

K. Arumugam
v.
Union of India & Others Etc.

(Civil Appeal Nos. 2842-2848 of 2012)

08 August 2024

[B.V. Nagarathna* and Nongmeikapam Kotiswar Singh, JJ.]

Issue for Consideration

Appellant-assesseees purchased Kerala State Lotteries from the District Lottery Offices and other States' lotteries in bulk from registered promoters at a discounted rate. The appellant subsequently sold them to retailers on an outright sale basis. Whether the activity of the appellants-assesseees would attract service tax within the scope and ambit of Section 65(19)(ii) read with Section 65(105)(zzb) of the Finance Act, 1994.

Headnotes[†]

Finance Act, 1994 – s.65(19)(ii) r/w. s.65(105)(zzb) – Appellant was directed by the Superintendent of Central Excise, Service Tax Range, to obtain registration and pay service tax under the heading ‘business auxiliary service’ in terms of the provisions of the Finance Act, 1994 – Correctness:

Held: It was opined in Sunrise Associates case that lottery tickets can be categorised as actionable claims – On a reading of clause (19) of Section 65 of the Finance Act, 1994 and on analyzing the same, it is evident that tax on a business auxiliary service is relatable to (i) any service concerning promotion or marketing or sale of goods, produced or provided by, or belonging to the client and (ii) promotion or marketing of service provided by the client – The definition of goods has also been noted in clause (50) of Section 65 of the Finance Act, 1994 which refers to clause (7) of Section 2 of the Sale of Goods Act, 1930 – The expression “goods” under the Sale of Goods Act expressly excludes actionable claims as well as money – Therefore, lottery tickets would not come within the meaning of the expression goods under clause (7) of Section 2 of the Sale of Goods Act, 1930, they would also

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not come within the scope and ambit of clause (50) of Section 65 of the Finance Act, 1994 – If that is so, they would also not come within the scope and ambit of clause (19)(i) of Section 65 of the Finance Act, 1994 – Lottery tickets being actionable claims and not being goods within the meaning of sub-clause (i) of clause (19) of Section 65 of the Finance Act, 1994, would expressly get excluded from the scope of the said provision – As far as Explanation added with effect from 16.05.2008 under clause 19(ii) of section 65 is concerned, when lottery ticket is an actionable claim and not “goods” and is therefore outside the scope of sub-clause (i) of clause 19 of Section 65 of the Finance Act, 1994, it could not have been included as lottery per se in the Explanation to sub-clause (ii) of Clause 19 of Section 65 of the Finance Act, 1994 – On a plain reading of the Explanation in light of the activity actually carried on by the appellant(s)-assessee(s) herein, it becomes clear that the outright purchase of lottery tickets from the promoters of the State or Directorate of Lotteries, as the case may be, is not a service in relation to promotion or marketing of service provided by the client, i.e., the State conducting the lottery – The conduct of lottery is a revenue generating activity by a State or any other entity in the field of actionable claims – The Explanation, cannot over-ride the main text of the provision as the Explanation which was sought to remove doubts is in fact contrary to the main provision which defines business auxiliary service and also contrary to the judgment of this Court in Sunrise Associates case and having regard to clause (50) of Section 65 of the Finance Act, 1994 – The said Explanation was omitted with effect from 01.07.2010 – However, these cases pertain to the period prior to 01.07.2010 – Therefore, either under sub-clause (i) of clause (19) of Section 65 or under the Explanation to sub-clause (ii) of Clause 19 of Section 65 of the Finance Act, 1994, after it was introduced with effect from 16.05.2008 and until it was omitted, service tax could not have been levied on the promotion or marketing of sale of goods or service provided by the client, on the premise that it was a ‘business auxiliary service’. [Paras 6.7, 6.8, 6.9, 6.10]

Case Law Cited

Sunrise Associates v. Govt. of NCT of Delhi [\[2006\] Supp. 1 SCR 421 : \(2006\) 5 SCC 603 – followed.](#)

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Finance Act, 1994; Finance Act, 2008; Constitution of India; Lotteries Regulation Act, 1998; Kerala State Lotteries and Online Lotteries (Regulation) Rules, 2003; Lotteries Regulation Act, 1998; Kerala Tax on Paper Lotteries Act, 2005; Sale of Goods Act, 1930.

