



THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

DATED : 24-09-2013

CORAM

HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PIUS CHAKKALAYIL KURIAKOSE
HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

WP(C) No. 32 of 2012

M/s. Future Gaming Solutions
India Private Limited,
A Private Limited Company
registered under the Companies Act, 1956,
having its registered office at
355-359, Daisy Plaza,
6th Street, Gandhipuram,
Coimbatore (Tamil Nadu)
and Branch Office at
Samdrupling Building,
Kazi Raod, Gangtok, Sikkim
through Mr. P. Ravichandran, Manager,
M/s. Future Gaming Solutions
India Private Limited **... Petitioner**

Versus

1. Union of India
through its Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. Commissioner of Service Tax, Siliguri,
C. R. Building,
Harendra Mukherjee Road,
Hakimpara Siliguri HO,
District : Darjeeling.
3. Superintendent of Central Excise,
Gangtok Range,
Jeewan Theeng Marg,
Development Area,
Gangtok, Sikkim - 737 101.

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4. The State of Sikkim
Through the Chief Secretary,
Government of Sikkim,
Gangtok,
Sikkim - 737 101.

... **Respondents**

For Petitioner : Mr. A. R. Madhav Rao,
Advocate with Mrs. Laxmi
Chakraborty, Mr. Tarun Jain
and Mrs. Manju Rai, Advocates.

For Respondents No.1 to 3 : Mr. B. K. Gupta, Advocate.

For Respondent No.4 : Mr. J. B. Pradhan, Additional
Advocate General with Mr.
Karma Thinlay Namgyal, Senior
Government Advocate and Mr.
S. K. Chettri, Assistant
Government Advocate.

J U D G M E N T

Wangdi, J.

By filing this Writ Petition, the Petitioner seeks to assail letter C. No.V(3)7/ST/FGSIPvtLtd/GTK/2009/295 dated 06-07-2012 issued by the Superintendent of Central Excise and Service Tax, Gangtok Range, Gangtok, Respondent No.3, informing the Petitioner that as per Notification No.36/2012-ST dated 20-06-2012 read with Rule 6(7C) of the Finance Act, 1994 (as amended) the Petitioner was liable to pay service tax as per the prevailing provisions since they had been rendering service to the State Government in relation to promotion,



marketing, organising and assisting in organising games of chance including lottery services.

2. The Petitioner is a Company registered under the Companies Act, 1956 and is engaged in the business of sale of lottery tickets organised by the Government of Sikkim, the Respondent No.4, under an agreement dated 10-08-2009 for a term of five years. By that agreement the Petitioner procures the lottery tickets in bulk from the Government of Sikkim and resells those to the public through various agents, stockists, resellers, etc.

3. The Writ Petition is founded on several grounds particularly the jurisdiction of the Respondents No.1 to 3 in demanding service tax and legality of their action in enforcing the provisions of the Finance Act, 1994, as amended by the Finance Act, 2012, upon the Petitioner with effect from 01-07-2012 since when the Finance Act, 1994 (as amended by the Finance Act, 2012) came into effect. The Petitioner asserts that by the amendment to the the Finance Act, 1994 in 2012, 'lottery' and 'transaction in actionable claim' have been kept outside the purview of the service tax. Specific reference was made to Sub-Sections (1), (34), (44) and (55) of Section



65B as well as Sections 66B and 66D of the Act to indicate the change in the law in clearly excluding 'lotteries'.

4. The next ground of attack is that there is no element of service in the Petitioner's relation with the Government of Sikkim, Respondent No.4, in respect of the Sikkim State Lotteries. As per the Petitioner, the Petitioner purchases lottery tickets in bulk and sells them to stockists, resellers, etc., by adding a profit margin. The stockists, resellers, etc., in turn sell these tickets to retailers who in turn sell them to the ultimate participants of the draw. As the tickets are sold to the Petitioner by the Government of Sikkim, the transaction is one of sale and purchase of lottery ticket and not one of rendering of any service. Thus, it is submitted that the Petitioner is not involved in rendering any 'taxable service'.

5. It is further submitted that lottery tickets are outside the purview of service tax by name under the 'negative list' provided under Section 66D of the Finance Act, 1994 and also excluded from the ambit of the expression 'service' which excludes 'transaction in actionable claim'. That 'lottery' is an 'actionable claim'



has been settled by a decision of a Constitution Bench of the Supreme Court of India in ***Sunrise Associates* vs. *Govt. of NCT of Delhi and Others* : (2006) 5 SCC 603.**

6. The next plank of attack is on the question of legislative competence of the Parliament to pass a law on lottery tickets in view of List II to Seventh Schedule of the Constitution of India which under Entry 34 and Entry 62 vests the subject-matter of 'Betting and gambling' and 'Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling' respectively within the sole competence of the State Legislature.

7. The contention on behalf of the Petitioner is that in view of this Constitutional scheme, imposition of tax on lottery tickets by a Central Legislation is bad for lack of legislative competence of the Parliament and resultantly the action of the Respondents No.1 to 3 taken in pursuance of such law is without jurisdiction and unconstitutional. It is stated that the demand of service tax on the activity of the Petitioner is a tax on 'betting and gambling', a tax that can only be imposed under a law enacted by the State Legislature under Entry 62 of List II of the Seventh Schedule to the Constitution of



India, thereby rendering the levy of service tax *ultra vires* the Constitution of India.

8. The Respondents No.1 to 3 in their counter-affidavit have reiterated their stand taken in their impugned letter dated 06-07-2012 referred to earlier. As per them, under Notification No. No.36/2012-ST dated 20-06-2012 read with Rule 6(7C) of the Finance Act, 1994, as amended, distributors or the selling agents are liable to pay service tax at the rate specified for the taxable service of promoting, organising or in any other manner assisting in arranging sale of lottery tickets on receipt of commission calculated on the number/value of tickets. They have asserted that merely mentioning in the agreement that the Petitioner is the sole purchaser of lottery tickets for Government of Sikkim does not constitute a relationship of purchaser and buyer. It is asserted that clauses 10, 14, 15, 19 and 24 vest the State with some vital rights. We may reproduce below these clauses, also set out in their counter-affidavit, for better appreciation and convenience: -

“10. Subject to the provisions of clause 4 of this agreement, the Government shall have the exclusive right to add or delete the number of lotteries, for reasons to be recorded and such

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addition or deletion shall be communicated to the sole purchaser.

14. That the Government shall deliver to and the sole purchaser shall take delivery from the Government whole of the lottery tickets printed for a draw of a particular scheme with a clear understanding that if the sole purchaser is not able to sell the whole tickets, he shall return the unsold tickets to the Government within 15 (fifteen) days from the date of draw, which shall then be destroyed after verification. The whole sale price of the tickets sold shall be determined by the Government on the basis of the prize amount, cost of paper, cost of printing, draw expenses, transportation charges and the Government share of revenue as fixed under clause 4:

Provided that the prices of the tickets may be changed under the following circumstances, namely:—

- (i) Change in the price structure of lottery schemes,
- (ii) Change in paper cost, printing charges and freight, and
- (iii) Market conditions.

15. That the full payment of the tickets resold by the sole purchaser shall be realized by the Government from the sole purchaser at wholesale rates as per clause 14 above.

19. The draws shall be held at Gangtok by the Government under the supervision of the Director, Sikkim State lotteries or any other *officer* authorized by him. The draws shall be held in public in the presence of judges appointed by the Government.

24. The taxable prizes shall be disbursed by the Government directly to the winners/claimants of the tickets after deducting income tax at source as per law."

9. It is thus submitted that in reality the Petitioner is not the purchaser but is actually facilitating the



Government of Sikkim in sale of lottery tickets and, therefore, is liable to pay service tax at the rate specified for the taxable service of promoting, organising or in any other manner assisting in arranging sale of lottery tickets for the sole consideration of earning commission/profit as offered by the Government of Sikkim.

10. It is pleaded that though the sale of lottery tickets by the Government of Sikkim, Respondent No.4, is concededly outside the purview of service tax, it in fact does not take the activities of the Petitioner outside such purview and is liable to service tax for the taxable service of the Petitioner of promoting, organising or in any other manner assisting in arranging sale of lottery tickets.

11. On the question of the change in law asserted on behalf of the Petitioner, the answering Respondents chose to deal only with the issue pertaining to the 'negative list' of services contained in Section 66D introduced by the Finance Act, 1994, as amended by the Finance Act, 2012 with effect from 01-07-2012. It is submitted that by the amendment, negative list based approach has been introduced for the tax on services under which rather than specifying the services that are



taxable, those which would not be liable for service tax have been specified. Hence, as per the Respondents No.1 to 3, it is only the sale of lottery tickets *per se* that has been included in the 'negative list' for the sake of maintaining continuity and conformity with Entry 62 of List II of the Seventh Schedule to the Constitution.

12. While conceding that lottery is a State Subject under List II of Seventh Schedule to the Constitution, it is stated that this aspect has no relevance in a situation where a person/party/institution is providing services for promoting, organising or in any other manner assisting in arranging sale in respect of lottery and that since the Petitioner is engaged in such activity, they are liable to pay service tax. As per the Respondents they have not imposed any tax on the sale of lottery tickets by the Government of Sikkim but what is being sought to be taxed is the service rendered by the Petitioner to the State Government of organising, promoting and selling its lottery tickets. It is thus submitted that the stand of the Respondents No.1 to 3 in demanding continuity in payment of service tax vide the impugned letter is well justified in law as well as the Constitution.



13. In order to appreciate the issues involved in the Writ Petition, it would be convenient to set out the development of service tax laws vis-à-vis the activities of lottery. In this regard it is relevant to note that the fundamental issue raised in the present case as regards the nature of the activity of the Petitioner was also subject-matter of two earlier Writ Petitions decided by a common judgment of a Division Bench of this Court in the matter of *M/s. Future Gaming Solutions Pvt. Ltd. and Another vs. Union of India and Others* of which one of us (Wangdi, J.) was a party. While disposing of those Writ Petitions being WP(C) Nos.36 and 23 of 2011, in our judgment dated 29-11-2012, we have traced the history as regards the law on service tax so far as it is relevant to lottery activities.

