CASE NO.:
Appeal (civil) 7128 of 2001

PETITIONER:
All India Federation of Tax Practitioners & Ors

RESPONDENT:
Union of India & Ors

DATE OF JUDGMENT: 21/08/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

KAPADIA, J.

This is an appeal filed by All India Federation of Tax Practitioners against the Division Bench judgment of the Bombay High Court dated 22.2.2001 in Writ Petition No. 142/99 upholding the legislative competence of Parliament to levy service tax vide Finance Act, 1994 and Finance Act, 1998. According to the impugned judgment, service tax falls in Entry 97, List I of the Seventh Schedule to the Constitution.

2. The question which arises for determination in this civil appeal concerns the constitutional status of the levy of service tax and the legislative competence of Parliament to impose service tax under Article 246(1) read with Entry 97 of List I of the Seventh Schedule to the Constitution. The issue arising in this appeal questions the competence of Parliament to levy service tax on practising chartered accountants and architects having regard to Entry 60 List II of the Seventh Schedule to the Constitution and Article 276 of the Constitution.

Background Facts

3. On 1.6.1998 Finance Bill, 1998 was introduced in Parliament. Clause 119 of the Notes sought to substitute Sections 65, 66 and 68 and amend Section 67 of the Finance Act, 1994 relating to service tax so as to levy a tax on services rendered by a practising chartered accountant, cost accountant and architect to a client in professional capacity at the rate of five per cent of the amount charged to the client. On 3.6.1998, Bombay Chartered Accountants Association made a representation to the Central Government objecting to the aforestated Bill. On 1.8.1998 the Finance Bill was however passed and the Finance (No. 2) Act, 1998 received the assent of the President of India. The Act came into force with effect from 1.4.1998. On 7.10.1998, Union of India issued Notification No. 57/98 inter alia exempting taxable services other than accounting and auditing. On 16.10.1998, Union of India issued another Notification No. 59/98 inter alia reducing the scope of the exemption. On 20.1.1999, Writ Petition No. 142/99 was filed by the Federation in the Bombay High Court challenging the validity of the levy of service tax. By the impugned judgment dated 22.2.2001 the Bombay High Court rejected the writ petition and upheld the legislative competence of Parliament to levy service tax.

Reason for Imposition of Service Tax

4. Service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, association, firms, body of individuals etc.. Service sector contributes about 64% to the GDP. \023Services\024 constitute heterogeneous spectrum of economic activities. Today services cover wide range of activities such as management, banking,

insurance, hospitality, consultancy, communication, administration, entertainment, research and development activities forming part of retailing sector. Service sector is today occupying the centre stage of the Indian economy. It has become an Industry by itself. In the contemporary world, development of service sector has become synonymous with the advancement of the economy. Economics hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs.

5. In late seventies, Government of India initiated an exercise to explore alternative revenue sources due to resource constraints. The primary sources of revenue are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is the tax on imports. The word \023goods\024 has to be understood in contradistinction to the word \023services\024. Customs and excise duty constitute two major sources of indirect taxes in India. Both are consumption specific in the sense that they do not constitute a charge on the business but on the client. However, by 1994, Government of India found revenue receipts from customs and excise on the decline due to W.T.O. commitments and due to rationalization of duties on commodities. Therefore, in the year 1994-95, the then Union Finance Minister introduced the new concept of \023service tax\024 by imposing tax on services of telephones, non-life insurance and stock-brokers. That list has increased since then. Knowledge economy has made \023services\024 an important revenue-earner.

6. At this stage, we may refer to the concept of \023Value Added Tax\024 (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.

7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.

8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value additioin by rendition of services. Therefore, for our understanding, broadly \023services\024 fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc.. Performance based services are services provided by service providers like stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc..

9. Government of India in order to tap new areas of taxation and to identify the hidden one appointed Tax Reforms Committee under the Chairmanship of Dr. Chelliah in August, 1991. The recommendations made by the Committee were accepted and the Service Tax was introduced in the Budget for 1994-95 through the Finance Act, 1994. Under the said enactment, Service Tax is the tax on notified services provided or to be provided. After its introduction, the constitutional validity of the services taxed by the Central Government was challenged before the Constitution Bench of this Court which took the view that the Central Government derived its authority from Entry 97 of List I of the Seventh Schedule to the Constitution for levying tax on services provided.

10. To provide necessary legal backup, the Government introduced a new Article 268A in the Constitution in the year 2003 by Constitution (Eighty-eighth Amendment) Act, 2003, which provides that taxes on services shall be charged by Union of India and shall be appropriated by Union of India and the States. A new Entry 92C was also introduced in the Union List for the levy of taxes on services. Section 65(16) of the Finance Act, 1994 provided for definition of \023taxable service\024 to mean any service provided by

stock-broker, telegraph authority, and by insurer. Section 67 provided for valuation of taxable service based on gross receipts. In cases where value of taxable service could not be decided then the cost of providing the service constituted the basis of the assessable value of taxable service.

