Express Hotels P. Ltd.

Vs

State of Gujarat and Another. (with writ petitions)

Civil Appeals Nos. 338 and 339 of 1981 with Writ Petitions Nos. 7990, 8338-39 and 9119 of 1981, 1271, 1272 and 162 of 1982 and 5321 of 1985

(S. Natarajan, S. Ranganathan, Sabyasachi Mukharji, M. N. Vankatachaliah JJ)

02.05.1989

JUDGMENT

VENKATACHALIAH J. –

1. In these civil appeals and writ petitions, the constitutional validity of legislations of different States, viz., the State of Gujarat, Stste of Tamil Nadu, the State of Karnataka and the State of West Bengal, imposing a tax on "luxuries" under entry 62 of List II of the Seventh Schedule to the Constitution of India is challenged.

Civil Appeals Nos. 338 and 339 of 1981 and Writ Petitions Nos. 7990, 9119, 8338, 8339 of 1981 relate to the challenge to the legislation by the State of Gujarat, viz., the Gujarat Tax on Luxuries (Hotels and Lodging Houses) Act, 1977. Write petition No. 162 of 1982 pertians to the corresponding legislation of the State of Tamil Nadu, viz., the Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Act, 1981. Writ Petitions Nos. 1271 and 1272 of 1982 pertain to the challenge to the corresponding Karnataka legislation, viz., the Karnataka Tax on Luxuries (Hotels and Lodging Houses) Act, 1979. Writ Petition No. 5321 of 1985 pertains to the challenge to the West Bengal Entertainments and Luxuries (Hotels and Restaurants) Tax Act, 1972. All these taxing statues, except for certain aspects individual to them, are analogous and the scheme of the legislation is substantially similar. The variations are in the differences in the criteria of classification of the hotels to which the Act is applied and the rates of taxes. The grounds of challenge are substantially the same. An examination of the contention urged in support of the challenge to one statute would cover the cases of the other statutes as well.

We might take up for consideration, the provisions of the Gujarat Act which may be considered as representative of the legislations on the topic. The constitutional validity of the Gujarat Act had been assailed before the High Court of Gujarat which, by its judgment dated July 23, 1980, upheld its constitutional validity. The judgment of the High Court is under appeal in C. A. Nos. 338 and 339 of 1981.

The Statement of Objects and Reasons in the Gujarat Legislative Bill states :

> "With a view to augmenting the financial resources of the State, it is proposed to levy a tax on luxury provided in hotels and lodging charges recovered by the proprietors of such hotels and lodging houses from persons lodging therein. Every accommodation provided in a hotel or lodging house the charges for which are not less than rupees thirty-five per day per person is, for the purposes of the tax, to be

treated as a luxury. This bill seeks to achieve that object."

Section 2 is the interpretation clause and defines, inter alia, the expressions "charges for lodging", "hotel", "luxury provided in hotel", "proprietor", occurring in clauses (a), (d), (e) and (g), respectively. The definitions are as follows :

> "(a) 'charges for lodging' include charges for air-conditioning, telephone, television, radio, music and extra beds and the like but do not include any charges for food, drink or other amenities.
>
> (d) 'hotel means a building or part, of a building where lodging accommodation, with or without board is, by way of business, provided for a monetary consideration, and includes a lodging houses;"
>
> (e) 'luxury provided in a hotel' means accommodation for lodging provided in a hotel, the rate of charges for which (including charges for air-conditioning, telephone, television, radio, music, or extra beds and the like but excluding charges for food, drink, and other amenities) is not less than thirty-five rupees per person per day;"

Section 3 is the charging section which provides :

> "3. (1) Subject to the provisions of this Act, with effect on and from the date on which this Act comes into force, there shall be levied and collected from every person a tax (to be known as 'luxury tax') in respect of any luxury provided to him in a hotel, at the following rates, namely :-
>
> #(a) Where the charges for 10 per cent. of such charges.lodging are thirty five-rupees or more but notmore than fifty rupeesper day per person.(b) Where the charges for Rs. 5 plus 20 per cent. of suchlodging are more than fifty charges in excess of Rs. 50 perrupees but not more person per daythan one hundred rupeesper day per person(c) Where the charges for Rs. 15 plus 30 per cent. of suchlodging are more than one charges in excess of Rs. 100 perhundred rupees per day per person per day :person##

