



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE
&
THE HONOURABLE MR. JUSTICE HARISANKAR V. MENON

THURSDAY, THE 18TH DAY OF DECEMBER 2025 / 27TH AGRAHAYANA, 1947

WA NO. 1106 OF 2016

AGAINST THE JUDGMENT DATED 22.03.2016 IN WPC NO.35646 OF 2015

APPELLANT/PETITIONER IN WPC:

M/S. VENGAD RESORTS & RETREATS LIMITED,
KEEZHMURI, VENGAD, MOORKKANAD, VALANCHERRY -679338,
REPRESENTED BY ITS WHOLE TIME DIRECTOR,
MR.ILYAS VADAKKAN.

BY ADVS.
SHRI.M.GOPIKRISHNAN NAMBIAR
SHRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURRYAN THOMAS

RESPONDENTS/RESPONDENTS IN WPC:

- 1 UNION OF INDIA, REPRESENTED BY SECRETARY TO
REVENUE DEPARTMENT, MINISTRY OF FINANCE,
NEW DELHI - 110001.
- 2 THE COMMISSIONER OF CENTRAL EXCISE,
CUSTOMS & SERVICE TAX, C.R. BUILDING,
MANANCHIRA, CALICUT - 670001.
- 3 THE STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM- 695001.

BY ADVS.
SHRI.V.GIRISHKUMAR, SENIOR PANEL COUNSEL
SREELAL N. WARRIER, SC, CENTRAL BOARD OF EXCISE

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 11.12.2025, THE COURT ON
18.12.2025 DELIVERED THE FOLLOWING:

**"C.R."****JUDGMENT****Harisankar V. Menon, J.**

This intra-court appeal is at the instance of the petitioner in the writ petition – a public limited company – stated to be engaged in running an 'amusement park', seeking to challenge the judgment of the learned Single Judge dated 22.03.2016, rejecting the challenge against the demand of 'service tax' on the activities carried out by the appellant.

2. The appellant points out that "admission to entertainment events or access to amusement facilities", by virtue of its inclusion under Section 66D(j) of the Finance Act, 1994, under the negative list, was not liable to taxation. However, by the Finance Act, 2015, sub-clause (j) to Section 66D was omitted, on account of which "admission to entertainment events or access to amusement facilities" was no longer in the negative list of services, consequent to which they became a taxable activity under the Finance Act, 1994, with effect from 01.06.2015. The appellant contends that the



Finance Act, 1994, is traceable to Entry 97 of List I of the Seventh Schedule to the Constitution of India and insofar as with reference to Entry 62 of List II of the Seventh Schedule to the Constitution of India dealing with 'taxes on luxuries, including taxes on entertainments, amusements, betting and gambling', the State Government has enacted the Kerala Local Authorities Entertainments Tax Act, 1961 (hereinafter referred to as "Entertainments Tax Act"), providing for levy of tax on the price for admission to entertainment in the facilities of the appellant, there cannot be any levy of service tax under the Finance Act, 1994. To put it otherwise, the appellant's case is that the omission of sub-clause (j) to Section 66D referred to above by the Union, amounts to trenching upon the legislative powers of the State and hence is *ultra vires* the Constitution of India. Taking this contention, the appellant instituted W.P(C) No.35646 of 2015. The learned Single Judge framed the following issue for consideration:

Whether the removal of "*admission and access to entertainment event and amusement facilities*" [sub-clause (j) of Section 66D of the Finance Act, 1994] from the Negative List of "Services" by



an Amendment of 2012 and the consequent imposition of service tax on such activity would result in the Union Parliament trenching upon the exclusive field, assigned to the State, under Entry 62 List II of the Seventh Schedule of the Constitution of India.

Thereafter, the issue was considered at length by the learned Single Judge with reference to the rival contentions, ultimately, finding that aspects of taxation by the Union and State - "service" and "amusement" - being different, there is no trenching upon the legislative powers of the State as contended by the appellant herein. Resultantly, the writ petition stood dismissed.