14. Under Chapter V of the Finance Act, 1994 passed on 01-07-1994 the Parliament for the first time introduced a new form of tax, namely, 'service tax'. Again by an amendment to the Finance Act, 1994, introduced by the Finance Act, 2003, a new category of taxable service called 'business auxiliary service' was introduced under Sub-Section (19) of Section 65 of the



Finance Act, 1994 with effect from 01-07-2003. In terms of this the Service Tax Department demanded of the Petitioner to register itself under the Act for payment of service tax. This action came to be challenged before this Court in Writ Petition (C) No.19 of 2007 in the matter of ***M/s. Martin Lottery Agencies Limited vs. Union of India and Others*** on the ground that such levy was not liable to be imposed upon the sale of lottery tickets. This Writ Petition was ultimately allowed by this Court vide judgment dated 18-09-2007 upholding the plea raised by the Petitioner that no service tax was payable on the activity undertaken by the Petitioner which, of course, was challenged before the Hon'ble Supreme Court in Civil Appeal No.3239 of 2009. However, during the pendency of this Appeal, the Finance Act, 1994, was further amended incorporating an 'Explanation' to Section 65(19)(ii) of the Finance Act whereby it was declared that "for the purpose of this Sub-Clause, 'service' in relation to promotion or marketing of service provided by the client would include any service provided in relation to promotion or marketing of games of chance, organised, conducted or promoted by the client, in whatever form or by whatever name called, etc."



15. The Hon'ble Supreme Court being apprised of the development took note of the Explanation and its impact on the judgment delivered by this Court and, in ***Union of India and Others vs. Martin Lottery Agencies Limited : (2009) 12 SCC 209***, ultimately held the Explanation to be a substantive law and declared it to be enforceable prospectively leaving the issue as regards the validity of the Explanation open. The judgment of this Court, however, was not interfered with. In a later Writ Petition filed before this Court being WP(C) No.36 of 2009 in the matter of ***M/s. Future Gaming Solutions India Private Limited vs. Union of India and Others***, the validity of the Explanation to Section 65(19)(ii) came to be challenged by the present Petitioner but was dismissed by judgment dated 30-07-2010. The Special Leave Petition being No.SLP(C) No. 26771 of 2010 filed before the Hon'ble Supreme Court challenging such decision is still pending consideration after the Union of India was put on notice.

16. During the pendency of the matter before the Hon'ble Supreme Court, the Finance Act, 1994, once again came to be amended by which the Explanation to



Section 65(19)(ii) impugned Section 65(19)(ii) was deleted and a new category of 'taxable service' introduced vide Clause (zzzzn) to Sub-Section (105) of Section 65 vide Finance Act, 2010 with effect from 01-07-2010. The relevant amendments were as under:

“(105) “taxable service” means any service provided or to be provided,—

.....
 (zzzzn) to any person, by any other person, for promotion, marketing organising or in any other manner assisting in organising games of chance, including lottery, Bingo or Lotto in whatever form or by whatever name called, whether or not conducted through internet or other electronic networks;”

17. This provision was also challenged before this Court by the Petitioner in WP(C) No.36 of 2011 in the matter of ***M/s. Future Gaming Solutions Pvt. Ltd. (supra)*** on various grounds bulwark of which was that as the activities of lottery distributors like the Petitioner, did not constitute service it was beyond the purview of taxable service as defined under the impugned Clause (zzzzn) of Sub-Section (105) of Section 65 of the Finance Act, 2010, and that the Parliament lacked the necessary legislative competence to pass such law in view of Entries 34 and 62 of List II read with Entry 97 of List I to the



Seventh Schedule of the Constitution of India as well as Article 248 thereof. This Writ Petition was allowed by judgment dated 29-11-2012 as earlier stated and is at present the subject-matter of a Special Leave Petition filed by the Respondents No.1 to 3 before the Hon'ble Supreme Court.

18. It is averred that even as the aforesaid SLP was pending disposal before the Hon'ble Supreme Court the Finance Act, 1994, was amended once again by the Finance Act, 2012, whereby several provisions were introduced giving a new dimension to the meaning of 'taxable service' as services that would be taxable thereunder. We may reproduce the relevant provisions of the Finance Act, 1994, as amended, by the Finance Act, 2012, which is effective from 01-07-2012 as under: -

"65B. *In this Chapter, unless the context otherwise requires,—*

(1) *"actionable claim" shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882);*

.....

(34) *"negative list" means the services which are listed in section 66D;*

.....

(44) *"service" means any activity carried out by a person for another for consideration, and*

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includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

.....

(iii) a transaction in money or actionable claim;

(51) "taxable service" means any service on which service tax is leviable under section 66B;

Charge of service tax on and after Finance Act, 2012.

66B. *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, another than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

Negative list of services.

66D. *The negative list shall comprise of the following services, namely:—*

.....

(i) betting, gambling or lottery;

....."

[emphasis supplied]

19. On the introduction of the aforesaid amendments the Petitioner had intimated to the Respondent No.2 vide letter Ref. No.FGSIPL/SK/0024/12-13 dated 28-06-2012 (Annexure P4 to the Writ Petition) stating that in view of the change in the legal position the Petitioner would not be paying service tax

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with effect from 01-07-2012. We may extract the relevant portions of the said letter below: -

".....

2. As per legal advice received by us, in terms of the aforesaid notifications, with effect from 1st July, 2012 the provisions of Section 65 and 66 shall cease to operate. Therefore no question arises of payment of service tax under these provisions, which levy service tax under 'games of chance service' with effect from 1st July, 2012. Further, in terms of these notifications service tax will be levied only on services which are not notified under the 'negative list' defined in Section 66D of the Finance Act, 1994 (as amended by Finance Act, 2012). This legal position comes into force with effect from 1st July, 2012.

3. The said 'negative list' covers 'betting, gambling or lottery'. Further, the definition of 'service' [under Section 65B(44)] excludes "a transaction in money or actionable claim". A Constitutional Bench of the Hon'ble Supreme Court in *Sunrise Associates* [2006 (5) SCC 603] has declared that lottery tickets are 'actionable claim'. Since we are undertaking the activity of dealing in lottery tickets, the activity is not covered under the ambit of provisions of Finance Act, 1994 as effective from 1st July, 2012. The factual position is already known to your Goodself and forms part of record as per documents filed by us with the Department from time to time.

4. In view of the aforesaid change in legal provisions relating to levy of service tax, we are writing this letter to inform your Goodself that **we will not be paying service tax with effect from 1st July, 2012.** This is for your information and records, please.

....."

20. In response to the above, the Respondent No. 3 issued the impugned letter letter C. No.V(3)7/ST/



FGSIPvtLtd/GTK/2009/295 dated 06-07-2012 stating
inter alia as follows: -

"In this matter, I have been directed by the Assistant Commissioner, Central Excise and Service Tax, Gangtok Division, Siliguri to inform you that as per the Not. No. 36/2012 ST dated 20.06.2012 read with Rule 6(7C) of the Finance Act 1994 (as amended), the distributor or selling agents are liable to pay service tax at the rate specified for the taxable service of promoting, organizing or in any other manner assisting in arranging lottery. Since you are rendering service to the State Govts. in relation to Promotion, Marketing, Organizing and assisting in organizing games of chance including lottery services, you are liable to pay service tax as the prevailing provisions.

Therefore, I have been directed to instruct you to continue the payment of service tax on the aforesaid service. This is for favor of your kind information and necessary action, please."

It is this letter and the basis upon which it is founded that are under challenge in this Writ Petition.

21. Having set out the factual matrix germane for determination of the questions involved in the present proceedings, we may proceed to consider on the merits of the warring contentions of the parties.

22. However, before embarking upon this, we deem it pertinent to note that at the stage of final arguments on behalf of the Respondents No.1 to 3, as many as three adjournments were sought for on the ground that either Senior Advocate would argue the case



on their behalf or that the Additional Solicitor General himself would address the Court. On the last date, i.e., 22-08-2013, when such adjournment was sought for again for four weeks, we had posted the case on 11-09-2013 peremptorily. On the date of hearing so fixed, i.e., 11-09-2013, instead of the Additional Solicitor General appearing, as was informed to us earlier, Mr. B. K. Gupta, Advocate, the standing counsel for the Department, rose to argue the case himself. Upon our enquiry, we were informed by him that he had been instructed to make the submissions on behalf of the Respondents No.1 to 3. We accordingly allowed him to do so.

23. Mr. A. R. Madhav Rao, Learned Counsel, appearing on behalf of the Petitioner, placed his submissions in support of the Writ Petition on several grounds with his usual characteristic clarity and articulation. The first ground of attack assailing the action of the Respondents under the new law was that the provisions of the Finance Act, 2012, are not applicable on 'lottery' as 'lottery tickets' are 'actionable claims' and, therefore, excluded from the ambit of the very definition of 'service' under the Finance Act, 1994.



He submits that Sub-Section (44) of Section 65B of the Finance Act, 1994, defines 'service' to mean 'any activity carried out by a person for another for consideration' but excludes an activity which constitutes merely 'a transaction in money or actionable claim'. Consequently, therefore, 'transaction in actionable claim' is excluded from the definition of 'service'. Reference has also been made to Section 65B of the Finance Act, 1994, where the expression 'actionable claim' has been given the same meaning assigned to it in Section 3 of the Transfer of Property Act, 1882. By taking us through the definition of 'actionable claim' as defined under Section 3 of the Transfer of Property Act Mr. Rao submits that taking into consideration this definition of 'actionable claim', a Constitution Bench of the Hon'ble Supreme Court in ***Sunrise Associates (supra)*** categorically held that tickets of lottery organised by the State Governments are 'actionable claims' and sale of lottery tickets by distributors is transfer of 'actionable claim' as defined under the Transfer of Property Act. Thus, by this decision a transaction in lottery tickets being 'actionable claim' stands clearly excluded from the ambit of 'service' itself. It is, therefore, submitted that the action of the



Respondents No.1 to 3 in enforcing the provisions of the Finance Act, 2012, suffers from the lack of jurisdiction and is in conflict with the very provisions of the Finance Act.