Provided that where charges for lodging are levied otherwise than on daily basis or per person, then, for the purpose of determining the tax liability of any person, under this section, the charges shall be computed as for a day and per person, based on the period of lodging for which charges are payable and the number of persons actually lodging or permitted to lodge according to the rule or custom of the hotel :

> Provided further that where any charges for lodging are paid by any person other than a citizen of India in any foreign exchange, then such person or where such charge are paid by any person or class of persons at the State Government may, by order, direct such as foreigners staying as guests in India of any Government or of any corporation or company owned or controlled by Government, or such other person as in the opinion of the State Government it is expedient in the public interest to exempt, then such person or persons shall be exempt from the payment of the tax.
>
> (2) Where luxury is provided in a hotel to representatives or employers of any company and charges for such luxury are to be borne by the company, there shall be

levied and collected the tax from such company.

Explanation. - In this sub-section 'company' means any body corporate and includes a firm or other association of persons.

(3) The tax payable under this section shall be collected by the proprietor and be paid into a Government treasury within the time and in the manner provided in the Act.

(4) In computing the amount of tax payable under this section, the amount shall, if it is not a multiple of five paise, be increased to the next higher multiple of five paise."

Section 4 provides for the mode of collecting of tax. It provides :

"4. (1) Where the rate of charges for luxury provided in a hotel is inclusive of the charges for food or drink or other amenities, if any (being amenities referred to in clauses (e) of section (2), then the Collector may, from time to time, after giving the proprietor an opportunity of being heard, fix separate rates of charges for such luxury and for food or drink or other amenities, if any, being amenities referred to in clause (e) of section 2 for the purpose of calculating the under this Act.

(2) Where, in addition to the charges for luxury provided in a hotel, service charges are levied and appropriated to the proprietor and not paid to the staff, then, such charges shall be deemed to be part of the charges for luxury provided in the hotel.

(3) Where luxury provided in a hotel to any person (not being an employee of the hotel) is not charged at all, or is charged at a concessional rate, then also there shall be levied and collected the tax on such luxury, as if fully charges for such luxury were paid to the proprietor of the hotel.

(4) Where luxury provided in a hotel for a specified number of persons is shared by more than the number specified, then, in addition to the tax paid for luxury provided to the specified number of persons, there shall be levied and collected separately, the tax in respect of the charge made for the extra persons accommodated.

(5) Where any proprietor fails for or neglects to collect the tax payable under this Act, the tax shall be paid by the proprietor as if the tax was recovered by the proprietor from the person to whom the luxury was provided and who was accordingly liable to pay the same."

Section 5, 6, 7, 8, 9, and 10, respectively, refer to the returns to be filed by every proprietor liable to pay tax under the Act; the assessment and collection of tax; the imposition of penalty; the payment of tax and penalty; appeals and revision.

Sections 13 and 14 speak of offences and offences by companies. Section 15 pertains to the compounding of offences. Section 17 confers power of inspection of accounts and documents and of search and seizure. Section 21 confers the power to make rules.

The Gujarat Act seeks to levy a tax at certain percentages of the lodging charges recovered by the proprietors of the hotels and lodging houses from persons lodging therein treating the lodging accommodation for which charges of Rs. 35 or more per day per person as a taxable luxury. The

scheme of the West Bengal Act is slightly different in regard to the scope of the charge to be given effect to under that "Act". The levy there is not confined to the lodging charges recovered from persons lodging in the hotels, but on the basis of the provision for luxury and not, as in the case of the other legislation, as the lodging charges actually paid by the lodgers. Section 4 of the West Bengal Act provides;

> "4. Liability for luxury tax. - There shall be charged, levied and paid to the State Government a luxury tax by the proprietor of every hotel and restaurant in which there is provision for luxury and such tax shall be calculated -
>
> (a) in the case of a restaurant at the rate of an annual sum of rupees three hundred for every ten square metres or part thereof in respect of so much of the floor area of the restaurant which is provided with luxury, and
>
> (b) in the case of a hotel at such rate not exceeding fifteen per centum on the charges of a room provided with luxury as may be notified by the State Government in the Official Gazette."