3. It is seeking to challenge the afore judgment that this intra-court appeal is filed by the appellant.

4. Heard Sri.Raja Kannan, the learned counsel for the appellant, as well as Sri.Sreelal N. Warriar, the learned counsel for the 2nd respondent.

5. Sri.Raja Kannan, the learned counsel for the appellant, would contend that when Entry 62 of List II authorises the State to legislate, on levy of tax on luxuries, including taxes on entertainments, amusements, betting and gambling, the Union



had no legislative competence with reference to residuary entry under Entry 97 of List I. Therefore, it is his submission that the learned Single Judge need not have applied the “aspects theory” to the case at hand. He would rely on the judgment of the Apex Court in **State of W.B. v. Kesoram Industries Ltd. and Another [(2004) 10 SCC 201]**, in support of the afore contention and state that the doctrine of pith and substance ought to be applied. He would also place considerable reliance on the Division Bench judgment of this Court in **Union of India and Others v. Kerala Bar Hotels Association [2015 (1) ILR (Ker) 267]**, in support of his submission. The judgment of the Apex Court in **Ashoka Talkies v. Badagara Municipality [1995 (2) KLT 895]** is also referred to.

6. *Per contra*, Sri.Warrier would contend that the two fields of legislation are independent of each other, and the learned Single Judge was justified in dismissing the writ petition. He would also state that Entry 62 of List II should be construed in such a manner that the State could only legislate



to levy tax on "luxury" and not amusement or entertainment simpliciter.

7. We have considered the rival contentions as well as the connected records.

8. The issue arising for consideration, as framed and answered by the learned Single Judge against the appellant herein, is as to whether the imposition of service tax on the activities carried out by the appellant herein amounts to a transgression by the Union on the legislative powers of the State.

9. The residuary Entry 97 of List I provides for the exclusive power to the Union to make laws with reference to the matters enumerated thereunder. However, Entry 97 categorically excludes those matters which are enumerated in List II or III. In other words, it is only in a situation where a particular subject is not enumerated in List II or III, the question of the Parliament legislating on the particular subject under Entry 97 arises.



10. The contention raised by the appellant is that the activity carried on by them is brought to tax by the State Government under the Entertainments Tax Act and therefore, the Union was not justified in providing for the levy of service tax with reference to the residuary Entry 97 under List I.

11. We have perused the provisions of the Entertainments Tax Act. The preamble to the Act provides for the unification of the law relating to the imposition and collection of taxes on "amusements and other entertainments" in the State of Kerala. Charging Section 3 of the Entertainments Tax Act provides for a local authority to levy tax at the rate prescribed therein on the price for "admission to any entertainment". It is with reference to the charging Section that the definition clauses under Section 2 of the Entertainments Tax Act require to be noticed, as under:-

2. Definition:

"(1) 'admission' includes admission as a spectator or as one of an audience and admission for the purpose of amusement by taking part in an entertainment;

(2) 'admission to an entertainment' includes admission to any place in which the entertainment is held;

.....



(4) 'entertainment' includes any exhibition, performance, amusement, game, sport or race to which persons are admitted for payment but does not include any magic performance;

(7) "payment for admission" means--
(a) the price for admission, and
(b) any payment for any purpose whatsoever connected with an entertainment (including any tax) which a person is required to make as a condition for attending or continuing to attend the entertainment in addition to the price for admission;

(7A) 'price for admission' means the cost of a ticket (excluding any tax) for a seat or other accommodation in a place of entertainment and includes in respect of any person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a higher payment is required."

(underlining supplied)

Thus, the Entertainments Tax Act provides for the levy of tax on admission to an entertainment, and the said admission includes both the admission as a spectator and as audience and the admission for the purpose of amusement by taking part in the entertainment, as is clear from Section 2(1) and (4) of the Entertainments Tax Act. This is further made clear by the definition of the term 'payment for admission' and 'price for admission', clarifying that both the 'admission' as well as



'actual entertainment' are brought to tax. True, Section 3B inserted by Act 26 of 2005, provides for a lump sum payment of tax by amusement parks, with reference to the investment and the area of the park. However, the alternative method of tax under Section 3B of the Entertainments Tax Act also requires to be read along with the charging Section 3 thereto.

