tax to be levied on the advocate for providing such services. Therefore, if the legislature thought it fit to exclude a individual advocate and rendering the above services to individuals, so long as he is rendering services to those who cannot afford to pay heavy professional fees and charges being individuals that the legislature deemed it fit not to include in the tax bracket the individual advocates. These advocates may be rendering services to the needy and specially women and children at Village, Taluka, District, Town and even at city levels. It is, therefore, apparent to us that the legislature while making the above distinction did not in any manner overlook the constitutional guarantee and as envisaged in the preamble to the Constitution of India., so also Article 21 and 39A thereof, the legislature made a distinction and which appears to us to be completely reasonable. The classification between those who can afford professional legal services and are ready to pay the fees or charges demanded without seeking any

reduction or concession and those who cannot pay legal fees but can at best bear meagre expenses has been made. This classification has a reasonable nexus with the object sought to be achieved. It cannot be said that while introducing this provision, the legislature did not take into account the economic realities. The economic realities are that even, legal services are rendered in an organized manner. There is not only an individual operating and functioning as an advocate but there is a firm or association of advocates operating on business principles and functional not only in metro towns and cities but even in those places which can be termed as district town and cities. When advocate is group or organize themselves by making huge investments in acquiring immovable properties for professional work, heavy overheads, in the form of clerical and support staff, with facilities of cabins or rooms, then, legal services are rendered to organized groups or business entities predominantly. They may be of the nature of advice, consultancy or further acting and appearance in Courts and Tribunals. These persons can very well pay the fees and charges without any demur or complaint. It is when services are rendered to such entities and persons by not individual advocates but those working on business lines, then, if they are brought within the net of taxable services and service tax is levied on them, they can hardly complain. Their right to carry on legal profession and as per their choice

can hardly be said to be taken away much less adversely affected. Mr. Pakale is right in placing reliance upon the judgments of the Hon'ble Supreme Court in which it is emphasized that in taxing legislations and statutes there is a greater latitude and discretion in the Government. In a decision reported in ***AIR 2012 SC 2351 State of M.P. V/s. Rakesh Kohli and another,*** the principles which have to be borne in mind while considering and dealing with constitutional validity of a Taxing Statute enacted by Parliament or State Legislature are set out and reiterated. The Hon'ble Supreme Court of India held as under:-

> *"13. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The Court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad."*
>
> *14. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely (i), that the appropriate Legislature does not have competency to make the law and (ii), that it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions.*
>
> *25. In Hamdard Dawakhana, the Court also followed the statement of law in Mahant Moti Das and the two earlier decisions, namely, Charanjit Lal Chowdhury V/s. Union of India and others and The State of Bombay and another V/s. F. N. Balsara and reiterated the principle that presumption was always in favour of constitutionality of an enactment.*

27. A well-known principle that in the field of taxation, the Legislature enjoys a greater latitude for classification, has been noted by this Court in long line of cases. Some of these decisions are : M/s. Steelworth Limited V/s. State of Assam; Gopal Narain V/s. State of Uttar Pradesh and another; Ganga Sugar Corporation Limited V/s. State of Uttar Pradesh and others, R.K. Garg V/s. Union of India and others and State of W.B. and another V/s. E.I.T.A. India Limited and others.

28. In R. K. Garg, the Constitution Bench of this Court stated that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc.

29. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the Court must have regard to the following principles : (i), there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature (ii), no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found (iii), the Court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence (iv), hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and (v), in the field of taxation, the Legislature enjoys greater latitude for classification."

42] We do not find that these principles have been in any way deviated or departed from by the Hon'ble Supreme Court later on. They fully govern the inquiry and controversy before us. If the said principles are applied to the facts and circumstances of the present case, then, we do not

see any substance in the challenge based on violation of the doctrine of equality enshrined by Article 14 of the Constitution of India.

43] We have already reproduced the relevant paragraphs from two affidavits which have been filed in reply to this Writ Petition. They contain the justification and particularly in para 17, 19, 20 and 21 so also para 24 of the first affidavit filed on 30th September, 2011. The reiteration of this stand is in the further affidavit filed on 13th January, 2012 in the Writ Petition No.1927 of 2011 in paras 5 and 9. That justification and reasons for the levy do not indicate that unequals have been treated equally. We do not find any basis or foundation in the complaint by Mr. Thacker inasmuch as imposition of such levy does not burden the litigant or the consumer of justice. We do not find any substance in the complaint that the profession of advocates and legal profession itself has been treated on par with commercial or trading activities or dealings in goods and other services. Merely because of the role of the advocate, it does not mean that his position as an officer of the Court and part and parcel of administration of justice is in any way undermined leave alone interfered with. The Advocates and legal practitioners are known to pay professional taxes and taxes on their income. They are also brought within the purview of service tax because their activities in legal field are expanding

in the age of globalization, liberalization and privatization. They are not only catering to individuals but business entities. If it is found that the advocates are catering to affluent and rich class of litigants and recipients of legal services, then, the tax on the services rendered to them is definitely within the permissive sphere of legislation. That cannot be faulted.