11. At this stage, we may state that the above discussion shows that what was the economic concept, namely, that there is no distinction between consumption of goods and consumption of services is translated into a legal principle of taxation by the aforestated Finance Acts of 1994 and 1998.

Scheme of the Finance Act, 1994 and Finance Act, 1998

12. Chapter V of the Finance Act, 1994 referred to Service Tax. It defined \023assessee\024 to mean a person responsible for collecting the service tax. Under the Act, \023service tax\024 was defined to mean tax chargeable under Chapter V. Under the Act, \023taxable service\024 was defined to mean any service provided by a stock-broker to an investor in connection with the sale or purchase of securities listed on a recognized stock exchange; services rendered to a subscriber by the telegraph authority; and services rendered by an insurer to a policy holder. Under the Act, it was clarified that words and expressions not defined in Chapter V but used therein shall bear the same meaning as given in the Central Excise Act, 1944. Section 66 stated that service tax shall be levied at the rate of five per cent of the value of taxable services provided to any person by the service provider who was responsible for collecting the service tax. It was similar to Section 3 of Central Excise Act, 1944. Section 67 dealt with valuation of taxable services. Section 68 dealt with collection and recovery of service tax. Section 71 dealt with assessment. Section 72 dealt with best judgment assessment. Section 73 dealt with value of taxable services escaping assessment. Section 83 inter alia stated that Section 9C, 9D, 11B etc. of the Central Excise Act shall apply also to collection and recovery of service tax. Further, it may be stated that the administration of service tax is given to the authorities under the Central Excise Act.

13. Broadly, to the same effect, is the Finance Act of 1998. The said Act has increased the list of notified services so as to include advertising agencies, travel agencies, architects, caterers, clearing and forwarding agents, credit rating agencies, customs house agents, practising chartered accountants, practising cost accountants, real estate agents, security agencies etc.. We are concerned in this case with the services provided by architects, chartered accountants and cost accountants covered by the Finance Act, 1998.

Relevant Provisions of the Constitution of India

14. The relevant provisions of the Constitution of India are as follows:

\023Article 246. Subject-matter of laws made by Parliament and by the Legislatures of States.\027 (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the \023Union List\024.

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Article 265. Taxes not to be imposed save by authority of law.\027No tax shall be levied or collected except by authority of law.

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Article 268A. Service tax levied by Union and collected and appropriated by the Union and the States.- (1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States

in the manner provided in clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be\027

(a) collected by the Government of India and the States;

(b) appropriated by the Government of India and the States,

in accordance with such principles of collection and appropriation as may be formulated by Parliament by law.

Article 269. Taxes levied and collected by the Union but assigned to the States.\027(1) Taxes on the sales or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

Explanation.\027For the purposes of this clause,-

(a) the expression "taxes on the sale or purchase of goods" shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;

(b) the expression "taxes on the consignment of goods" shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

(2) The net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.

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Article 276. Taxes on professions, trades, callings and employments.\027(1) Notwithstanding anything in article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board,

local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two thousand and five hundred rupees per annum.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.\024

Entry No. 92C of List I of the Seventh Schedule to the Constitution is as follows:

\02392C. Taxes on services.\024

Entry Nos. 53, 60 and 62 of List II of the Seventh Schedule to the Constitution are as follows:

\02353. Taxes on the consumption or sale of electricity.\024

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\02360. Taxes on professions, trades, callings and employments.\024

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\02362. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.\024

Entry 38 of List III of the Seventh Schedule to the Constitution is as follows:

\02338. Electricity.\024

Arguments:

15. The basic argument advanced on behalf of the appellant-Federation before us was on Entry 60 of List II of the Seventh Schedule reproduced above. The said Entry refers to taxes on professions, trades callings and employments. The argument advanced by Shri Shyam Divan, learned counsel on behalf of the appellant, was that every entry in the Lists in the Seventh Schedule represents a field of legislation. Therefore, it should be read in a broad sense. The appellant did not dispute before us the proposition that the service tax was a tax on service and that it was not a tax on the service providers. The basic contention of the appellant was that the State Legislature alone has an absolute jurisdiction and legislative competence to levy service tax. It was submitted that service tax was a tax on profession. It was submitted that service tax fell within the ambit of Entry 60 of List II. It was submitted that the word profession in the said Entry was not limited by any restriction/qualification and, therefore, it must be read with the widest possible sense. It was submitted that the word \023profession\024 has been defined in Black\022s Law dictionary to mean a vocation requiring advance education and training. It was submitted that the word \023profession\024 has been defined in the English dictionary by Collins to mean an \023occupation\024 requiring special training in the liberal arts or sciences, especially one of the three learned professions, law, theology, or medicine. It was contended on behalf of the appellants that there was no difference between tax on profession and tax on services. According to the learned counsel, the word \021profession\022 in Entry 60 List II was synonymous with the word \021service\022 and, therefore, tax on profession would include tax on service, which tax could be levied only by