12. As against the afore, the Finance Act, 1994, provides for the levy of tax on "services". The term "service" is defined under Section 65B(44) of the Finance Act, 1994, as under:-

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include:-

(a) an activity which constitutes merely-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution: or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

(underlining supplied)

Thus, under the Finance Act, 1994, any activity carried out by a person for another for consideration amounts to service.



13. The stand taken in support of the levy of service tax is to the effect that what is taxed under the Finance Act and what is taxed under the Entertainments Tax Act are different "aspects".

14. A scanning of the provisions of the Entertainments Tax Act, noticed above, would show that it is a legislation for the imposition and collection of taxes on "amusements and other entertainments" in the State. Charging Section 3 thereto provides for the levy of tax on "price for admission" to any entertainment. The term "entertainment" includes an "amusement". Therefore, there cannot be any dispute that the activity carried out in the premises of the appellant would partake of the character of "entertainment" being an amusement to which the entertaineer is being admitted. The term "admission" also takes within its ambit both the admission to the venue as a "spectator" and the admission for the purpose of "amusement" through the entertainment. This is made further clear in the definition of the term "payment for admission" - including the "price for admission" and for the



purpose connected with the “entertainment”. The provisions of Section 2(7) of the Entertainments Tax Act came up for consideration before the Apex Court in **Ashoka Talkies** (*supra*) wherein the Apex Court held that “payment for admission” defined by Section 2(7) of the Entertainments Tax Act would include any payment for any purpose whatever, connected with an entertainment which the person is required to make, as a condition for admission to the entertainment. Thus, according to the provisions of the Entertainments Tax Act, what is collected and brought to tax thereunder includes both the price for admission to the venue and the payment for the actual entertainment.

15. It is with reference to the afore statutory position; the provisions of Entry 62 of List II are to be considered *qua* the residuary Entry 97 of List I. The afore entries are extracted below for ease of reference:-

“List I

97. Any other matter not enumerated in List II or List III, including any tax not mentioned in either of those Lists.



List II

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.”

(underlining supplied)

16. Entry 62 of List II provides for the levy of tax on luxuries, including taxes on entertainment/amusement, etc. The scope and ambit of Entry 62 of List II arose for consideration before the Apex Court in **Godfrey Phillips India Ltd. and Another v. State of U.P. and Others [(2005) 2 SCC 515]**. The Apex Court was called upon to consider the question as to whether under the afore entry, the levy of luxury tax on “goods or articles” was contemplated. The Apex Court, while holding that Entry 62 of List II only empowers taxation of “activities” and not “goods or articles of luxury,” held as under:

“74. In the context of Entry 62 of List II this would not mean that the word “luxuries” would be restricted to entertainments, amusements, betting and gambling but would only emphasis the attribute which is common to the group. If luxuries is understood as meaning something which is purely for enjoyment and beyond the necessities of life, there can be no doubt that entertainments, amusements, betting and gambling would come within such understanding. Additionally,



entertainments, amusements, betting, and gambling are all activities. "Luxuries" is also capable of meaning an activity and has primarily and traditionally been defined as such. It is only derivatively and recently used to connote an article of luxury. One can assume that the coupling of these taxes under one entry was not fortuitous but because of these common characteristics.

75. Where two or more words susceptible of analogous meaning are clubbed together, they are understood to be used in their cognate sense. They take, as it were, their colour from and are qualified by each other, the meaning of the general word being restricted to a sense analogous to that of the less general....."

(underlining supplied)

Thus, the Apex Court found that the term "luxury" is also capable of being considered as an activity, and additionally, entertainments, amusements, betting, and gambling are also separate activities/fields. This interpretation provided by the Apex Court is an answer to the contentions raised by Sri. Warriar, that it is only an activity of luxury *per se* that can be brought to tax under Entry 62 of List II.