One of the contention which is peculiar to the West Bengal Act is that the impost on the mere possibility of enjoyment of a "luxury" cannot be taxed.

We have heard Shri Soli J. Sorabjee, Senior Advocate, Shri R. F. Nariman, Shri Harish Salve, Advocates, for the petitioners and Shri P. S. Poti and Shri Shah, learned Section Advocates, for the respondents.

On the contentions urged at the hearing in support of the challenge, the following points arise for consideration :

> (a) The taxation - entry 62 of List II providing for taxes on "luxuries" contemplates, and taxes within its sweep, a tax on goods and articles in their aspect and character as luxuries and does not included "services" or "activities". The levy on the services for lodging provided at the hotels, is, therefore, beyond the scope of entry 62 List II.
>
> (b) Section 4 of the West Bengal Act which envisages a tax on the mere existence of the means of providing the luxury - independently of its utilisation - is outside entry 62 List II.
>
> (c) The real criterion distinguishing "luxury" is the special attribute or quality of the commodity of the services, as the case may be, and not the price-factor simpliciter. The essential distinguishing attribute is a qualitative one. Distinction based purely on the quantitative difference in the price is not a rational criterion to identify "luxury". The impost based on the mere criterion of price which has no relation to the concept of luxuries, is ultra vires the State power under entry 62 List II.
>
> (d) The scheme of the Act in so far as it makes the price and not quality, the sole basis for indentification of the subject of the tax, makes no distinction between the components of the services which include both necessities and comforts, as distinguishable, from "luxuries". Levy on such composite subject-matter is bad.
>
> (e) The expression "and the like" in the definition of "charges for lodging" in section

2 (a) is vague and irrational and read with the Explanation, which renders the decision of the State Government, on what constitutes "lodging charges" final, is an unreasonable restriction, violative of article 19(1)(g).

(f) Section 4(3) which provides that tax in respect of accommodation provided free or at concessional rates be taxed as if the full charges were deemed to have been received, is unreasonable and offends article 19(1)(g).

(g) The "luxury" tax imposed on the charges for lodgings has the direct and immediate effect of restriction the freedom under article 301 of the Constitution as it directly, impedes the right of "intercourse" throughout the territories of India.

Re : Contention (a) : The arguments of learned counsel on the first three contentions require to be considered together as these contentions themselves have certain overlapping areas amongst them. Basically, the question is as to what constitutes "luxuries" as the subject of a tax under entry 62, List II, and secondly, whether, providing of accommodation for lodging in hotels or lodging houses even if the accommodation could be said to be "luxuries" in a colloquial sense, could be the subject of a tax under entry 62 of List II. Shri Sorabjee contended that the concept of a tax on "luxuries" contemplates a tax on articles and goods, like jewellery, perfumes, liquors, tobacco, etc., in their character and attributes as articles of luxury. The idea, it is urged, does not include services or activities as falling within the concept of luxuries as a subject of taxation. The Gujarat High Court, dealing with this contention held that the contention, if accepted, would diminish the content of the entry and reduce its scope from "taxes on luxuries" to taxes on articles of "luxuries". Shri Sorabjee, however, submitted that the High Court was in error in its understanding of the import of the concept of "luxuries" in entry 62 as a subject of tax. Learned counsel also referred to the following observations of the High Court of Bombay in State of Bombay v. R. M. D. Chamarbaugwala, AIR 1956 BOM 1,11 :

"With regard to luxuries it is significant to note that the plural and not the singular is used, and the luxuries in respect of which a tax can be imposed under entry 62 is a tax on goods or articles which constitute luxuries, and it is again significant to note that the topic of luxuries, only, is to be found in entry 62 in the taxation power and not in either entry 33 or 34. That clearly shows that, what was contemplated was a tax on certain articles or goods constituting luxuries and not legislation controlling an activity which may not be a necessary activity but may be necessary and in that sense a luxury." emphasis supplied)

It is to be noticed that the decision of the Bombay High Court in which the above observation occurs was overruled by this court in State of Bombay v. R. M. D. Chamarbaugwala [1957] SCR 874. The impugned State legislation which the High Court had struck down was held to be a valid piece of legislation under entry 62, List II. In the light of the decision of this court in the case, the observations of the learned Chief Justice of the Bombay High Court excerpted are rendered inapposite. Indeed, a view similar to the one taken by the Bombay High Court as to the concept of "luxuries" in entry 62 of List II was taken by the Kerala High Court in A. S. Bava v. State of Kerala [1971] Tax LR 512. However, the views of the Bombay and Kerala High Court were referred to and dissented from by the Calcutta High Court.