44] In this regard, it would be proper and appropriate to refer to some of the observations of the Hon'ble Supreme Court of India. In ***All India Federation of Tax Practitioners V/s. Union of India reported in (2007) 7 SCC*** while dealing with the legislative competence of Parliament to levy service tax, the Hon'ble Supreme Court made detailed reference to the test of saleability/marketability and held as under:

> *"24. The importance of the above judgment of this Court is two fold. Firstly, 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 stands consumed by the service receiver. It is this principle of equivalence which is in-built into the concept of service tax, which has received legal support in the form of the Finance Act, 1994. To give an illustration, an Event Manager (professional) undertakes an activity, namely, of organising shows. He belongs to the profession of Event Management. As long as he is in the business or calling or profession of an Event Manager, he is liable to pay the tax on profession, calling or trade under Entry 60 of List II. However, that tax under Entry 60 of List II will not cover his activity of organising shows for consideration which provide entertainment to the connoisseurs. For each show he plans and creates events based on his skill, experience*

and training. In each show he undertakes an activity which is commercial and which he places before his audience for its consumption. The tax on service is levied for each show. This situation is very similar to a situation where goods are manufactured or produced with the intention of being cleared for home consumption under the Central Excise Act, 1944. This is how the principle of equivalence equates consumption of goods with consumption of services as both satisfy the human needs. In the case of internet service provider, service tax is leviable for online information and database provided by websites. But no service tax is leviable on e-commerce as there is no database access.

25. On the basis of the above discussion, it is clear that service tax is VAT which in turn is both a general tax as well as destination based consumption tax leviable on services provided within the country.

26. The Finance Act is passed every year to fix the rate of tax. This is the primary object for enacting the Finance Act. But it does not mean that a new distinct charge cannot be introduced by the Finance Act. For example, what is not "income" under the Income Tax Act, 1961 can be made income by the Finance Act. This is, however, subject to the Finance Act complying with the constitutional limitations. Additional tax revenue can be collected either by increasing the rate or by levy of a fresh charge. All levies through the medium of the Finance Act may either enhance the rate or levy a fresh charge. The Finance Act can also make an extensive modification in an Act.

27. In Madurai District Central Coop. Bank Ltd. v. Third ITO [(1975) 2 SCC 454 : 1975 SCC (Tax) 374 : AIR 1975 SC 2016] this Court held that the Income Tax Act, 1961 and the annual Finance Acts are enacted by Parliament in exercise of the power conferred by Article 246(1) read with Entry 82 of List I. It was further held that though it was unconventional for Parliament to amend the taxing statute by incorporating the amending provision in an Act of a different pith and substance, such course would not be unconstitutional. It was held that though the Income Tax Act, 1961 was a permanent Act while the Finance Acts are passed every year to prescribe the rates at which the tax has been charged under the Income Tax Act, 1961 still it would not mean that a new and distinct charge cannot be introduced under the Finance Act. Therefore, what is not income under the Income Tax Act, 1961 can be made "income" by a Finance Act. Similarly an exemption granted by the Income Tax Act can be withdrawn by the Finance Act. Similarly, subject to constitutional limitations, additional tax revenue

could be collected by enhancement of the rate of tax or by the levy of a fresh charge vide the Finance Act. Parliament, through the medium of the Finance Act, may do what the amendment to the Income Tax Act, 1961 by a separate amendment Act, can do. It was further held that, the Finance Acts, though annual Acts, are not necessarily temporary Acts as they may contain provisions of a general character which are of permanent operation. Thus, Parliament is competent to introduce a charging provision in a Finance Act. In the said judgment, it had been further held that even an additional charge (surcharge) can be levied by the Finance Act for the purposes of the Union.

28. The aforesaid judgment was in the context of the Income Tax Act, 1961. However, the ratio of that judgment would apply equally to the Finance Acts enacted annually for enhancement of the rate of excise duty by levy of a fresh charge under that Act. Applying the test laid down in the aforestated judgment of this Court, we hold that a new charge by way of service tax or tax on service came to be levied statutorily by the said Finance Act, 1994, which has subsequently attained constitutional status by virtue of the Constitution (Eighty-eighth Amendment) Act, 2003.

…..

33. Applying the above tests laid down in the aforestated judgments to the facts of the present case, we find that Entry 60 of List II, mentions taxes on professions, trades, calling 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.

34. As stated above, Entry 60, List II refers to taxes on professions, etc. It is the tax on the individual person/firm or company. It is the tax on the status. A chartered accountant or a cost accountant obtains a licence or a privilege from the competent body to practise. On that privilege as such the State is competent to levy a tax under Entry 60. However, as stated above, Entry 60 is not a general entry. It cannot be read to include every activity undertaken by a chartered accountant/cost accountant/architect for consideration. Service tax is a tax on each activity undertaken by a chartered accountant/cost accountant or an architect. The cost accountant/chartered accountant/architect charges his client for advice or for auditing of accounts. Similarly, a cost accountant charges his client for advice as well as doing the work of costing. For each transaction or contract, the chartered accountant/cost accountant renders profession based services. The activity undertaken by the chartered accountant or the cost accountant or an architect has two aspects. From the point of view of the chartered accountant/cost accountant it is an activity undertaken by him based on his performance and skill. But from the point of view of his client, the chartered accountant/cost accountant is his service provider. It is a tax on "services". The activity undertaken by the chartered accountant or cost accountant is similar to saleable or marketable commodities produced by the assessee and cleared by the assessee for home consumption under the Central Excise Act.

35. For each contract, tax is levied under the Finance Act, 1994 and 1998. Tax cannot be levied under that Act without service being provided whereas a professional tax under Entry 60 is a tax on his status. It is the tax on the status of a cost accountant or a chartered accountant. As long as a person/firm remains in the profession, he/it has to pay professional tax. That tax has nothing to do with the commercial activities which he undertakes for his client. Even if the chartered accountant has no work throughout the accounting year, still he has to pay professional tax. He has to pay the tax till he remains in the profession. This is the ambit and scope of Entry 60, List II which is a taxing entry. Therefore, Entry 60 contemplates tax on professions, as such Entry 60, List II refers to tax on employments."

…..