17. In the light of our analysis of the provisions of the Entertainments Tax Act and Finance Act as above, read along with the principles laid down by the Apex Court in **Godfrey Philips** (*supra*), we are of the opinion that the Entertainments



Tax Act has provided for an all-inclusive levy with respect to the “admission” and “entertainment”, and nothing further remains for taxation with reference to the Finance Act, 1994. Therefore, the question of invoking the residuary power under Entry 97 of List I does not arise in the case at hand.

18. In this regard, reference is also to be made to the views of the Constitution Bench of the Apex Court in **Kesoram Industries Limited** (*supra*). The Constitution Bench in the above case specifically considered the extent of the residuary power of legislation available to the Union under Entry 97 of List I. The cesses levied by various States with reference to the Entries in List II were held as unconstitutional by various High Courts in the light of the legislative power of the Union under Entry 97 of List I. The matter was considered by the Constitution Bench in the afore circumstances. After referring to the legislative powers of the Parliament and the State Legislature as prescribed under Article 246 of the Constitution of India, the Apex Court held that the power of making any “laws imposing tax not mentioned in the Concurrent List or



State List vests in the Parliament”, being the residuary power. The Apex Court also referred to the principles summarised in **Hoechst Pharmaceuticals Ltd. and Others v. State of Bihar and Others [(1983) 4 SCC 45]**, wherein it was found that the various entries in the three Lists were “fields of legislation” on account of which independent sources of taxation is extended to the Union and the State, that therefore they must receive a liberal construction prescribed by a broad and generous spirit and not a narrow pedantic sense, that when questions of the like nature where overlapping may occur arises, the doctrine of pith and substance requires to be applied to find out to which Entry a legislation relates, that the statute is to be analysed as a whole with reference to its main objects, scope and effect of its provision. The Constitution Bench also emphasized the findings in **Hoechst Pharmaceuticals** (*supra*) that “the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II, though it may incidentally affect any item in List I”. Ultimately, the Constitution Bench



summarized the legal principles as regards the distinction between the general entries and the taxation entries as under:

"129. The relevant principles culled out from the preceding discussion are summarised as under:

- (1) In the scheme of the lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.
- (2) Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping *in fact* but there would be no overlapping *in law*. The subject-matter of two taxes by reference to the two lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the *subject* of a tax and the *measure* of a tax.
- (3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The



mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

.....

- (5) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:
- One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?
- Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation?
- and
- Three — Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

.....

- (9) The heads of taxation are clearly enumerated in Entries 83 to 92-B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of List II, can also not be levied by the Union though as stated in



Entry 50 itself the Union may impose *limitations* on the power of the State and such limitations, if any, imposed by Parliament by law relating to mineral development to that extent shall circumscribe the States' power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional."

(underlining supplied)

Thus, the Apex Court found that the nature of the tax levied is different from the measure of tax, and further, when there is conflict between the entries in List I and II, the approach should be as laid down therein, after which the question as to whether an incidental trenching upon in another field of legislation is to be ignored requires to be answered. The Constitution Bench also categorically found that the residuary power of the Union under Entry 97 of List I can be applied only to those subjects that are not included in Entries 45 to 63 of



List II.

19. The challenge raised in this intra-court appeal, noticed earlier, requires to be analysed with reference to the principles laid down by the Constitution Bench as above.

20. The fact that Entry 62 of List II provides for the levy of tax on luxuries, including entertainments/amusements, is not in dispute. Entry 97 of List I admittedly is a residuary entry which can be applied only for those matters not enumerated in List II. The impugned provisions of the Finance Act, 1994, seeks to impose service tax on the amusement parks with reference to the service provided by the appellant herein. As we have already found, Entry 62 of List II specifically provides for the levy of tax on entertainments and amusements by the State legislature. Applying the doctrine of pith and substance, as held by the Supreme Court, it has to be noticed with reference to the provisions of the Entertainments Tax Act, as a whole, that the State legislation provides for imposing tax on the entertainment/amusement, for which the entertaineer is admitted. In the light of the afore, we are of the opinion that



the question of imposition of tax on the activities of the appellants herein can only be with reference to Entry 62 of List II.