In Spences Hotel P. Ltd. v. State of Bengal [1975] Tax LR 1890, 1892 (Cal), it is held :

> "In these premises, we are of opinion that 'luxuries' in entry 62 of List II should not be confined to articles or object of luxury alone. In view of the social and economic structure of our country, there can be no doubt that an air-conditioned space whether in a hotel or in a restaurant is a luxury by itself. People enter into these spaces for enjoyment of a luxury. In fact, the ambit, of entry 62 which includes taxes on entertainments, amusements, betting and gambling, shows that a tax levied under entry 62 cannot be rusticated to certain articles only but may also be extended to things incorporeal. The comfort that a person derives in a hot summer day in an air-conditioned space is a luxury particularly in the context of the conditions in which the masses live in India today. In our opinion, the State Legislature is competent to impose a tax on this luxury."

For reasons we shall state presently, we approve the view taken by the Calcutta High Court.

We are dealing with an entry in a Legislative List. The entries should not be read in a narrow or pedantic sense but must be given their fullest meaning and the widest amplitude and be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in them.

In Western India Theatres Ltd. v. Cantonment Board [1959] Supp. 2 SCR 63; AIR 1959 SC 582, this court was dealing with the scope of the power of the Provincial Legislature under section 100 of the Government of India Act, 1935, with respect to entry 50 in the Seventh Schedule of the said Act, to make laws with respect to "taxes on luxuries including taxes an entertainments, amusements, betting and gambling". The contention of the appellant in that case was that the entry authorised a law imposing taxes on person who received or enjoyed the luxuries, etc., and that no law made with respect to that entry could impose a tax on persons who provide the luxuries, entertainment or amusements. It was contended that those who provide the luxury, etc., did not themselves receive or enjoy the luxury or entertainment or amusement, but were simply carrying on their profession or trade and were not amenable to betaxed under that entry. Rejecting the argument, it was said (at p.585 of AIR 1959 SC) :

> "... In view of this well established rule of interpretation, there can be no reason to construe the words 'taxes on luxuries entertainments or amusements' in entry 50 as having a restricted meanings so as to confine the operation of the law to be made thereunder only to taxes on person receiving the luxuries, entertainments, or amusements. The entry contemplates luxuries, entertainments, and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to the tax..."

The concept of "luxuries" as a subject of tax was not confined to those who received or enjoyed the luxury. It could be also on those who provided it.

In the Encyclopaedia Britannica, the meaning of the word "luxury tax" is set out thus :

> "Luxury tax : A tax on commodities or services that are considered to be luxuries rather then necessities. Modern examples are taxes levied on the purchase or jewellery, perfume and tobacco."

In Webster's Comprehensive Dictionary, International Edition, the word "luxury" is defined :

> "Luxury : 1. A free indulgence in the pleasures that gratify the senses. 2. Anything that ministers to comfort, or pleasure that is expensive or rare, but is not necessary to life, health, subsistence, etc.; a delicacy."

Luxury connotes extravagance or indulgence, as distinguished from the needs and necessities of life.

> "The New Dictionary of Thoughts" has these thoughtful things to say of "Luxury".
>
> "On the soft bed of luxury, most kingdoms have expired." - Young.
>
> "Unless we are accustomed to them from early youth, splendid chambers and elegant furniture had best be left to people who neither have nor can have any thoughts." - Goethe.
>
> "War destroys men, but luxury destroys mankind, at once corrupts the body and the mind." - Crown.
>
> The concept of a tax on "luxuries" in entry 62, List II, cannot be limited merely to tax things tangible and corporeal in their aspect as "luxuries". It is true that while frugal or simple food and medicine may be classified as necessities, articles such as jewellery, perfume, intoxicating liquor, tobacco, etc., could be called articles of luxury. But the legislative entry cannot be exhausted by these cases, illustrative of the concept. The entry encompasses all the manifestations or emanations, the notion of "luxuries" can fairly and reasonably be said to comprehend and the element of extravagance or indulgence that
>
> differentiates "luxury" from "necessity" cannot be confined to goods and articles. There can be elements of extravagance or indulgence in the quality of services and activities.

