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EY Tax Alert

SC upholds co-existence of both entertainment tax and service tax levy on broadcasting activities applying Aspect theory

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Executive summary

This Tax Alert summarizes a recent judgement of the Supreme Court (SC)[1] on validity of both State levy (entertainment tax) and Central levy (service tax) w.r.t. same broadcasting activities.

The key observations of the SC are:

- Article 246 of the Constitution distributes legislative powers between the Union and States which requires a liberal interpretation of entries under the lists to determine competence based on the substance of the law rather than its form.
- List I and II of the Seventh Schedule separately enumerate legislative and taxation powers, preventing overlap. Power to tax is not incidental or ancillary and cannot be implied within a regulatory entry. Entry 31 of List I and Entry 32 of List II are regulatory entries and Entry 62 of List II is a taxation entry.
- The expression "entertainments" is of wide import and is commonly understood to include cinema, drama, and similar performances. With technological advancement, "entertainments" must be interpreted broadly to include content accessed in private spaces, such as homes, through television or digital devices, and not confined to traditional or public forms.
- State Legislatures have the competence to levy entertainment tax under Entry 62 of List II. Broadcasting via cable networks primarily serves entertainment and falls within this entry. While broadcasting is a mode of communication, its incidental overlap with Entry 31 of List I does not affect the validity of the State's taxing power.
- As per Aspect theory, the activity of broadcasting can be subject to service tax under the Finance Act, 1994 for the service aspect, while its entertainment aspect can attract entertainment tax as per the State laws.

Accordingly, the SC upheld the simultaneous levy of entertainment tax and service tax on broadcasting services.

[1] TS-442-SC-2025-NT

Background

- Article 246 of the Constitution outlines the division of legislative powers between the Union and the States, with separate entries in the Union List (List I) State List (List II) and Concurrent List (List III) contained in the Seventh Schedule, specifying their respective taxing powers and areas of legislative competence.

  Entry 62 of List II grants power to the State Legislature to impose taxes on luxuries which include entertainment, amusements, betting and gambling.

  Entry 97 of List I gives power to the parliament to make laws or impose tax on any matters not mentioned under the Concurrent list or the State list.

  Several State Governments enacted laws under Entry 62 of List II to impose entertainment tax on broadcasting activities, simultaneously, the Central Government levied service tax on broadcasting services under Entry 97 of List I.

- Writ petitions were filed before various High Courts (HCs) challenging the levy of Entertainment tax by States along with service tax by Centre.

  HCs had held[2] that the levy of entertainment tax on direct-to-home (DTH) services falls squarely within the legislative competence of the States.

  Applying aspect theory, HCs observed that there is an aspect of service which is amenable to service tax and an aspect of entertainment which is amenable to entertainment tax.

  The levy of service tax and entertainment tax can co-exist and can be harmonized as they concern different aspects.

- The matter reached Supreme Court (SC) challenging the simultaneous levy of service tax and entertainment tax, on the ground that broadcasting is not an activity of providing entertainment and thus, falls outside the State legislative competence.

Supreme Court Ruling

Interpretation of Entries under the Lists in Seventh Schedule of the Constitution

- Article 246 of the Constitution deals with the distribution of legislative power between the Union and the States. The said Article has to be read along with entries under three lists contained in the Seventh Schedule, namely, the Union List, the State List and the Concurrent List.

  While interpreting the entries a liberal construction must be given to the entry by looking at the substance of the legislation and not its mere form.

- However, in cases of apparent overlap between two entries, the doctrine of pith and substance should be applied to determine the enactment's true nature and the appropriate legislative entry.

  According to the pith and substance doctrine, a law is valid if it primarily falls within the enacting legislature's competence, even if it incidentally touches on a subject under another legislature's domain.

  When one entry is made "subject to" another, it means the latter entry governs a specific area excluded from the former.

  However, once legislation is found to be "with respect to" a legislative entry in question, the legislature has full authority, including all ancillary and reasonably related matters within that subject.

  The expression "subject to" and "with respect to" in Article 246 of the Constitution aids the applicability of the doctrine of pith and substance to find out the true character of the enactment and the entry within which it would fall.

- List I and II of the Constitution are essentially divided into two groups. One relating to the power to legislate on specified subjects and the other, relating to the power to tax.

  The entries on levy of taxes are specifically mentioned. Therefore, as such, there cannot be a conflict of taxation power of the Union and the State.

- The expression "entertainments and amusements" finds a place, both, in Entries 33 as well as 62 of List II. The former is a regulatory entry while the latter is a taxation entry.

  Entertainment or amusement activities by private entities or authorized by a State Government can be regulated by the State Legislature under Entry 33 of List II. This also includes entertainment provided through television.