List of Keywords

Section 65(19)(ii) read with Section 65(105)(zzb) of the Finance Act, 1994; Clause (50) of Section 65 of the Finance Act, 1994; Lottery tickets; Actionable claim; Business auxiliary service; Service tax; Promotion or marketing of service provided.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2842-2848 of 2012

From the Judgment and Order dated 19.08.2011 of the High Court of Kerala at Ernakulam in WPC No.25131 and 26123 of 2009 and WPC No. 6263, 7618, 11585, 13443 and 29499 of 2010

With

Civil Appeal Nos. 2781, 2782, 2783, 2841, 2829-2840 of 2012, and Civil Appeal No. 9993 of 2024

Appearances for Parties

Vikramjit Banerjee, A.S.G., S. Ganesh, George Poonthottam, Arijit Prasad, Sr. Advs., B. Krishna Prasad, M/s. Parekh & Co., Gautam Narayan, Ms. Asmita Singh, Anirudh Anand, Tushar Nair, Ms. Rohini Musa, Mukunda Rao, Nipun Katyal, Atul Shankar Vinod, Dileep Pillai, Kannan Gopal Vinod, M. P. Vinod, Chirag M. Shroff, Dhananjay Kataria, Raj Bahadur Yadav, Mukesh Kumar Maroria, A.R. Madhav Rao, Arjun Garg, Aakash Nandolia, Ms. Sagun Srivastava, Ms. Kriti Gupta, Arvind Kumar Sharma, Ms. Usha Nandini V., Biju P. Raman, John Thomas Arakal, Mrs. Nisha Bagchi, Shubhendu Anand, Meru Sagar Samantaray, Annirudh Sharma Ii, G. S. Makker, Mukunda Rao Angara, Raghvendra Kumar, Anand Kumar Dubey, Nishant Verma, Simanta Kumar, Maneesh Pathak, Ms. Harsha Sharma, Devvrat Singh, Jainendra Kumar, Varun Singh, Sameer Abhyankar, Kushagra Aman, Aakash Thakur, Rahul Kumar, Ms. Ayushi Bansal, M/s. Arputham Aruna And Co., C. K. Sasi, Ms. Meena K Poulose, Ms. Anupriya, Advs. for theappearing parties.

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Leave granted in SLP (Civil) No.21584 of 2012.

2. These appeals are filed by the assessees against the judgments of the High Courts of Sikkim and Kerala dated 03.07.2010 and 19.08.2011 respectively.
3. In *K. Arumugam vs. Union of India, C.A. No. 2842-2848 of 2012*, the facts are that the appellant is registered with the Directorate of State Lotteries in Thiruvananthapuram and has purchased Kerala State Lotteries from the District Lottery Offices and other States' lotteries in bulk from registered promoters at a discounted rate. The appellant contends that this purchase was made on an outright sale basis, meaning, they bought all tickets in bulk with no return policy ("all sold basis") and subsequently sold them to retailers, also on an outright sale basis. A profit was made from the difference between the amount received from retailers and the amount paid to the State Government or registered promoters. The sale of lotteries in Kerala was regulated by the Kerala State Lotteries and Online Lotteries (Regulation) Rules, 2003 framed under Section 12(3) of the Lotteries Regulation Act, 1998 and the Kerala Tax on Paper Lotteries Act, 2005.
 - 3.1 Appellant was directed by the Superintendent of Central Excise, Service Tax Range, Palakkad Division, Mettuppalayam Street, Palakkad-1, Kerala, to obtain registration and pay service tax under the heading '*business auxiliary service*' in terms of the provisions of the Finance Act, 1994. Subsequently, the appellants were served notices by the Assistant Commissioner of Central Excise demanding details of their lottery purchase since the year 2003. In some instances, searches were conducted and items, including hard discs, were seized.
 - 3.2 As a result, the appellant approached the Kerala High Court challenging the constitutionality of the Explanation added to Section 65 (19) (ii) of the Finance Act, 1994 and all consequential steps taken in pursuance thereto. The appellant argued that the profit made from the difference between the purchase price and the face value of the tickets did not constitute a '*taxable service*'