24. It was then submitted that even if dealing in 'lottery tickets' is considered a 'service', it still stands excluded from the ambit of 'service tax' as it is one of the activities specified in the 'negative list'. Section 66B of the Finance Act, 1994, as amended by the Finance Act, 2012, provides that those 'services' specified in the 'negative list' under Section 66D of the Finance Act, 1994, stands excluded from the purview of the 'service tax'. Mr. Rao drew our attention to Clause (i) of Section 66D to point out that it clearly included 'betting, gambling or lottery' in the 'negative list'. It is, therefore, submitted that the Respondents lacked the jurisdiction in applying the law against the Petitioner as being clearly contrary to the specific provisions of the Finance Act itself.

25. The next contention as regards the legislative competence of the Parliament to pass the Amendment Act of 2012, it is submitted that by levying the 'service



tax' the Parliament has encroached upon the domain of the State Legislature under Entry 62 read with Entry 34 of List II to Seventh Schedule vesting the subject-matter of 'taxes on betting and gambling' and 'betting and gambling' upon the State Legislature. The Act is in excess of and in colourable exercise of power in as much as it has gone beyond the scope of Entry 40 of List I that vests the Parliament to legislate on a law conferring a general power of regulation which is quite different from a substantive power to tax. It is submitted that in terms of the well-settled principles laid down in *M/s. R.M.D.C. (Mysore) Private Ltd. vs. State of Mysore : AIR 1962 SC 594* (Constitution Bench); *State of W.B. vs. Kesoram Industries Ltd. and Others : (2004) 10 SCC 201* (Constitution Bench); and *State of W.B. and Others vs. Purvi Communication (P) Ltd. and Others : (2005) 3 SCC 711*, there is a clear distinction between general power of regulation and power to tax. It is further submitted that even in view of the settled position that lottery is pernicious in character and in the nature of 'betting and gambling', it inescapably would fall within the purview of Entry 34 and, therefore, under Entry 62 of List II to Seventh Schedule of the Constitution of India.



Mr. Rao submits that the Hon'ble Supreme Court, in ***Martin Lottery Agencies Limited (supra)***, having expressed grave doubts as to the very existence of 'service' element in a lottery, it was not open for the Respondents No.1 to 3 to collect service tax on lottery. It is further submitted that Entry 92C of List I to Seventh Schedule of the Constitution of India providing for taxes on services, has still not been notified thereby making it incompetent for the Parliament to levy service tax even under this Entry. That even under the residuary provision under Entry 97 of List I the Parliament would not be empowered to levy tax on service as it would apply only in a situation where a subject-matter of Legislation is not covered under any of the Entries under List II to the Seventh Schedule of the Constitution of India in the light of Article 248 thereof.

26. The next contention is that as per the agreement dated 10-08-2009 entered into between them the relationship between the Petitioner and the Government of Sikkim is that of a buyer and a seller and the entire transaction is on principal to principal basis where the Petitioner purchases the lottery tickets from



the Government of Sikkim and resells them to agents, stockists, resellers, etc., during the process earns a profit being the difference between the sale and purchase price.

27. Relying upon (a) ***Bowstead & Reynolds on Agency***; (b) ***Alwaye Agencies vs. Dy. Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam : 1998 (Supp) SCC 394***; (c) ***Gordon Woodroffe & Co. (Madras) Ltd. vs. Shaik M.A. Majid & Co. : AIR 1967 SC 181***; (d) ***Mahindra and Mahindra Limited vs. Union of India and Another : 1984 (16) ELT 76 (Bom)***; and (e) ***Pioneer Tools and Appliances (P) Ltd. vs. Union of India : 1989 (42) ELT 384 (Bom)***, it is submitted that as the entirety of the transaction is on a principal to principal basis, the question of there being demand of service tax would not arise. It is further submitted that the Government of Sikkim is never the client of the Petitioner in the sense that the Petitioner is rendering any service to them. The activity of marketing and promotion of lottery tickets, if any, is undertaken by the Petitioner in terms of the agreement on its own account and expenses for which activity no consideration or reimbursement flows from the Government of Sikkim. The activity of



marketing or promotion of lottery tickets, if any, is of the Petitioner's own accord as an effort to boost its sale to further its own business of earning. Therefore, there being no service being rendered the demand of service tax upon the Petitioner is without jurisdiction.

28. Taking his submission further Mr. Rao urges that at each stage of the transaction, i.e., from the Government of Sikkim to the Petitioner and then from the Petitioner to stockists, resellers, etc., it involves transfer of property in the lottery tickets akin to sale of goods as the sale of lottery tickets involves by implication transfer of property and other rights in the tickets at those stages. That before the decision in ***Sunrise Associates (supra)*** sales tax was being charged upon sale of lottery tickets under various State Legislations. But the position stands changed with the exclusion of sale of lottery tickets from the definition of goods as it is found to have been an 'actionable claim'. Relying upon the decision of the Hon'ble Supreme Court in ***Laghu Udyog Bharati and Another vs. Union of India and Others : (1999) 6 SCC 418*** and ***All-India Federation of Tax Practitioners and Others vs. Union of India and Others : (2007) 7 SCC***



527, Mr. Rao would submit that a transaction of sale is not amenable to service tax there being no element of service in such transaction thereby clearly taking the transaction in question outside the purview of the Finance Act, 2012. As per Mr. Rao, it is a settled law that 'sale' and 'service' are mutually exclusive and that sale transaction does not fall within the ambit of the Service Tax Laws. On this, he placed reliance upon ***Bharat Sanchar Nigam Ltd. and Another vs. Union of India and Others : (2006) 3 SCC 1*** and ***Imagic Creative (P) Ltd. vs. Commissioner of Commercial Taxes and Others : (2008) 2 SCC 614*** as well as a decision of the Hon'ble Delhi High Court in ***Indian Railways C. & t. Corpn. Ltd. vs. Govt. of NCT of Delhi : 2010 (20) STR 437 (Delhi)***. Mr. Rao re-emphasises that by the organisation of lottery no services are being rendered in view of its pernicious character as held in ***State of Bombay vs. R.M.D. Chamarbaugwala and Another : 1957 SCR 974, B. R. Enterprises vs. State of U.P. and Another : (1999) 9 SCC 700*** and also in view of the decision in ***Martin Lottery Agencies (supra)*** where it has been held most categorically that in organising lottery no service is being rendered.



29. It is then contended by referring to ***Association of Leasing & Financial Service Companies vs. Union of India and Others : (2011) 2 SCC 352*** that service tax can be levied only on the amount received as consideration against the services provided by the service provider. In the present case, as no consideration at all is being received from the State Government, the question of levying service tax on the Petitioner would not arise. On this reliance has also been placed upon Circular No.354/59/2006-TRU dated 10-11-2006 issued by the Central Board of Excise and Customs (CBEC) clarifying that service tax can be levied only when a consideration is received for taxable services provided. It is stated that such Circulars having been issued in terms of Section 37B of the Central Excise Act, 1944 (as applicable to Finance Act, 1994 in terms of Section 83 thereof), these are binding on all field formations of the Department as settled by various decisions of the Hon'ble Supreme Court including ***Commissioner of Central Excise, Mumbai vs. Rajpurohit GMP India Limited : 2008 (231) ELT 577 (SC)*** and ***State of Kerala and Others vs. Kurian Abraham (P) Ltd. and Others : 2008 (224) ELT 354 (SC)***.



30. The next contention is that there does not exist any element of service in the organisation of lottery by the Government of Sikkim and, therefore, levy of service tax would not apply on the transaction between the Petitioner and the State Government involving the sale of lottery tickets by the Petitioner of lottery organised by the State Government.

31. Mr. Rao would further submit that organisation of lottery having been declared to be *res extra commercium* and not a business or trade in ***R.M.D. Chamarbaugwala (supra)*** and ***B. R. Enterprises (supra)***, the Government of Sikkim is not rendering any service by organising lottery. The entire gamut of sale of lottery activity being in the form of a 'scheme' or a 'draw' which determine the quantum of lottery tickets that are to be sold for the day, week or month, etc., assumes a form of 'gambling' and, therefore, is kept under the regulation/control of the State under the Lotteries (Regulation) Act, 1998, and, therefore, there is no service involved in the running of such lotteries.



32. It is next contended that by selling lottery tickets to the Petitioner on actual sold basis the Government of Sikkim is parting with its privilege and the price paid is the consideration paid to the State for parting such privilege. It is asserted that as held in ***State of Kerala vs. Maharashtra Distilleries : (2005) 11 SCC 1*** where State parts with its privilege in trade what is charged by the State is its privilege price and, therefore, under such circumstances, the question of rendering service does not arise. Thus, there being no element of service in the organisation of lottery the Petitioner stands excluded from the application of the Finance Act, 1994, as amended by the Finance Act, 2012.

33. It is then contended that the Respondents have failed to discharge the burden of proof that there is a taxable service chargeable on the Petitioner and pass the test laid down in ***M/s. Girdhari Lal Nannelal vs. The Sales Tax Commissioner, M.P. : (1976) 3 SCC 701***, a decision that has consistently been followed some of which are ***B. Satyanarayana Murthy and Sons vs. State of Andhra Pradesh : 57 STC 274 (AP)*** and ***Jindal Dyechem Industries Pvt. Ltd. vs. Sales Tax Officer***



(Enforcement) : 142 STC 257 (Delhi). To emphasise on this, two more decisions of the Hon'ble Supreme Court were cited which are set out below: -

(a) ***Union of India and Others vs. Garware Nylons***

Ltd. and Others : (1996) 10 SCC 413 where it

has been held as under: -

"15. The burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority."

(b) ***Commissioner of Central Excise, Pondicherry***

vs. ACER India Ltd. : (2004) 8 SCC 173 on the

following portions: -

"33. It is also well-settled rule of construction of a charging section that before taxing a person it must be shown that he falls within the ambit thereof by clear words used as no one can be taxed by implication.

34. It is further well settled that a transaction in a fiscal legislation cannot be taxed only on any doctrine of "the substance of the matter" as distinguished from its legal signification, for a subject is not liable to tax on supposed "spirit of the law" or "by inference or by analogy"."