In A. B. Abdul Kadir v. State of Kerala [1976] 2 SCR 690, 699-700; AIR 1976 SC 182, 190, Khanna J. said :

> "The word 'luxury' in the above context has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an articles is popular among the poor sections of the populating would not detract from its description or nature of being an article of luxury. The connotation of the word 'luxury' is something which conduces enjoyment over and above the necessaries of life. It denotes something which is superfluous and not indispensable and which we take with a view to enjoy, amuse or entertain ourselves. An expenditure on something which is in excess of what is required for economic and personal well-being would be expenditure on luxury although the expenditure may be of a nature which is incurred by a large number of people, including those not economically well-off..."

The submission of Shri Sorabjee, if accepted, will unduly restrict the scope of the legislative entry which should otherwise have the widest and the most liberal meaning and connotation given to it. Contention (a), in our opinion, is unacceptable.

Re : Contention(b) :

This contention pertains to a provision particular to the West Bengal legislation. It is urged that in so far as section 4 of the West Bengal Act envisages a tax on the mere existence of the provision of the luxury and is levied even if the luxury is not utilised by any person. It was beyond the scope of the legislative entry. It was submitted that there must be both a giving and receiving of the luxury and that a tax on the mere existence of the means of providing the luxury would be insufficient to support a law imposing a tax thereon. It would, in any event, it is urged, constitute an unreasonable restriction on the freedom under article 19(1)(g).

Reliance was also placed on certain observations in Western India Theaters Ltd.'s case [1959] Supp. 2 SCR 63. The passage in the judgment relied upon by Shri Sorabjee merely says that both the giver and the receiver of the luxuries are amenable to be taxed. The decision cannot be understood as laying down the proposition that if there is no actual utilisation of the luxury, no tax can be levied on the mere existence of the provisions made for the prospective or potential utilisation of the luxury.

In support of the proposition that a tax on luxuries must relate to and be based on an actual utilisation of the luxury and not on the mere existence of the means of providing "luxury", Sri Sorabjee placed strong reliance on the observations of the High Court of Bombay in Ramesh Waman Toke v. State of Maharashtra, AIR 1984 Bom 345, which, while dealing with the legislating under entry 62, List II, imposing a tax on entertainment, held (at p. 350) :

> "... In our opinion, this is not a tax on entertainment at all which the State Legislature is entitled to levy under item 62 of the State List. In order that the entertainment duty should amount to a tax on entertainment it should be levied on entertainment which is actually held and not on entertainment which is theoretically capable of being held. Looking to the provisions which have been examined in detail it is clear to us that the said provisions do not take into account entertainment that is actually held by the owner of the touring cinema or the owner of the video exhibition. The basis on which tax can be validly levied is the fact of entertainment. The taxing event is the entertainment. If there is no entertainment at all, the question of levying entertainment tax in exercise of the legislative powers conferred upon the State Legislature does not arise at all. If the Act purports to levy tax on notional entertainment, then the exercise of that taxing power must be held to be ultra vires the Constitution. This is exactly what has happened in the instant case."

There might possibly be some distinctions between the ideas of "entertainment" and "luxuries". With due respect to the High Court, the interpretation that commended itself to the High Court would unduly restrict the scope of the legislative entry. On such an interpretation, it might be possible for a person to go further and also contend that no "entertainment" was actually derived. The concept of "luxuries" in the legislative entry takes within it everything, that can fairly and reasonably be said to be comprehended in it. The actual measure of the levy is a matter of legislative policy and convenience. So long as the legislation has reasonable nexus with the concept of "luxuries" in the broad and general sense in which the expressions in legislative test are comprehended, the legislative competence extends to all matters "with respect to" that field or topic of legislation.