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under the relevant provision. It was argued that the activities did not constitute a ‘taxable service’. It was also conjunctively argued that the Explanation inserted in the year 2008 introduced a new concept inconsistent with the main provision and that no service tax could be imposed based on this Court’s ruling in ***Sunrise Associates vs. Govt. of NCT of Delhi, (2006) 5 SCC 603 (“Sunrise Associates”)*** wherein it was held that lottery tickets are not goods but actionable claims. However, the High Court of Kerala dismissed the petitions on 19.08.2011. Aggrieved by the aforesaid judgment, present appeals are preferred.

- 3.3 In the case of *Tashi Delek Gaming Sol. Pvt. Ltd. & Anr vs. Union of India & Ors., C.A. No.2781 of 2012*, the appellant has impugned the judgment of the Sikkim High Court, which dismissed the appellant’s writ petition challenging the constitutional validity of the Explanation to Section 65(19)(ii) introduced by the Finance Act, 2008 with effect from 16.05.2008. The appellant in this case was appointed as the exclusive statutory marketing agent by the State of Sikkim on 24.08.2001, under Section 4(c) of the Lotteries Regulation Act, 1998, for the sale of online lottery tickets organized by the said State. According to the agreement between the appellant and the State of Sikkim, the appellant purchased lottery tickets in bulk from the Directorate of Lotteries at a price lower than the maximum retail price (MRP). The appellant then sold the tickets to distributors, adding a margin of 1%, who in turn sold the tickets to retailers, who ultimately sold them to the public at the MRP.
- 3.4 A letter dated 07.07.2009 was issued to the appellant herein by the Office of the Superintendent of Central Excise, Gangtok Range, Gangtok, Government of India requesting the appellant to submit an application Form ST-1 seeking service tax registration under the category “*business auxiliary service*” as the service rendered by the appellant came within the ambit of “*business auxiliary service*” in terms of the Explanation to Section 65(19) (ii) of the Finance Act, 2008 and therefore, the appellant was liable to pay service tax.

Aggrieved by the aforesaid communication dated 07.07.2009, a writ petition, being W.P.(C) No.21 of 2009 was filed by the petitioner before the High Court of Sikkim at Gangtok, challenging the constitutionality of the letter dated 07.07.2009 as well as the Explanation to Section

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65(19)(ii) inserted by the Finance Act, 2008. *Vide* impugned judgment dated 03.07.2010, the High Court of Sikkim dismissed the writ petition filed by the appellant herein.