21. We would also notice the judgment of the Division Bench of this Court in **Kerala Bar Hotels Association** (*supra*), which considered the challenge against the imposition of service tax by the air-conditioned restaurants and the service provided by hotels providing accommodations to their guests. The imposition as above was challenged mainly contending that the levy encroaches on the legislative power of the State Government under Entry 54 (taxes on sales) and Entry 62 (taxes on luxuries etc.) of List II. The Division Bench of this Court, with reference to the provisions of Entry 54, found that after the 46th Amendment of the Constitution, tax could only be levied by the State Government dealing with the supply of food and beverages in a restaurant as a sale. With reference to the demand for service tax from hotels etc., the Division Bench referred to the provisions of the Kerala Taxes on Luxuries Act, 1976, and the provisions therein, holding that



it is only the State legislature which has the legislative competence to impose tax on a hotel. In summarising its findings, the Division Bench also held as under:

“15.We are of the view that since the whole of the consideration received by a restaurant owner for supply of food and other articles of the human consumption, including the service part of the transaction, is exigible to tax by the State by virtue of the constitutional definition, it is not open to the Union to characterise the same transaction as a service for imposition and levy of service tax.....”

The provisions of the Entertainments Tax Act, noticed earlier, also seek to impose tax on the entire consideration received by the appellants herein from their clients/customers. The question of the Union imposing tax on the very same transaction in such a scenario would be unconstitutional.

22. In the light of the afore finding, we would also analyse the findings in the impugned judgment of the learned Single Judge.

23. We note that the learned Single Judge, while repelling the challenge, sought to rely on the “aspect theory”, as considered by the Apex Court in **Federation of Hotel & Restaurant Association of India v. Union of India and**



Others [1989 (3) SCC 634], as well as Express Hotels (P) Ltd. v. State of Gujarat and Another [(1989) 3 SCC 677].

In the first case – **Federation of Hotel & Restaurant** (*supra*) – the Apex Court was considering the challenge raised against the constitutional validity of the Expenditure Tax Act, 1987, envisaging a tax on “chargeable expenditure” spent in hotels wherein “room charges” were Rs.400/- per day, per individual. The challenge was essentially with reference to the levy of tax on expenditure, which, according to the appellants, was a tax on luxuries or a tax on consideration paid for the purchase of goods, falling out of the competence of the Union. The Apex Court, in that context, applied the aspect theory and upheld the contention of the Union that the tax is essentially a tax on “expenditure” and not on “luxuries” or on “sale of goods”. The Court accepted this contention, essentially because it was the aspect of “expenditure” of the particular transaction that was sought to be assessed by the Union. But in the case at hand, the principles laid down in the afore judgment cannot be applied to repel the challenge against the constitutionality,



since the “aspect” that is now sought to be assessed under the Finance Act, 1994, and the Entertainments Tax Act, is one and the same – the aspect of entertainment/amusement. The aspect of “amusement” or “entertainment” to the extent of imposition of tax is within the domain of the State legislature under Entry 62 of List II. Therefore, the residuary power cannot be applied to the case at hand.

24. The judgment of the Apex Court in **All-India Federation of Tax Practitioners and Others v. Union of India & Others [(2007) 7 SCC 527]**, also requires to be noticed. The afore case considered the challenge against the imposition of service tax on practising Chartered Accountants, Cost Accountants, etc. The challenge was with reference to the incompetency of the Union under Entry 97 of List I, pointing out the levy of tax by the State under Entry 60 of List II on “profession, trades, callings, employments”. Considering this issue, the Apex Court found as under:

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



and employments". Entry 60 is a taxing entry. It is not a general entry. Therefore, we hold that tax on professions, etc. has to be read as a levy on professions, trades, callings, etc., as such. Therefore, Entry 60 which refers to professions cannot be extended to include services. This is what is called as an Aspect Theory. If the argument of the appellants is accepted, then there would be no difference between interpretation of a general entry and interpretation of a taxing entry in List I and List II of the Seventh Schedule to the Constitution. Therefore, "professions" will not include services under Entry 60. For the above reasons, we hold that Parliament had absolute jurisdiction and legislative competence to levy tax on services. While interpreting the legislative heads under List II, we have to go by schematic interpretation of the three Lists in the Seventh Schedule to the Constitution and not by dictionary meaning of the words "profession" or "professional" as was sought to be argued on behalf of the appellants, otherwise the distinction between general entries and taxing entries under the three Lists would stand obliterated. The words "in relation to" and the words "with respect to" are no doubt words of wide amplitude but one has to keep in mind the context in which they are used."

Thus, the Apex Court found that there is a difference between tax on "profession" and the service tax levied on the professionals with respect to the services provided by them. Thus, it is only because of the particular aspect that was sought to be assessed – the aspect of service by the professional – that the challenge came to be repelled by the Apex Court.



However, in the case at hand, the service tax is also being sought to be levied on the aspect of entertainment, which is within the exclusive domain of the State Legislature.

25. **M/s.Sainik Motors, Jodhpur v. State of Rajasthan [AIR 1961 SC 1480]** is also referred to by the learned Single Judge, where the imposition of tax on passengers and goods under Entry 56 of List II was challenged, contending that, in reality, the tax is one on the “income” of the operator. The Apex Court found that tax is being collected on the fares and freights, which is only a measure of tax, and the subject of taxation is passengers only, thus upholding the levy. Here, the subject of taxation in the Finance Act and the Entertainments Tax Act being one and the same, the challenge raised requires to be accepted. We also note that the measure of tax is also one and the same under the two enactments.

26. The Apex Court in **State of Karnataka and Others v. Drive-in Enterprises [(2001) 4 SCC 60]** considered the imposition of entertainment tax with reference to the provisions of the Karnataka Entertainments Tax Act, 1958,



which was struck down by the Karnataka High Court as being beyond the legislative competence of the State legislature. The contention taken was that the imposition of entertainment tax on 'admission of cars' inside the theater was *ultra vires* to the Constitution of India. The Apex Court held that in such circumstances, the true nature and character of an enactment can be ascertained by examining the whole enactment, its objects, scope, and effects of its provisions. The Apex Court also noticed the provisions of the Karnataka Act as under:-

"11. We are in full agreement with the aforestated statement of law and are of the view that it is not the nomenclature of the levy which is decisive of the matter, but its real nature and character for determining the competency or power of the State Legislature to enact law imposing the levy. It is in the light of the aforesaid statement of law, we would examine the validity of levy challenged in the present case. Before we deal with the question in hand, we would first examine the provisions of the Act. Section 2(a) of the Act defines "admission". "Admission" includes admission as a spectator or as one of the audiences, and admission for the purpose of amusement by taking part in an entertainment. Clause (b) of Section 2 defines "admission to an entertainment" which includes admission to any place in which an entertainment is held. Clause (ca) of Section 2 defines "cinema theatre" as any place of entertainment in which cinematography shows are held to which persons are



admitted for payment. Clause (e) of Section 2 of the Act defines "entertainment", which means a horse race or cinematography shows including exhibition of video films to which persons are admitted on payment."

(underlining supplied)

On the basis of the afore, the Apex Court further found as under:-

"13. Entry 62 List II of the Seventh Schedule empowers the State Legislature to levy tax on luxuries, entertainment, amusements, betting and gambling. Under Entry 62, the State Legislature is competent to enact law to levy tax on luxuries and entertainment. The incidence of tax is on entertainment. Since entertainment necessarily implies the persons entertained, therefore, the incidence of tax is on the persons entertained.

.....