34. The next contention urged by Mr. Rao is that the levy and collection of service tax on the activity of lotteries is without the authority and sanction of law and violative



of Article 265 of the Constitution of India. It is stated that in terms of Article 265 no tax can be levied or collected except by the authority of Law. The demand of the Respondents upon the Petitioner to pay service tax vide their impugned letter dated 06-07-2012 being on the basis of Service Tax Rules, 1994, as amended, i.e., on the strength of a subordinate legislation, it cannot be sustained in law. That it is a settled law that tax cannot be levied by way of subordinate legislations in terms of Article 265. On this, Mr. Rao placed reliance on various decisions, some of which are reproduced below:

(a) ***State of Kerala vs. Madras Rubber Factory Ltd. : (1998) 1 SCC 616 —***

20. It is no doubt true that Section 12(1) does not specifically state that the taxable person is a producer or the grower of the rubber. It is, however, not possible to accept the contention that the Rules alone are to be looked at in order to fix the liability of payment of cess. Sections 12(1) and 12(2) have to be read together. Excise duty being a levy on the manufacture or production of goods could ordinarily have been collected at that stage itself. This was, in fact, the position prior to the amendment of Section 12(2) in 1960. Section 12(2) after amendment makes it very clear that the levy of cess is under sub-section (1) of Section 12 and not under sub-section (2). It is only with regard to the collection of the cess that an option is given to collect the same either from the producer or the manufacturer. A charge under a taxing statute can only be under the Act and not under the Rules. The Rules normally provide for the procedure to be followed for the realisation of the statutory dues. It is in this context that sub-



section (2) enables the framing of the rules whereby the duty instead of being realised from the producer is realised at a latter stage, namely, from the manufacturer.

[emphasis supplied]

- (b) ***Cooperative Sugars (Chittur) Ltd. vs. State of T.N. : 1993 Supp (4) SCC 42 —***

"8. The stipulation in the G.O.Ms. No.2260 cannot also be relied upon by the State of Tamil Nadu for sustaining the levy. A tax can be levied only by a statutory provision. This is not a case where the State of Tamil Nadu is seeking to enforce any agreement between the parties. It was an assessment under the Madras Act. In such a case, the agreement, if any, incorporated in G.O.Ms. No. 2260 is not relevant."

[emphasis supplied]

- (c) ***Bimal Chandra Banerjee vs. State of Madhya Pradesh Etc. : (1970) 2 SCC 467 —***

"13. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it."

[emphasis supplied]

- (d) ***MGRM Medicare Limited vs. Commercial Tax Officer (Int.), Abids Division, Hyderabad and Another : (2011) 45 VST 47 (AP).***

35. On the strength of the above, it is submitted that in the absence of a specific provision in the Finance Act, 1994, levy and collection of service tax



cannot be imposed under the Rules framed thereunder and, therefore, demand upon the Petitioner to make such payment is without jurisdiction.

36. Finally, it is submitted that since the impugned letter dated 06-07-2012 has not adverted to any of the points raised in the Petitioner's letter dated 28-06-2012 and is bereft of any reason as to how those were incorrect, it is liable to be quashed as being a non-speaking one. It is stated that Rule 6(7C) of the Service Tax (Second Amendment) Rules, 2012, which the letter quotes as one of the reasons for the demand, is only an optional composite scheme for payment of service tax provided to the taxpayers and that it does not create a charge of service as the said Rule is only a piece of subordinate legislation framed in exercise of powers conferred under the Finance Act, 1994. Therefore, the Rule 6(7C) cannot go beyond the provisions of Finance Act in view of the settled position of law that subordinate legislation cannot override statutory provisions. On this, Mr. Rao cited reliance on the following: -



- (a) ***Tahir Hussain vs. The District Board, Muzaffarpur : AIR 1954 SC 630;***
- (b) ***Hukam Chand Etc. vs. Union of India and Others : (1972) 2 SCC 601;***
- (c) ***Jagat Talkies Distributors vs. Deputy Commissioner of Police : (2010) 170 DLT 659 (Delhi); and***
- (d) ***Union of India and Others vs. S. Srinivasan : JT 2011 (5) SC 618.***

37. Relying upon the ***Government of Andhra Pradesh and Others vs. P. Laxmi Devi (Smt) : (2008) 4 SCC 720*** and ***Ispat Industries Ltd. vs. Commissioner of Customs, Mumbai : (2006) 12 SCC 583*** it was submitted that the hierarchy of legal norms in India being (i) the Constitution of India; (ii) Statutory Law which may be either Law made by the Parliament or by the State Legislature; and (iii) Delegated Legislation, which may be in the form of Rules made under the Statute etc. and (iv) purely executive orders not made under any Statute and that "if a law (norms) in the higher layer in the above hierarchy clashes with the law with a lower layer, the former will prevail". It is, therefore, submitted that since the impugned letter dated 06-07-2012 is issued under the Service Tax Rules as against the provisions of Finance Act, 2012, it has to be held to be illegal and unsustainable.



38. It is further submitted that levy of tax cannot be inferred from Notification and Service Tax Rules, 1994. On this, Mr. Rao placed reliance upon the following decisions: -

(a) ***The Sales Tax Officer, Navgaon and Another VS. Timber and Fuel Corporation : (1973) 2 SCC 292 —***

"5. Now we are left with the sales effected by the assessee in Madhya Pradesh, the turnover of which amounted to rupees one lakh. On this question, there is no dispute about facts. The only question is whether those sales were first sales or second sales. Under the Madhya Pradesh Sales Tax Act, only first sales of timber could be taxed. The second sales were exempt. The period which we are concerned in this case is from October 8, 1959 to February 22, 1962. During that period, the forest department of Madhya Pradesh was considered as a dealer liable to pay tax under the Madhya Pradesh Sales Tax Act. On this point, there is no dispute. There is also no dispute that, as the law stood at the relevant time, the sales of timber by the Madhya Pradesh Forest Department were first sales, which were not exempt from the levy of sales-tax. Hence when the taxing events took place, namely, when the sales in question took place, the assessee was not liable to pay any tax in respect of those sales, as the sales effected by him were second sales. But on June 1, 1963, the Madhya Pradesh Government issued a notification exempting the forest department from paying any sales-tax in respect of the sales effected by it as from April 1, 1959 to November 2, 1962 (both days inclusive). On the basis of this notification, it is contended that the assessee became retrospectively liable to pay sales tax in respect of the sales effected by it. The question is whether the exemption given to the forest department creates a fresh levy on the assessee with retrospective effect. As mentioned earlier, when the taxing events took place, the assessee was not liable to be taxed. Its liability has to be determined as on those dates. Once we come to the conclusion that it was not liable to pay any sales-tax when the sales took place, the fact that



the forest department was retrospectively exempted from paying tax from an earlier date cannot make the assessee liable to pay tax which he was otherwise not liable to pay. The Government had no power to levy tax either prospectively or retrospectively. The power of the Government was merely to exempt one or more dealers from paying tax. That power cannot be used directly or indirectly to retrospectively levy tax on someone else. Hence, we see no substance in any of the contentions advanced on behalf of the appellant.”

[emphasis supplied]

(b) ***International Packing Industry vs. Central Board of Excise and Customs, New Delhi and Others : 1987 (32) ELT (AP) —***

“9. The learned Central Government Pleader on behalf of the respondent placed in our hands the notification of the Central Government signed by the Deputy Secretary to the Government of India, dated 6-6-1979, which reads as follows: -

“In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government exempts Laminated Jute hags falling under Item No. 68 of the First Schedule to the Central Excise and Salt Act, 1944 (1 of 1944) from the whole of the duty of excise leviable thereon.

The object of the learned Central Government Pleader in placing this notification in our hands was to contend that it was under that notification the Central Government exempted laminated jute bags from the whole of the duty of excise leviable thereon; and in the very notification laminated jute bags having been described as goods falling under item No. 68 of the First Schedule, it must be presumed that it fall under Item No. 68, not under Item No. 22A. If on a true interpretation of the expressions used in Item No. 22A, we find that laminated jute bags fall within that item and merely for the reason that the Government in the notification granting exemption of excise duty, described it as one falling under Item No. 68, it would not either cease to be one falling under Item No. 22A or became one falling under item No. 68. The object of the notification was only to exempt the whole of the duty of excise leviable on laminated jute bags; whether it fell under any



particular item was not real consequence; it does not appear that the government described it as one falling under Item No. 68 after due and proper application of mind on the question."

(c) ***Japan Dyeing Works vs. Collector of Central Excise : 1992 (61) ELT 289*** (CEGAT, Delhi) —

"7.

..... We do not agree with the contention of the Departmental Representative that exemption Notification is the guiding factor to interpret the term 'manufacture' since calendering with plain rollers was used in the said notification. The term 'manufacture' either in the tariff entry or in any Notification has to be interpreted on the basis of its definition in the present Statute. What was not in the main definition of term 'manufacture' cannot be substituted or entered in the Tariff entry or in the Notification. Since we have taken the view that calendering was not specified in the Tariff Entry and 'any other process' does not include process of calendering and, as such, calendering does not amount to manufacture. We do not feel it necessary to go into other issues raised by both sides."

39. The decision for the Hon'ble Supreme Court in ***Tata Sky Ltd. vs. State of Madhya Pradesh : (2013) 4 SCC 656*** was also brought to our notice by Mr. Rao to buttress his submission that Notification cannot be enlarged the provisions of the Statute and emphasises on the following paragraph: -

"33. Coming now to the notification dated 5-5-2008, it is elementary that a notification issued in exercise of powers under the Act cannot amend the Act. Moreover, the notification merely prescribes the rate of entertainment duty at 20 per cent in respect of every payment for admission to an entertainment other than cinema, video



cassette recorder and cable service. The notification cannot enlarge either the charging section or amend the provision of collection under Section 4 of the Act read with the 1942 Rules. It is, therefore, clear that the notification in no way improves the case of the State. If no duty could be levied on DTH operation under the 1936 Act prior to the issuance of the Notification dated 5-5-2008 as fairly stated by Mr Dave, we fail to see how duty can be levied under the 1936 Act after the issuance of the notification."

[emphasis supplied]

40. For the aforesaid reasons, it is the submission of Mr. Rao that the demand of service tax by the Respondents based on the provisions of the Service Tax Rules, 1994, and Notification No.36/2012-ST being in conflict with provision of Finance Act, 1994, as amended by Finance Act, 2012, would be unsustainable and, therefore, liable to be quashed.