- 3.5 The appellant maintained that the sale of lottery tickets is, in fact, an outright purchase and does not involve any service to the State in terms of promotion or marketing under the Explanation to Section 65(19)(ii) of the Finance Act, 1994 as amended by the Finance Act, 2008. The tickets sold were mainly for lotteries organized by the States of Kerala and Sikkim as well as the Government of Bhutan.
- 3.6 The Union of India, on the other hand, argued that the appellants, in addition to selling the tickets, provided a service to the State by marketing and promoting lotteries, as evidenced by the Agreement, including modifications and additions thereto, between the appellant and the State of Sikkim dated 24.08.2001, 09.12.2003, and 18.11.2005. It was contended that the appellant was not merely engaged in outright sale of lottery tickets simpliciter but rendered expansive services. The Union sought to explain that the appellant herein issued advertisements, had a right to be consulted in respect of design of a lottery ticket, had a say in the matter of arranging and organizing the lottery, had been authorized to promote and market the online lottery and paid minimum assured revenue of rupees Ten crores per annum to the State of Sikkim.
- 3.7 It would be relevant to observe that these appellants were/are all carrying on the business of buying and selling of lottery tickets. They purchased the lottery tickets from the State Governments which organized the lotteries and sold the same in various other States or in the States where the lottery business was organized, through stockists and distributors.
- 3.8 The Central Government sought to levy service tax on the premise that the activity which the appellants were/are carrying on was a business auxiliary service within the definition of Section 65(19) of the Finance Act, 1994 and therefore, chargeable to service tax. The same was resisted by these appellants by filing writ petitions before the High Courts.
- 3.9 Both the High Courts of Sikkim as well as Kerala have held against these appellants and have opined that service tax is

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leviable on their activity under the nomenclature of business auxiliary service. Hence these appeals.

4. We have heard learned senior counsel Sri S. Ganesh and learned counsel Sri A. R. Madhav Rao for the appellants and learned senior counsel Sri Arijit Prasad and learned counsel for the respondent – Union of India and perused the material on record.

Points for consideration:

5. Having heard learned counsel for the respective sides, the following questions arise for our consideration:

1. ***Whether the activity of the appellants – assessees would attract service tax within the scope and ambit of Section 65(19)(ii) read with Section 65(105)(zzb) of the Finance Act, 1994? If not, what relief(s) the appellants are entitled to?***

2. What Order?

6. In order to better understand the controversy in these cases, it would be relevant to advert to the provisions of the Constitution as well as the provisions of the Finance Act, 1994 (which imposes service tax, pertinently on business auxiliary service).

- 6.1 Article 246 of the Constitution pertains to the division of subjects between the Central (Parliament) and State Legislatures in the form of three lists in the Seventh Schedule of the Constitution, namely List 1 – Union List, List 2 – State List and List 3 – Concurrent List. It would be useful to extract Article 246 of the Constitution as under:

“246. Subject-matter of laws made by Parliament and by the Legislatures of States.

- (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).
 - (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to

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make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).

- (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the “State List”).
 - (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.”
- 6.2 Article 248 deals with Residuary power of Legislatures and the same reads as under:

“248. Residuary powers of legislation.

- (1) Subject to Article 246A, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
- (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.”

At this stage itself, it may be mentioned that the residuary power is reserved to the Parliament to legislate on any subject provided such power is not included in either the Concurrent List or the State List.

- 6.3 The Finance Act, 1994 was legislated by the Parliament in terms of Article 248 of the Constitution of India read with Entry 97 List 1 which reads as under:

“97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.”

It is also pertinent to mention that Entry 92-C of List I which deals with taxes on services was inserted by the Constitution (Eighty-eighth

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Amendment) Act, 2003, but was not notified and was omitted by the Constitution (One Hundred and First Amendment) Act, 2016 with effect from 16.09.2016. In the circumstances, we observe that the Finance Act, 1994 is relatable to Entry 97 of List I of the Seventh Schedule of the Constitution. Subsequently, *vide* the same Constitution (One Hundred and First Amendment) Act, 2016, Article 246A was inserted as special provision with respect to goods and services tax.

6.4 For the sake of completion, it would also be relevant to refer to Entries 33 and 34 List II. Entry 62 List II (State List) as it stood then, deals with taxes on luxuries including taxes on entertainment, amusement, betting and gambling, etc. The said Entry has subsequently been amended with effect from 16.09.2016. However, it is not necessary to extract the amended Entry as these appeals pertain to the period prior to 01.07.2010. Entries 33 and 34 of List II are the regulatory Entries, which read as under:

- “33. Theaters and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.
- 34. Betting and gambling.”