the State Legislature. It was submitted that there cannot be a profession without service. It was submitted that service rendered by a chartered accountant/cost accountant to his client is the service rendered as a professional. It was urged on behalf of the appellant that it was not the case of the appellant that services cannot be taxed. The only argument advanced on behalf of the appellant was that the tax on profession was the State Entry and, therefore, Entry 97 of List I cannot be invoked and that Parliament had no legislative competence to levy service tax. It was submitted that under the Finance Acts, taxability was limited to rendition of professional services and, therefore, tax on profession under Entry 60 of List II would include tax on service. In short, according to the learned counsel, the word \021profession\022 in Entry 60 of List II was nothing but service and, therefore, levy of service tax came within the competence of State Legislature alone. Placing reliance on Article 276(1), learned counsel on behalf of the appellants submitted that the words used in Article 276(1), namely, no law of the State Legislature relating to taxes in respect of professions, callings etc. were words of widest amplitudes and, therefore, the word \023profession\024 would cover every aspect connected with it; that the word \023service\024 was not an aspect of the word \023profession\024 it was in fact synonymous to each other; that they were inseparable and, therefore, tax on services could be levied only by State Legislature. Learned counsel urged that the expression \023relating to\024 and the expression \023in respect of\024 are the two expressions which have linkage to levy of taxes on profession, calling etc. and to the words profession, trade, calling etc. in Article 276(1) and, therefore, if the aforestated two expressions are read in their proper context, they indicate the intention of the Constitution framers in incorporating taxes on profession under a separate Legislative Head. According to the learned counsel, therefore, this Court must give a wide interpretation to the words taxes on professions, trades, callings etc. Learned counsel submitted that the words in respect of professions, trades, callings etc. in Article 276(1) indicate amplitude and the wide field open to the State Legislature to make laws imposing taxes on professions, trades, callings etc.. It was urged that the above two expressions, namely, \021relating to\022 and \021in respect of \021 are known in law as words of widest amplitude and if the significance of the said two expressions is kept in mind, then it becomes clear that the Constitution framers intended the State Legislature alone to be competent to impose taxes on professions, trades, callings and employments and that they did not intend to give such a power to Parliament. Learned counsel submitted that if due weightage is given to the aforestated two expressions then the word \021profession\022 in Article 276(1) and Entry 60 of List II would cover every aspect of the concept of professions, trades, callings and employments. It was submitted that profession cannot exist without service as service is the core of profession. Learned counsel submitted that if the above two expressions in Article 276(1) are given due weightage then there would be no difference between the words \023profession\024 and \023service\024; that these two words would be interchangeable and if used interchangeably, it is clear that the State Legislature alone has the absolute competence to levy tax on services as there was no difference between the two words, namely, \023service\024 and \023profession\024. Reliance was also placed on Article 276(3) in support of the contention that the Constitution itself had made a dichotomy between taxes on professions, trades, callings and employments on one hand and taxes on incomes arising out of professions, trades, callings and employments on the other and that the said dichotomy between tax on profession (service) vis-a-vis the tax on income arising out of professions, trades, callings etc. itself indicates that a separate field is demarcated for Parliament to enact laws imposing tax on incomes arising out of professions and, at the same time, the State Legislature alone shall have the competence to impose tax on professions, trades, callings etc.

16. Shri V. Shekhar, learned senior counsel for the Department, placing reliance on judgments impugned of various High Courts, submitted that \023service tax\024 was a tax on activities undertaken for consideration; that it was a tax on services and not on the service-provider; that the tax on profession was essentially a tax on the professional and, therefore, Parliament had the legislative competence to levy service tax under Entry 97 of List I. It was

further submitted that with the Constitution (Eighty-eighth Amendment) Act, 2003 by which Entry 92C is inserted, the controversy is closed and, therefore, there is no question of going behind the said entry which has accepted the validity of the impugned judgments by Constitutional Amendments.

Findings:

(i) Meaning of \023Service Tax\024:

17. As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of Service Industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of Finance Act, 1994, the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268A in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92C was also introduced in the Union List for the levy of service tax. As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003. Further, it is important to note, that \023service tax\024 is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client.

