Federation of Hotel and Restaurant Association of India and Others

Vs

Union of India and Others. (and other writ petitions)

Writ Petition No. 1395 of 1987 with Writ Petitions Nos. 1538, 1540 to 1542, 1598, 1600, 1660 and 1669 to 1671 of 1987 and No. 287 of 1988

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

02.05.1989

JUDGMENT

M. N. VENKATACHALIAH J. –

1. In these writ petitions under article 32 of the Constitution of India, the petitioners, who are engaged in, or associated with, the hotel industry in India, challenge the constitutional validity of the Expenditure-tax Act, 1987 (Central Act 35 of 1987). the Act envisages a tax at 10 per cent, ad valorem on "chargeable expenditure" incurred in the class of hotels wherein "room charges" for any unit of residential accommodation are rupees four hundred or more per day per individual. The "chargeable expenditure" as defined in section 5 of the Act includes expenditure incurred in or payments made in such class of hotels in connection with the provision of any accommodiation, residential or otherwise, food or drink whether at or outside the hotel; or for any accommodation in such hotel on hire or lease; or any other services envisaged in that section. However, any expenditure incurred in or paid for the "foreign exchange" or by persons who enjoy certain diplomatic privileges and immunities is exempt.

The challenge to the varies of the Act is on grounds of lack of legislative competence and of violation of the rights under articles 14 and 19(1)(g). the Union of India seeks to sustain the legislative competence to enact the impugned law under article 248 read with entry 97 of List I of the Seventh Schedule.

Writ Petition No. 1395 of 1987 is quite comprehensive as to the array of parties and may generally be regarded as representative of the contentions urged in support of the challenge. The first petitioner therein is the Federation of Hotel and Restaurant Association of India, which is said to be a representative body of over 1,000 member- petitioners in India. Petitioners Nos. 2 to 5 are said to be the Regional Associations of the Federation and petitioners Nos. 6 and 7 are two hotel companies which own several hotels in India. Petitioners Nos. 8 and 9 are Indian citizens who are the directors and shareholders of petitioners Nos. 6 and 7, respectively. Petitioner No. 10 is a practicing chartered accountant who claims to use the services in the several hotels in India owned by the members of the federation. The array of petitioners is quite comprehensive so as to include all interests affected so as to satisfy the requisite standing to sue from all points of view.

The Expenditure Tax Bill No. 90 of 1987, preceding the impugned Act was introduced in the Union Legislature on August 26, 1987. It became an Act on september 14, 1987. It extends to the whole of India except the State of Jammu and Kashmir. the requisite notification under section 1(3) of the Act was issued on October 14, 1987, appointing November 1, 1987, as the date on which the Act shall

come into force.

The Expenditure Tax Bill No. 90 of 1987 states the following as its objects and reasons (see [1987] 167 ITR (St.) 57) :

> "The Bill seeks to imposed a tax on expenditure incurred in hotels where the room charges for any unit of residential accommodation are four hundred rupees or more per day per individual. This tax will be levied at the rate of ten per cent. of the expenditure incurred in connection with provision of any accommodation, food, drinks and certain other categories of services. this tax will not apply to expenditure incurred in foreign exchange or in the case of persons enjoying diplomatic privileges."

A brief survey of the provisions of the Act is perhaps necessary to apprehend and assess the grounds of challenge in their true perspective Section 4 is the charging section which says (see [1987] 168 ITR (St.) 50) :

> "Subject to the provisions of this Act, there shall be charged on and from the commencement of this Act, a tax at the rate of ten per cent. of the chargeable expenditure."

The expression "chargeable expenditure" is defined in clauses (a),(b), (c), and (d) of section 5, which read (see [1987] 168 ITR (St.) 50) :

> "For the purposes of this Act, chargeable expenditure means any expenditure incurred in, or payments made to, a hotel to which this Act applies, in connection with the provision of, -
>
> (a) any accommodation, residential or otherwise; or
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> (b) food or drink by the hotel, whether at the hotel or outside, or by any other person at the hotel; or
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> (c) any accommodation in such hotel on hire or lease; or
>
> (d) any other services at the hotel, either by the hotel or by any other person, by way of beauty parlor, health club, swimming pool or other similar services..."
>
> (Rest of the provisions of section 5 are omitted as unnecessary for the present.]

The expression "assessee", "hotel" and "room charges" are some of the material expressions defined in the interpretation clause.

> "2(1) 'assessee' means a person responsible for collecting the expenditure-tax payable under the provisions of this Act."
>
> "2(6) 'hotel' includes a building or part of a building where residential accommodation is, by way of business, provided for a monetary consideration."
>
> "2(10) 'room charges' means the charges for a unit of residential accommodation in a

hotel and includes the charges for -

(a) furniture, air-conditioner, refrigerator, radio, music, telephone, television, and

(b) such other services are normally included by a hotel in room rent,

but does not include charges for food, drinks and any services other than those referred to in sub-clauses (a) and (b)."

Section 3 is the crucial provision which lays done the dirrerentia for the classification of the hotel to which the Act applies. that section provides that the Act shall apply in relation to any "chargeable expenditure", incurred in a hotel wherein the "room charges" for any unit of residential accommodation at the time of incurring of such expenditure are Rs. 400 or more per day per individual. The levy of tax is confined to such class of hotels which satisfy that statutory standard. Where, however, composite charges are payable in respect of both residential accommodation and food, then the "room charges" for purposes of determination of the criteria attracting the Act shall have to be apportioned in the manner to be prescribed. Section 3 enables the assessing officer to determine the "room charges" on such reasonable basis as he may deem fit where (see [1987] 168 ITR (St.) 50) :

"(i) a composite charge is payable in respect of residential accommodation, food, drinks and over services, or any of them, and the case is not covered by the provisions of sub-section (2), or

(ii) it appears to the Income-tax Officer that the charges for residential accommodation, food, drinks or other services are so arranged that the room charges are understated and the other charges are overstated."

Section 6 and 24 envisage and provide for the authorities to administer the Act and engraft the machinery and procedure of the Income-tax Act Section 6(1) says (see [1987] 168 ITR (St.) 51) :

"Every Director of Inspection, Commissioner of Income-tax Commissioner of Income-tax (Appeals), Inspecting Assistant Commissioner of Income- tax, Income-tax Officer and Inspector of Income-tax shall have the like powers and perform the like functions under this Act as he has and performs under the Income-tax Act, and for the exercise of his powers and the performance of his functions, his jurisdiction under this Act shall be the same as he has under the Income-tax Act."

Section 24 provides (see [1987] 168 ITR (St.). 58) :

"The provisions of the following sections and Schedules of the Income- tax Act and the Income-tax (Certificate Proceedings) rules, 1962, as in force from time to time, shall apply with necessary modifications as if the said provisions and the rules referred to expenditure-tax instead of to income-tax :

2(43B) and (44), 118, 125, 125A, 128 to 136 (both inclusive), 138, 140 144A, 159 to 163 (both inclusive), 166, 167, 170, 171, 173 to 179 (both inclusive), 187, 188, 189, 220 to 227 (both inclusive), 229, 231, 232, 237, to 245 (both inclusive), 254 to 262 (both inclusive), 265, 266, 268, 269, 278B, 278C, 278D, 278E, 281, 181B, 282, 283, 284, 287, 288, 288A, 288B, 289 to 293 (both inclusive), the Second Schedule and

the Third Schedule :

Provided that references in the said provisions and rules to the'assessee' shall be construed as references to an assessee as defined in this Act."

Section 8(1) provides that every "person responsible for collecting" the tax as defined in section 2(8) shall, before the expiry of four months from March 31, in each year furnish or cause to be furnished to the Income-tax Officer, in the prescribed form and verified in the prescribed manner, a return in respect of the immediately preceding financial year showing (a) the aggregate of the payments received in respect of "chargeable expenditure"; (b) the amount of the tax collected; (c) the amount of the tax paid to the credit of the Central Government; and (d) such other particulars as may be prescribed.

The incidence of the tax is on the persons who incur the "chargeable expenditure" in the class of hotels to which the Act applies. Section 7 enjoins upon the "person responsible for collecting" the duty to collect the taxes and pay the same to the credit of the Central Government. The "room charges" of Rs. 400 per day per individual stipulated in section 3 is the differentium which keeps apart the class of hotels to which the Act applies. The petitioners say that section 3 merely defines the place, viz., the hotel where a room carries a charge of Rs 400 per day marked on it and the rest of the incidents and consequences of the provisions of the Act envisage the levy of a tax on the "luxuries" provided at such a place. the legislation, it is urged, is squarely within entry 62 of List II within the State power. The Act, it is contended, does not imposed an "expenditure-tax" but taxes "luxuries". Even if the legislation has an "expenditure dampening" objective and seeks to inhabit, by creation of disincentives, ostentatious and wasteful expenditure, the classification, it is said, has no rational basis. Persons similarly situated and who incur the same extent and degree of expenditure on the same luxuries are differentiated on the sole basis that in one case the expenditure is incurred in a hotel where one of the rooms has a charge of Rs. 400 per day per individual marked for it, while in the other though equally wasteful expenditure is incurred in a more luxurious restaurant, the latter expenditure is exempt. It is urged that even if more sophisticated and expensive food and drinks and other services, envisaged in clauses (a) to (d) of section 5, are provided in a hotel or catering establishment which falls outside the class, the expenditure incurred thereon is unaffected by the law. this aspect of under-inclusiveness is assailed as violative of article 14.