  Entry 62 of List II is a specific taxation entry which grants and reserves legislative competence to the State Legislature to impose taxes on "luxuries" which includes entertainments, amusements, betting and gambling.

Meaning and Scope of the expression "Luxuries, Entertainments and Amusements"

- Entry 62 of List II enables a State Legislature to tax activities of luxuries, entertainments and amusements. Therefore, it will be necessary to understand the meaning and content of these expressions.

[2] W.P.(C) No. 4935/2011; Writ Petition (M/B) No. 4 of 2010; Writ Petition (C) No. 8966 of 2011 etc.

Luxury is something which conduces enjoyment over and above the necessities of life to which one takes with a view to enjoy, amuse or entertain oneself.

Taxes on luxuries, entertainments or amusements cannot have a restricted meaning so as to confine the operation of the law only to taxes on persons receiving the luxuries, entertainments or amusements.

There can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments and amusements and both may, with equal propriety be made amenable to tax.

The taxable event need not be actual use or consumption of the luxury. Once legislative competence and a nexus with the subject of taxation are established, other aspects are matters of fiscal policy. The tax measure is distinct from the subject of tax.

- The expression "entertainments" is a word of general import and in common parlance. It includes cinema shows, dramatic performances, *etc.*

  Webster's Third New International Dictionary has defined 'entertainment' as an act of diverting, amusing or causing someone's time to pass agreeably.

- In case of Purvi Communication[3], this court held the expression entertainment to include performance, film or programs shown to the viewers through the cable television network.

  The court had interpreted the expression "entertainment" in a broad and wide manner and not restricted to entertainment in a public place.

  The definition of 'entertainments' in Geeta Enterprises[4] is not comprehensive, as it doesn't reflect technological advances enabling diverse forms of entertainment in both public and private spaces such as a home, through mobile or a cell phone or smart watch and other personal devices etc.

  The expression 'entertainments' must be given a broad, liberal and expansive meaning than what has been discussed in Geeta Enterprises by this Court.

  It includes within its scope and ambit not only the provider of entertainment but also the receiver, inter alia, through the medium of television.

- The expression "amusement" would mean diversion, pass time or enjoyment or a pleasurable occupation of the senses or that which furnished it.

  The expression "entertainments and amusements" would have to be read ejusdem generis.

Legislative Competence of State Legislatures to impose Entertainment Tax

- Supreme Court in case of MPV Sundararamier[5] and H.S. Dhillon[6], observed that the power to tax is not an incidental or ancillary power.

  The power to legislate on a subject not expressly related to taxation cannot be interpreted to imply a power to tax. There is a distinction between the power to regulate and control and the power to tax.

  Taxation is considered to be a distinct matter for the purposes of legislative competence and the power to tax cannot be deduced from the general legislative entry as an ancillary power.

- Entry 31 of List I is a regulatory entry which deals with various forms of communication including broadcasting.

  Entry 62 of List II gives States exclusive taxing power over "entertainments and amusements," which cannot be overridden by the regulatory scope of Entry 31 of List I on "broadcasting and similar communications."

- Legislative power to levy a tax on entertainment and amusements in the instant case, cannot be split between Parliament and the State Legislature when the said power is expressly enumerated in Entry 62 of List II.

  Entry 31 of List I is meant only for the purpose of regulation. The said entry cannot be expanded to cover the power to levy taxes on entertainments and amusements by Parliament when such a power is envisaged in Entry 62 of List II.

  Parliament may, however, regulate entertainment or amusement.

- Entry 97 of List I can be invoked only when any matter is not enumerated in List II or List III including any tax not mentioned in the said Lists.

  The power to tax entertainment and amusements cannot be implied under Entry 31 or treated as a residuary power under Entry 97 of List I, as this would contradict constitutional interpretation principles and relevant judicial precedents.

- The State Legislature were fully justified in imposing entertainment tax under Entry 62 of List II. The activity of broadcasting through T.V. cable network or cable operators is for carrying out the activity of entertainment and in pith and substance falls within the scope and ambit of the said Entry 62.

  However, since broadcasting is a mode of communication, it incidentally also touches upon the subject under Entry 31 of List I.

[3] (2005) 3 SCC 711

[4] (1983) 4 SCC 202

[5] AIR 1958 SC 468

[6] (1971) 2 SCC 779

Meaning of broadcasting and applicability of Service Tax

- Section 65(13) of the Finance Act, 1994 defines broadcasting by adopting the meaning from Section 2(c) of the Prasar Bharti Act ((Broadcasting Corporation of India) Act, 1990. The said Act is made pursuant to Entry 31 of List I.

  The expression "broadcasting" includes dissemination of any form of communication by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations.

  Over the time broadcasting has evolved to included transmission through electromagnetic waves, cables, Direct-to-Home signals, or any mode to cable or multi-system operators, including through agents, branches, or representatives in India.