18. In Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad 1995(76) E.L.T.241(SC) we get a clue of an important principle, namely, \023principle of equivalence\024. In that judgment, this Court was required to explain the words \023excisable goods\024 and \023produced or manufactured\024. It was held by this Court that the expression \023excisable goods\024 has been defined in Section 2 of the Central Excise Act, 1944 to mean goods specified in the Schedule. It was held that the object for having a schedule in the Act was to fix rates under different entries including residuary entry. At this stage, we may say that the object of the Finance Act is also to fix rates of duty under different entries. However, the question which arose before this Court in Moti Laminates (supra) was the meaning of the word \023goods\024 in Central Excise Act, 1944. This Court noticed that Section 3 of the 1944 Act levied duty on all excisable goods mentioned in the schedule provided they are produced and manufactured, therefore, this Court laid down the test that where goods are specified in the schedule they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the assessee. This Court further explained that the expression \023produced or manufactured\024 would mean that the goods produced must satisfy the test of saleability/marketability. The reason being that the duty under the 1944 Act is on manufacture/production but the manufacture/production is intended for taking such goods to the market for sale. It was observed that the obvious reason for levying excise duty linked with production or manufacture is that the goods so produced must be a distinct commodity known in the market. We quote hereinbelow para 7 of the said judgment, which is as follows:

\023The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be useable, moveable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise

duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling. Since the solution that was produced could not be used as such without any further processing or application of heat or pressure, it could not be considered as goods on which any excise duty could be levied.\024

Therefore, even if an item is manufactured or produced, it will not fall in the concept of goods till the test of marketability is satisfied. In the case of Moti Laminates (supra) the \021solution\022 was an intermediate product produced in the course of manufacture of laminated sheets. It had a short shelf life. It was not marketable, therefore, this Court took the view that the solution was not \023goods\024 and, therefore, not dutiable.

19. The importance of the above judgment of this Court is twofold. 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 Finance Act, 1994. To give an illustration, an Event Manager (professional) undertakes an activity, namely, of organizing shows. He belongs to the profession of Event Manager. 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 organizing shows for consideration which provide entertainment to the connoisseurs. For each show he plans and creates 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 manufacture 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 on-line information and database provided by web sites. But no service tax is leviable on E-commerce as there is no Database Access.

20. 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.

(ii) Object of enacting the Finance Act:

21. 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 \023income\024 under the Income Tax Act (\023IT Act\024) 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.

22. In the case of The Madurai District Central Co-operative Bank Ltd. v. The Third Income Tax Officer, Madurai reported in AIR 1975 SC 2016 this Court held that the IT 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 IT Act, 1961 was a permanent Act while Finance Acts are passed every year to prescribe the rates at which the tax has been charged under the IT 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 IT Act, 1961 can be made \023income\024 by a Finance Act. Similarly an exemption granted by the IT 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 Finance Act, may do what the amendment to the IT 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 Finance Act for the purposes of the Union.

23. The aforestated judgment was in the context of the IT 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.

(iii) Interpretation of Taxing Entries in the Seventh Schedule to the Constitution:

24. Constitutional law, like taxing law, essentially concerns concepts and principles.

25. In the present case, it has been vehemently urged on behalf of the appellant that legislative Entries in the Seventh Schedule are legislative heads/fields and, therefore, they should be given widest interpretation. There is no dispute regarding the said proposition. However, there are two groups of entries in each of the three Lists in the Seventh Schedule. In List I, Entries 1 to 81 refer to several matters over which Parliament has authority to legislate. But Entries 82 to 92 enumerates the taxes which could be imposed by a law of Parliament. An examination of these two groups of entries shows that while the main subject of legislation finds place in the first group, a tax in relation thereto is separately mentioned in the second group. For example, Entry 22 in List I refers to \023Railways\024 whereas Entry 89 refers to \023Terminal taxes on goods or passengers, carried by railway\024. If Entry 22 is construed as involving taxes to be imposed, then Entry 89 would be superfluous. Similarly, Entry 41 of List I refers to \023Trade and commerce with foreign countries; import and export across customs frontiers\024, however, Entry 83 refers to \023Duties of customs including export duties\024. If Entry 41 of List I, which refers to trade and commerce with foreign countries and which refers to import and export, is to be interpreted as including duties of customs under that Entry, then Entry 83 would be rendered superfluous. Similarly, Entries 43 and 44 of List I relate to incorporation, regulation and winding up of corporations whereas Entry 85 provides for \023Corporation tax\024. If Entries 43 and 44 are to cover taxes then Entry 85 would be rendered superfluous.