The petitioners further contend that the several provisions of the Act which impose certain statutory obligations of an corners nature, the breach of which are visited with penal consequences, render the law an unreasonable restriction on the petitioners' fundamental rights under article 19(1)(g).

The contentions urged in support of the petitions admit of being noticed and are formulated in the following terms :

(a) The Act, in its true nature and character, is not one imposing an "expenditure-tax", as known the law, accepted notices of public finance, and to legislative practice but is, in pith and substance, either a tax on luxuries falling within entry 62 of List II of the Seventh Schedule; or a tax on the consideration paid for the purchase of goods constituting an impost of the nature envisaged in entry 54 of List II, and clearly outside the legislative competence of the Union Parliament;

(b) that even if the Act is held to imposed a tax which is "suigeneris" or a "non-descript", tax with respect to which the Union Parliament is competent to make a law

under article 248 and entry 97 of List I, then, at all events, the Act is violative of article 14 inasmuch as the differentium on which the hotels are classified is arbitrary and unitellibible, has no rational nexus with the taxing policy under the Act;

(c) that the Act is violative of the petitioners' fundamental right under article 19(1)(g) as it imposes unreasonable and oneropus restrictions on their freedom of business.

Re : Contention (a) :

Shri Palkhivala, learned senior counsel for the petitioners, contended that the apellation of "expenditure-tax" given to the impost is a misnomer as the concept of "expenditure-tax" as known to law and recognised by the theorists of public finance is not a tax on a few stray items of expenditure but is a term of art which has acquired a technical import as "nomenjuris" and that the impost envisaged by the Act, in its true nature and character, is no more and no less than a tax on luxuries under entry 62, List II, within the States exclusive power. Learned counsel urged that the delicate balance in the demarcation in a federal polity of legislative powers between the Union and the states would impose on the Union, the repository of the residuary power, the sensitive task of recognising both the line of demarcation as well as the constitutional mandate - and a disciplined reluctance - not to cross it. The contention as to lack of legislative competence emphasises two aspects - one with a negative implication and the other of a positive import. Negatively, it is urged that the impost is not, and does not satisfy the concept of an "expenditure- tax" which has a technical connotation both in law and in public finance. A tax on certain stray items of expenditure is not, it is contended, a general "expenditure-tax". the nomenclature of the levy is really a mare ill-fitting legal make for what is really a tax under entry 62, List I. The nomenclature of the tax, it is urged, is irrelevant in deciding its true nature and character. It belongs to the rudiments of the subject, says learned counsel, that a constitutional grantee of a power cannot enlarge its own by choosing for the legislation enacted in exercise of that power, a nomenclature that corresponds to and semantically subsumes with the grant. Shri Palkhivala submitted that the true nature and concept of "expenditure- tax", as known to the theories of public finance, has a specific, well accepted legal connotation and is a tax levied on income or capital "saved". It is this concept of "expenditure-tax", as a fiscal tool, which has certain social and economic objectives informing its policy. The present impost and its incidents, it is urged, have no rational connection with the concept of "expenditure-tax" known to and accepted by the principles of public finance and recognised by established legislative practice.

'Referring to the economists' concept of "expenditure-tax", learned counsel referred us to the report of the Study group "On Taxation of Expenditure" (Government of India, Ministry of finance, April 1987) :

"An expenditure tax is generally taken to mean a direct tax on personal consumption, i.e., the total annual consumption (minus an exemption, if any) of an individual taxpayer of family. This implies that the tax will be payable in the year in which consumption takes place. One can conceive of the tax base being computed by adding up all items of expenditure, which are by law defined as consumption expenditure,...... or alternatively, by summing up all the receipts and subtracting

therefrom expenses of earning income as well as outflows in the form of savings (going into different types of investments, including repayment of past loans). In practice, the latter method would be preferable."

> "India has the distinction, shared with Sri Lanka, of having actually experimented with a direct tax on consumption expenditure though the idea itself had caught the imagination of many tax theorists in developed conuntries, some of whom had developed practical systems for implementation. In both India and Sri Lanka, the tax was introduced on the basis of the recommendations of Prof. Nicholas Kaldor. Prof. Kaldor had been invited to come to India by the Indian Statistical Institute to make an investigation of the Indian tax system in the light of the revenue requirements of the Second Five Year Plan. In his report, he recommended the introduction of a direct tax on personal consumption expenditure as a limb of a comprehensive and self-checking system comprising the income-tax, (which was already in operation in India), a tax on capital gains (which had been tried for two years in the post-war period and then withdrawn), an annual tax on net wealth, a general gift-tax a and a tax on personal expenditure. He envisaged that these five levies would be assessed simultaneously on the basis of a single comprehensive return,..."

> "Under the scheme of expenditure taxation suggested by Prof. Kaldor, a taxpayer would not be required to give any detailed account of his out lays on consumption but only a statement of his total outlay as part of a comprehensive tax return showing all his receipts, investments, etc., and all the items for which he claimed exemption..............."

> "In India too, although the expenditure tax was tried twice and was given up, there has been a revival of interest in making expenditure the base for personal taxation. In particular, it has been maintained that India should seriously consider moving towards a progressive expenditure ax for three important reasons :

> (a) it will promote savings;

> (b) it would be, on the who, more euqitable than the present or any practicable form of income-tax; and

> (c) it will significantly reduce the inducement of direct tax evasion"

In Musgrave of "Public finance", referring to the concept of a personal expenditure tax, it is stated :

> "................ In analogy to the income-tax the taxpayer would determine his total consumption for the year, subtract whatever personal exemptions or deductions were allowed, and apply a progressive rate schedule to the remaining amount of taxable consumption."

Shri Palkhivala also referred to certain passages of Nicholas Kaldor "Expenditure Tax" and the same eminent economist reports on "Indian Tax Reform", to reinforce the submission that the conceptualisation of "expenditure-tax", as a fiscal tool for economic regulation, has a specific and definite connotation and the "tax" so conceptualised by experts on public finance is an entirely different idea from the one built into the present legislation. The very concept of "expenditure- tax" envisaged in the impugned legislation, it is urged, is unknown to accepted principles of public

finance and is the result of a grave misconception a to the essential nature and incidents of what in law and legislative practice is recognised as "expenditure-tax". The whole exercise, learned counsel said, is a draft on credibility and that the Finance Minister's speech on the Bill leaves no doubt that what the Government wanted from the law was really a tax on "luxuries". The impost, it is urged, is not susceptible of any other legitimate understanding than that it is in substance and effect, a tax on "luxuries" within the States' power. Shri Palkhivala emphasised the relevance of what was implicit in the observations of this court in H. H. Prince Azam Jha Bahadur v. expenditure-tax Officer [1972] 83 ITR 92 ; [1972] 1 SCR 470, made while upholding the legislative competence of the Union Parliament to enact the Expenditure-tax Act, 1957, as referable to the residuary entry 97 of List 1. the implication of the observations of this court at page 479 of the report, according to learned counsel, is that what distinguished an "expenditure-tax" from a levy under entry 62 of List II, was that the scheme of taxation took into account the totality of expenditure over a unit of time, as distinct form sums laid out on stray purchases of luxuries.

Shri Palkhivala, then, submitted that the notion of expenditure-tax, as recognised by legislative practice is a relevant factor. In Croft. v. Dunphy [1933] AC 156 (PC), Lord Macmillan held that when power is conferred on the Legislature on a particular topic, it is important, in determining the scope of the power, to have regard to what, in legislative practice, is ordinarily tested as embraced within the topic and particularly in the legislative-practice of the State which has conferred the power. In Wallace Brothers and Co. Ltd. v. CIT [1948] 16 ITR 240 (PC); 1948] L. R. 75 IA 86, Lord Uthwatt referred to the permissibility and, indeed, the importance of referring to the legislative practice as to what is ordinarily treated as within the topic of legislation in understanding the scope of a legislative power. The notion of expenditure-tax in the scheme of the Expenditure- tax Act, 1957, would, it is urged, detract from such legislative practice.

The second limb of the argument is that the impost so clearly of the nature of a tax on luxuries within entry 62 of List I. the simple test, according to the argument, is whether, if a State Legislature had enacted a similar law, it would not have been held to be within its competence under entry 62 of List II ? The answer would, according to the submission, be an emphatic affirmation. Referring to the concept of a luxury tax, learned counsel referred to the New Encyclopaedia Britannica, via,. 7, which, referring to "luxury tax", says :

> "Luxury tax, excise levy on goods or services considered to be luxuries other than necessities. modern examples are taxes on jewellery and perfume. Luxury taxes may be levied with the intent of taxing the rich, as in the case of the late 18th and early 19th century British taxes on carriages and manservants; or they may be imposed in a deliberate effort to alter consumption patterns, either for moral reasons or because of some national emergency. In modern times, the revenue production of luxury taxes has probably overshadowed the moral argument for them. Further more, the progressive nature of the early taxes began to be lost as more lower income people's 'luxuries' were taxed in the interest of generating additional revenue; an example is the amusement tax."

On the analogy of the wealth-tax envisaged by entry 86 of List 1, it was urged that even as the concept of "wealth" for the imposition of a tax there on is not the individual components of the assets of the the assessee but a totality of all assets which the assessee owns, so is the concept of "expenditure" which does not consist of a few stray items of expenditure but a systematised reckoning of expenditure for and during a particular unit of time.