The real nature and character of the impugned levy is not on the admission of cars or motor vehicles, but the levy is on the person entertained who takes the car inside the theatre and watches the film while sitting in his car. We are, therefore, of the view that in pith and substance the levy is on the person who is entertained. Whatever be the nomenclature of levy, in substance, the levy under heading "admission of vehicle" is a levy on entertainment and not on admission of vehicle inside the drive-in-theatre. As long as in pith and substance the levy satisfies the character of levy, i.e. "entertainment", it is wholly immaterial in what name and form it is imposed. The word "entertainment" is wide enough to comprehend in it, the luxury or comfort with which a person entertains himself. Once it is found there is a nexus between the legislative competence



and subject of taxation, the levy is justified and valid. We, therefore, find that the State Legislature was competent to enact sub-clause (v) of clause (i) of Section 2 of the Act. We accordingly hold that the impugned levy is valid.”

(underlining supplied)

Thus, applying the doctrine of pith and substance, the Apex Court found that the levy is actually on the person who is being entertained and not merely on the admission of the vehicle inside the drive-in-theater. The Court also found that it is the variation in the comfort offered to the person entertained which is being assessed to entertainment tax. Therefore, it is clear that it is the service being offered that is assessed to the entertainment tax. We also notice that the provisions of the Kerala Act and the Karnataka Act are in *pari materia*. Hence, the Kerala Act would be within the legislative competence of the State legislature under Entry 62 of List II.

27. We also notice the recent judgment of the Apex Court in **State of Kerala and Another v. Asianet Satellite Communications Ltd. and Another [(2025) 143 GSTR 214 (SC)]**, wherein the question as to whether the assessee therein were liable to pay entertainment tax under the



provision of the State statutes traceable to Entry 62 of List II as also the service tax under Finance Act, 1994 traceable to Entry 97 of List I was considered. The Apex Court held that the doctrine of pith and substance requires to be applied to consider the *vires* of the statute when principles of legislative competence between the Centre and the State are raised, and the aspect theory has application only in relation to taxing statutes. The Court ultimately found as under:-

"17.37 While applying the aspect theory to the present case, it is noted that the activity of broadcasting is for the purpose of entertainment of the subscriber as held in *Purvi Communication [State of West Bengal v. Purvi Communication P. Ltd.* No entertainment can be presented to the viewers unless the broadcaster transmits the signals for instantaneous presentation of any performance, film or any programme on their television. Thus, there are two aspects in this activity; the first is the act of transmission of signals of the content to the subscribers. The second aspect here concerns not only the content of the signals, but the effect of the decryption of the signals by the Set-Top Boxes and the viewing cards inside these boxes provided by the assesseees to the subscribers, which is providing and receiving of entertainment through the television. Without the apparatus provided for by the assesseees to decrypt the signals, the subscriber would not be able to watch the content that is transmitted, the content being for the purpose of entertainment. The television entertainment



provided by them through their modus operandi, i.e., by broadcasting, is a luxury within the meaning of entry 62-List II. The assessees who are engaged in the activity of providing entertainment are liable to pay service tax on the activity of broadcasting under the provisions of the Finance Act, 1994 read with relevant amendments and are also liable to pay entertainment tax in terms of entry 62-List II as being a specie of luxuries. Therefore, both the taxes, one by the State Legislature and the other, by the Parliament are leviable on the activity of the assessees herein. This is because by rendering the service of broadcasting, the assessees are entertaining the subscribers within the meaning of entry 62-List II. There is no overlapping in fact or in law, inasmuch as different aspects of the same activity are being taxed under two different legislations by two different Legislatures. This is because the activity of broadcasting is a service and liable to service tax imposed by the Parliament (entry 97-List I) and the activity of entertainment is a subject falling under entry 62-List II and therefore, the assessees herein are liable to pay entertainment tax as well. Hence, the State Legislatures as well as the Parliament, both have the legislative competence to levy entertainment tax as well as service tax respectively on the activity carried out by the assessees herein."