26. Turning to List II, Entries 1 to 44 form one group mentioning the \023subjects\024 on which States could legislate. Entries 45 to 63 in that List form another group, and they deal in with taxes. At the relevant time, Entry 18 referred to \023Lands\024 whereas Entry 45 referred to \023Land Revenue\024. If land revenue was to fall under Entry 18 then Entry 45 would be rendered superfluous. The above analysis is not exhaustive. However, the above analysis shows that taxation is not intended to be compromised in the main

subject in which an extended construction can be given as that test cannot be applied to taxation. Taxing entries are distinct entries. This distinction between the abovementioned two groups of entries is also manifest in the language of Article 248 clauses (1) and (2) as also in the language of Entry 97 in List I of the Seventh Schedule to the Constitution. [See M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh and anr. AIR1958SC468 para 51]

27. The above distinction between the group of general entries and the group of taxing entries to the Lists in the Seventh Schedule has also been highlighted in the case of Southern Pharmaceuticals & Chemicals v. State of Kerala reported in (1981) 4 SCC 391 in which this Court took the view that enactment of the Medicinal Act, 1955 by Parliament under Entry 84 List I does not prevent the State Legislature from making a law under Entry 8 List II as Entry 8 was a general entry whereas Entry 84 List I was a taxing entry. This distinction has been brought to light in another judgment of this Court to which one of us, Kapadia, J., was a party in the case of State of Bihar and ors. v. Shree Baidyanath Ayurved Bhawan (P) Ltd. and ors. reported in (2005) 2 SCC 762 (para 28), which is quoted hereinbelow:

\02328. Before concluding, we may point out that in the case of Southern Pharmaceuticals & Chemicals, Trichur and Ors. v. State of Kerala and Ors. (1981) 4 SCC 391 this Court has taken the view, which we have taken hereinabove. In that case, this Court held, that, by enactment of Medicinal Act, 1955 by Parliament under Entry 84 List-I of the Seventh Schedule of the Constitution or by the framing of rules by the Central Government thereunder for recovery of excise duty on manufacture of medicinal and toilet preparations containing alcohol, a State Legislature is not prevented from making a law under Entry 8 List II with respect to intoxicating liquor or a law under Entry 51 List II levying excise duties on alcoholic liquors for human consumption. In that case it was held that the Abkari Act of Kerala is relatable to the State's power to make a law under Entry 8 and Entry 51 List II of the Seventh Schedule to the Constitution. There is a difference between the word "on" and the expression "with respect to". When we refer to levy on excise duty under Entry 84 List I, we emphasize the word "on". On the other hand, when we refer to Entry 8 List II, which is a general entry, relating to "intoxicating liquor", we refer to a wider activity. The words "in respect of or the words "with respect to" used in the aforestated judgment in the context of Entry 8 List II bring out the above difference. Entry 8 List-II is an entry on general subject unlike Entry 84 List-II which deals with taxation. Keeping in mind the difference between the two, we hold that the State law under Entry 8 List-II covers a wider field of use, consumption, possession, diversion etc. vis-a-vis Entry 84 List I, which deals with duty on manufacture of medicinal preparation, as such. This difference is lost sight of by the High Court in the impugned judgment.\024

(emphasis supplied)

28. 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 \023Taxes on professions, trades, callings and employments\024. 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, \023professions\024 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 \021profession\022 or \021professional\022 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 \023in relation to\024 and the words \023with respect to\024 are no doubt words of wide amplitude but one has to keep in mind the context in which they are used.

(iv) Meaning of the words Taxes \021on\022 professions:

29. 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 professional 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 \023services\024. The activity undertaken by the chartered accountant or cost accountant is similar to a saleable or marketable commodities produced by the assessee and cleared by the assessee for home consumption under the Central Excise Act. For each contract, tax is levied under the Finance Acts, 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 \023Tax on employments\024. In one case, the question arose whether Parliament was entitled to impose income tax on pension under Entry 82 of List I. The controversy was that \023pension\024 is a retiral benefit. It was argued that pension was an incident of \023employment\024 and, therefore, Parliament had no legislative competence to impose income tax under Entry 82 of List I and that the State Legislature alone had absolute jurisdiction to make a law imposing tax on pension. This argument was rejected on the ground that Entry 60 of List II refers to \023Tax on employments\024, as such. So long as a person is in the employment, he does not earn pension. He earns pension only on retirement. On retirement, he ceases to be in the employment, therefore, on retirement the receipt of pension constitutes \023income\024 in the hands of the pensioner and, therefore, Parliament had legislative competence to enact Income Tax Act, 1961 under which pension was taxable as income. This example demonstrates the meaning of the word \023Taxes on professions, callings, trades and employments\024. It also indicates two aspects of the same item, namely, pension. One aspect falls in the category of \023employment\024, the other falls in the category of \023income\024. Therefore, there is no merit in the contention advanced on behalf of the appellant that the widest possible interpretation should be given to the word \023profession\024 in Entry 60 List II. We have to keep in mind while interpreting

the Entries in the three Lists the distinction between the general entry and the taxing entry.