41. Mr. Rao sought to summarise his submissions as under: -

- (a) That the activities undertaken by the Petitioner do not fall under the definition of 'taxable services' defined under the Finance Act, 1994, as amended.
- (b) As the definition of the expression 'service' under Section 65B(44) of the Finance Act, 1994 excludes 'transaction in actionable claim', no service tax can be levied on sale and purchase of lottery tickets which have



been declared by the Hon'ble Supreme Court to be actionable claim. Therefore, in terms of the amended provisions of the Finance Act, 1994 (with effect from 01-07-2012) lottery tickets are outside the scope of service tax levied under the said Act of 1994.

- (c) That sale of lottery tickets is excluded from service tax purview in terms of the negative list under the Section 66D of the Finance Act, 1994 (as amended by Finance Act, 2012).
- (d) That by the judgment dated 29-11-2012 of this Court in WP(C) No.36 of 2011 filed by very same Petitioner as in the present case, it has *inter alia* been held that the Parliament lacks the necessary legislative competence to enact a law on levy of tax on lotteries.

Clearly, therefore, the impugned letter dated 06-07-2012 and the action of the Respondents to enforce the provisions of the Finance Act, 1994 (as amended by the Finance Act, 2012) is illegal and without jurisdiction.

42. In reply to the submissions placed on behalf of the Petitioner, Mr. B. K. Gupta, Learned Counsel, appearing for the Respondents No.1 to 3, limited his



arguments in justifying the issuance of impugned letter dated 06-07-2012 on the following grounds: -

- (i) Notification No.36/2012-ST dated 20-06-2012 read with Rule 6(7C) of the Service Tax Rules, 1994 (as amended) (erroneously mentioned as 'Finance Act, 1994), requires the distributors or the selling agents to pay service tax at the rate specified for the taxable service of promoting, organising or in any other manner assisting in arranging sale of lottery tickets on the commission received by them as calculated on the numbers/value of tickets.
- (ii) Although, the agreement mentions the Petitioner ostensibly as the sole purchaser of lottery tickets for the Government of Sikkim it does not constitute a relationship of purchaser and buyer in view of the conditions mentioned in the agreement conferring vital rights upon the Government of Sikkim. Mr. Gupta reiterates what have been set out in the counter-affidavit by referring to clauses



10, 14, 15, 19 and 24 of the agreement. It is stated that the State Government under Clause 10 of the agreement enjoys exclusive right to add or delete the number of lotteries. Clause 14 stipulates that the wholesale price of the tickets is to be determined by the Government of Sikkim on the basis of the prize amount, cost of paper, cost of printing, draw expenses, transport charges, Government share of revenue with a proviso that the Government can change the price of tickets on (i) change in the price structure of lottery tickets; (ii) change in the paper cost printing, freight; and (iii) change in the market condition. Clause 15 mandates that the Government shall realise the full payment of the tickets resold by the Petitioner at the wholesale rate prescribed under Clause 14 of the agreement. Clause 19 of the agreement prescribes that the lottery draw shall be held by the Government of Sikkim and Clause 24 of the agreement provides that the taxable prizes shall be disbursed by the Government



directly to the winners/claimants to the tickets.

It is stated that for the aforesaid reason in reality the Petitioner is not the purchaser but is only facilitating the Government in sale of lottery tickets thereby bringing him within the provisions of the Service Tax Laws as amended.

- (iii) The sale of lottery tickets may be outside the purview of the sales tax but the Petitioner's activities being promoting, organising and assisting in arranging sale of lottery tickets, it is leviable to service taxable for such activities as service tax is leviable on the service provider engaged in assisting in arranging sale of lottery for the Government of Sikkim.
- (iv) Inclusion of lottery in the 'negative list' under Section 66D would not exclude the Petitioner from the purview of the Service Tax Law, as amended, as the activities of the Petitioner of



providing taxable service of promoting, organising or assisting in arranging sale of lottery tickets of the Government of Sikkim is quite distinct from lottery itself and, therefore, chargeable under the new law. That it is not a case where the Central Government has imposed any tax on lottery tickets purchased from the Government of Sikkim but is rather being imposed on the activities of the Petitioner as both the activities are mutually exclusive.

- (v) When the Petitioner is engaged in providing the services of promoting, organising or in any other manner assisting in arranging sale of lottery tickets of Government of Sikkim the question of constitutionality of the law as being in conflict with the State List in the Seventh Schedule to the Constitution is of no relevance and, that even though tax on lottery is a State Subject as per List II to the Seventh Schedule of the Constitution, yet it does not take the activities of the person/



party/institution providing any service for promoting, organising or assisting in arranging sale in respect of lottery outside the purview of service tax.

- (vi) That the Petitioner is liable to pay service tax as the nature of the service provided by the it is against the sole consideration of payment of commission by the Respondent No.4, the Government of Sikkim, calculated on the number of sold lottery tickets and, that the service tax is being levied on this which is a commercial activity, i.e., activities as service comprising of promoting, organising or assisting in arranging sale of lottery tickets received from the Government of Sikkim on payment of commission.
- (vii) That as per legal advice received by the Respondent No.2 from the Technical Officer, Tax Research Unit, New Delhi, vide letter dated 26-07-2012, it was conveyed by way of clarification that any service provided or to be provided to any person, by any other person,



for promotion, marketing, organising or in any other manner assisting in organising games of choice, including lottery, Bingo or Lotto in whatever form or by whatever name called, whether or not conducted through internet or other electronic networks, continues to be liable to service tax. Mr. Gupta placed a copy of the letter before us and referred to the following paragraphs of the letter: -

"3. Hon'ble High Court of Kerala in P. Muraleedharan, Managing Partner v. Union of India held that *"Discount or commission received by the petitioners as well as the retailers for marketing the lottery tickets is nothing but consideration for service rendered to the promoter or organiser of the lottery. Obviously without the service rendered by the distributors namely, the petitioners and down line dealers, the lottery tickets will not reach the ultimate customers who are the participants in the draw. So much so, in our view, the whole scheme of the lottery, printing and distribution of tickets and the conduct of draw involve service from various agencies and the most important service rendered by petitioners is as distributors. So much so, we are unable to accept the contention of the petitioners that they are not rendering any service in relation to marketing of lottery"*. Hence, the activity which was subjected to service tax was the auxiliary services involved in the lottery not the sale of lottery tickets per se.

4. From 1st day of July, 2012, negative list based approach is being introduced for the taxation of services. In this approach, rather than specifying the taxable services to be taxed, Government of India has specified the activities which would not be liable for the service tax.



Hence the sale of lottery ticket per se has been included in the negative list so as to have continuity and also in conformity with the entry No.62 of List-II of seventh schedule of the Constitution is "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". However, like in the past, the auxiliary services involved in the betting, gambling and lottery would be liable for service tax at the compounding rate specified under the Rule 6(7C) of the Service Tax Rules, 1994.

5. Further, principles of interpretation of specified descriptions of services laid down under Sub-section (1) of section 66F of the Finance Act, 1994 says that "Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service".

(viii) That by judgment dated 19-08-2011 of a Division Bench of the Kerala High Court in a batch of cases in ***P. Muraleedharan, Managing Partner vs. Union of India : 2011 (4) KLJ 808***, it has been held that the activities like that of the Petitioner is a service in the marketing of lottery as would be apparent from the following portion of the judgment: -

"7. We are unable to accept this contention because admittedly lottery tickets are purchased by the petitioners at discounted price and they in turn sell the same by sharing the discount availed by them to retail dealers. Discount or commission received by the petitioners as well as the retailers for marketing the lottery tickets is nothing but consideration for service rendered to the promoter or organiser of the lottery. Obviously without the service rendered by the distributors namely, the petitioners and



down line dealers, the lottery tickets will not reach the ultimate customers who are the participants in the draw. So much so, in our view, the whole scheme of the lottery, printing and distribution of tickets and the conduct of draw involve service from various agencies and the most important service rendered by petitioners is as distributors. So much so, we are unable to accept the contention of the petitioners that they are not rendering any service in relation to marketing of lottery."

- (ix) Mr. B. K. Gupta also brought to our notice Section 66F of the Act providing for principles of interpretation of specified description of services called 'bundled services'. For convenience, we may reproduce below the provision of Section 66F: -

"66F. Principles of interpretation of specified descriptions of services or bundled services.—(1) Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.

(2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

(3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely:—

- (a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;*
- (b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which*



results in highest liability of service tax.

Explanation.— For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.]"

- (x) Relying upon the above, it was submitted that the activities of the Petitioner fall within this provision being a bundle of services.
- (xi) For these reasons, as per Mr. Gupta the contentions raised on behalf of the Petitioner would not be sustainable.
- (xii) Finally, it was submitted rather feebly that the Writ Petition was not maintainable for want of territorial jurisdiction.

43. Having heard the Learned Counsel on their divergent submissions and upon consideration of the pleadings and the provisions of the Statutes and Rules placed before us, we find that the moot question that calls for our determination is as to whether or not the activity of the Petitioner of promoting, organising or assisting in arranging the sale of lottery tickets of the Government of Sikkim is a taxable service falling within the purview of the



Finance Act, 1994, as amended by the Finance Act, 2012. The cognate question that would then arise in the determination of this question would be as to whether there is an element of service in the activity of the Petitioner. In order to answer these questions, however, we deem it essential to traverse the various issues projected on the question by the Learned Counsel. It would be unfair not to do so.

44. However, before entering into the merits of the case, it would be appropriate to deal with the question of lack of territorial jurisdiction of this Court in entertaining the Writ Petition, an objection that was raised on behalf of the Respondents. The objection, in our view, has no merit in view of the admitted position that the questioned agreement between the Petitioner and the Respondent No.4 dated 10-08-2009 was entered into at Gangtok in respect of the lottery of the Government of Sikkim, Respondent No.4. The draws of the lottery are held at Gangtok and the prize of the winning lottery tickets are also disbursed at Gangtok. The Respondent No.3 has his Office at Gangtok and the impugned letter C. No.V(3)7/ST/FGSIPvtLtd/GTK/2009/295 dated 06-07-



2012 was also issued from his Office at Gangtok addressed to the registered Office of the Petitioner at Gangtok within the jurisdiction of this Court. In view of this, the objection does not appear to have any merit and is accordingly rejected.