37. In Western India Theaters Ltd. v. Cantonment Board [AIR 1959 SC 582] the appellant was a public limited company. It was a lessee of two cinema houses. It was an exhibitor of cinematograph films. A notice was issued to the appellant by the Cantonment Board under section 60 of the Cantonments Act, 1924 imposing tax on entertainments. The said levy was challenged on the ground that

under Section 100 of the Government of India Act, 1935 (The GOI Act, 1935 read with Entry 50 in Schedule VII, the Provincial Legislature had power to make law with respect to taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. It was urged on behalf of the appellant that Entry 50 was not applicable since Entry 50 contemplated enactment of a law imposing taxes on persons who receive or enjoy the entertainments/amusements and, therefore, the said entry did not authorise imposition of tax on assessee/persons who provide entertainments or amusements.

38. According to the appellant, Western India theaters were entertainment providers; that they were not entertainment receivers; that they simply carried on their profession, trade or calling and, therefore, Entry 50 was not applicable. It was further urged that entertainment providers fell under Entry 46, which entry is similar to Entry 60 of List II in the present case and which referred to taxes on professions, trades, callings and employments. This argument advanced on behalf of the appellant was rejected by this Court. It was held that Entry 50 contemplated a tax on entertainment and amusement as objects on which a tax is to be imposed and, therefore, it was not possible to differentiate between the entertainment provider and the entertainment receiver. It was held that entertainment was trade or calling of Western India Theaters and, therefore, the tax imposed on entertainment under the Cantonments Act came within Entry 50 of the Provincial List. The importance of this judgment lies in the fact that this judgment makes a distinction between tax imposed for the privilege of carrying on any trade or calling on one hand and a tax on every show, that is to say on every incidence of the exercise of the particular trade or calling. It was held that if there was no show, there was no tax.

39. It was further observed that a lawyer has to pay tax to take out a licence irrespective of whether he actually practises or not. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so. It was held that the impugned tax on entertainment levied by the Cantonment Board was a tax on the act of entertainment resulting in a show and, therefore, the impugned law imposing tax on entertainment fell under Entry 50 of the Provincial List in Schedule VII to the GOI Act, 1935 and not under Entry 46 (similar to Entry 60 of List II). Therefore, it was held that Bombay Legislature had power to enact the law imposing tax on entertainment which had nothing to do with the law imposing tax on the privilege of carrying on any profession, trade or calling under Entry 46 (similar to Entry 60 of List

Ii in the present case). Therefore, this Court has clarified the dichotomy between tax on privilege of carrying on any trade or calling on one hand and the tax on the activity which an entertainer undertakes on each occasion. The tax on privilege to practise the profession, therefore, falls under Entry 60, List II. It is quite different from tax on services. Keeping in mind the aforestated dichotomy, it is clear that tax on service does not fall under Entry 60, List II. Therefore, Parliament has absolute jurisdiction and legislative competence to enact the law imposing tax on services under Entry 97, List I of the Seventh Schedule to the Constitution."

45] Thus, what holds good for chartered accountants and architects must equally apply to other professionals such as advocates, and who too are well conscious of their status. The manner in which the services of lawyers and advocates are rendered has been a subject matter of a decision in the case of disciplinary action initiated by Bar Council of Maharashtra against a professional. In that context, the decision of the Hon'ble Supreme Court in the case of ***The Bar Council of Maharashtra V/s. M. V. Dabholkar & Ors. reported in 1976(2) SCC 291*** the Hon'ble Supreme Court held as under:-

"18. How can a disciplinary authority, aware of its accountability to the Indian Bar, functioning as the stern monitor holding the punitive mace to preserve professional purity and promote public commitment and appreciative of what is disgraceful, dishonourable and unbecoming, judged by the standards of conduct set for this noble calling and deviations damaging to its public image, find its way to hold such horrendous misbehaviour as snatching, catching, fighting and undercutting as not outraging the canons of conduct without exposing itself to the charge of dereliction of public duty on the trisection of Rule 36 and blind to the 'law for lawyers'?

19. It has been universally understood, wherever there is an

organised Bar assisting in administering justice, that an attorney, solicitor, barrister or advocate will be suspended or disbarred for soliciting legal business. And the 'snatching' species of solicitation are more revolting than 'ambulance chasing', advertising and the like. If the learned profession is not a money-making trade or a scramble for porterage but a branch of the administration of justice, the view of the appellate disciplinary tribunal is indefensible and deleterious. We, as a legal fraternity, must and shall live up to the second and live down the first, by observance of high standards and dedication to the dynamic rule of law in a developing country.

….

24.*We wish to put beyond cavil the new call to the lawyer in the economic order. In the days ahead, legal aid to the poor and the weak, public interest litigation and other rule-of-law responsibilities will demand a whole new range of responses from the Bar or organised social groups with lawyer members. Indeed, the hope of democracy is the dynamism of the new frontiersmen of the law in this developing area and what we have observed against solicitation and alleged profit-making vices are distant from such free service to the community in the jural sector as part of the profession's tryst with the People of India."*

46] We do not think that these paragraphs which were heavily relied by Mr. Thacker indicate that all professionals are alike. Rather the conclusions in these paragraphs of the judgment of the Hon'ble Supreme Court would indicate that the warning given has had little impact. The profession continues to be carried on in the manner commented upon by the Hon'ble Supreme Court despite it underlying the role and monopoly status of the professional. It would not be out of place to observe that the profession is noble but the professional is not necessarily so. Similarly, the Hon'ble Supreme Court has already been critical of the manner in which legal education is being imparted and administered. Standards of legal

education have not been upto the mark. The private law colleges and which are mushrooming do not necessarily churn out a noble professional. They may conduct and carry a course of study after completion of which they confer a degree but that hardly guarantees that the recipient thereof functions and works efficiently for the society as a whole. Thus, falling standards in the society and the urge to make quick and fast money catches up. In present day litigation one would find parties ready to go at any length and for a favourable order. All of them do not necessarily seek justice. They are only worried and bothered about a cause which they propound and espouse. So long as that cause, whatever be its merits, succeeds, they are happy. In that process, if justice is a casualty they would hardly complain. In several instances we find that speculative litigation is instituted and pursued with full vigour and all might. Parties do not wish to give up although warned of the consequences of institution and prosecution of such a litigation. If they have brought about a situation where justice is accessible only to those with heavy purses or to wealthy or rich and hardly available and affordable for those below the poverty line and downtrodden, then, persons claiming to be professionals and advising them can hardly be said to be aggrieved.