6.5 Reverting to the Finance Act, 1994 and particularly Chapter V which deals with Service Tax, the following provisions, which are relevant for the purpose of this controversy, could be extracted as under:

- “65. **Definitions.**—In this Chapter, unless the context otherwise requires.—

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65(19) “**business auxiliary service**” means any service in relation to,—

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
- (ii) promotion or marketing of service provided by the client; or

Explanation.- For the removal of doubts, it is hereby declared that for the purpose of this

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sub-clause, “service in relation to promotion or marketing of service provided by the client” includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

- (iii) any customer care service provided on behalf of the client; or
- (iv) procurement of goods or services, which are inputs for the client; or

Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, “inputs” means all goods or services intended for use by the client;

- (v) production or processing of goods for, or on behalf of the client; or
- (vi) provision of service on behalf of the client; or
- (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any activity that amounts to “manufacture” of excisable goods.

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Section 65(50) “**goods**” has the meaning assigned to it in clause (7) of section 2 of the Sale of Goods Act, 1930 (3 of 1930)

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Section 66. Charge of service tax – There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g,) (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk),(zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (**zzb**), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg), (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc), (zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzj), (zzzzk), (zzzzl), (zzzzm), (zzzzn), (zzzzo), (zzzzp),(zzzzq), (zzzzr), (zzzzs), (zzzzt), (zzzzu), (zzzzv) and (zzzzw)] of clause (105) of section 65 and collected in such manner as may be prescribed.

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Section 65(105) “taxable service” means any service provided or to be provided,-

(a) xxx

(zzb) to a client, by any person in relation to business auxiliary service;”

6.6 It is relevant to note that Section 65(50) of the Finance Act, 1994 defines goods to have the same meaning assigned to it under Clause (7) of Section 2 of the Sale of Goods Act, 1930. Clause (7) of Section 2 of the Sales of Goods Act, 1930, reads as under:

“2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

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(7) “**goods**” means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things

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attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;”

(underlining by us)

- 6.7 In the case of *Sunrise Associates*, the Constitution Bench of this Court speaking through Ruma Pal, J., opined that lottery tickets can be categorized as actionable claims. The relevant paragraphs of the said judgment read as under:

“40. An actionable claim would include a right to recover insurance money or a partner’s right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability (see *Union of India v. Sri Sarada Mills Ltd.* [(1972) 2 SCC 877] , SCC at p. 880). A claim for arrears of rent has also been held to be an actionable claim (*State of Bihar v. Maharajadhiraja Sir Kameshwar Singh* [(1952) 1 SCC 528 : 1952 SCR 889 : AIR 1952 SC 252] , SCR at p. 910). A right to the credit in a provident fund account has also been held to be an actionable claim (*Official Trustee v. L. Chippendale* [AIR 1944 Cal 335 : ILR (1943) 2 Cal 325] ; *Bhupati Mohan Das v. Phanindra Chandra Chakravarty* [AIR 1935 Cal 756 : 40 CWN 102]). In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim.

41. A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to a conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right. The Court in *H. Anraj* [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] , as we have seen, held that a lottery ticket is a slip of paper or memorandum evidencing the transfer of certain rights. We agree.

42. *Webster’s Words and Phrases*, Permanent Edn., Vol. 25-A Supplement defines a “ticket” as “a printed card or a piece of paper that gives a person a specific right, as to attend a theatre, ride on a train, claim

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or purchase, etc.” The Madras High Court in *Sesha Ayyar v. Krishna Ayyar* [AIR 1936 Mad 225 : ILR 59 Mad 562 (FB)] also held: (AIR p. 227)

“Tickets of course are only the tokens of the chance purchased, and it is the purchase of this chance which is the essence of a lottery.”