45. On behalf of the Petitioner, the challenge to the amendment of 2012 to the Finance Act, 1994, is multi-pronged but, in our view, the question that would clinch the issue would be as to whether or not the Petitioner is an agent of the Government of Sikkim in pursuance to the agreement dated 10-08-2009 in respect of the sale of lottery tickets. However, we find that this question which was also directly in issue stands fully answered in the judgment of this Court dated 29-11-2012 in WP(C) No.36 of 2011 in the matter of *M/s. Future Gaming Solutions Pvt. Ltd. (supra)* and, therefore, it need not delay us much except to recapitulate hereafter on some of the essential aspect of the finding.

46. We find that the pleadings and oral submissions placed before us on the question are identical and repeat of those placed in WP(C) No.36 of 2011. The decisions as well as other precedents cited before us and the



commentaries referred to apart from the various terms and conditions of the very agreement dated 10-08-2009 highlighted in the present case, are found to have been considered in detail. We also find that ***Sunrise Associates (supra)*** has been taken note of where the Hon'ble Supreme Court has held lottery tickets to be 'goods' in the wider sense of the term though it is an 'actionable claim' and that it is only on account of the statutory exclusion from the definition of goods in various State Sales Tax Laws that it has been held not to be 'goods'. Decision of this Court in WP(C) No.19 of 2007 in the matter of ***M/s. Martin Lottery Agencies Limited (supra)*** has been referred to and notice taken of the conclusion arrived at therein by relying upon ***Sunrise Associates (supra)*** that lottery ticket is an 'actionable claim' and, therefore, outside the purview of 'service' and that the Appeal filed by the Union of India being Civil Appeal No.3239 of 2009, was dismissed and the decision of this Court was not interfered with.

47. We have also noted that for arriving at a conclusion as to whether the Petitioner having been appointed as a distributor can constitute an agency, we



have accepted the argument that distributor as the purchaser acts as a wholesaler on payment of total sale price, he is a buyer and not an agent. We had also accepted the proposition founded on ***Pioneer Tools and Appliances (P) Ltd. (supra)*** that in the light of the terms of the agreement the State Government had no concern with the further sale of the ticket by the Petitioner except for it to comply with the regulatory provisions contained in the Lotteries (Regulation) Act, 1988, and the Rules framed thereunder and that the State Government was not concerned with the amount of discount or margin or profit left by the Petitioner for their stockists or selling agents. That clause 30 of the agreement made this all the more clear while unambiguously stipulating that the State Government shall have no privity of the contract with the stockists, selling agents or the ultimate purchaser of lottery tickets in the street making it the sole responsibility and liability of the purchaser in case of any dispute or claim. Distinction between agents and purchaser defined in ***Benjamin's Sale of Goods, 8th Edition*** and ***Bowstead & Reynolds on Agency, 16th Edition 1996 (supra)*** were also taken note of and referred to while considering this question. Decisions in ***Alwaye***



Agencies (supra); Gordon Woodroffe (supra); Bharat Sanchar Nigam Ltd. (supra); Imagic Creative (P) Ltd. (supra) and *Indian Railways C. & T. Corpn. Ltd. (supra)* were also analysed for determination of the very question. Upon consideration of all these it was ultimately concluded that where the transaction is purely that of sale and purchase from which the component of service cannot be clearly segregated and is undiscernible, no service tax is payable and that where the two components of 'sale' and 'service' are capable of compartmentalisation service tax may be leviable on the service component in a transaction.

48. On the related question regarding the discount of 30% provided on the MRP of the lottery ticket which as per the Respondents was a commission provided to the Petitioner in lieu of the service rendered by them, we had taken note of *Mahindra and Mahindra Ltd. (supra); Pioneer Tolls and Appliances (P) Ltd. (supra); Philips India Ltd. vs. Collector of Central Excise, Pune : (1997) 6 SCC 31; Collector of Central Excise, Boroda vs. Besta Cosmetics Ltd. : 2005 (183) ELT 122 (SC);* a Division Bench judgment of the Kerala High Court dated 07-04-



2004 in the matter of *The Commissioner of Income Tax, Thiruvananthapuram and Another vs. Shri M. S. Hameed and Others* and *Commissioner of Income Tax vs. Jai Drinks Pvt. Ltd. : 2011 (336) ITR 383* (Delhi), to ultimately hold that on the undisputed position that the lottery ticket is sold as a good by the State Government to the Petitioner at the discounted value of 75 paise per ticket as against its gross value/MRP of Rupee One, is a discount provided in a normal trade practice in any transaction of sale on purchase and, that the activity of the Petitioner of sale of the State Lottery through its various stockists, agents, etc., cannot be construed to be a service rendered to the State Government to fall within the purview of the service tax in the absence of any element of service in such activity.

49. In *Martin Lottery Agencies (supra)*, following the legal proposition that the activity of the lottery is *res extra commercium* laid down in *R.M.D. Chamarbaugwala (supra)* and *B. R. Enterprises (supra)* as being gambling, doubt was expressed "as to how service element of the entire transaction is to be ascertained". The decision in *P. Muraleedharan (supra)* relied upon on behalf of



Respondents No.1 to 3 no doubt rejected the contention that the Petitioner were not rendering any service in relation to marketing of lottery in the portion of the judgment extracted earlier. However, we find this in conflict with an earlier decision dated 07-04-2004 in **M. S. Hameed (supra)**, also of a Division Bench of that very Court, the relevant portion of which is reproduced below for convenience: -

“Whether tax can be deducted or collected at source from the persons who received bulk quantity of lottery tickets at a commission or at a discounted price invoking Section 194 G of the Income Tax Act, 1961 (in short ‘the Act’) considering the nature of transactions between the petitioners and Government is the question to be decided in this case.

4.

..... Here, State is not responsible for paying any amount to lottery agents. Lottery ticket is sold at a reduced price to bulk purchasers depending upon the offtake as mentioned in Ext.P4. Anybody is entitled to purchase it in bulk at that rate. Therefore, petitioners are not agents strictly. On payment of sale price, ticket is sold at that price. Whether it is further sold to their sub agents or they directly sell to the public is not the Government’s look out. Even if bulk tickets purchased by the petitioners remains unsold, Government is not bound to pay anything to them. It is the loss of the petitioners. Sold tickets will not be taken back by the Government. As per the terms in Ext.P1, Government is not responsible for paying anything to the petitioners. Section 194G authorises only the deduction at source if Government is liable to pay any commission or any remuneration to the lottery agents. Unlike Section 206C, Section 194G is not giving any permission to collect tax from the buyer. If Government pays remuneration or commission or any amount (by whatever name it is called) to the lottery agents, Section 194G will apply. Here,



Government is selling the tickets to the petitioners at a reduced price considering the bulk quantity they are purchasing, in order to boost up the sale of lottery tickets on commercial consideration. But that is outright sale. It is a well-settled principle that in a taxing Statute, one has to look merely at what is clearly said. There is no room for any intendment.

There is no equity or presumption as to tax. When Government is not responsible for paying commission or remuneration to the petitioners when it is selling lottery at a reduced price, there is nothing for deduction and paying balance after deducting at source is not possible in these transactions. "

50. Although this decision was rendered in the context of Section 194G of the Income Tax Act, 1961, providing for deduction of income tax at source at the rate of 10%, it would be equally germane for consideration in the present case also in so far as the finding that the Petitioners are not agents and that the Government is not responsible for paying commission or remuneration. SLP (C) No.10985 of 2004 in ***M. S. Hameed's case*** was dismissed and, therefore, by implication the finding that the Petitioner is not an agent of the Government of Sikkim in the sale, promotion, etc., of its lottery tickets still holds the field. In any case, the finding of ***M. S. Hameed's case*** is in consonance with the decision of this Court in WP(C) No.36 of 2011 wherein apart from holding that the Petitioner was not an agent of the Government in relation



to the sale of lottery, it has categorically been decided that there is no element of service in such activity

51. Following from the above, we are of the view that the basis upon which the Respondents No.1 to 3 are seeking to impose service tax upon the Petitioner under the Amendment Act of 2012 to the Finance Act, 1994, on the erroneous premises that the Petitioner is a service provider engaged in assisting in arranging sale of lottery ticket for the Government of Sikkim is clearly unsustainable.

52. The next limb of the argument in assailing the jurisdiction of the Respondents in issuing the impugned letter is that the service tax is being sought to be collected on the activity of the Petitioner without the authority and sanction of law and, therefore, violative of Article 265 of the Constitution and that Rule 6(7C) of the Service Tax Rules, 1994 (wrongly quoted as 'Finance Act, 1994) being a subordinate piece of legislation, cannot go beyond the provision of the Finance Act in view of the settled position of law that subordinate legislation cannot overrule statutory provisions. We are inclined to agree with this as the position of law is well-established.



53. We find substance in the submission of Mr. Rao that Rule 6(7C) of the Service Tax (Second Amendment) Rules, 2012, only provides an optional composite scheme for payment of service tax that by itself it does not create a charge of service tax. There is no doubt of the fact that this Rule, i.e., Rule 6(7C) of the Service Tax Rules, 1994 (as amended), is only a piece of subordinate legislation framed under the Rule making powers provided in the Finance Act, 1994. In view of the settled position of law that subordinate legislation cannot override the statutory provisions, Rule 6(7C) cannot go beyond the provision of the Finance Act, 1994. This proposition of law has been laid down in a plethora of decisions some of which as cited by Mr. Rao are *Tahir Hussain (supra)*; *Hukam Chand (supra)*; *Jagat Talkies Distributors (supra)* and *S. Srinivasan (supra)*. When there is no liability to pay tax under the statutory provisions, i.e., under the provisions of the Finance Act, 1994, as amended by the Finance Act, 2012, with effect from 01-07-2012, it is not open to the Respondents to demand such tax under an optional scheme of payment of service tax notified under subordinate legislation vide the impugned letter. As submitted by Mr. Rao, it is well-settled that charging



provision is an essential and indispensable ingredient of taxation. In the absence of a charging provision no tax can be levied solely on the basis of a machinery for collection of tax. Since in the present case, we do not find any charge of service tax upon 'transaction in actionable claim' and 'lottery' even though a machinery for collection by way of alternative scheme exists, service tax cannot be collected solely on the basis of machinery for collection of taxes. Therefore, Rule 6(7C) of the Service Tax Rules, 1994 (as amended), in so far as it relates to 'lotteries' is *ultra vires* the Finance Act, 1994, as amended by the Finance Act, 2012, with effect from 01-07-2012. Reference in this regard may be made to ***Laghu Udyog Bharati (supra)***.