The taxable event need not necessarily be the actual utilisation or the actual consumption, as the

case may be, of the luxury. The contention, in substance, is that the means of providing luxury, by itself, does not provide the nexus between the taxing power and the subject of tax and there must be an actual, and not merely a notional or potential, consumption or utilisation of the luxury. As an instance of what can be said to be fairly and reasonably comprehended in a legislative entry, reference may be made to the "notional" income, for purposes of a tax on income, of a person, from a house property in his own personal occupation or a property not actually let. In that context, this court said "that which can be converted into an income can be reasonably regarded as giving rise to income". See Bhagwan Dass Jain v. Union of India [1981] 128 ITR 315 (SC); AIR 1981 SC 907. A luxury which can reasonably be said to be amenable to a potential conception does provide the nexus.

If the provider of the luxury is also independently amenable to the tax, the further restriction on the power suggested by the argument tends to cut into the plenitude of the field of legislation. If the idea of "luxuries" is required to be so wide as to comprehend in it every aspect which can fairly and reasonably be said to be embraced by it, then, the taxing power cannot be limited or conditioned in the manner suggested. Once the legislative competence and the nexus between the taxing-power and the subject of taxation is established, the other incidents are matters of fiscal policy behind the taxing law. The measure of the tax is not the same thing as, and must be kept distinguished from, the subject of the tax.

So far as the argument that fundamental rights under article 19(1)(g) are violated by a levy on a mere provision for luxury, without its actual utilisation, is concerned, it is settled law that the mere excessiveness of a tax or that it affects the earnings cannot, per se, be held to be violative of article 19(1)(g). Contention (b) is not substantial either.

Re : Contentions (c) and (d) : These contentions were somewhat attractively presented and bear close scrutiny. Shri Sorabjee, urged that the concept of "luxuries" is a relative or comparative idea, distinguishable from "necessities" by the special attribute or quality of distinction inherent in them. The articles or activities of luxury could be identified as such only by reason of that inherent distinguishing special quality or attribute. The price factor, says learned counsel, might be, prima facie, an index of that special quality or attribute; but the price is not itself a substitute for the special quality or attribute. Therefore, if what is legislatively classed as luxury is on the sole basis of the price alone, then the legislative definition or the means of identification of the luxury becomes irrational as it has the effect of substituting price in place of the special quality. The two are not the same thing. There is nothing in the law, it is urged, which identifies or distinguishes "luxury" on the basis of any special attribute apart from the price factor.

This argument itself recognises that price might be, and very often is, evidence of quality. The statute proceeds on the premise that any accommodation in a hotel which is priced above a certain level could reasonably be held to be of a particular quality distinguishing it from others. These ideas of luxury or necessity are necessarily relative ideas and are required to be understood in the context of the contemporary standards of living. What might have been a "luxury" some decades ago might cease of partake to that character now. What is luxury today might be considered a necessity a decade or so later.

In Abdul Kadir's case, AIR 1976 SC 182, it was observed (at p. 190) :

> "It may be added that there is nothing static about what constitutes an article of luxury. The luxuries of yesterday can well become the necessities of today. Likewise,

> what constitutes necessity for citizens of one country or for those living in a particular climate may well be looked upon as an item of luxury for the nationals of another country or for those living in a different climate. A number of factors may have to be taken into account in adjudging a commodity as an article of luxury ..."

We are presently concerned with the question whether the quality or standards of lodging accommodation in hotels can be called luxuries by contemporary standards by reason of the higher standards of charges payable for the accommodation. The Legislature has chosen to identify the luxury by the statutory standards prescribed by it. According to the legislative assumption, price does become evidence of the special quality on the basis of which "luxuries" could be distinguished and that some special quality is attributable to goods and services through the means of the price. Quality and price, in the legislative assessment, can be assumed to have a logical inter-relationship. This cannot be held to suffer from the vice of irrationality.