It was then urged that recourse to the residuary power under article 248 read with entry 97 of List I should be the very last refuge and would be available if, and only if, the other entries in the State and Concurrent lists do not cover the topic.

Reliance was also placed on the observations of the federal Court in Subrahmanyan Chettiar v. Muttuswami Goundan, AIR 1941 FC 47, where it was held (at p. 778 of AIR 1981 SC) :

> "But resort to that residual power should be the very last refuge. It is only when all the categories in the three Lists are absolutely exhausted that one can think of falling back upon a nondescript."

Shri Palkhivala recalled the following words of caution sounded by Chinnappa Ready J.in International Tourist Corporation v. State of Haryana [1981] 2 SCR 364; AIR 1981 SC 774, 777 :

"Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State Legislature must be clearly established. Entry 97 itself is specific that a matter can be brought under that entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those lists. In a federal Constitution like ours where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislature. That might affect and jeopardies the very federal principle. The federal nature of the Constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle State autonomy must be rejected................"

Shri Palkhivala also sought to demonstrate how, looked at from another angle, the levy presents an anomalous situation by splitting up a transaction which would otherwise be one of sale of goods and isolating the price of the goods for separate treatment as a distinct subject-matter for levy of expenditure-tax, thus robbing the state power of its substance.

Learned Advocate-General for the State of kerala, who intervened, made submissions which, while being substantially on the lines of the petitioners' contentions, however, sought to qualify that legislative competence to the extent of operation of the Act in the Union Territories could be sustained.

Learned attorney-General on the contrary, submitted that the law, in pith and substance, is not one "with respect to" luxcuries under entry 62 List I and the tax on expenditure, as the legislature has chosen to conceive it, is referable to residuary power. Learned attorney-general said that the economists' concept of such expenditure tax is at best an idea of the manner of effectuation of fiscal programme and is no limitation on the legislative power. Indeed, if a topic is not shown to fall within the fields of legislation in Lists II or III, no further inquiry is necessary in order to support the legislative competence of the Union to legislate on the topic. The purpose of incorporating a separate List for the Union, as observed in Union of Indian v. Harbhajan Singh Dhillon [1972] 83 ITR 582, 610 (SC); [1972] 2 SCR 33 at 67 is :

> "................ there is some merit and legal effect in having included specific items in List I for when there are three lists it is easier to construe List II in the light of Lists I and III. If there had been no List I, many items in List II would perhaps have been given much wider interpretation than can be given under the present scheme. Be that

> as it may, we have the three lists and a residuary power and, therefore, it seems to us that in this context if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquiry if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises."

Learned Attonery-General characterised that the petitioners' contention that the impugned impost is really a tax on luxuries or that one aspect of the taxable event in the sale of goods had impermissibly been isolated for the creation of an artificial idea "expenditure", suffers from certain basic fallacies. The legislative powers, it is urged, recognise the demarcation of distinct aspects of the same matter as distinct topics of legislation and the present challenge to legislative competence overlooks the dichotomy of distinct aspects of the same matter constituting distinct fields of legislation, the line of demarcation, though sometimes thin and subtle, being real. Learned Attorney-General further contended that the measure adopted for the levy of the tax does not necessarily determine its essential character and that the object on which the expenditure is laid out might be an item of luxury or it might not be one; or "expenditure" might constitute the price of the goods but, what is taxed is the "expenditure" aspect which, in itself, susceptible of recognition, as a distinct topic of legislation.

We have bestowed our careful consideration to these rival contentions. The principal question is whether the tax envisaged by the impugned law is within the legislative competence of the Union Parliament. In that sense, the constitutionality of the law becomes essentially a question of power which, in a federal constitution, unlike a legally omnipotent Legislature like the British Parliament, turns upon the construction of the entries in the legislative lists. If Legislature with limited or qualified jurisdication transgresses its powers, such transgression may be open, direct and overt, or disguised, indirect and covert. The latter kind of trespass is figuratively referred to as "conlourable legislation", connoting that although apparently the Legislature purports to act within the limits of its own powers yet, in substance and in reality, it encroaches upon a field prohibited to it, requiring an examination, with some strictness, of the substance of the legislation for the purpose of determining what that Legislature was really doing. Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists isn each Legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to present such a result, the two provisions must be read together, and the language of one interpreted, and, where necessary, modified by that of the other.

The Judicial Committee in Prafulla Kumar Mukherjee v. Bank of Commerce [1946] FCR 179; AIR 1947 PC 60, referred to, with approval, the following observations of Sri Maurice Gwyer C.J. in Subrahmanyan Chettiar's case, AIR 1941 FC 47 :

> "It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statues being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining

> whether it is legislation with respect to matters in this list or in that."

This necessitates an "essential of federal Government, the role of an impartial body, independent of general and regional Governments", to decide upon the meaning of decision of powers. The court is this body.

The position in the present case assumes a slightly different complexion. It is not any part of the petitioners' case that "expenditure-tax" is one of the taxes within the States' power or that it is a forbidden field for the Union Parliament. On the contrary, it is not disputed that a law imposing "expenditure-tax" is well within the legislative competence of the Union Parliament under article 248 read with entry 97 of List I. But the specific contention is that the particular impost under the impugned law, having regard to its nature and incidents, is really not an "expenditure-tax" at all as it does not accord with the economists notion of such a tax. That is one limb of the argument. The other is that the law is, in pith and substance, really one imposing a tax on luxuries or on the price paid for the sale of goods. The crucial questions, therefore, are whether the economists' concept of such a tax qualifies and conditions the legislative power and, more importantly, whether "expenditure" laid out on what may be assumed to be "luxuries" or on the purchase of goods admits of being isolated and identified as a distinct aspect susceptible of recognition as a distinct field of tax legislation.

In Lefroy's 'Canada's federal System', the learned author, referring to the "aspects of legislation" under section 91 and 92 of the Canadian constitution, i.e., British North America Act, 1867, observes that "one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that subjects which in one aspect and for one purpose fall within the power of a particular Legislature may, in another aspect and for another purpose, fall within another legislative power. Learned author says :

> "................. that by 'aspect' must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

In Union colliery Co. of British Columbia ltd. v. Bryden [1899] AC 580 (PC) at p. 587, Lord Haldane said :

> "It is remarkable the way this Board has reconciled the provisions of section 91 and section 92, by recognizing that the subjects which fall within section 91 in one aspect, may, under another aspect, fall under section 92."

Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctions of the aspects. Lord Simonds in Governor-General in Council v. Province of Madras [1945] FCR 179, 193 (PC); AIR 1945 PC 98; 101, in the context of concepts of duties of excise and tax on sale of goods said :

> "The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense

> overlap. But in law there is no overlapping. The taxes are separate and distinct imposis. If, in fact, they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale............"

Referring to the "aspect" doctrine, Laskin's "Canadian Constitutional Law" states (at. 115) :

> "The 'aspect' doctrine bears some resemblance to those just noted but, unlike them, deals not with what the 'matter' is but with what it 'comes within'................"
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> ".............. it applies where some of the constitutive elements about whose combination the statue is concerned (that is, they are its 'matter') are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is."
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> ".............. I pause to comment on certain correlations of operative income portability and the 'aspect' doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a 'matter' bring it within a class of subject............."

On the distinction between what is "ancillariness" and what "incidentally affecting", the treatise says (at p. 115) :

> "................ There is one big difference though it is little mentioned Ancillariness is usually associated with an explicit statutory provision of a peripheral nature; talk about 'incidentally affecting' crops up in connection with the potential of a non-differentiating statute to affect indiscriminately in its application matters assertedly immune from control and others. But it seems immaterial really whether it is its words or its works which draw the flotsam within the statute's wake."

Referring to the flexibility in the modes of effectuating a tax in view of innate complexities in the fiscal adjustment of diverse economic factors inherent in the formulation of a policy of taxation and the variety of policy-options open to the State, J. Rauls, in "Modern Trends in Analytical and Normative Jurisprudence" (Introduction to Jurisprudence by Lord Lloyd of Hampstead and Freeman, 5Edn.) observes :

> "........... In practice, we must usually choose between several unjust, or second best, arrangements; and then we look to nonideal to find the least unjust scheme. Sometimes its scheme will include measures and policies that a perfectly just system would reject. Two wrongs can make a right in the sense that the best available arrangement may contain a balance of imperfections, as adjustment of compensating injustices."

Adverting to "Expenditure dampening" policies and the choice of measures designed to reduce the

aggregate demand for goods and services the "Dictonary of Economic Terms" by Allan Gilpin says :

> "Expenditure dampening policies : Government measures designed to reduce the aggregate demand for goods and services in the community. The measures may consist of raising taxes (q. v.), lowering Government expenditure or curtailing hire-purchase or other credit facilities. See EXPENDITURE-SWITCHING POLICES.
>
> Expenditure-switching policies : Government measures designed to influence the pattern of expenditure by the community. For example, the taxing of imported goods may effecrt a switch of expenditure from imported to home-produced goods; devaluation of the nation's currency may have the same effect as imports become more expensive. See EXPENDITURE-DAMPENING POLICIES."