47] The Hon'ble Supreme Court has time and again expressed its pain and anguish that doors of the Court are not open to those who knock at them the most. In a decision reported in ***AIR 1986 SC 1370*** (***LIC of India V/s. Escorts Ltd.)*** ***The Hon'ble Supreme Court*** lamented as under:-

> *"Problems of high finance and broad fiscal policy which truly are not and cannot be the province of the court for the every simple reason that we lack the necessary expertise and, which, in any case, are none of our business are sought to be transformed into questions involving broad legal principles in order to make them the concern of the Court. Similarly what may be called the 'political' process of corporate democracy are sought to be subjected to investigation by us by invoking the principle of the Rule of law, with emphasis on the rule against arbitrary State action. An expose of the facts of the present case will reveal how much legal ingenuity may achieve by way of persuading courts, ingenuously, to treat the variegated problems of the world of finance, as litigable public-right-questions. Courts of justice are well-turned to distress signals against arbitrary action. So corporate giants do not hesitate to rush to us with cries for justice. The court room becomes their battle ground and corporate battles are fought under the attractive banners of justice, fair-play and the public interest. We do not deny the right of corporate giants to seek our aid as well as any Lilliputian farm labourer or pavement dweller though we certainly would prefer to devote more of our time and attention to the latter. We recognise that out of the dust of the battles of giants occasionally emerge some new principles, worth the while. That is how the law has been progressing until recently. But not so now. Public interest litigation and public assisted litigation are today taking over many unexplored fields and the dumb are finding their voice.*
>
> *2. In the case before us, as if to befit the might of the financial giants involved, innumerable documents were filed in the High Court, a truly mountainous record was built up running to several thousand pages and more have been added in this Court. Indeed, and there was no way out, we also had the advantage of listening to learned and long drawn-out, intelligent and often ingenious arguments, advanced and dutifully heard by us. In the name of justice, we paid due homage to the causes of the high and mighty by devoting precious time to them, reduced, as we were, at times to the*

position of helpless spectators. Such is the nature of our judicial process that we do this with the knowledge that more worthy causes of lesser men who have been long waiting in the queue have been blocked thereby and the queue has consequently lengthened. Perhaps the time is ripe for imposing a time-limit on the length of submissions and page-limit on the length of judgments. The time is probably ripe for insistence on brief written submissions backed by short and time-bound oral submissions. The time is certainly ripe for brief and modest arguments and concise and chaste judgments. In this very case we heard arguments for 28 days and our judgment runs to 181 pages and both could have been much shortened. We hope that we are not hoping in vain that the vicious circle will soon break and that this will be the last of such mammoth cases. We are doing our best to disentangle the system from a situation into which it has been forced over the years by the existing procedures. There is now a public realisation of the growing weight of the judicial burden. The co-operation of the bar too is forthcoming though in slow measure. Drastic solutions are necessary. We will find them and we do hope to achieve results sooner than expected. So much for sanctimonious sermonising and now back to our case."

48] Apart from this, we find that post globalization, liberalization and privatization, the legal sector has been involved in several issues particularly to advice the foreign institutional investors and multi-national corporations keen on investing in infrastructure and other sectors in India. If they are keen on doing business in India and equally the Indian Corporate sector experiencing new challenges including expansion of existing capacities that there is enormous scope for advocates, law firms and organized law groups. The horizon is ever expanding. In such circumstances, we find that laws are undergoing a change. That change is visible if one peruses the provisions and amendments to corporate laws.

Similarly, the enactments such as Securities and Exchange Board of India Act, 1992, Insurance Regulatory and Development Authority Act and Competition Act etc., result in further opportunities to the advocates of providing varied services to business entities. Thus, corporate law and corporate lawyers witnessing radical changes and reforms that the Government or the Ministry of Finance thought it fit to levy tax on these services rendered by advocates but without disturbing their essential and core professional duty. Therefore, the service tax net has been expanded and to include legal services provided to business entities.

49] There are varied services provided ranging from advice, consultation to appearance before specialised Tribunals, traditional Courts of Justice and Foreign Institutional Arbitration. Mergers and Acquisition of Companies by corporate Giants, takeover of Management or having a authoritative voice in Corporate-Management and policy by subscribing or purchasing a percentage of shares, restructuring or reorganising of companies, amalgamation of business or manufacturing activities etc. takes place only with high priced, quality and all-round legal participation. If advocacy is meant to cover and reaching out, to cater to and serve all of them, then, the traditional position and status of an Advocate has undergone a drastic change. Now, advocacy is no longer taking up and

presenting or arguing any cause before a Court of justice. It is much more than that. It is actively participating in and involving oneself in market strategies, aligning oneself exclusively with large business groups and also serving their interests. Hence, we have labels such as “corporate Law” and “corporate Lawyers”. Today, like any other service provider Advocates are pushing themselves by rigorous marketing and advertisement, branding themselves as specialists in Corporate Law, Intellectual and other property rights, divorce law and not Matrimonial and Family Laws etc. If they are part of and have entered the market, exhibiting all trends prevailing therein, then, it is surprising that they are agitated, worked up at being termed service providers and taxed as such. They have qualified themselves for being bracketed with other services noted by the Hon'ble Supreme Court. None grudges their achievements, success in providing diverse services and some times under one roof but what surprises us is their reaction and response at being termed as additional revenue generating source by the State. The State looks at the organised legal set up alone this way and at the same time excludes individual Advocates rendering legal aid, advice and assistance to the poor, impoverished and needy. This distinction or segregation of services made by the Parliament does not fall foul of the constitutional guarantee of equality. We had to say and observe all this because Mr. Thacker vehemently contended that