  Section 65(72)(zk) of Finance Act, 1994 includes broadcasting services within the definition of taxable service, making any service by a broadcasting agency related to broadcasting liable to tax.

  Broadcasting service is a taxable service, and the broadcasting service provider is required to pay service tax under the provisions of the Finance Act, 1994.

- Merely borrowing of the definition of "broadcasting" from the Prasar Bharti Act for imposition of service tax on a broadcaster and thereby including a person who is in the entertainment industry to also be liable to pay service tax, is not a levy in the nature of entertainment tax.

  Service tax levies tax on broadcasting service while entertainment tax under Entry 62 of List II levies tax on the activity of providing and receiving entertainment.

Parameters of Taxation

- A legislative enactment which provides for imposition of tax must specify the following parameters:

  i) taxable event which forms the basis of levy;

  ii) the measure of tax;

  iii) the rate of tax; and

  iv) incidence of tax

  The said parameters are distinct and must not be conflated with the others.

  This court in the case of Govind Saran Ganga Saran[7] laid down that a legislative scheme which seeks to impose a tax, ought to define each of the afore stated components with certainty and precision.

- Review of the relevant provision under consideration shows that all key taxation parameters are clearly defined and relate to the subject of "entertainment," falling within the scope of Entry 62 of List II.

Aspect Theory

- Aspect theory is a tool of constitutional interpretation used in Canada to resolve issues which arise when both the Federal and Provincial Government have the right to legislate on a subject.

  In India, there appears to be no clarity on the applicability of aspect theory in Canadian sense. One of the reasons being that both Parliament and the State legislature do not have the power to levy tax on the same subject matter.

  This court has applied Aspects theory in case of Federation of Hotel and Restaurants Associations of India, Elel Hotels & Investments, All India Federation of Tax Practitioners in a manner different from how it is applied in Canada[8].

- Understanding the use of 'aspect theory' in India requires revisiting some well-established principles for interpreting taxation entries. These are:

  i) Legislative entries must be interpreted broadly.

  ii) In the scheme of the Lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation.

  iii) Tax fields are distinctly enumerated in Lists I and II, preventing legal overlap, though factual overlap may occur.

  iv) The pith and substance of legislation must be assessed by its subject matter and charging provision.

  v) The measure of tax is not a true test of the nature of tax

  vi) A single transaction may give rise to multiple taxable events across different aspects. An overlap does not negate their distinctness.

- The doctrine of pith and substance is applied to consider the *vires* of legislation impugned on the basis of legislative competence between State and Centre.

  Aspect theory has no relevance in determining the constitutionality of any provision on the ground of legislative competence in India.

- The aspect theory has been applied in India essentially to determine whether an activity, in pith and substance, falls within a specific Entry of the

[7] 1985 Supp SCC 205

[8] (1989) 3 SCC 634; (1989) 3 SCC 698; (2007) 9 SCR 527

Seventh Schedule, thereby conferring legislative competence to tax that aspect.

Legislation incidentally touching an entry in another List remains valid if its pith and substance fall within a competent legislature's entry.

- In the activity of broadcasting, there are two aspects, first is the act of transmission of signals of the content to the subscribers. The second aspect here is the content of the signals provided by the broadcaster to the subscribers, which is providing and receiving entertainment through the television.

- Accordingly, the activity of broadcasting can be subject to service tax for the service aspect under Entry 97 of List I, while its entertainment aspect can attract luxury tax under Entry 62 of List II.

  Broadcasting service being a taxable service under the provision of the Finance Act 1994 allows Parliament to levy service tax, while State Legislatures can impose luxury/entertainment tax on those providing entertainment to viewers.

  There is no overlap as the taxes arise from distinct entries in separate legislative Lists.

Accordingly, the SC upheld the simultaneous levy of entertainment tax and service tax on broadcasting services.

Comments

a. Earlier, SC in case of Bharti Telemedia [TS-427-SC-2024-ST] had upheld the levy of service tax on broadcasting services.

b. Following the Constitution (One Hundred and First Amendment) Act, 2016, Entry 62 of List II was amended to restrict the levy and collection of entertainment and amusement taxes by Panchayats, Municipalities, Regional Councils, or District Councils.

c. Patna HC in case of Den Network Limited [TS-233-HC-2023(PAT)-VAT] had held the levy of entertainment tax by State Government under the Bihar Entertainment Tax Act as ultra vires post the above Constitutional amendment.

d. The Karnataka Government recently enacted the Karnataka Cine and Cultural Activist Welfare Act, 2024 [Karnataka Act No. 46 of 2024], imposing a cess on movie tickets, TV channels and OTT platforms. In light of the 101st Constitutional Amendment, it remains to be seen whether such levy can be challenged before the courts.

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