Learned Attorney-General also referred to the following observations in the British Tax System (by J. A. Kay M. A. King) to indicate that a tax on expenditure need not necessarily be an expenditure-tax in the economists' reckning of thingts :

> "An annual expenditure tax, which seeks to measure an individual's spending in each separate year of assessment, poses very serious administrative problems, because it requires that his assets be assessed annually............."
>
> "............... But there is a much easier way of reaching a more accurate answer. You simply measure how much foreign currency you took with your, add the amount of currency you bought while abroad, and subtract what was left when you got back. You measure, not the expenditure itself, but the sources of the expenditure, and can thus achieve a simple and reliable measure on the basis of a small number of recorded (and readily verifiable) transactions."

It is trite that the true nature and character of the legislation must be determined with reference to the question of the power of the Legislature. The consequences and facts of the legislation are not the same thing as the legislative subject-matter. It is the true nature and character of the legislation and not its ultimate economic results that matter.

Indeed, as an instance of different aspects of the same matter, being the topic of legislation under different legislative powers, reference may be made to the annual letting value of a property in the occupation of a person for his own residence being, in one aspect, the measure for levy of property tax under State law and in another aspect constituting the notional or presumed income for purpose of income- tax.

The petitioners' reference to legislative practice as determining the scope of the present legislation does not assist them. There are two infirmities in the contention. The first is that the question of legislative practice as to what a particular legislative entry could be held to embrace is inapposite while dealing with a tax which is sui generis or non-descript imposed in exercise of the residuary powers so long as such tax is not specifically enumerated in Lists II and III. Secondly, there is no conclusive material indicating that the appropriate Legislature had limited the notion of a tax of this kind within any confines. It is relevant to recall the words of Lord Uthwatt in Wallace Brothers' case [1948] 16 ITR 240, 245; AIR 1948 PC 118, 120 :

> "The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception

> involved in towards in the enabling Act."

But, as observed in Navinchandra Mafatlal v. CIT [1954] 26 ITR 758,763 (SC); [1955] 1 SCR 829, 835, the meaning of the word "income" as given in the Income-tax Act is not determinative of its content as an entry in a legislative list. Das J. observed :

> "It is, therefore, clear that none of the authorities relied on by Mr. Kolah establish what may be called a legislative practice indicating the our view, it will be wrong to interpret the word 'income' in entry 54 in the light of any supposed English legislative practice as contended for by Mr. Kolah..........."

In Union of India v. H. S. Dhillon [1972] 83 ITR 582, 604; [1972] 2 SCR 33 at 61, this court dealt with the scope of the residuary power under entry 97, List I. referring to the following observations of Lord Loreburn in Attonery-General for Ontario v. Attorney-General for Canada [1912] AC 571 at 581 (PC) :

> "Now, there can be no doubt that under this organic instrument the powers distributed between the dominion on the one hand and the provinces on the other hand, cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada,".

It was held that the last portion of the above excerpt applied a fortiori to the Constitution of the Sovereign Democratic Republic. Sikri C.J. proceeded to observe [1972] 83 ITR 582, 604; [1972] 2 SCR 33 at 61 :

> "If this is the true scope of residuary powers of Parliament, then we are unable to see why we should not, when dealing with a Central Act, enquiry whether it is legislation in respect of any matter in List II for this is the only field regarding which there is a prohibition against Parliament. If a Central Act does not enter or invade these prohibited fields, there is no point in trying to decide as to under which entry or entries of List I or List III a Central Act would rightly fit in."

Then, considering the includibility of the value of agricultural property in the wealth of the assessee under the Wealth-tax Act despite the exclusionary words in entry 86, List I, the learned chief Justice said ([1972] 83 ITR 582, 591) :

> ".......... we are definitely of the opinion, as explained a little later, that the scheme of our constitution and the actual terms of the relevant articles, namely, article 246, article 248 and entry 97, List I, show that any matter, including tax, which has not been allotted exclusively to the State Legislatures under List II or concurrently with Parliament under List III, falls within List I, including entry 97 of that list, read with article 248."

It was held that the subject did not fall under entry 49, List II, and that despite the exclusion in entry 86, List I, the Union, as the repository of the residuary power, had the competence to legislate as long as the topic was not allotted to or within the State power It was further observed ([1972] 83 ITR 582, 591 and 615) :

> "It seems to us unthinkable that the Constitution-makers, while creating a sovereign

> democratic republic, withheld certain matters or taxes beyond the legislative competence of the Legislatures in this country either legislating singly or jointly.............."
>
> "There is no principle that we know of which debars Parliament from relying on the powers under specified entries I to 96, List I, and supplementing them with the powers under entry 97, List I, and article 248, and for that matter powers under entries in the Concurrent List."

the subject of a tax is different from the measure of the levy. The measure of the tax is not determinative of its essential character or of the competence of the Legislature. In Sainik Motors v. State of Rajasthan [1962] I SCR 517; AIR 1961 SC 1480, the provisions of a State law laying a tax on passengers and goods under entry 56 of List 1 were assailed on the ground that the State was, in the guise of taxing passengers and goods, in substance and reality taxing the income of the stage carriage operators or, at any rate, was taxing the "fares and freights", both outside of its powers. It was pointed out that the operators were required to pay the tax calculated at a rate related to the value of the fare and freight. Repelling the contention, Hidayatuallah J., speaking for the court, said (at. p. 1484 of AIR 1961 SC) :

> "................. We do not agree that the Act, in its pith and substance, lays the tax upon income and not upon passengers and goods. Section 3, in terms, speaks of the charge of the 'tax in respect of all passengers carried and goods transported by motor vehicles', and though the measure of the tax is furnished by the amount of fare and freight charged, it does not cease to be a tax on passengers and goods..........."

Indeed, reference may be made to the following statement in Encyclopaedia Britannica [Vol. 14, page 459] on "Luxury Tax" :

> "A different approach to luxury taxation, much less frequently found, seeks to single out the luxury component of spending on a given object rather than taxing specified goods and services as laxities. One example of this is the Massachusetts 5% tax on restaurant meal of $ 1 or more.....".

The submissions of the learned Attorney-General that the tax is essentially a tax on expenditure and not on luxuries or sale of goods falling within the State power, must, in our opinion, be accepted. As contended by the learned Attorney-General, the distinct aspect, namely, "the expenditure" aspect of the transaction falling within the Union power must be distinguished band the legislative competence to imposed a tax thereon sustained. Contention (a) is, in our opinion, unsubstantial and, accordingly fails.

Re : Contention (b) : It is urged that the application of the Act is confined to hotels where the "room charges" for any unit of residential accommodation are Rs. 400 or more per day per individual, while expenditure of greater magnitude and quantum incurred in other hotels is not exigible to the tax, either because such room charges are less than Rs. 400 or because the establishment which, though providing food and drink and other services envisaged by section 5, may not provide residential accommodation. This distinction, it is said, is violative of the constitutional pledge of quality. The averments in this behalf in the memorandum of writ petition are these :

> "There is no basis or intelligible differntia for discriminating between the levy of the

> tax on expenditure over food or drink provided by a hotel and the food or drink provided by a restaurant or eating house not situated in a hotel (or in a hotel to which the Act does not apply) even though the cost of food or beverage is higher than that on similar items in an applicable hotel. There is also not intelligible differentia for discriminating between levying of tax on expenditure on food and drinks outside the hotel which is provided by the hotel and not levying tax on expenditure on food and drinks incurred outside the hotel but which is not provided by the hotel, even though the latter expenditure may be more greater than the former..............."
>
> "The arbitrariness and lack of intelligible differentia is even more apparent in respect of clause 5 (d) read with exception (c). To give an example, if a shop or office is owned by the hotel in the hotel, any expenditure incurred in such a shop or office would attract expenditure tax but if such a shop or office is not owned or managed by the hotel even though situated in the hotel premises, such expenditure in by/the hotel would not be liable to the impugned expenditure-tax."
>
> "By way of illustration, it may be pointed out that in the City of Bombay, there are numerous restaurants like, Talk of the Town, China Garden, Gazebo and Gaylord which are similarly situated in every way to restaurants located in applicable hotels, from the point of view of their decor, furnishing, the range of the menu, the pricing of the items, the standards of service. The clientele of such restaurants is also as affluent as the class of people who patronise restaurants which are located in applicable hotels. Furthermore, many of the said independent restaurants are far more luxurious and expensive than restaurants and/or dining rooms attached to applicable hotels in the City of Bombay which have one or more rooms charging a daily tariff of rupees 400 or more per person."

It is now well settled that though taxing laws are not outside article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy, the Legislature enjoys a wide latitute in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment, what is looked into is not its phraseology, but the real effect of its provisions. A Legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is quality and uniformity within each group, the law would not be discriminatory. Decisions of this court on the matter have permitted the Legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.

But, with all this latitude, certain irreducible desiderata of equality shall govern classifications for differential treatment in taxation laws as well. The classification must be rational and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. But this alone is not sufficient. Differential must have a rational nexus with the object sought to be achieved by the law. The State, in the exercise of its Governmental power, has, of necessity, to make laws operating differently in relation to different groups or class of persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience.

Classifications based on differences in the value of articles or the economic superiority of the persons of incidence are well recognised. A reasonable classification is one which includeds all who are similarly situated and none who are not. In order to ascertain whether persons are similarly placed, one must look beyond the classification and to the purposes of the law.

In Jaipur Hosiery Mills (P.) Ltd. State of Rajasthan [1970] 2 SCC 27; [1970] 26 STC 341 (SC), a notification under the Rajasthan Sales Tax Act, 1950, exempting from tax the sale of garments which did not exceed Rs. 4 per piece was assailed. This court found the classification permissible. It was held (at p. 343 of 26 STC) :

> "............. it has to be borne in mind that in matters of taxation, the Legislature possesses a large freedom in the matter of classification. Thus wide discretion can be exercised in selecting persons or objects which will be taxed and the statute is not open to attack on the mere ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally and cannot be justified on the basis of a valid classification that there would be a violation of article 14."