Advocates cannot be compared with traders and businessmen nor their services can be equated with those rendered by commercial establishments, transporters, property agents etc. The argument is that Advocate is a officer of the Court and part and parcel of administration of justice. We do not feel that this aspect has been ignored or brushed aside by the Parliament. Rather by a rational and intelligible differentiation the Parliament has proceeded to levy and impose service tax on legal services or services in the field of law rendered to business entities by individual Advocates or a firm of Advocates. The differentiation as maintained and made takes note of the commercialisation of the practice of law. The service rendered to a individual litigant is not of the above nature and, therefore, he is rightly left out.

50) The classification between service provided to business entities and individuals, therefore, cannot be said to be illusory. The classification has a definite nexus and with the object sought to be achieved. If that is to explore and expand the sources of revenue and by widening the tax net, then, it is achieved by bringing within the fold the aforementioned services. There is, therefore, no violation of the constitutional mandate. The classification cannot be termed as arbitrary, discriminatory, unfair, unreasonable and unjust.

51] The decisions cited by Mr. Thacker on this point can be easily distinguished and on facts. Before we take note of them, we would refer to the settled and established legal principles, which are laid down in some of the Judgments of the Hon'ble Supreme Court. These Judgments summarise the principles relied upon by Shri. Pakale. In ***M. A. Rahman and Ors. vs. State of A. P. and Ors.*** reported in ***AIR 1961 SC 1471,*** the Hon'ble Supreme Court held that reasonable restriction on the right guaranteed by Article 19(1)(g) can be imposed. The first Judgment in Rehman's case (supra) is by the Constitution Bench. Equally in another Constitution Bench Judgment in the case of **C. Krishna Moorthy v. State of Orissa** reported in **AIR 1964 SC 1581**, the Hon'ble Supreme Court held that the restriction does not cease to be reasonable merely because the legislative power to tax has been exercised retrospectively. In that regard, the Hon'ble Supreme Court held as under:-

> *"11. Mr. Sastri also argued that the retrospective operation of the impugned section should be struck down as unconstitutional, because it imposes an unreasonable restriction on the petitioners' fundamental right under Article 19(1)(g). It is true that in considering the question as to whether legislative power to pass an Act retrospectively has been reasonably exercised or not, it is relevant to enquire how the retrospective operation operates. But it would be difficult to accept the argument that because the retrospective operation may operate harshly in some cases, therefore, the legislation itself is invalid. Besides in the present case, the retrospective operation does not spread over a very long period either. Incidentally, it is not clear from the record that the petitioners did not recover sales tax from their customers when they sold the gold ornaments to them. The counter-affidavit filed by the respondent-State alleges that even where sales-tax*

has not been charged separately the price charged included sales-tax because it was the usual practice of every registered dealer doing similar business to collect sales-tax either by showing it as such separately and thereby claiming deduction of the sales-tax from the gross turnover to arrive at the taxable turnover shown separately or by including it in the price and thereby collecting it as a part of the price charged. In any event, we do not think that in the circumstances of this case it would be possible to hold that by making the provision of Section 2 of the impugned Act retrospective the legislature has imposed a restriction on the petitioners' fundamental right under Article 19(1)(g) which is not reasonable and is not in the interest of the general public."

52] In the case of **M. A. Rahman**(supra), The three Judge Bench of the Hon'ble Supreme Court examined the challenge to imposition of increased tax by Andhra Pradesh Motor Vehicle (taxation of passengers and goods) Amendment and Validation Act (34 of 1961). In negativing a challenge raised to this increased tax on the ground that it violates the mandate of Articles 14 and 19(1)(g) of the Constitution of India, the Supreme Court held as under:

"(7) The reasonableness of this provision as to cancellation of registration certificate has to be judged in the background of what we have already said about the purpose of the levy and its liability on the seller. It is true that there are other provisions in the law for realisation of public dues from those who default in making payments; but generally speaking cancellation of registration in cases like these is one more method of compelling payment of tax which is due to the State. Collection of revenue is necessary in order that the administration of the State may go on smoothly in the interest of the general public. The State has therefore armed itself with one more coercive method in order to realise the tax in such cases. It is true that cancellation of registration may result in a dealer being unable to carry on the business, but the same result may even follow from the application of other coercive processes for realisation of dues from a trader, for his assets may be sold off to pay the arrears of tax and

he may thereafter be not in a position to carry on the business at all. Therefore the provision for cancellation of registration for failure to pay the tax or for fraudulently evading the payment of it is an additional coercive process which is expected to be immediately effective and enables the State to realise its revenues which are necessary for carrying on the administration in the interest of the general public. The fact that in some cases restrictions may result in the extinction of the business of a dealer would not by itself make the provision as to cancellation of registration an unreasonable restriction on the fundamental right guaranteed by Article 19(1)(g). We may in this connection refer to Narendra Kumar v. Union of India (1960) 2 SCR 375: (AIR 1960 SC 430) where it was held that:

> *"the word restriction in Arts. 19(5) and 19(6) of the Constitution includes cases of 'prohibition' also; that where a restriction reaches the stage of total restraint of rights special care has to be taken by the Court to see that the test of reasonableness is satisfied by considering the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, the beneficial effect reasonably expected to result to the general public, and whether the restraint caused by the law was more than was necessary in the interest of the general public."*

Applying these tests we are of opinion that the cancellation of registration will be justified even though it results in the extinction of business as such cancellation is in respect of a tax meant for the general revenues of the State to carry on the administration in the interest of the general public."