54. Similarly, demand of payment for service tax based upon Notification No.36/2012-ST dated 20-06-2012 as indicated in the impugned letter cannot be sustained in view of the settled position of law that levy of tax cannot be inferred from a Notification and the Service Tax Rules, 1994. We have already adverted to this aspect while dealing with the submission of Mr. Rao earlier and have set out the relevant portion of the decision in ***Timber &***



Fuel Corporation (supra) wherein this proposition stands well-settled. Therefore, it can undoubtedly be held that the stand of the Respondents that service tax is payable in view of the provisions of Service Tax Rules, 1994 and Notification No.36/2012-ST dated 20-06-2012 is grossly erroneous, invalid and unsustainable in law in view of the specific provisions of the Finance Act, 1994, as amended by Finance Act, 2012.

55. The next crucial aspect that requires consideration is the interpretation of the newly inserted provisions by the Finance Act, 2012, which we have already reproduced earlier. Sub-Section (1) of Section 65B has defined 'actionable claim' as having the same meaning assigned to it in Section 3 of the Transfer of Property Act. Sub-Section (44) as we have seen defined service *inter alia* to mean any activity carried out by a person for another for consideration but not to include amongst others a transaction in money or actionable claim.

56. We have already noted that in ***Sunrise Associates (supra)*** lotteries have been held to be nothing but a transfer of actionable claim. Therefore, from the



very provisions introduced by the Finance Act, 2012, i.e., Sub-Section (1) of Section 65B read with Sub-Section (44), lottery stand excluded by implication from the purview of service tax.

57. The submission on behalf of the Respondents that the levy under the new provision only deals with the activity of the Petitioner of promoting, organising or in any other manner assisting in arranging sale of lottery tickets and not on lottery *per se*, does not appear to be convincing. This, in our view, appears to be an erroneous interpretation of the meaning of the word 'service' appearing in Sub-Section (44) of Section 65B which clearly includes transaction in money or actionable claim.

58. In *Sunrise Associates (supra)* the Hon'ble Supreme Court while holding that lottery is transfer of an actionable claim observed as under: -

"43. It is sufficient for our purposes to note that tickets are themselves, normally evidence of and in some cases the contract between the buyer of the ticket and its seller. Therefore a lottery ticket can be held to be goods if at all only because it evidences the transfer of a right.

44. The question is, what is this right which the ticket represents? There can be no doubt that on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize



money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of "goods" under the Sale of Goods Act and the sales tax statutes. This was also accepted in *H. Anraj* [(1986) 1 SCC 414] when the Court said that to the extent that the sale of a lottery ticket involved a transfer of the right to claim a prize depending on chance, it was an assignment of an actionable claim. Significantly in *B.R. Enterprises v. State of U.P.* [(1999) 9 SCC 700] construing *H. Anraj* the Court said: (SCC p.746, para 52)

"52. So, we find three ingredients in the sale of lottery tickets, namely, (i) prize, (ii) chance, and (iii) consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket."

45. Every right can be subdivided into lesser rights. When these lesser rights culminate in a legally recognisable right, it is the latter which defines the right. The right to participate in the draw is a part of the composite right of the chance to win and it does not feature separately in the definition of the word "lottery". It is an implicit part of the chance to win. It is not a different right. The separation is specious since neither of the rights can stand without the other. A draw without a chance to win is meaningless and one cannot claim a prize without participating in the draw. In fact the transfer of the chance to win assumes participation in the draw."

[emphasis supplied]

Therefore, on a combined reading of the ratio laid down in ***Sunrise Associates (supra)***, Sub-Sections (1) and (44) of Section 65B of the Finance Act, 2012, we most unhesitatingly hold that lottery is not a 'service' being an activity falling within the meaning of 'actionable claim' and, therefore, stands excluded from the taxable service



under the Service Tax Laws introduced under the Finance Act, 2012.

59. This also negates the reliance being placed on behalf of the Respondents to Section 66F to invoke the principle of 'bundled services' notwithstanding the fact that nothing was placed before us on behalf of the Respondents as to how the activity of the Petitioner can be said to fall within the meaning of 'bundled services'.

60. From a bare perusal of Section 66F reproduced earlier while alluding to the submissions on behalf of the Respondents No.1 to 3, we find that the essential requirement of the activities to fall within the meaning of bundled services is the element of 'service'. This becomes quite apparent from the very heading to the Section which reads as 'Principles of interpretation of specified descriptions of services or bundled services'. As we have found that the activities of the Petitioner in promoting, organising and selling the lottery tickets of the Government of Sikkim does not contain an element of rendering service the question of such activity falling within the premises of Section 66F would not arise at all. Since as already indicated nothing was placed before us as



to how the activity of the Petitioner falls within the provisions to Section 66F as bundled services, we have made efforts on our own to seek out the basis of the submission from the pleadings in the counter-affidavit and we have reasonably inferred that a distinction is being sought to be drawn by the Respondents between the sale of lottery by the State Government and the sale of lottery of the State Government by the Petitioner. This can be gathered *inter alia* from the following averments contained in paragraph 12 of the counter-affidavit filed on behalf of the Respondents No.1 to 3: -

"12.

..... The Central Government has not imposed any tax on Lottery tickets purchased from the Sikkim Government. The service/activities given by the petitioner in promoting, organizing and assisting in arranging the sale is liable to service tax. The petitioner is doing all this on commission basis calculated on the price/no's of sold tickets only. The unsold tickets for a scheduled period are received back by the state Government (Sikkim)."

In our considered view, the interpretation and understanding of lottery as perceived by the Respondents No.1 to 3 is grossly erroneous and reflects their ignorance of the concept of 'lottery'.



61. In *B. R. Enterprises (supra)* the Hon'ble Supreme Court has gone in depth to examine what is 'lottery'. While doing so, a wide spectrum of literature including its meaning contained in various dictionary were gone into. We may for convenience reproduce the following portions of the decision: -

"51. So, now we proceed to examine what is "lottery", what would be the ingredients in the "sale of lottery tickets" and then to equate with other forms of contract pertaining to trade and commerce. Whether there is any striking difference between the two. "Lottery" is defined as:

In *Words and Phrases (Permanent Edn.)*, Vol. 25-A at p. 439:

"A 'lottery' is a species of gambling."

At p. 444:

"The lottery statutes were enacted to suppress the widespread evil of gambling in lotteries and to allay and curb the gambling spirit of the public and thus prevent waste of money needed for more substantial purposes, the term 'lottery' as popularly and generally used referring to a gambling scheme in which chances are sold or disposed of for value and the sums thus paid are hazarded in the hope of winning a much larger sum, a scheme for the distribution of prizes by chance."

At p. 445:

"The term 'lottery' in law is of wide signification. In *Horner v. United States* [13 S.Ct 409, 147 US 449 : 37 L Ed 237 (1983)] Mr. Justice Blatchford discussed various definitions of lottery, and among others approved that found in *Webster's Dictionary*, in which it is defined to be 'game of hazard in which small sums are ventured with the chance of obtaining a large value, either in money or other articles'."

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At p. 491:

"The term 'tickets' when speaking of the sale of lottery tickets, in equivalent to 'chances'."

At the same page:

"In a general sense, 'lottery tickets' are more in the nature of choses in action than merchandise, being in some respects memoranda of conditional promises to pay."

State v. Mabrey [60 NW 2d 889, 893] NW 2d at p.893:

"Generally, to constitute 'lottery' there must be a prize awarded by chance for a consideration with no infusion of skill."

Common Wealth v. Laud [15 A 2d 839, 840, 843, 845] A 2d at pp. 840, 841, 843, 845:

"An artifice, no matter how new, is within the condemnation of the law against lotteries if it, in effect, embodies the principle of a 'lottery' and operates as such."

In *Law Lexicon*, P. Ramanatha Aiyar, 1997 Edn., at p.1151:

"Scheme for the disposal or distribution of property by chance. The term 'lottery' has no technical meaning in the law distinct from its popular signification. A lottery is a scheme for the distribution of prizes by chance."

In *Words and Phrases*, Butterworths, 3rd Edn., at p. 70 :

"A lottery has been described as a scheme for distributing prizes by lot or chance."

At p. 71:

"..... It must not be entirely forgotten in the construction of these Acts of Parliament [see now the Lotteries and Amusements Act, 1976] that the evil which the lottery law has sought to prevent was the evil which existed where poor people with only a few pence to feed their children would go and put these few pence into a lottery and lose them, and this sociologically was a bad thing."



In *Stroud's Judicial Dictionary*, 5th Edn., Vol. 3, at p. 1507:

"In *Webster's Dictionary* a lottery is defined to be 'A distribution of prizes by lot or chance' — and a similar definition is given in *Johnson*. Such definitions are, in our opinion, correct."

In *Black's Law Dictionary*, 6th Edn., at p. 947:

"A chance for a prize for a price. A scheme for the distribution of a prize or prizes by lot or chance, the number and value of which is determined by the operator of lottery."

What appears from the above and from the portion of ***Sunrise Associates*** reproduced earlier, is that the lottery is a consolidated concept possessed of different characters and ingredients as has been found noted above. 'Lottery' has been defined *inter alia* "as a scheme for distributing prizes by lot or chance" (*Words and Phrases*, Butterworths, 3rd Edition at p. 70), "a distribution of prizes by lot or chance" (*Webster's Dictionary*), "a chance for a prize for a price. A scheme for the distribution of prize or prizes by law or chance, the number and value of which is determined by the operator of lottery" (*Black's Law Dictionary*, 6th Edn., at p. 947). These ingredients or elements that consolidate to form 'lottery' cannot be said to fall within the meaning of bundled of services as none of those characteristics is a 'service'. This is notwithstanding our opinion that there is no element of



service in the activity of the Petitioner in promoting, assisting or reselling lottery of the Government of Sikkim and also for the reasons that would follow hereafter.