In Hira Lal Rattan lal v. STO [1973] 2 SCR 502, 510, 511; [1973] 31 STC 178, 185, 186 (SC), this court said :

> "................. It is open to the Legislature to define the nature of the goods, the sale or purchase of which should be brought to tax. The Legislature was not incompetent to separate the processed or split pulses from the unsplit or unprocessed pluses and treat the two as separate and independent goods."
>
> "................ But the legislature has wide powers of classification in the case of taxing statutes."
>
> ".......... The classification between the processed or split pulses and unprocessed or unsplit pulses is a reasonable classification. It is based on the use to which those goods can be put. Hence, in our opinion, the impugned classification is not violative of article 14."

In State of Gujarat v. Shri Ambica Mills Ltd. [1974] 3 SCR 760, 784; AIR 1974 SC 1300, 1314, Mathew J. said :

> "Statutes are directed to less than universal situations. Law reflects distinctions that exist in fact or at least appear to exist in the judgment of legislators - those who have the responsibility for making law fit fact. Legislation is essentially enmpiric. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation. To recognize marked differences that exist in fact is living law : to disregard practical differences and concentrate on some abstract identities is lifeless logic."
>
> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature, after all, has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of

> the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

In G. K. Krishnan v. State of Tamil Nadu [1975] AIR 1975 SC 583; [1975] 2 SCR 715, 729, Mathew J. referred to the following observations of the Supreme Court of U. S. A. in San Antonio School District v. Rodrigues [1973] 411 US 1 (at p. 592 of AIR 1975 SC) :

> "Thus we stand on familiar ground when we continue to acknowledge that the Justices of this court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favour of some other from of taxation. No scheme of taxation, whether the tax is imposed on property income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause."

In ITO v. N. Takin roy Rymbai [1976] 103 ITR 82, 89 (SC); [1976] 3 SCR 413, it was held :

> "Given legislative competence, the Legislature has ample freedom to select and classify persons, districts, goods, properties, incomes and objects which it would tax, and which ITR would not tax. So long as the classification made within this wide and flexible range by a taxing statute does not transfers the fundamental principles underlying the doctrine of euqlity, it is not vulnerable on the ground of discrimination merely because it taxes or exempts form tax some incomes or objects and not others. Nor the mere fact that tax falls more heavily on some in the same category, is by itself a ground to render the law invalid. It is only when within the range of its selection, the law operates unequally and cannot be justified on the basis of a valid classification, that there would be a violation of article 14."

In the present case, the bases of classification cannot be said to be arbitrary or unintelligible nor as being without a rational nexus with the object of the law. A hotel where a unit of residential accommodiation is priced at over Rs. 400 per day per individual is, in the legislative wisdom, considered a class apart by virtue of the economic superiority of those who might enjoy its custom, comforts and services. This legislative assumption cannot be condemned as irrational. It is equally well recognised that judicial veto is to be exercised only in cases that leave no room for reasonable doubt. Constitutionality is presumed. These words of James Bradley Thayer may be recalled :

> "This rule recognieses that, having regard to the great, complers ever-unolding exigencies of government, much which will seem unconsitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the Constitution does not impose upon the Legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional."

[See : Supreme Court State craft; The Rule of Law and Men : Walance Mendelson : p 4.]

Thayer also referred to the words of a chief Justice of Pennsylvania way back in 1811, which are also worth recalling :

> "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this Court, and every other court of reputation in the United Stages, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."

In Secretary of Agriculture v. Central rough Refining cod. [1949] 338 U. S. 604, the Supreme court of USA said :

> "............... This court is not a Tribunal for relief for crudities and inequities of complicated experimental economic legislation." :

In Hoechst Pharmaceuticals Ltd. v. State of Bihar [1985] 154 ITR 64 (SC); AIR 1983 SC 1019, 1046, it was observed :

> "On questions of economic regulations and related matters, the court must defer to the legislative judgment. When the power to tx exists, the extent of the burden is a matter for the discretion of the law- makers. it is not the function of the court to consider the propriety or gustiness of the tax, or to enter upon the realm of the legislative policy. If the burden with a fair and reasonable degree of quality, the consitutional requirement is satisfied............."

It is contended that the standards and measures for the computation of the "chargeable expenditure" under the Act are vague and arbitrary. it is pointed out that the expression "or other similar services" in clauses (d) of section 5 is non-specific and vague. This argument does not commend itself to us. It is true that when the statute says "other similar services" it decided does not contemplate that the "other services" shall, in all respects, be the same. If they were the same, then words would indeed, be unnecessary. These were intended to embrace services like - but not identical with - those described in the preceding words.

The content of the expression "other similar services" following, as it does, the preceding expressions "by way of beauty parlour, health club, swimming pool or........." has a definite connotation in the interpretation of such words in such statutory contexts. The matter is one of construction as to whether any particular service falls within the section and not one of constitutionality

We find contention (b) is also not acceptable

Re : Contention (c)

It is urged that the provisions of the Act impose an unreasonable restriction on the petitioners' fundamental right under article 19(1)(g). It is averred in the petition :

> "............. The various taxes to which the hotel industry is subject are mentioned in the earlier part of this petition. Thus, in respect of food and beverages consumed in a

> hotel, the element of taxes representing sales tax and the present expenditure-tax works out, for example in Maharashtra, to as much as thirty five per cent. Likewise, in respect of the room tariff, the element of tax works out, for example in Gujarat, to as much as thirty-seven per cent. The details of the said calculations are given in exhibit 'D' annexed to this petition. The hotel industry today is subject to an extremely heavy dose of taxation in the shape of income-tax and even the recent tax on works contracts. The petitioners say that the tourism industry is now not in a position to sustain any additional burden and the impugned tax is literally the last straw on the camel's back............"

It is also contended :

> "........... Several of the hotels belonging to members of petitioner associations have entered into long-term contracts for supply of food and beverages and for providing accommodation. The execution of such contracts would become onerous and even impossible in view of the levy of the present expenditure-tax. there is no provision in the Act or any separate legislation whereby hotels can pass on such a tax to persons who have contractually agreed to avail of any services at contracted rates..........."

A taxing statute is not, per se, a restriction of the freedom under article 19(1)(g). The policy of a tax, in its effectuation, might, of course, bring in some hardship in some individual cases. But that is inevitable, so long as law represents a process of abstraction from the generality of a cases and reflects the highest common factor. Every cause, it is said, has its martyrs. Then again, the mere excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per se, and without more, constitute violation of the rights under article 19(1)(g). Fazal Ali J., though in a different context, in Sonia Bhatia v. State of U. P. [1981] AIR 1981 SC 1274, 1284; [1981] 3 SCR 239 at 258, observed :

> "The Act seems to implement one of the most important constitutional directives contained in Part IV of the Constitution of India. If in this process a few individuals suffer severe hardship, that cannot be helped, for individual interests must yield to the larger interests of the community or the country as indeed every noble cause claims its martyr."

Contention (c) also insubstantial.

in the result, for the foregoing reasons, these petitions fail and are dismissed. However, in the circumstances of the case, there will be no order as to costs.

<u>RANGANATHAN J.</u>

I have perused the judgment of my learned brother. Venkatachaliah J., in this batch of writ petitions as well as in the two connected batches of matters, viz. C. A. Nos. 338 and 339 of 1981, and W. P. Nos. 254-261 of 1981. I respectfully agree with his conclusions in all these matters but wish to add a few words, primarily in so far as the constitutional validity of the expenditure- tax Act, 1987, is concerned. As my learned brother has set out, analysed and discussed in detail the provisions of the various statutes, the validity of which is in question. I shall avoid a repetition of the same and confine myself only to the consideration of the crucial issues for determination.

The contentions of the assessees in the three batches of cases above referred to, prima facie, sought

to make out a state of direct collision, between a group of State enactments on the one hand and a couple of Central enactment on the other, which cannot be averted save by declaring one set of the enactments to be invalid. The powerful, if also "diplomatic", endeavour of the lend Attorney-general, appearing for the Union of India, was to show that these sets of enactments are not really on a collision course at all but, on the contrary, are proceeding on parallel lines and that each of the sets of legislations is quite safe from attack on the ground of legislative incompetence. whether this contention is acceptable and both sets of enactments can be saved or whether one of the two has to give way to the other is the question for consideration in these batches of cases.

the set of State enactments which blazed the trail (to be followed up by others) and hence are prior in point of time, is that comprising of various statutes passed by several States in India. The specific State legislations which are in challenge in the petitions and appeals before us (as indicated in the brackets at the end) are :

> (a) Gujarat Tax on Luxuries (Hotels and Lodging Houses) Act (No. 24 of) 1977. [C. A. Nos. 338, 339 of 1981; W. P. Nos. 7990, 8338, 8339, 9110 of 1981]
>
> (b) Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Ordinance, 1980, followed by an Act (Act No. 6 of 1981). [W. P. No. 162 of 1982]
>
> (c) Karnataka Tax on Luxuries (Hotels and Lodging Houses) Act (No. 22 of) 1979. [W.P. Nos. 1271 and 1272 of 1982]
>
> (d) West Bengal Entertainments and Luxuries (Hotels and Restaurants) Tax Act (No. 21 of) 1972 [W. P. No. 5321 of 1985]

The States of Uttar Pradesh, Maharashtra and Kerala have also passed similar enactments, being the :

> (a) Uttar Pradesh Taxation and Land Revenue Laws Act (No. 8 of) 1975;
>
> (b) Maharashtra Tax on Luxuries (Hotels and lodging Houses) Act XLI of) 1987; and
> (c) Kerala Tax on Luxuries in hotels and Lodging House Act (No. 32 of) 1976, repealing Kerala Ordinance No. 5 of 1976.