The further contention is that when the price factor is made the sole criterion for imparting the quality of luxury to the lodging accommodation, the means of identification so adopted ceases to distinguish areas in the services which are not luxuries but are really necessities and comforts and the subject of the tax would come to include, not merely luxuries, but necessities and comforts also. The answer is that, in the context of lodging accommodation and the services that go with it, the concept of luxury would necessarily be a comprehensive idea taking into account the various components of the services. Differences of degree can, at a particular stage, become differences of kind. The composite elements of lodging accommodation and services associated with it cannot be broken into components so as to distinguish some components as necessities, some others as comforts and yet others as luxuries. Even necessities and comforts which have to them the additional element of undue elegance to a point of extravagance and indulgence might become luxuries. Though the arguments on these contentions were not without their interesting facets, we must, however, express our inability to accept them as valid arguments against the constitutionality of the provisions.

Contentions (c) and (d) are, accordingly, held against and answered against the petitioners and the appellants.

Re : Contention (e) : The point sought to be put across arises out of the definition of the expression "charges for lodging" in section 2(a) read with the Explanation to that provision. Section 2(a) defines "charges for lodging" to include charges for air-conditioning, telephone, television, radio, music, extra beds "and the like". It is contended that the expression "and the like" is vague and confers an arbitrary power to bring to tax an undefined entity. It is further contended that the Explanation appended to section 2(a) to the effect that the decision of the State Government on any dispute in that behalf is final and shall not be called in question in any court aggravates the arbitrariness and constitutes an unreasonable restriction and is violative of article 19(1)(g). Reliance was placed on the decision of this court in Corporation of Calcutta v. Calcutta Tramways Co. Ltd. [1964] 5 SCR 25.

We are afraid the argument overlooks certain relevant factors bearing on the point. It is, no doubt, true that is has been held in several cases that the absence of a provision for a corrective machinery, by way of appeal or revision, to rectify adverse order made by an authority on whom power is conferred, might indicate that the power so conferred is unreasonable or arbitrary. But the corrective machinery may itself take several forms and be inherent or found in the provisions for conferment of the power themselves. The mere absence of a corrective machinery or the existence of a

provision imparting finality, by themselves, would not be conclusive so as to render the conferment of power per se unreasonable and arbitrary retiring the provision unconstitutional. In Babubhai and Co. v. State of Gujarat [1985] 2 SCC 732, 736; AIR 1985 SC 613, 615, this court said :

> "... in other words, mere absence of a corrective machinery by way of appeal or revision by itself would not make the power unreasonable or arbitrary, much less would it render the provision invalid. Regard will have to be had to several factors, such as, on whom the power is conferred, whether on a high official or petty officer, what is the nature of the power - whether the exercise thereof depends upon the subjective satisfaction of the authority or body on whom it is conferred or is it to be exercised objectively by reference to some existing facts or tests...."

There are in-built checks on the power under the Explanation to section 2(a). The expression "and the like" would require to be construed ejusdem generis. The genus or the class of items envisaged by the preceding words not being exhaustive of the genus or the class, the Legislature, therefore, has supplied the words "and the like" so as to bring in any other item of the same class or genus. This, by itself, is a clear guide for the exercise of the power. Another relevant consideration is the identity and status of the repository of the power. The power is given to a high authority like the State Government. In these circumstances, it cannot be said that the power is an uncanalised power and is an arbitrary or unreasonable one. There are statutory guides governing its exercise and guidelines are governed by well-settled principles of interpretation. There is no substance in contention (e).

Re : contention (f) : What is assailed here is the deeming provision in section 4(3) which brings to charge at the normal rates cases where no charge is collected at all for lodging or where concessional rates are charged. The deeming provision does not apply to cases where accommodation is provided free or at commercial rates to the employees of the hotel. No fault can be found with this provision which merely states that where the usual lodging charges are not collected for providing the lodging accommodation, tax shall be payable as if the usual charges had been collected. This is a provision against evasion. There is no merit in the challenge to the validity of this provision. Contention (f) requires to be rejected.