30. In the case of Western India Theatres Ltd. v. Cantonment Board reported in 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 (\023GOI Act, 1935\024) read with Entry 50 in Schedule VII, the Provincial Legislature had power to make law with respect to \023Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling\024. 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 authorize imposition of tax on assessees/persons who provide entertainments or amusements. According to the appellant, Western India Theatres 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 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 Cantonment 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. It was further observed that a lawyer has to pay tax to take out a licence irrespective of whether he actually practices or not. That tax is a tax for the privilege of having the right to exercises the profession if and when the person taking out the license 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 occasions. The tax on privilege to practice 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.

(v) Significance of Article 276:

31. Learned counsel for the appellants in support of his argument that the words \021professions\022 and \021services\022 are synonymous for the purposes of deciding the question of legislative competence of the State Legislature under Entry 60 List II, placed heavy reliance on Article 276, which has been quoted hereinabove.

32. Article 276 corresponds to Section 142A of the GOI Act, 1935. However, under a large number of laws enacted before the 1935 Act came into force, power was conferred on local Governments and local authorities to impose taxes on certain activities which broadly came under the Heads \023Taxes on professions, trades etc.\024 on one hand and \023Taxes on income\024 on the other hand. This resulted in the enactment of Section 142A by British Parliament, which saved the power conferred by pre-existing laws to impose tax on professions, callings etc. but limited the amount payable to a specified amount. At that time, it was Rs. 50.00, which was the tax payable on profession. That was in 1935. Article 276 was, therefore, preceded by Section 142A of the GOI Act, 1935. The limit has been subsequently enhanced. The States\022 power to tax professions etc. is founded on Entry 60 of List II and the purpose of Article 276 is not to amend that power but to provide that such tax on professions, trades etc. shall not be invalidated on the ground that it relates to a tax on income. Once the State seeks to exercises its power under Entry 60 List II, it has to comply with the provisions of Article 276. Where, however, the exercise of power by the State overlaps with its power under some other Entry, then the limitation under Article 276(2) shall have no relevance. Thus, Article 276 will not apply to levy of tax on \023circumstances and property\024 which is referable to Entry 49 and Entry 60 of List II and amongst other Items to Entry 58, taxes on cinematograph shows, taxes on entry of goods. A tax on profession can be imposed if a person carries out a profession whereas a tax on income can be imposed only if there is income. Therefore, a tax on profession is irrespective of the question of income. Article 276 enables the State Legislature to make laws for imposition of taxes on profession, for the benefit of the State, Municipality, District Board etc. by stating that such law shall not be invalid on the ground that it relates to a tax on income. There is a distinction between a tax on professions, trades, callings and employments and a tax on income arising out of such professions, trades etc.. In the former case, it will have to be paid by any person practising that trade, profession etc., whether he derives any income from it or not. This is where the above example of pensioner becomes relevant. A pensioner does not carry out any profession, trade, business or calling. A tax on profession is not a tax on employment. At the time, the tax is levied, the pensioner is not in employment, but he receives an amount of pension that receipt constitutes his income though it might be for past services from an employment.

33. As stated above, every Entry in the Lists has to be given a schematic interpretation. As stated above, Constitutional law is about concepts and principles. Some of these principles have evolved out of judicial decisions. The said test is also applicable to taxation laws. That is the reason why the Entries in the Lists have been divided into two Groups, one dealing with general subjects and other dealing with taxation. The entries dealing with taxation are distinct entries vis-‘-vis the general entries. It is for this reason that the doctrine of pith and substance has an important role to play while deciding the scope of each of the entries in the three Lists in the Seventh Schedule to the Constitution. This doctrine of pith and substance flows from the words in Article 246(1), quoted above, namely, \023with respect to any of the matters enumerated in List I\024. The bottom line of the said doctrine is to look at the legislation as a whole and if it has a substantial connection with the Entry, the matter may be taken to be legislation on the topic. That is why due weightage should be given to the words \023with respect to\024 in Article 246 as it brings in the doctrine of \023pith and substance\024 for understanding the scope of legislative powers. Competence to legislate flows from Articles 245, 246 and the other Articles in Part XI. A legislation like Finance Act can be supported on the basis of a number of Entries. In the present case, we are concerned with the Constitutional status of the levy, namely, service tax. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of Parliament and State Legislatures are subject to Constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in

the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two Groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to taxes on professions, trades, callings etc. Therefore, Entry 60 of List II and Entry 92C/97 of List I operate in different spheres.