The above statutes have apparently been enacted by the various State legislatures in exercise of the legislative powers conferred on them under article 246(3) of the Constitution, read with entry 62 of List II in the Seventh Schedule to the Constitution of India, which runs :

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

(Some aspects thereof are also sought to be related to entry 54 of List II, but as this stands on the same footing as entry 62 for the purposes of the present case, no separate reference is made to entry 54 hereinafter). This is clear because the short title to each of the above enactments describes it as an Act to provide for the "imposition" or "the levy and collection" of a tax on "luxuries" or "entertainment and luxuries" in or provided in "hotels" or "hotels and restaurants" or "hotels and lodging houses". Although "luxuries and entertainments" may be provided or availed of in various ways and could all be made the subject-matter of tax virtue of the entry above referred to these enactment are confined only to one type of such entertainments and luxuries, viz., those provided in

hotels restaurants or leadings houses, as defined under the relevant enactment. Also only certain specified classes of entertainments or luxuries provided in such places are bought to tax. The details of the imposition levy and collection of the taxes very with the enactment and need not be repeated here. It is quite clear from the scheme of the legislations that they all fall within the scope of entry 62 of List ll set out earlier. My learned brother had held so and l agree, their validity would, perhaps have gone unchallenged but for the enactment by Parliament of the Hotel Receipts Tax Act, 1980 (hereinafter referred to as "the 1980 Act"). When in pursuance of the 1980 Act, a tax on some of the receipts of a hotelier was sough to be charged with effect from February, 1, 1981, it was but natural form some of the effected hotelier to rush to court for relief against the two-pronged taxation of their receipts. Writ petitions were filed challenging the competence of both sets of the enactments and these have now come up for final hearing. It must, however, be mentioned here that the levy of the hotel receipts tax was withdrawn after a year; nevertheless it was in operation for the one assessment year and hence the challenge to its validity is not purely academic. the validity of the 1980 Act has been upheld by my learned brother as traceable to entry 82 of List l in the Seventh Schedule to the Constitution - Taxes on income other than agricultural income. I respectfully agree.

The relief conferred by the withdrawal of the 1980 Act was, however, shortlived; it was only a "lull before the storm" which descended on all hoteliers in the from the Expenditure-tax |Act, 1987 (hereinafter referred to as "the 1987 Act"). Before referring to this enactment, the validity of which has been challenged in writ petition by a period of three decades.

Mr. Nicholas Kaldor, Reader in Economics in the University of Cambridge, was the proponent of levy styled "expenditure-tax." When the Government of lndia requested him some time tin the fifties, to have a look at the system of direct taxation prevailing in this country and make his recommendations for a comprehensive scheme of tax reform, he suggested, inter alia the levy of an "expenditure-tax." His opinion was that such levy supplementing an income-tax levy at rates lower than those purulent them, would enable the Government to more effectively harness its resources. In the course of arguments before us, copious references have been made to passage form Nicholas Kaldor's Book ("An Expenditure-tax" published by George Allen and Unwin Ltd., of U. K.). and his "Survey Report on Indian Tax Reform" (published by the Government of India) but it will be sufficient to mention here that prof. Kaldor's report was implements by parliament by enacting the Expenditure-tax Act, 1957 (herein after referred to as "the 1957 Act"). The validity of the above Act was challenged before this court but unsuccessfully. The decision of this court is reported as H. H. Prince Azam Jha Bahadure v. ETO [1972] 83 ITR 92 (SC); [1972] 1 SCR 470. The nature and scope of the Act have been dealt with in the above decision and it is unnecessary to repeat the same here.

The 1957 Act was withdrawn after a few years : to be precise, with effect from the assessment year 1965-66. It was given up both because it was found to be too cumbersome an difficulty to administer and also because the yield of revenue therefrom was not substantial due to the mentioned, The 1980 Act occupied the filed for a very short time, the pendency of writ petitions challenging its validity having perhaps largely contributed to its withdrawal. After some interval, now parliament has come in with the 1987 Act. The ambit and scope of this Act along with, on the one hand, its distinguishing features, as contrasted with the 1957 and 1980 Acts and its similarities when compared to the State legislations, on the other have been borough out in the judgment of brother Venkatachaliah J. and do not need repetition here. It is in this background that we have to determine the pith and substance of the 1987 Act and decide whether Parliament had the legislative competence to exact the same or not.

The short question that one has to answer in these cases is whether the levies in question by the States and the Union can both stand or whether we have to treat the levies as either tax on "luxuries" or as tax on "income" or "expenditure" and thus uphold one of the them but not both. I do not think there can be any doubt at all that, in the context of the social and economic conditions that prevailed in lndia, it was a luxury for any person to stay in hotels charging high rents and providing various types of facilities amenities and conveniences such as telephone, television, airconditioner,, etc., The decision of this court in A. B. Abdul Kadir v. State of Kerla [1976] AIR 1976 SC 182; [1976] 2 SCR 690, and in particular the discussion at pages 699 to 701 places this beyond all doubt. This aspect has also been discussed by Thakkar J. of the Gujarat High Court (as his Lordship then was) in the judgment under appeal and I am in agreement with his reasonings and conclusion that the Gujrat statute has been validly enacted in exercise of the powers available to the State Legislatures under entry 62 of List ll. This applies equally to the other impugned State enactment as well.

It has been argued that the monetary ceilings for the rents have been fixed at such low figures that even temporary stay at not so comfortable a hotel or leadings house, when a person is constrained to go outside his hometown, will become a luxury, according to these standards. Indeed, some statistics have been supplied by the Gujarat petitioners in support of such as convention. But this, I think, is a matter which must be left to the legislative determination. As is well known the Legislature has particularly in a taxing statute, a considerable amount of latitue and there is no material to hold that in fixing the standards of indication of luxury, the Legislature has not applied its mind. In fact, the figures have been amended from the time to time and one has to presume that the Legislature had good reason for fixing these standards. The State legislations are, therefore clearly within the competence of the State Legislatures and are not liable to be challenged.

It seems equally clear that the pith and substance of legislation of the 1980 Act is, as held by Venkatachaliah j., traceable to entry 82 of List l. In interpreting the scope of the legislative entries in the three lists, we have to keep in mind that, while on the one hand it is desirable that each entry in each of the list should receive the broadest interpretation, it is equally important, on the other, that the three should be read together and harmoniously. Our attention was drawn to some of the entries in List ll. which show that the legislative power in respect thereof are to be exercised subject to the powers of Parliament envisaged under List l, vide entries nos. 2,17, 22,23,24,26,27,32,33 and 50. There is no doubt that these entries have to be read subject to the entries of List l which have been mentioned or the powers of Parliament referred to therein. These, however, are instances of entries which on their very language are controlled by entries in List l. But even apart from these instances, the language of clauses (1) and (3) of article 19 makes it clear that the power of the State Legislature to make laws with respect to any of the matters enumerated in List ll. is subject to the exclusive power of Parliament to make laws with respect to any of the matters enumerated in List l. Hence, if a matter is covered by an entry in the Union list, on restrictions can be read into the power of parliament to, make laws in regard thereto. This is so far as the general power of legislation is concerned As pointed out by this court in M. P. V. Sundararamier and Co. v. State of AP [1958] AIR 1958 SC 468; [1958] 9 STC 298 1422,1479 and 1490, the legislative entries are so arranged that the power to exact laws in general and the power to impose taxes are separately dealt with. The subject matters of taxation available to parliament are enumerated in entries 82 to 97 of List l, those available to the State Legislatures in entries 45 to 63 of List ll. and those available to both in entry 44 of List lll. Under section 246 (1), Parliament has exclusive power to make laws with respect to any of the matters and this includes the power to imposed taxes - enumerated in List l. In this situation and in view of the fact that the 1980 Act, is in pith and sub-stance, a tax on income its constitutional validity can be in no doubt at all.

But, can the Union enactment of 1987 of also be supported for the same reasons, as imposing an expenditure tax which, as held in Azam Jha's case [1972] 83 ITR 92 (SC); [1972] 1 SCR 470, falls within the scope of entry 97 of List l ? Shri Palkhivala says it cannot be. His first contention is that the tax levied by the 1987 Act, is not, in fact and in truth, an expenditure-tax. He says that it is not sufficient for the Legislature to give such a description or label to a tax proposed to be levied by it as does not fall under List ll and claim that it should be upheld under entry 97. The tax sough to be imposed should be one which has real existence and recognition in the world of economics. According to him, the economic concept of an expenditure tax is of a tax that is levied not on isolated items of expenditure but one of one on the totality of the expenditure incurred by an assessable entity, just as income-tax has gained recognition as a tax on the total income of taxable entity. That was the concept of the expenditure-tax which Nicholas Kaldor and in mind, which was embodied in the 1957 Act, and which hence, was endorse with approval by this court. A tax on a few items of expenditure, it is said, is not necessarily the same as an expenditure tax. Referring to the decisions of this court upholding the levy of wealth-tax and gift-tax in so far as it affected agricultural lands : GTO v. D. H. Hazareth [1970] 76 ITR 713; [1971] 1 SCR 195 and Union of India v. H. S. Dhillon [1972] 83 ITR 582 (SC); [1972] 2 SCR 33, it is submitted that the decisions may well have been different had they been concerned with an imposition only on "lands and buildings" by reference to their capital value or only on" "agricultural lands" on the occasion of a gift.