(underlining supplied)

Thus, the Apex Court held that both service tax and luxury tax can be imposed since there are two aspects in the activities concerned, 'transmission of signals', and 'decryption of the signal by the set-top boxes', and hence both service tax as well



as luxury tax could be levied, and there is no overlapping of fact or law. But as we have already found in the case at hand, it is the very same "aspect" that is sought to be assessed under the Finance Act, 1994, and the Entertainments Tax Act.

28. We are fortified in arriving at the conclusion as above by virtue of the judgement in **Mineral Area Development Authority and Another v. Steel Authority Of India and Another [(2024) 10 SCC 1]**, where a Bench of nine Judges of the Apex Court considered the question as to whether a State can levy tax on mineral rights in view of the levy of royalty under the Mines and Minerals (Development and Regulation) Act, 1957 traceable to Entry 54 to List I. The court, considering the afore issue, found as under: -

"214. As discussed in the above segments, the field of tax on mineral rights vests with the State Legislature. Parliament cannot impose a tax on mineral rights under List I Entry 54. Parliament cannot resort to its residuary powers to tax mineral rights when the subject-matter is specifically enumerated in Entry 50 of the State List. The fixation of the rates of royalty under Section 9 can be validly traced to List I Entry 54 because royalty is not a tax. The fixation of the rates of royalty falls with the regulatory powers of Parliament under List I Entry 54. The



decisions in *Mahalaxmi Fabric Mills* [State of *M.P. v. Mahalaxmi Fabric Mills Ltd., Saurashtra Cement, and Mahanadi Coalfields* do not reflect the correct position of law.

215. List II Entry 50 is not an exception to the *Sundararamier* principle which is that taxing entries are enumerated separately from the general entries in Lists I and II of the Seventh Schedule. The field of taxation cannot be derived from regulatory legislative entries and has to be derived from a specified taxing entry. This principle has now been well entrenched in our constitutional jurisprudence. A legislature has incidental and subsidiary powers with respect to a legislative entry. However, the power to tax is neither incidental nor subsidiary to the power to legislate on a particular matter in the nature of a regulatory entry.

216. List II Entry 50 is subordinated only to the extent of any limitations that may be imposed by Parliament by law relating to mineral development. Unless Parliament imposes a limitation, the plenary power of the State Legislature to levy taxes on mineral rights is unaffected.

217. The question of an overlap between the taxing entry and general entry does not arise because Parliament cannot impose taxes on minerals under List I Entry 54. There is no direct conflict between the taxing powers of the States under List II Entry 50 and the regulatory powers of the Union. Resultantly, the principle of federal supremacy has no application in the instant case. Hence, while List II Entry 50 is *sui generis*, it does not constitute



an exception to the position of law laid down in *M.P.V. Sundararamier.*"

(underlining supplied)

Thus, it is held by the Apex Court that when a specific legislative power is vested in the State legislature for taxation, it cannot be invoked by the Parliament.

29. In the case at hand also, the taxation of entertainment/ amusement is specifically covered under Entry 62 of List II, and the residuary power of the Union under Entry 97 of List I would not have any application.

30. We may also notice the contention raised by the revenue that it is ultimately the service element that is sought to be assessed under the Finance Act, 1994. However, we notice that there are no such machinery provisions in the statute, providing for the levy of service tax only on the service element in the activity of the appellants herein. Therefore, for that reason also, the levy of service tax cannot be sustained, as held by the Apex Court in **Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited**



[(2016) 1 SCC 170].

On the whole, we are of the opinion that the appellant is entitled to succeed. Therefore, the question framed by the learned Single Judge, as noticed in paragraph 2 of this judgment, would stand answered in the affirmative. Consequently, this appeal would stand allowed by setting aside the judgment of the learned Single Judge and declaring the attempt to impose service tax on "access to amusement facilities" as unconstitutional.

Sd/-

**A.MUHAMED MUSTAQUE,
JUDGE**

Sd/-

**HARISANKAR V. MENON,
JUDGE**

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