(vi) Discussions of Judgments cited on behalf of the appellants:

34. In the case of Godfrey Phillips India Ltd. and anr. V. State of U.P. and ors. reported in (2005) 2 SCC 515 the assessees/appellants, who were either manufacturers, dealers or sellers of tobacco, had challenged the levy of luxury tax on tobacco and tobacco products by treating them as \023luxuries\024 within the meaning of the word in Entry 62 of List II of the Seventh Schedule to the Constitution of India. Uttar Pradesh Tax on Luxuries Act, 1995 and certain other State enactments imposed luxury tax on tobacco by treating it as \023luxury\024 within the meaning of the word in Entry 62 of List II. It was held by the Constitution Bench of this Court that the word \023luxuries\024 in Entry 62, List II refers to activities of enjoyment, indulgence or pleasure and since none of the impugned enactments had sought to tax any activity and since the impugned enactments sought to tax \023goods\024 as luxuries it was held that the said U.P. Tax on Luxuries Act, 1995, Andhra Pradesh Tax on Luxuries Act, 1987 and West Bengal Luxury Tax Act, 1994 were beyond the legislative competence of the State Legislature. In this connection, it was observed, vide para 57, by the Constitution Bench of this Court that a tax on a thing or goods can only be with reference to a taxable event but there is a distinction between such a tax and a tax on the taxable event. In the first case, the subject-matter of tax is the goods and the taxable event is within the incidence of the tax on the goods. In the second case, the taxable event is the subject-matter of tax itself. In our view, para 57 supports the reasoning given by us hereinabove. As stated above, service tax is a value added tax. Value addition is on account of the activity like planning, consultation, advising etc.. It is an activity, which provides value addition as in the case of manufacturer of goods, which attracts service tax. In the present case, tax falls on the activity which is the subject-matter of service tax. In other words, we are substituting the word \023service\024 in place of \023goods\024 by applying the principle of equivalence. Under the Act, the Taxable Event is each exercise undertaken by the service-provider in giving advice on tax planning, auditing, costing etc.. It is the said principle of equivalence which equates \023service tax\024 to the Central Excise Duty, one taxes the provision of services and other production of goods. See para 2.14 of the recommendations made by Tax Reforms Committee headed by Dr. Chelliah which has stated that from the economic point of view, there is little difference between the taxation of commodities and taxation of services.

35. In the case of International Tourist Corporation and ors. v. State of Haryana and ors. reported in (1981) 2 SCC 318 the appellants were transport operators. The State of Haryana levied a tax on passengers and goods under the Haryana Passengers and Goods Taxation Act, 1952. The appellants questioned the vires of Section 3(3) insofar as the levy of tax on passengers and goods carrying by their vehicles plying along the National Highway. It was urged on behalf of the appellants that there was nothing in the Constitution to prevent Parliament from combining its power to legislate with respect to any matters enumerated in Entries 1 to 96 of List I with its power to legislate under Entry 97 of List I and, if so, then the power to legislate with respect to tax on passengers and goods carried on National Highway was within the exclusive legislative competence of Parliament and, therefore, Section 3(3) of Haryana Passengers and Goods Taxation Act, 1952 was beyond the legislative competence of the State Legislature. This argument was rejected by the Division Bench of this Court, which took the view that before exclusive legislative competence can be claimed for Parliament by resort to Entry 97 List I, the legislative competence of the State Legislature must be established. Entry 97 itself was specific. In that, a

matter can be brought under that Entry only if it is not enumerated in Lists II or III, and in the case of a tax, if it is not mentioned in either of those Lists. We do not dispute the above proposition. That proposition is well settled. This Court is concerned with the application of the said principle in this case. In the present matter, as stated hereinabove, the State Legislature is empowered to levy tax on professions, trades, callings etc., as such and, therefore, the word \023services\024 cannot be read as synonymous to the word \023profession\024 in entry 60. Therefore, tax on services do not fall under Entry 60 List II. That, service tax would fall under Entry 92C/Entry 97 of List I.

36. In the case of Sodan Singh and ors. v. New Delhi Municipal Committee and ors. reported in (1989) 4 SCC 155 the appellants claimed a right to engage in trading business on the pavements of Delhi city. In that context, it was held by the Constitution bench of this Court that, the guarantee under Article 19(1)(g) extends to practise any profession, or to carry on any occupation, trade or business. In that case, the word \023profession\024 had been defined to mean an occupation carried on by virtue of specialized qualifications, personal qualifications, training or skill. We do not find any relevance of this judgment to the present case. As stated above, we are concerned with interpretation of legislative heads under the three Lists in the Seventh Schedule to the Constitution. As stated above, we have to go by the schematic interpretation of those entries. Moreover, we are concerned with a distinct taxing entries and not general entries. Hence, the judgment in the case of Sodan Singh (supra) has no application to the present case.