It is difficult to accept the contention that the tax cannot be considered to be an expenditure-tax because it is not on "expenditure" generally but is restricted to specific types of expenditure. There is no legal judicial economic or other concept of expenditure-tax that would justify and such restrictive meaning. If, conceptually, the expenditure incurred by a person can be a subject-matter with reference to which a tax case be levied there is no reason why such taxation should not be restricted only to certain items or categories of expenditures and why its base should necessarily be so wide as to cover all expenditure incurred by an assessable entity. After all, even under the 1957 Act, expenditure of all persons was not liable to tax. It substantially covered only certain types of assessees and certain types of expenditure (for several types of expenditure were exempted) and that too only when it exceeded certain limits. The analogy of the income-tax or wealth-tax or Gift-tax Acts also does not really help us. Thought they are enactmets which cover a larger area of the subject-matter taxed, that was because the Legislature found it expedient to do so and not because they were obliged to cover the entire area of income, wealth or gift. An Act imposing a tax for example on hotel receipts alone or dividends alone or on capital gains alone will not be any the less a tax on income within the scope of entry 82 of List I. Likewise even if the Legislature had confined its levy of wealth-tax to certain assets such as lands ans buildings or the Gift-tax Act had levied a tax only on gifts of agricultural land, they would not have ceased to fill within the scope of the relevant entries of Union List, so long as in pith and substance, they were found respectively to be taxes on the capital value of the assets in question or on the transaction of gift. The Central Excise Act, for example does not levy excise duty on the manufacture and production of all goods and additional excise duty is levied only in respect of certain goods. So also in regard to sales tax. it is, indeed, even possible to say that no tax levy in respect of any subject-matter can or does a operate universally without any exceptions or exemptions. Selection of objects and goods for taxation is the essence of any tax legislation and any limitation of the nature suggested in an unwarranted curtailment of this selective power of taxation of Parliament.

There is also no established legislative practice which would enable one to limit the concept of an expenditure-tax in the manner suggested. So far as expenditure-tax is concerned, the only legislation earlier in force was the 1957 Act which was in a force for a period of eight years. Such shortlived

legislation can hardly furnish the foundation of an argument to limit the scope of legislate power to the manner in which it was exercised under that enactment. If, after withdrawing this legislation, Parliament considered that it was not worthwhile or possible to imposed a tax on all expenditure and that it would be sufficient expedient or necessary to impose such levy only on lavish spending in certain directions, that cannot certainly be precluded on any theory of established legislative practice, as was done in State of Madras v. Gannon Dunkerley and Co. (Mad) Ltd. [1959] SCR 379, in respect of sales tax. In that case, the legislative trend prevalent over decades was relied upon in interpreting the expression "sale of goods" used in the Constitution. But there the court was concerned with a legal term "sale" which had adcquired a definite connotation in law and in legislative instruments and that analogy cannot be availed of to interpret the scope of entry 97. On the other had even a family long established legislative practice under which income-tax levy by the Centre was restricted to items of income stricto sensu (as contrasted with capital gains) was not considered sufficient to place that type of restriction on the interpreation of the expression "taxes on income" used in the Central Legislative List : vide, Navinchandra Mafatlal v. CIT [1954] 26 ITR 758 (SC); [1955] 1 SCR 829. Not only that, the validity of late definitions of "income" under the income-tax Act which have a much wider ambit has been upheld as covered by the above legislative entry. See, in this context, the decisions in Navnit Lal C. Javeri v. K. K. Sen,AAC [1965]56 ITR 198 (SC); AIR 1965 SC 1375, H.K. Bhargava v.Union of India [1966] 59 ITR 243 (SC);[1966] 2 SCR 22 and Bhagwan Dass Jain v. Union of India [1981] 128 ITR 315 (SC); [1981] 2 SCR 808. There is not even that much of legislative practice so far as expenditure-tax is concerned, which would justify our importing any limitation on the concept of a "tax on expenditure" under entry 97 of List l. A perusal of the decision of this court upholding the validity of the 1957 Act Azam Jha's case [1972] 83 ITR 92 (SC); [1972] 1 SCR 470, does not also justify the reading in of any such limitation. The wider coverage of the tax made it easier for the court to pinpoint its subject-matter as "expenditure" and to treat it as a matter falling under the residuary try, but it does not justify the inference sough to be drawn that a tax cannot be said to be a tax with reference to "expenditure" because it does not tax expenditure in general but confines item to certain types or categories of expenditure. Once it is granted that the tax need not exhaust the entire universe of the subject-matter, the extent of the subject-matter that should be covered or selected for imposing tax should be entirely left to Parliament, subject only to any criteria of discrimination or unreasonableness that may attract the provisions of Part lll of the Constitution.

The fact that the 1987 Act seeks to tax only the expenditure on items which can be described as luxuries is, however, used by Shri Palkhivala to support his other contention (which has really troubled me considerably) that the pith and substance of both sets of legislations is the same, that they both impose a tax only on luxuries or entertainments and that the distinction sought to be made on behalf of the Revenue that one is a tax on "luxuries" while the other is a tax ton expenditure incurred by a person on luxuries is holy a distinction between "Tweedledum" and "Tweedledee." The object and affect of tax on luxuries is only to curb expenditure on luxuries and such a tax may be imposed levied or collected either from the provider of luxuries or the person who enjoys them. The object of expenditure- tax is also similar and that can also be levied either on the person who spends the moneys directly or though some other person, or even from the person who benefits by the incurring of such expenditure. The provision of a luxury and the payment for it are only obverse sides of the same coin and cannot from any practical point of view, be considerd as two separate and independent subject-matters of taxation. It is a well-settled proposition that the entries in the legislative lists should be given the broadest connotation and, hence, a tax on luxuries by reference to the expenditure thereon will fall clearly under the entry in the State List. The pith and substance of both sets o legislation, therefore, falls only under untry 62 of the State List. This being so, entry

97 of List l will have no applicability at all; that can be called in aid only to cover matter not specifically enumerated or taxes not mentioned in List ll or lll.It is, therefore, not possible, it is urged, to sustain the validity of the 1987 Act by reference to entry 97 of List l.

The learned Attorney-General sought to meet this contention in two ways. He first urged that the pith and substance of the two legislations are different. A tax on "luxuries" measured by reference to the amount charged or paid therefor is totally different from a tax to curb opulent or ostentatious expenditure even though the categories of expenditure brought in for taxation by particular statue may be restricted. The latter cannot be described as a tax on "luxuries" and does not fall within the scope of entry 62 of the State List and,in the absence of any referability to any other entry of List ll, it is safe from attack under article 248 (2) and will also be covered, if need be by entry 97 of List l. The second argument is that, after the decision in Azam Jha's case [1972] 83 ITR 92 (SC); [1972] 1 SCR 470 holding that a "tax on expenditure" will be legislation covered by entry 97 in List 1, the constitutional position is the same as if, before item 97, a specific entry had been inserted in List 1 [say, entry 96A] which reads "Taxes on expenditure". The result, he says, is that the Central legislation will be squarely covered by an entry in List 1 and so we need not embark on any investigation as to whether it falls or does not fall under any entry in List llor List lll.

It seems to me that there is a fallacy in the second line of argument addressed by the learned Attorney-general. I do not think that the legislative lists can be interpreted, as suggested by him, on the assumption that term is a deemed entry, "Taxes on expenditure" added to List l as a result of the decision in Azam Jha's case [1972] 83 ITR 92 (SC); [1972] 1 SCR 470. One cannot add entries to the legislative lists on the basis of decisions of this court. In Azam Jha's case [1972] 83 ITR 92 (SC), the pith and substance of the act considered did not fall under any of the entry No. 97 describing the tax, having regard to its pith and substance, as a tax on expenditure. Here however, we have a legislation which covers only certain types of expenditure and the contention of the petitioners is that these are all items of expenditure pertaining to luxuries. The decision in Azam Jha's case [1972] 83 ITR 92 (SC) cannot help us to determine whether the legislation before us should be construed as imposing a tax on expenditure or one on luxuries. If in spite of its dealing with only certain types of expenditure relatable to luxuries, it can be said to be, in the pith and substance, not a tax on luxuries then we may hold that Parliament can legislate with reference to it and for purposes of convenience, take advantage of its description as a tax on expenditure to rest it on entry 97 of List l. In other words entry 97 of List l cannot come to our rescue unless we are in a position to say that the substance of the Central legislation in question is not a tax on luxuries, entertainaments or amusements. This takes us to the first part of the argument of the learned Attorney-General.