Re : Contention (g) : Shri R. F. Nariman, learned counsel, who addressed arguments with particular emphasis on this contention submitted that tax laws are not outside the purview of Part XIII of the Constitution and that the present tax on lodgings and accommodations in hotels is violative of the freedom of "trade, commerce and intercourse" and offends article 301. Learned counsel submitted "that business undoubtedly is commerce but is something more, it is intercourse". The word "intercourse" specifically occurs in article 301 intending to give the largest connotation to the concept of commerce. The question is whether the impugned tax imposes a restriction on the freedom under article 301. If it does, the further questions whether the restriction is reasonable and is required in public interest and whether Presidential sanction had been obtained for the introduction of the legislative measure arose for consideration. It has been held that only such taxes as are directly and immediately restrictive of trade, commerce and intercourse that fall within the purview of article 301. On the several facets of the similar - some say deceptively similar - provisions of section 92 of the Commonwealth of Australia Constitution Act, 1901, comments of a learned author may be recalled :

> "The lengthy series of judicial decisions on the meaning and scope of the immunity afforded by section 92 is ample testimony to the difficulty involved in giving some precise meaning to a provision which, in reality, expresses a political slogan rather

> than a legal precept. Rich J. once pithily described the lot of the High Court in relation to section 92 as being 'to explain the elliptical and expound the unexpressed', and he emphasized that the practical necessity of determining precisely what impediments were no longer to obstruct inter-State trade 'obliged the court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution'."

On the significance of the word "intercourse" in section 92 of the Australian Constitution, it was held by the Australian High Court in Gratwick v. Johnson, [1945] 70 CLR 1 that an order which provided that no person should travel by rail or commercial passenger vehicle from any State in the Commonwealth to any other State without a permit from a Commonwealth official would violate the freedom of "intercourse" under section 92. It was held that the prohibition showed "an indifference to, if not a disdain of, the terms of section 92".

In Atiabari Tea Co. Ltd. v. State of Assam [1961] 1 SCR 809, 860-61; AIR 1961 SC 232, 254, this court said :

> "... in determining the limits of the width and amplitude of the freedom guaranteed by article 301, a rational and workable test to apply would be :

Does the impugned restriction operate directly or immediately on trade or its movement ? .... It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods, it attracts the provisions of article 301...."

In Firm A. T. B. Mehtab Majid and Co. v. State of Madras [1963] Suppl. 2 SCR 435; AIR 1963 SC 928, 931, this Court said :

> "It is, therefore, now well settled that taxing laws can be restrictions or trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities; sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against article 301..."

Taxes can and do sometimes, having regard to their effect and impact on the free flow of trade, constitute restrictions on the freedom under article 301. But the restriction must stem from the provisions of the law imposing the tax which could be said to have a direct and immediate effect or restricting the free flow of "trade, commerce and intercourse". It is not all taxes that have this effect.

Freedom under article 301 is, by all reckoning, a great freedom, one of the utmost significance to economic unity of the nation. Underlying the need for and the recognition of the freedom of inter-State trade, commerce and intercourse, one is tempted to refer to the lofty sentiments of Justice Cardozo in Charles H. Baldwin v. GAF Seeling [1934] 294 US 511, that "it was framed upon the theory that peoples of several States must sink or swim together and that in the long-run prosperity and salvation are in union and not in division" and that "the ultimate principle is that one State, in dealing with another, may not place itself in a position of economic isolation".

But, in the present case, it has not been pointed out how a tax on "luxuries" enjoyed by a person in a

hotel is either discriminatory or has the direct and immediate effect of impeding the freedom of intercourse. In Grannal v. Marrickville Margarine (P.) Ltd. [1955] 93 CLR 55, a New South Wales statute which prohibited the manufacture of margarine without a licence which, if granted, would contain a condition limiting the quantity to be manufactured was assailed on the ground of its violation of section 92 of the Australian Constitution. Repelling the challenge, it was held :

> "It is, of course, obvious that without goods, there can be no inter- State or any other trade in goods. In that sense manufacture or production within, or importation into, the Commonwealth is an essential preliminary condition to trade and commerce between the State in merchandise. But that does not make manufacture, production or importation, trade and commerce among the States. It is no reason for extending the freedom which section 92 confers upon trade and commerce among the State to something which precedes it and is outside the freedom conferred."

We find no substance in contention (g).

In the result, for the foregoing reasons, the writ petitions and the appeals are dismissed. But, in the circumstances, there will be no order as to costs.

Petitions and appeals dismissed.

</html