53] Incidentally, we may observe that no material has been placed before us by the Petitioners which would indicate that for a brief period from the time the impact of levy of service tax fall on them and until the issuance of the notification number 30 of 2012 dated 20th June, 2012 the Advocates suffered in any manner and particularly pointed out in **C.Krishna Moorthy's** case (supra).

54] Lastly, reference can usefully be made to another Judgment of the Hon'ble Supreme Court in the case of the ***Malva Bus Services Pvt. Ltd. vs. State of Punjab and Ors.*** **AIR 1983 SC 634**. There as well the Hon'ble Supreme Court held that the mere fact that a tax falls more heavily on certain goods may not result in its invalidity. In that regard and by holding that such a stipulation would not make the levy confiscatory in character, the Hon'ble Supreme Court held as under:-

> *"21. The next submission urged on behalf of the petitioners is based on Article 14 of the Constitution. It is contended by the petitioners that the Act by levying Rs.35,000/- as the annual tax on a motor vehicle used as a stage carriage but only Rs.1,500/- as per year on a motor vehicle used as a goods carrier suffers from the vice of hostile discrimination and is, therefore, liable to be struck down. There is no dispute that even a fiscal legislation is subject to Art. 14 of the Constitution. But it is well settled that a legislature in order to tax some need not tax all. It can adopt a reasonable classification of persons and things in imposing tax liabilities. A law of taxation cannot be termed as being discriminatory because different rates of taxation are prescribed in respect of different items, provided it is possible to hold that the said items belong to distinct and separate groups and that there is a reasonable nexus between the classification and the object to be achieved by the imposition of different rates of taxation. The mere fact that a tax falls more heavily on certain goods or persons may not result in its invalidity. As observed by this Court in Khandige Sham Bhat v. the Agricultural Income Tax Officer (1963) 3 SCR 809 : (AIR 1963) SC 591) in respect of taxation laws, the power of legislature to classify goods, things or persons are necessarily wide and flexible so as to enable it to adjust its system of taxation in all proper and reasonable ways. The courts lean more readily in favour of upholding the constitutionality of a taxing law in view of the complexities involved in the social and economic life of the community. It is one of the duties of a modern legislature to utilise the measures of taxation introduced by it for the purpose of achieving maximum social good and one has to trust the wisdom of the legislature in this regard. Unless the fiscal law in question is manifestly discriminatory the court should refrain from striking it*

down on the ground of discrimination. These are some of the broad principles laid down by this Court in several of its decisions and it is unnecessary to burden this judgment with citations.

22. .....The considerations similar to those which weighed with this Court in upholding the Mustard Oil Price Control Order, 1977 in Parg Ice and Oil Mills v. Union of India (1978) 3 SCR 293 : (AIR 1978 SC 1296) ought to be applied in this case also. Though patent injustice to the operators of stage carriages in fixing lower return on the tickets issued to passengers should not be encouraged, a reasonable return on investment or a reasonable rate of profits can not be the sine qua non of the validity of the order of the Government fixing the maximum fares which the operators may collect from their passengers. It cannot also be said that merely because a business becomes uneconomical as a consequence of a new levy, the new levy would amount to an unreasonable restriction on the fundamental right to carry on the said business. It is, however, open to the State Government to make any modifications in the fares if it feels that there is a need to do so. But the impugned levy cannot be struck down on the ground that the operation of stage carriages has become uneconomical after the introduction of the impugned levy. More-over the material placed by the petitioners is not also sufficient to decide whether the business has really become uneconomical or not. We do not, therefore, find any merit in this ground also."

55] Applying these principles to the facts and circumstances before us, we do not find that levy of service tax on a limited category and class of professionals, namely Advocates, the burden of which does not fall on them but on the receiver of the service, can be said to be violative of the guarantee or right under Article 19(1)(g) of the Constitution of India.

56] In the first decision, which was cited before us by Mr. Thacker, [***All India Sainik Schools Employees' Association V/s. Defence Minister-cum-Chairman Board of Governors, Sainik Schools Society, New Delhi***

and others] (supra) the Hon'ble Supreme Court was dealing with the Writ Petition seeking a writ of mandamus to the Union of India as also Sainik School Society to implement the recommendations of the Fourth Pay Commission in the Sainik Schools and to extend all the benefits already given to employees of the Kendriya Vidyalayas by way of implementing recommendations of a certain commission. This equivalence in the service conditions including emoluments was claimed at par with the employees and staff of Kendriya Vidyalayas. It is in the context of dealing with such a case that the Hon'ble Supreme Court extended certain benefits to the Sainik School Staff. This judgment does not decide or lay down any principle.

57] In the case of ***Uttar Pradesh Power Corporation Ltd. V/s. Ayodhya Prasad Mishra and another reported in (2008) 10 Supreme Court Cases 139*** the Hon'ble Supreme Court was considering a question as to whether there ought to be parity for all employees in selection to the promotional posts and non-giving of such parity would violate the doctrine of equality enshrined in Article 14 and 16 of the Constitution. The executive engineers placed in category I and category II are unequals and that is why the classification as made was held to be valid and not violative of Article 14 or 16 of the Constitution of India. The priority

given to executive engineers placed in category I over and above the executive engineers found in category-II for promotional post of Superintendent engineer was upheld by the High Court and that decision came to be confirmed by the Hon'ble Supreme Court of India. We do not find that the principle of law laid down therein, about which there can be no dispute, is of absolute application. That principle will have to be applied to the facts and circumstances in each case. The status and position of the respective persons, the duties, the benefits derived are all relevant and germane matters. In such circumstances, the decision in Uttar Pradesh Power Corporation Ltd. (supra) also cannot assist the Petitioners.