Is there a tenable and true distinction between the tax on expenditure levied by the Act and a tax on luxuries ? Are Parliament and the State Legislatures dealing with the same "Matter" and taxing one and the same thing, though describing it differently or are they taxing two different matters or things ? Shri Palkhivala says that the subject- matter of taxation is "luxury" and that it is meaningless to consider the expenditure incurred on it as a separate and distinct subject- matter. The acceptance of such an argument, he says, will lead to double taxation in respect of almost every matter on earth. For instance, A may be taxed on the salary or interest or dividend paid to him by B as his income and, at the same time B can be asked to pay a tax on the expenditure incurred by him by way of such salary, interest or dividend payment. A can be asked to pay wealth-tax on the capital value of the assets acquired by him and also asked to pay an expenditure tax on the money spent on such acquisition. A can be asked to pay sales tax on the goods sold by him to B and also asked to pay or collect a tax on the expenditure incurred by B to purchase the same. Such instances he says, can be

multiplied and will reduce the argument to an absurdity.

The Attorney-General, on the other hand submits that the question whether both legislations relate to the same matter does not bring out correctly the controversy in issue. He says that if the expression "matter", in this Context, is understood in its widest sense it will create chaos in the matter of interpretation of the lists. According to him, for applying the doctrine of pith and substance, we have to understand the expression "matter" not in a "gross", but in a "rare" sense. He develops this contention by invoking, to his aid, what may be called the "aspect" rule as explained in certain text books and judicial decisions.

A. H. F. Lefroy in his "Canadian Constitution" observes, at p. 98 :

> "Sec. XXI. Aspect of legislation : Subjects which in one aspect and one purpose fall within section 92 of the Federation Act and so are proper for provincial legislation may, in another aspects and for another purpose all within section 97 and so be proper for Dominion legislation. And as the cases which illustrate the principle show, by 'aspect' here must be understood the aspect or point of view of the legislator in legislating, the object, purpose and scope and of the legislation. The word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

To similar effect is the passage from Laskin's Canadian "Constitutional Law" extracted in the judgment of Venkatachaliah J. The Federal Court in the C.P. and Berar Act case [1939] FCR 18; AIR 1939 FC 1, 10, also touches upon the "aspect" theory at p. 49 :

> "Here are two senate enactments, each in one aspect conferring the power to impose a tax upon goods; and it would accord with should principles of construction to take the more general power, that which extends to the whole of lndia as subject to an exception created by the particular power, that which extends to the province only."

A similar reference to the "aspect" of legislation can be seen in Kerala State Electricity Board v. Indian Aluminium Co. Ltd., AIR 1976 SC 1031,1044; [1976] 1 SCR 552 at p. 573-74 :

> "The argument of the learned Solicitor-General appearing on behalf of the Keral Electricity Board in support of his submission that the legislation falls under entries 26 and 27 of List ll may be summarised as follows : Those entries do not enable the State Legislatures to legislate with regard to all conceivable goods like arms, ammunition, atomic minerals, etc., as was argued by Mr. Sen. A Legislature while legislating with respect to matters within its competence, should be deemed to know its limits and its legislative authority and should not be deemed to be legislating beyond its jurisdiction. One thing that has always got to be kept clear in one's mind is that there may be more than one aspect with regard to a particular subject-matter."

Relying on this principle, and backed by these observations, the learned Attorney-General Submits that properly understood, the pith the and substance of the 1987 Act is "expenditure" and not "luxuries."

As first blush the argument of the learned Attorney-General may should a little subtle and somewhat artificial but on some reflection, legislative competence will indeed be seen to vary with different aspect s of subject-matter as understood in wide sense. This can be seen from some of the decided cases. The first triumvirate of cases that arose in India under the Government of India Act, viz. In

re, Central Provinces and Berar Act XIV of 1953 [1939] FCR 18, Province of Madras v. Boddu Paideanna and Sons [1942] AIR 1942 FC 33; [1942] FCR 90, Governor General-in-Council v. Province of Madras [1945] FCR 179, were concerned with there question whether the impugned tax was one on the sale of goods or an excise duty. Interpreting the word "subject- matter" in a broad seance, it could perhaps be said that both were taxes with respect to goods but referred to taxes in respect of two different activities referable to goods (conveniently described as the "taxable event"), one the manufacture and production of goods and the other with the sale thereof. In the light of these legislative entries, the two different activities could properly be regarded as two different matters for taxation and the relevant legislation was held to be one concerned with "sale" and not with "manufacture". In other words, there could be two enactment "each, in one aspect, conferring the power to imposed a tax upon goods." The legislation was held not to be vacillated merely because there was an element of overlapping in that both excise duty and sales tax became leviable on the same assessee in respect of the same goods and by reference to the same sale price when the first sale after manufacture occurs, one by reference to the "manufacture" aspect and the other by reference to the "sales" aspect. This bifurcation of the two different aspects pertaining to goods was justified by the language of legislative entries themselves which referred separately to the different sets of activities and put them down in different legislative lists. Again, on the same principle, the manufacture of electricity may attract excise duty at the point of its captive consumption (under entry 84 of List 1) and also a tax on the conception or sale of electricity (referable to entry 53 of List ll).

The power to levy taxes with respect to "property" has created similar problems. All States (or corporations and municipalities therein) levy a property tax on the owner or occupier which is almost universally measured by the reference to its annual value (viz., the rent it would fetch if let from year to year.). The income-tax Act also charges a tax on the same basis. In other words, in realistic and practical sense, the tax was levied by both Legislatures on the same amount and with reference to the same matter. But both levises have been upheld under the 1935, Act, the former as a "tax on lands and buildings, hearths and windows" (entry 42 of ListIl) and the latter as a tax on income (under entry 34 of List 1). Ralla Ram [1948] FCR 207, AIR 1949 FC 81, pointed out that they were different types of levies one on land and buildings (generally, but not necessarily, measurable by reference to the income derived or capable of being derived) and the other on the income (actually or nationally) derived from it. The pith and substance of the former, it was said, was not "income" (from the property) though the tax was levied on the basis thereof. Expressed differently, it would be said that, though both were taxes with respect of property, they touched different aspects of the above subject matter; the first was a tax on the aspect of ownership or occupation of the property; the second on the aspect of income from the property. the decision of this Court in Bhagwan Dass Jain v. Union of India [1981] 128 ITR 315; [p1981] 2 SCR 808 is also to the same effect.

The Hingeir-Rampur Coal Co. Ltd. v. State of Orissa [1961] 2 SCR 537; SC 459,was concerned with the validity of an Orissa Act which sought to levy a cess not exceeding 5% of the valuation of the coal stacked at the pit's mouth. The question was whether this was in pith and substance a duty of excise (entry 84 of List 1) or a fee to regulate and control the coal mining industry (entries 66 and 23 of List 11.) Here gain, though the method adopted for recovering the import was the same as that of an excise duty the validity of the tax was upheld as it related to the aspect of control over the industry rather than to the aspect of an import on production of coal.

Sainik Motor's case [1962] 1 SCR 517 furnishes an illustration which comes nearer to the question at issue before us. In that case, a Rajasthan Act purported to levy a tax on passengers and goods

measuring it by reference to the fares and freights chargedn by operators for carriage of such passengers or goods. If it were to be treated as a tax on "fares and freights", it would be a tax on income which the state Legislature and could not levy. But, if treated as a tax on passengers and goods carried by road, it was valid under entry 56 of List ll. The validity of the Act was upheld on the letter ground the court pointing out that the tax was on goods and passengers though meansured by reference to fares and freights. This dichotomy could perhaps also be justified on the basis of the languages of entry 89 of List l. that entry makes a distinction between the two types of imposts and illustrate the two different aspects of the same matter, viz., taxes in respect of vehicles carrying passengers or goods can form separate matters for taxation.

In the light of the above entries and decisions, I think that the learned Attorney-General is right in using that merely because the 1987 Act as well as the State Acts levy taxes which have ultimate impact on persons who enjoy certain luxuries, the pith and substance of both cannot be considered to be the same. The object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which the Legislature wishes to imposed a curb. The idea is to encourage society to cater better to the needs of those who cannot afforded them. For instance, a luxury tax may, to cite a catchy example encourage construction of "janata" hotels rather than five star hotels. Such a tax may be on the person offering the luxury of the person enjoying it. It may be levied on the basis of the amount received for providing or the amount paid of or expended for enjoying the luxury. Conceivably, it could be on different basis altogether. The object of an expenditure tax - and, that, conceptually, there can be an expenditure tax is born out by Azam Jha's case [1972] 83 ITR 92 (SC) - is to discourage expenditure which that of the second would be to discourage people from incurring expenditure in unproductive or undersirable channels. If a general Expenditure-tax Act, like that or of 1957, had been enacted on challenge to its validity could have been raised because it incidentally levied the tax on expenditure incurred on luxuries. The fact that there will be some overlapping then or that here there is a good deal of such overlapping, because the States have chosen to tax only some types of luxuries and the Centre to tax, at least for the time being, only expenditure which result s in such luxuries, should not be allowed to draw a curtain over the basic difference between the two categories of imposts. For instance, if the conflict alleged had been between the present state Acts and an Act of Parliament taxing expenditure incurred in the construction of theatres of the maintains of race horse establishments or the like, there would have been on overlapping at all the pith and substance of the Central tax could well be described as "expenditure" and not "luxuries". This distinction is not obliterated merely because of the circumstance that both Legislatures have chose to attack the same area of vulnerability, one with a view to keep a check on "luxuries" and the other with a view to curb undesirable "expenditure."

For these reasons, I agree with my learned brother, Venkatachaliah J., that the validity of the three impugned enactments has to be upheld and these writ petitions and appeals dismissed.

Petitions dismissed.

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