43. The sale of a ticket does not necessarily involve the sale of goods. For example, the purchase of a railway ticket gives the right to a person to travel by railway. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to travel. A contract is not property, but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie (*Said v. Butt* [(1920) 3 KB 497 : 1920 All ER Rep 232]). Like railway tickets, a ticket to see a cinema or a pawnbroker’s ticket are memoranda or contracts between the vendors of the ticket and the purchasers. Cases on whether the terms specified on such tickets bind the purchaser are legion. It is sufficient for our purpose 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 : 1986 SCC (Tax) 190] 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.*

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State of U.P. [(1999) 9 SCC 700] construing *H. Anraj* [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] 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.”

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51. We are therefore of the view that the decision in *H. Anraj* [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] incorrectly held that a sale of a lottery ticket involved a sale of goods. There was no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a transfer of an actionable claim. The decision to the extent that it held otherwise is accordingly overruled though prospectively with effect from the date of this judgment.”

- 6.8 On a reading of clause (19) of Section 65 of the Finance Act, 1994 and on analyzing the same, it is evident that tax on a business auxiliary service is relatable to (i) any service concerning promotion or marketing or sale of goods, produced or provided by, or belonging to the client and (ii) promotion or marketing of service provided by the client.
- 6.9 The definition of goods has also been noted in clause (50) of Section 65 of the Finance Act, 1994 which refers to clause (7) of Section 2 of the Sale of Goods Act, 1930. The expression “goods” under the Sale of Goods Act expressly excludes actionable claims as well as money. This Court in *Sunrise Associates* has held that lottery tickets are actionable claims. Therefore, as lottery tickets would not come within the meaning of the expression goods under clause (7) of Section 2 of the Sale of Goods Act, 1930, they would also not come within the scope and ambit of clause (50) of Section 65 of the Finance Act, 1994. If that is so, they would also not come within the scope and ambit of clause (19)(i) of Section 65 of the Finance Act, 1994. Lottery tickets being actionable claims and not being goods within the meaning

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of sub-clause (i) of clause (19) of Section 65 of the Finance Act, 1994, would expressly get excluded from the scope of the said provision. In the circumstances, service tax on the promotion or marketing or sale of lottery tickets which are actionable claims could not have been levied under the said sub-clause.

- 6.10 In order to remove the doubt whether service tax could be levied on promotion or marketing or sale of lottery tickets under Clause 19(ii) of Section 65 of the Finance Act, 1994, an Explanation was added with effect from 16.05.2008. The Explanation has also been extracted above. Although the Explanation is for the purpose of removal of doubts, it is relevant to note that what is excluded in sub-clause (i) of clause (19) of Section 65 of the Act, namely lotteries being actionable claim and not goods, as analysed above, is sought to be mentioned as lottery *per se* in the Explanation. Thus, when lottery ticket is an actionable claim and not “goods” and is therefore outside the scope of sub-clause (i) of clause 19 of Section 65 of the Finance Act, 1994, it could not have been included as lottery *per se* in the Explanation to sub-clause (ii) of Clause 19 of Section 65 of the Finance Act, 1994 as “service in relation to promotion or marketing of service provided by the client” including any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo.

The Explanation sought to bring the activity of sale of lottery tickets within sub-clause (ii) of Clause 19 of Section 65 of the Finance Act, 1994, when it was excluded from sub-clause (i) on account of the lottery tickets being interpreted as actionable claims and not goods on the premise that it was a service within the meaning of said sub-clause. On a plain reading of the Explanation in light of the activity actually carried on by the appellant(s)-assessee(s) herein, it becomes clear that the outright purchase of lottery tickets from the promoters of the State or Directorate of Lotteries, as the case may be, is not a service in relation to promotion or marketing of service provided by the client, i.e., the State conducting the lottery. The conduct of lottery is a revenue generating activity by a State or any other entity in the field of actionable claims. The client, i.e., the State is not engaging in an activity of service while dealing with the business of lottery. Explanation to sub-clause (ii) of Clause 19 of Section 65 of the Finance