37. In the case of Tamil Nadu Kalyana Mandapam Assn. v. Union of India and ors. reported in (2004) 5 SCC 632 the Division Bench of this Court held that service tax is an indirect tax and is to be paid on all the services notified by the Government of India. It has been further held that the said tax is on \023service\024 and not on the service-provider. In paragraph 58 it has been observed that under Article 246(1) of the Constitution, Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (State List). In the said judgment, it has been held that service tax is made by Parliament under Entry 97 of List I. In our view, therefore, the point in issue in the present case is squarely covered by the judgment of this Court in the case of Tamil Nadu Kalyana Mandapam (supra). Of course, in the present case, we are not concerned with the services rendered by a Mandap-keeper, who performs what is called as property based services. In this case, we are concerned with performance based services. However, both the categories fall within the ambit of the word \021services\022.

38. In the case of Gujarat Ambuja Cements Ltd. and anr. v. Union of India and anr. reported in (2005) 4 SCC 214 it was held that service tax is not a tax on goods or on passengers but it was on the transportation itself and, therefore, it falls under residuary power of Parliament under Entry 97 of the Seventh Schedule to the Constitution. It was further held that service tax is not a levy on passengers or goods but on the event of service in connection with the carriage of goods and, therefore, it was not possible to hold that the Act was in pith and substance within the State\022s exclusive powers under Entry 56 of List II. It was held that service tax came within Entry 97 of List I. In the present case, as stated above, we are concerned with Entry 60 of List II. As stated above, service tax is on performance based services itself. It is on professional advice, tax planning, auditing, costing etc.. On each of the exercise undertaken tax becomes payable. Therefore, the above judgment has no application.

39. In the case of Bharat Sanchar Nigam Ltd. and anr. v. Union of India and ors. reported in (2006) 3 SCC 1 the question which arose for determination before this Court was whether a telephone service (mobile or fixed) would attract liability to service tax. It was held that in order to attract the liability under the service tax there has to exist what is called as \023goods\024. Since goods in question consisted of electromagnetic waves or radio

frequencies, which carries voice, messages or other data, a telephone service was nothing but a service. We are not concerned with such a controversy in the present case. In the present case, we are concerned with the legislative competence of Parliament to legislate in respect of service tax under Entry 97/92C of List I. In the present case, we are concerned with the period covered by the Finance Acts of 1994 and 1998. However, learned counsel for the appellants has relied upon para 82 of the said judgment in the case of Bharat Sanchar Nigam Ltd. (supra) in which it is observed that the residuary powers of Parliament under Entry 97 of List I cannot swamp away the legislative Entries in the State List. Entry 54, List II read with Article 366(29-A), therefore, cannot be whittle down by referring to the residuary provision. As stated above, we are concerned with the application of the above principles. In the present case, as stated above, we are concerned with the Constitutional status of the levy. As stated above, we have to examine the nature of the levy. We have done so and we have come to the conclusion that the word profession in Entry 60 List II cannot be made synonymous with the word service and, therefore, service tax would fall under the residuary Entry 97 read with Entry 92C after 2003. This position is also made clear by Article 268A, inserted by the Constitution (Eighty-eighth Amendment) Act, 2003.

40. Lastly, in our view, the judgment of this Court in the case of R.R. Engineering Co. v. Zila Parishad, Bareilly and anr. reported in (1980) 3 SCC 330 has no application to the facts of the present case. In that case this Court observed that there was a basic distinction between a tax on \023income\024 and a tax on \023circumstances and property\024. If there is no income, there can be no income tax. In contrast, in the case of a tax on \023circumstances and property\024 there can be a tax on the total turn-over of the assessee from his trade or calling or on his having an interest in the property. It was held that whereas Entry 49 of List II relates to taxes on lands and buildings, Entry 60 relates to taxes on professions and, therefore, the true nature of the tax in that case was not a tax on income but it was a tax referable to Entry 49 and Entry 60 of List II. It was held that the impugned tax was a composite tax, one of its components being the \023circumstance\024, namely, the financial position of the assessee. It may be clarified that in the case of R.R. Engineering Co. (supra) the validity of the levy was under challenge and that levy constituted what is called a composite tax. We do not see any relevance of the judgment in the case of R.R. Engineering Co. (supra) to the facts of the present case. In the present case, we are not concerned with a composite tax. Hence, the judgment of this Court in the case of R.R. Engineering Co. (supra) has no relevance to the facts of the present case.

Conclusion:

41. For the above reasons, we find no merit in Civil Appeal No. 7128 of 2001 filed by All India Federation of Tax Practitioners and ors.. We hold 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 on chartered accountants, cost accountants and architects. We further hold that the above position now stands fortified by the Constitution (Eighty-eighth Amendment) Act, 2003 which has inserted Article 268A and Entry 92C which clearly indicates that Entry 60 of List II and Entry 92C of List I operate in different spheres. However, we make it clear that before us there is no challenge to the Constitutional validity of the said Constitution (Eighty-eighth Amendment) Act, 2003.

42. Accordingly, the civil appeal is dismissed with no order as to costs.