58] Similarly, the decision in the case of ***Prem Chand Somchand Shah and another V/s. Union of India and Another reported in (1991) 2 SCC 48*** will not assist the Petitioner. There, on facts it was found that the relaxation cannot be claimed by the Petitioners because they were not similarly situate. The grant of additional licenses which were entitled to the relaxation stand on a different footing and merely because additional licenses were granted to the Petitioners they cannot claim the benefit of the relaxation. It is on this finding that the principle referred above was applied. This judgment cannot assist the Petitioner. Rather it would

support our conclusions. Just as there cannot be any discrimination but equality must be maintained between equals, unequals cannot be treated equally. The Court found that the two classes and two persons were unequals.

59] The orders of admission of similar Writ Petitions by other High Courts in India cannot assist the Petitioners either.

60] The Petitioner has relied upon the judgments and particularly on the role of advocates to which we have already made a detailed reference. In the same decision, the Hon'ble Supreme Court has strongly commented upon the falling standards in the profession. Mr. Thacker places reliance on the code of professional ethics carved out by the Bar Council of India to support his argument on the role and status of the advocates in the society. We have referred to this very code and emphasized that the advocate gives benefit of his service to the litigant and the litigant/client approaches him because of his learning, talent and his expertise. The monopoly status of the advocate has an attached and corresponding duty to the public. He has to render his services selflessly and it is his duty to the Court which is paramount and higher than his duty to his clients. He is not a mouthpiece of his client. In these circumstances, the decision in

D.P. Chadda V/s. Triyugi Narain Mishra and others reported in (2001) 2 SCC 221 (paras 24 to 27) would support our view. Finally, the judgment in the case of ***Manoharan V/s. Sivarajan and others reported in (2014) 4 SCC 163*** emphasizes that Article 39A not only includes free legal aid by the appointment of counsel for litigants but also includes ensuring that justice is not denied to litigating parties due to financial difficulties. That aspect is taken care of in the present tax set up by excluding from the tax net the individual litigants and services provided to them by individual advocates. Therefore, there is no infraction of the constitutional mandate.

61] Now it is time to refer to the further amendments made to the Finance Act firstly by Mega Notification No.25/2012 dated 20th June, 2012. That mega Notification proceeds to exempt the taxable services mentioned therein from the whole of the service tax leviable thereon under section 66B of the said Act. The said Notification supersedes the earlier notification dated 17th March, 2012. Now, services provided by an Arbitral Tribunal to any person other than a business entity or a business entity with a turn over upto Rs.10 lakhs in the preceding financial year are exempted from the whole of the service tax leviable thereon under section 66B of the Finance Act. Similarly, services provided by an individual as

an advocate or a partnership firm of advocates by way of legal services to an advocate or partnership firm of advocates, to any person other than a business entity or a business entity with a turnover upto Rs.10 lakhs in the preceding financial year and services provided by a person represented to an Arbitral Tribunal were exempted. This exemption takes care of apprehension of Mr. Thacker that services provided by individual advocates or a firm of advocates to small time traders or businessmen would be taxable. Now, the services provided by individuals as an advocate or a partnership firm of advocates by way of legal services to any person other than a business entity or a business entity with a turnover upto Rs.10 lakhs in the preceding financial year are exempt from the whole of the service tax leviable thereon under section 66B of the Finance Act. Therefore, the small businessman, petty traders and persons carrying on business in individual capacity would be able to afford the services of individual advocates or a partnership firm of advocates. In such circumstances and when the term 'business entity' has been understood to include a individual he will not be deprived of quality legal services if his turnover in the preceding financial year is within the limits specified above.

62] The next notification is no.30/2012 dated 20th June, 2012 and that

while superseding the earlier Notifications of 31st December, 2004 and 17th March, 2012 proceeds to notify the taxable service and the extent of service tax payable thereon by the person liable to pay service tax for the purpose of section 68(2). Now, the taxable services provided or agreed to be provided by an Arbitral Tribunal or an individual advocate or a firm of advocates by way of support services to any business entity located in the taxable territory are brought within the net and stand covered by the Finance Act. However, this Notification does not touch, far from superseding the Mega Notification No.25/2012 of the same date, namely, 20th June, 2012. All that it states is that the taxable services provided or agreed to be provided by an Arbitral Tribunal or an individual advocate or a firm of advocates by way of support services to any business entity located in the taxable territory are liable to service tax. However, if the services are legal services, then, the recipient of the service or service receiver has to bear the brunt and will pay the tax at 100%. This Notification merely recognizes the fact that rendering of such services, namely, legal and support to business entities is the trend of the day. Even an Arbitral Tribunal is not placed in the same position as it was and in the initial stages when Arbitration Act 1940 was in force. The position and role of a Arbitrator was very succinctly discussed in a earlier Judgment of the Hon'ble Supreme Court in **Food Corporation of India vs.**

Joginderpal Mohinderpal and Anr. reported in ***AIR 1989 SC 1263.*** Hon'ble Mr. Justice Sabyasachi Mukherji as my Lord the Chief Justice of India, then was and known for his erudition and learning in Arbitration and commercial law, observed as under:

> *"6. …..In India, there is a long history of arbitration. Arbitration is a mode of settlement of disputes evolved by the society for adjudication and settlement of the disputes and differences between the parties apart from the courts of law. Arbitration has a tradition, it has a purpose. Arbitration, that is a reference of any particular dispute by consent of the parties to one or more persons chosen by the parties with or without an umpire and an award enforceable by the sovereign power were generally unknown to ancient India. Hindus recognised decisions of Panchayats or bodies consisting of wealthy, influential and elderly men of the community and entrusted them with the power of management of their religious and social functions. The sanction against disobedience to their decision was excommunication, or ostracism and exclusion from the religions and social functions of the community. An agreement to abide by the decision of a Panchayat and its decision with regard to the line of boundary was held not to be conclusive, since a reference to arbitration and award properly so-called did not exist. See the observations in Mukkuduns of Kimkunwady V/s. Inamdar Brahmins of Soorpal, (1841-46) 3 Moo Ind App 383. See also Bachawat's Law of Arbitration at page 1.*
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> *7. When power came to the East India Company, they framed Regulations in exercise of the power vested in them by the British Government. Some of these Regulations were touching arbitration. Bachawat gives description of the evolution of the Arbitration Act, 1940. Therefore, arbitration as a mode for settlement of disputes between the parties, has a tradition in India. It has a social purpose to fulfill today. It has a great urgency today when there has been an explosion of litigations in the Courts of law established by the sovereign power. New rights created, or awareness of these rights, the erosion of faith in the intrinsic sense of fairness of men, intolerant and uncompromising attitudes are all the factors which block our courts. The courts are full of litigations, which are pending for long time. Therefore, it should be the endeavour of those who are interested in the administration of justice to help settlement by*

arbitration, if possible. It has also a social efficacy being the decision by the consent of the parties. It has greater scope of acceptance today when there is a certain erosion of faith in view of the failure to appreciating the functions of the courts of law. It has also the advantage of not quickness of decision but of simplicity of procedure. But in proceedings of arbitration these must be adherence to justice, equity, law and fair play in actions. However, the proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to. It is, therefore, the function of courts of law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator."

63] After the Arbitration and Conciliation Act 1996 was enacted, the nature of the disputes referred to and to be resolved by arbitration demonstrate that the same has attained the character of "corporate luxury". The members of the Arbitral Tribunal and those representing parties before the Arbitral Tribunal have started operating in a business-like manner. It is difficult for individuals to afford the Arbitral services any longer. The hefty fees charged by the Tribunal and the Advocates per day and sometimes per hour make it difficult for litigants including companies to bear the costs of Arbitration. There is no basis for the argument that by the service tax provision section 89 of the Code of Civil Procedure is given a go-bye. We are sorry to say this but day after day we receive complaints as to how arbitration is beyond the reach of a common

man. They can hardly dream of approaching an arbitrator and who will settle or resolve their disputes at a reasonable cost, charges and expenses. If the arbitrations are conducted in Five Star Hotels and Air Conditioned Conference rooms, by incurring heavy costs and charges, then, those appearing before them would be obliged to pay the service tax. Even the Abitral Tribunal will be obliged to pay service tax. Once again, we mean no disrespect to the Arbitrators and the Tribunals presently functional across the Country. The attempt is to impress upon them the fact that they are perceived as Alternate Dispute Redressal Mechanism and brought into effect to promote a socially laudable cause. It is not an opportunity to make money post retirement as was noted by none other than Hon'ble Mr. Justice J. S. Verma, Ex-Chief Justice of India. He never earned money as an Arbitrator till his death. However, it is the recipient who will bear the burden. In such circumstances, we do not find that the Notification make any difference to the position noted by us. Once the law has been amended and the burden now falls on the recipient, then, all the more the advocates whether appearing either individually or as a firm can hardly complain. They come within the tax bracket only because they are rendering service to a business entity located in the Taxable territory. It is only such service which is taxable. The individual advocate rendering

service to individual is not in any manner affected. Despite supersession of the Notification dated 17th March, 2012 his position is not altered or changed in any manner. The services rendered by an individual advocate to any person other than a business entity or to an individual advocate or a partnership firm of advocates providing legal services is exempted as the Mega Notification remains in the field and is unaffected.

64] The only argument now remains is that before the mega Notification was issued the burden of paying service tax is to be borne by the advocates themselves. That cannot be shifted on to the litigants till date of issuance of the Mega Notification and it being brought into effect, is the argument. Such advocates are claiming that this Notification of 20th June, 2012 bearing No.30/2012 be given a retrospective effect. It is not possible to accept this argument because the categories of advocates mentioned in these Notifications cannot claim an exemption from the tax and as of right. The legislature having decided to grant the exemption and equally to shift the burden on to the recipient from a particular date, namely, prospectively and not retrospectively by itself does not mean that the doctrine of equality has been violated. If individual advocates and those providing services either individually or collectively to business entities of the classes specified in the two Notifications No.25 and

30/2012 are incomparable, not equally situate, then, all the more, this argument has no basis. The legislature has a choice and very wide in matters of taxation. It can include and exclude from the tax bracket persons or classes of persons. It is free to decide on a cut-off date. Equally it is free to legislate retrospectively in matters of taxation. Similarly, if it decides that a particular provision or an enactment will have prospective operation, the person on whom the burden falls cannot complain that the legislature must give such provision retrospective effect. There is no such right and particularly in matter of taxation. In such circumstances, we do not find any merit in this argument either.

65] As a result of the above discussion, Rule in each of these Writ Petitions is discharged. The Petitions are dismissed. There would be no orders as to costs.

(A. A. SAYED, J.) (**S.C. DHARMADHIKARI, J.**)

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