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Act, 1994 cannot bring within sub-clause (ii) by assuming an activity which was initially sought to be covered under sub-clause (i) thereof but could not be by virtue of the definition of goods under the very same Act read with Section 2(7) of the Sale of Goods Act, 1930. The mere insertion of an explanation cannot make an activity a taxable service when it is not covered under the main provision (which has to be read into the said sub-clause by virtue of the legislative device of express incorporation). This is because sale of lottery tickets is not a service in relation to promotion or marketing of service provided by a client, i.e., the State in the instant case. Conducting a lottery which is a game of chance is *ex facie* a privilege and an activity conducted by the State and not a service being rendered by the State. The said activity would have a profit motive and is for the purpose of earning additional revenue to the State exchequer. The activity is carried out by sale of lottery tickets to persons, such as the assessees herein, on an outright basis and once the lottery tickets are sold and the amount collected, there is no further relationship between the assessees herein and the State in respect of the lottery tickets sold. The burden is on the assessees herein to further sell the lottery tickets to the divisional / regional stockists for a profit as their business activity. This activity is not a promotion or a marketing service rendered by the assessees herein to the State within the meaning of sub-clause (ii) of Clause 19 of Section 65 of the Finance Act, 1994. This is because, to reiterate, the States are not rendering a service but engaged in the activity of conducting lottery to earn additional revenue. Moreover, once the lottery tickets are sold by the Directorate of Lotteries—a Department of the State, there is transfer of the title of the lottery tickets to the appellants, who, as owners of the said lottery tickets, in turn sell them to stockists and others. Thus, there is no promotion of the business of the State as its agent. Thus, there is no ‘principal—agent’ relationship which would normally be the case in a relationship where a business auxiliary service is rendered. The relationship between the State and the appellants is on a *principal to principal* basis. Thus, there is no activity of promotion or marketing of a service on behalf of the State. Neither is the State, which conducts the lottery, rendering a service within the meaning of the Finance Act, 1994.

The Explanation, therefore, cannot over-ride the main text of the provision as the Explanation which was sought to remove doubts is in fact contrary to the main provision which defines business auxiliary service and also contrary to the judgment of this Court in Sunrise

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Associates and having regard to clause (50) of Section 65 of the Finance Act, 1994.

No doubt the Explanation was omitted with effect from 01.07.2010. However, these cases pertain to the period prior to 01.07.2010. Therefore, either under sub-clause (i) of clause (19) of Section 65 or under the Explanation to sub-clause (ii) of Clause 19 of Section 65 of the Finance Act, 1994, after it was introduced with effect from 16.05.2008 and until it was omitted, service tax could not have been levied on the promotion or marketing of sale of goods or service provided by the client, on the premise that it was a ‘business auxiliary service’.

7. The High Courts have lost sight of the definition of ‘goods’ in clause (50) of Section 65 of the Act while interpreting the expression “lottery”. As already noted, the definition of ‘goods’ in clause (7) of Section 2 of Sale of Goods Act, 1930, that is expressly incorporated in clause (50) of Section 65 of the Act, which expressly excludes actionable claims. This Court has by the Constitution Bench in ***Sunrise Associates*** opined that lottery tickets are actionable claims. The High Courts have also lost sight of the fact that the sale of lottery tickets by the State is a privileged activity by itself and not rendering of a service for which the assesseees are rendering promotion or marketing service.
8. In view of the above discussion, the appeals filed by the appellants-assessees are liable to be allowed and are ***allowed*** by setting aside the impugned judgments of the High Courts of Sikkim and Kerala.
9. Having regard to the mandate of Article 265 of the Constitution of India, the appeals are *allowed* with all consequential reliefs to the appellants.
10. It is needless to observe that if any representations are made seeking refund of the amounts paid, the same shall be considered expeditiously by the concerned departments of the respondents.
In the facts and circumstances of these matters, there will be no order as to costs.

Result of the case: Appeals by appellants-assessees allowed.

[†]*Headnotes prepared by:* Ankit Gyan