62. The next provision that we have been found introduced are Sub-Section (34) to Section 65B which defines 'negative list' as meaning those services listed in Section 66D. While Section 66B which is the charging Section, excludes all services specified in the 'negative list' from the purview of service tax, Section 66D enumerates those activities which are in the negative list. We find that under Clause (i) of Section 66D 'betting, gambling or lottery' have been specifically mentioned. From the various statutory provisions that we have discussed and from the interpretations of the Hon'ble Supreme Court on the question of what is 'goods' and 'actionable claims', it is difficult for us to accept the contention made on behalf of the Respondents that it is only the activity of the Petitioner, that is being taxed and not the sale of lottery ticket by the State of Sikkim. This argument obviously is flawed also considering the ratio laid down in **M. S. Hameed (supra)** and WP(C) No.36 of 2011 in **M/s. Future Gaming Solutions Pvt. Ltd. (supra)**. No doubt, these decisions are subject to what the Hon'ble Supreme Court



will finally hold on the question but until then the law as laid down in those decision shall continue to hold sway.

63. We have already noticed that lottery is not a tangible thing but in a sense chance for a prize and, that sale of a lottery ticket is only a sale that chance. The true meaning of lottery is, therefore, the entire gamut of activity, i.e., lottery. We, therefore, hold that the lottery being 'actionable claim' does not fall within the purview of the service tax Laws as introduced by the new provisions by the Finance Act, 2012.

64. On the challenge to the legislative competence of the Parliament to pass the Amendment Act, 2012, introducing these provisions in the Service Tax Laws, we find that in WP(C) No.36 of 2011 in the matter of ***M/s. Future Gaming Solutions Pvt. Ltd. (supra)***, the very same challenge had been thrown on the introduction of Clause (zzzzn) to Sub-Section (105) of Section 65 of the Finance Act, 2010. While dealing with Ground (B) of the challenge to those impugned provisions we have noticed the following observations: -

- “(i) whether the conduct of lottery is an Act of “Betting and Gambling” envisaged under entries 34 and 62 of List II to Schedule 7;



- (ii) whether it is within the exclusive domain of State legislature to impose taxes on organising lotteries being an act of "Betting and Gambling";
- (iii) whether the Parliament has the competence to enact law in exercise of its residuary legislative power under entry 97 of List I to Schedule 7 de hors the entries 34 and 62 of List II;
- (iv) whether the State legislature and Parliament both can simultaneously impose taxes on the conduct of lottery by the State Government under entry 62 of List II and entry 97 of List I to Schedule 7, if so, under what circumstances; and
- (v) whether such circumstances exist in the case in hand?"

65. The same questions also arise in the present proceedings in relation to the new provisions introduced by the Finance Act, 2012. This Court while dealing with the first limb under serial no.(i), has held lottery to be an act of betting and gambling by relying upon ***B. R. Enterprises (supra)*** and ***Martin Lottery Agencies (supra)***. On the questions no.(ii) and (iii) set out above this Court after examining the constitutional schemes under Entry 40 to List I and Entry 34 of List II to Seventh Schedule, Articles 246 and 254 of the Constitution of India and the ratio laid down in ***Purvi Communication (P) Ltd. (supra)***, ***Union of India vs. Shri Harbhajan Singh Dhillon : (1971) 2 SCC 779***; ***Kesoram Industries Ltd. (supra)***; ***N. V. Marketing Pvt. Ltd. vs. State of Maharashtra & Others :***



2009 (III) (8) BLR 3397; Godfrey Phillips India Ltd. and Another vs. State of U.P. and Others : (2005) 2 SCC 515; Express Hotels Private Ltd. vs. State of Gujarat and Another : (1989) 3 SCC 677 and RMD Chamarbaugwala (supra) etc., arrived at the following findings: -

- (a) There is no Entry in any of the List to the Seventh Schedule that specifically provides for levy of tax on lottery;
- (b) The power to enact law for imposition of tax on lotteries have to be construed as inherent in the expression of 'betting and gambling', lottery being one such activity; and
- (c) Though the power of regulation of lotteries vests in the Parliament in terms of Entry 40 of List I, power to tax is not an incidental power.

66. We may also refer to the following portions of the judgment in WP(C) No.36 of 2011 in the matter of **M/s. Future Gaming Solutions Pvt. Ltd. (supra): -**

“(t) It is also settled legal position that where the entries under different Lists empower the respective legislatures to enact law on any subject matter and the question arises regarding the legislative competence of the legislative bodies,



the doctrine of pith and substance is to be applied to find out the real intention of the legislative entry and the object of enacting a law. As observed in ***State of West Bengal v. Kesoram Industries Ltd. (supra)*** if any law enacted by Parliament is not traceable to any legislative entry in List II or List III, it is irrelevant whether the power of the Parliament is traceable to a specific entry and Parliament shall be deemed to have legislative competence. Its natural corollary would be if power to enact law on a subject matter including levy of taxes is traceable to any entry in List II and List III, residuary power under entry 97 of List I read with Article 248 of the Constitution of India will not be available to it, the same having been specifically restricted under entry 97 of List I and Article 248 of the Constitution.

(u) In the instant case, the power to tax on lotteries or even “betting and gambling” is not available under any of the entries of List I. However, such power is germane to and emanates from entry 62 of List II in Seventh Schedule, meaning thereby that the residuary power to enact a law imposing tax on lotteries would not be available to the Parliament.

(y) Various entries empowering the Parliament and State Legislatures to enact laws for levy of tax do not mean or confine the kind of taxes prevalent or in vogue at the time these entries were enacted in Seventh Schedule. The word “tax” includes all kinds of taxation present or future that may be thought of by the competent legislative body. Thus the argument of Mr. Razzak that service tax does not find mention in entry 62 and thus is beyond its purview cannot be accepted or appreciated. Any kind of tax that may be envisaged and can be legally conceptualized by the legislative body falls within the purview of tax in view of all embracing definition of expressions “tax (taxation)” under clause (28) of Article 366. Service tax though a new regime, it would be antithesis of the term “tax” if considered to be a category of tax not envisaged by any of the entries in Seventh Schedule empowering to levy tax. Applying the principle of pith and substance, the power to levy tax on lottery being a game of chance and included in the expressions “betting and gambling” in entry 62 List II, the State Legislature has the exclusive legislative competence and jurisdiction of Parliament to levy such a tax in exercise of its residuary power under entry 97 of the List I read



with Article 248 of the Constitution stand excluded. There is another important aspect; entry 92C – ‘Taxes on services’ was also incorporated in List I Seventh Schedule by Eighty-eighth Constitutional Amendment Act, 2003. However, this entry has not been notified till date.”

67. On the next question as set out in (iv) above, it was held that where the transaction or contract comprises of twin elements of sale and service, both the State Legislature under Entry 54 of List II and the Parliament in exercise of its residuary powers under Entry 97 of List I, are competent to levy ‘sales tax’ and ‘service tax’ respectively at the same time provided the components of ‘sale’ and ‘service’ are visible and are capable of compartmentalisation.

68. In the case at hand, we do not find any change in the circumstance as regards the position found in questions no.(ii) to (v) set out above except that Clause (zzzzn) of Sub-Section (105) of Section 65 of the Finance Act, 2010, has now been replaced by a new service tax law regime under the Finance Act, 2012, in the form of Section 65B and Sub-Sections thereunder, Sections 66B and 66D with which we have already dealt with in detail earlier. The question of the Constitutional vires which appears to be the same having already been considered



and decided in detail is no more *res integra* so far as this Court is concerned which, needless to state, shall be subject to the outcome of the SLP filed by the Union of India in the Hon'ble Supreme Court. We are also of the view that nothing further needs to be stated on this having regard to the fact that the Petitioner has not prayed for quashing the impugned provisions of the Amendment Act, 2012, on the ground of those being *ultra vires* the Constitution.

69. On contention (v), i.e., whether such circumstances exist in the case at hand, this Court after taking into consideration the finding that neither the State Government was paying any consideration to the Petitioner nor was the Petitioner rendering any service to the State, held that as the lottery ticket was being sold as goods by the State Government to the Petitioner at the discounted value of 75 paise per ticket as against its gross value/MRP of Rupee One, the pre-dominant part of the transaction was sale of goods with a discount of 30% as a normal trade practice. In all the subsequent transactions thereafter no circumstance came into existence by which the activity of sale of State organised lottery by the



Petitioner through its various stockists, agents, etc., could be construed as a service rendered to the State Government in order to be liable under the Service Tax Laws.

70. In view of the facts and circumstances and the discussions, our conclusions are as under: -

- (i) In the light of Sub-Section (1) to Section 65B read with Sub-Section (44) thereof lottery is excluded from the definition of 'service' being 'actionable claim';
- (ii) Even under Sub-Section (34) of Section 65B read with Sections 66B and 66D lottery stands excluded from the purview of service tax under the Finance Act, 2012 as being one in the 'negative list';
- (iii) The activity of the Petitioner comprising of promotions, organising, reselling or any other manner assisting in arranging of lottery tickets of the State Lotteries does not establish the relationship of a principal or an agent but rather that of a buyer and a seller and, on principal to



principal basis in view of the nature of the transaction consisting of bulk purchases of lottery tickets by the Petitioner from the State Government on full payment on a discounted price as a natural business transaction and, other related features like there being no privity of contract between the State Government and the stockists, agents, resellers under the Petitioner.

- (iv) The impugned letter C. No.V(3)7/ST/FGSIPvt Ltd/GTK/2009/295 dated 06-07-2012 does not have the sanction and authority of either the Constitution or the law as there is no provision anywhere for imposing of service tax on 'lottery' and the action of the Respondents to impose such tax on the Petitioner on the basis of Notification No.36/2012-ST dated 20-06-2012 and the Service Tax Rules is *ultra vires* the very provisions of the Finance Act being in excess of the powers vested therein.



71. For all these reasons we are of the view that transactions in lottery tickets are not liable to service tax under the provisions of the Finance Act, 1994, as amended by the Finance Act, 2012. It is accordingly declared so. Consequently the impugned letter C. No.V(3)7/ST/FGSIPvtLtd/GTK/2009/295 dated 06-07-2012 issued by the Respondent No.3, Annexure P5 to the Writ Petition, stands hereby quashed.

72. In the result, the Writ Petition is allowed.

73. No order as to costs.

Sd/-
(S. P. Wangdi)
Judge
24-09-2013

Sd/-
(P. C. Kuriakose)
Chief Justice
24-09-2013

Approved for reporting : Yes

Internet : Yes