

**P. Muraleedharan, Managing Partner v. Union of India (HC Kerala)**

Dated AUGUST 19, 2011

C.N. RAMACHANDRAN NAIR AND P.S. GOPINATHAN, JJ.

W P(C) NOS. 19625, 20638, 20650, 20764, 23216, 25131, 28511, 26123, 28018, 29612 & 31715 OF 2009 AND 6263, 7618, 9634, 9638, 9648, 9682, 9692, 9693, 11585, 13443, 14419, 14590, 15067, 15928, 18024, 19154, 21590, 28071 & 29499 OF 2010

**JUDGMENT**

**C.N. Ramachandran Nair, J** - In all the 30 cases the question raised is one and the same i.e. whether the explanation introduced to section 65(19)(i) read with section 65(105)(zzb) of the Finance Act 1994 providing for levy of tax on service rendered in relation to lotteries promoted or marketed by the clients is unconstitutional as claimed by the petitioners. All the petitioners are distributors or agents of lotteries organised by various State Governments or their authorised agencies engaged in sale of lottery tickets in Kerala. The tickets sold are of lotteries organised or authorised by States of Kerala, Sikkim and also Bhutan Government. The petitioners have approached this Court challenging notices issued demanding details and documents pertaining to the charges received for the service rendered in relation to lotteries, which is obviously for levy of service tax under the head "Business Auxiliary Service" covered by Section 65(19) of Finance Act, 1994.

2. We have heard Shri A.R. Madhav Rao and Shri George Poonthottam learned counsel appearing for the petitioners and various Standing Counsel for the Department appearing for the respondents. Even though learned Standing Counsel for the respondents submitted that the Additional Solicitor General from Delhi wants to argue the matter for the respondents, we requested them to argue the case because one outside counsel for the petitioners came and started arguments yesterday itself. Further on hearing the petitioners' counsel, we are not convinced on the merits of the case in favour of the petitioners. So much so, we requested learned Standing Counsel to argue whatever they want to, and accordingly they made their submissions.

3. Before examining the constitutional validity of the *Explanation* to Section 65(19)(i) introduced by Finance Act, 2008 with effect from 16/05/2008, we have to refer to the back ground of the case. A circular was issued by the Central Board of Direct Taxes on 14/01/2007 stating that service rendered in relation to lotteries could be brought to service tax under the head "business auxiliary service" falling under Section 65(19) of the Act. Sikkim being a major centre of lottery business, the Superintendent of Central Excise, Gangtok Range issued follow up notice for levy and collection of service tax in relation to lottery. This was questioned by the distributors in Sikkim which led to the judgment of the Sikkim High Court declaring that service rendered in relation to lottery cannot be assessed to service tax under "Business Auxiliary Service". The Department filed appeal against the judgment of the Sikkim High Court before the Supreme Court and during pendency of the appeal before the Supreme Courts amendment was made to Section 65(19)(ii) of the Act inserting explanation to the said provision, which is extracted hereunder.

"65. In this Chapter, unless the context otherwise requires,-

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(19) "business auxiliary service" means any service in relation to-

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(i) promotion or marketing of service provided by the client; or

*Explanation.*- For the removal of doubts, it is hereby declared that for the purposes of this 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, organised, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;"

Subsequent to the incorporation of the above explanation to Section 65(19), the Honourable Supreme Court vide judgment in *Union of India v. Martin Lottery Agencies Ltd.* [2009] 20 STT 203 (SC) upheld the decision of the Sikkim High Court.

Even though the amendment was brought to the notice of the Supreme Court, its validity not being the subject matter of the appeal pending before it, the Honourable Supreme Court did not consider it. However, the Supreme Court observed that if at all the explanation to Section 65(19)(ii) serves as a substantive provision for charging of tax on service in relation to lottery, it can be only prospective. It is this amendment that is under challenge in all the Writ Petitions.

4. Before proceeding to consider the arguments, it is to be noted that the above provision that is under challenge in the WP(C)s remained in the statute only from 16/05/2008 to 30/06/2010 and thereafter a separate charging provision was introduced by Finance Act, 2010 w.e.f. 01/07/2010. We are told that the amended provision that came into force from 01/07/2010 is not under challenge and the tax at compounded rates are being paid by lottery organisers/promoters.

5. During the arguments, the petitioners' advocate Shri Madhav Rao referred to the judgment of the Supreme Court above referred and submitted that all the infirmities based on which the Supreme Court confirmed the judgment of the Sikkim High Court remained as such, or in other words, the amendment does not authorise levy of tax on the service rendered in relation to lottery. He has also relied on several other decisions of the Supreme Court particularly in *Sunrise Associates v. Gov. of NCT of Delhi* [2006] 4 STT 105 (SC)/2006 (5) SCC 603, wherein the Supreme Court held that lottery tickets are in the nature of actionable claim and hence no sales tax is attracted.

Relying on this decision the contention raised by the learned counsel for the petitioners is that lottery tickets also fall within the realm of sub-clause (i) of Section 65(19) and only by virtue of the above decision of the Supreme Court tax is not payable on the service in relation to sales. In other words, the contention raised is that there is no service involved in the marketing of lottery. However, learned Standing Counsel appearing for the respondents relied on the later judgment rendered by the Chief Justice of the Sikkim High Court in WP(C) No.21/2009, wherein the very same issue raised was turned down and the constitutional validity of the amendment was upheld by that Court. However, learned counsel for the petitioners submitted that SLP No.26445/2010 filed against the above judgment is pending before the Supreme Court even though the Supreme Court has not granted any stay against the operation of the judgment. The main contention raised by the learned counsel appearing for the petitioners is that there is no element of service in the marketing of lottery tickets because the petitioners are purchasing tickets from the promoters/organisers of lottery at discounted price and are reselling the same. Therefore, no service is rendered in relation to the clients which in this case are organisers or promoters of lottery to attract levy of tax under the explanation. Learned counsel also contended that even after the introduction of the

explanation, the decision of the Supreme Court in Martin Lottery Agencies case stated above squarely applies.

6. Standing Counsel appearing for the respondents submitted that the very purpose of the amendment which is by way of introduction to *Explanation* to Section 65(19)(ii) by Finance Act, 2008, with effect from 16.5.2008 is to get over the judgment of the Supreme Court in *Martin Lottery Agencies Ltd.'s* case (*supra*) and so much so, the contention of the petitioners that *Martin Lottery Agencies Ltd.'s* case (*supra*) still, governs the law on the subject is thoroughly unacceptable. According to them, the Sikkim High Court upheld the validity of notices issued proposing levy and collection of service tax on service rendered in relation to lottery based on the amendment stated above vide judgment in Writ Petition(C) No.21/2009 referred above.

7. The main ground advanced by several counsel appearing for the petitioners is that lottery being an actionable claim answers the description of "goods" as defined under Section 65(50) of the Act which in turn is adopted from the definition contained in Section 2(7) of the Sale of Goods Act. The petitioners have heavily relied on the decision of the Supreme Court in *Sunrise Associate's* case (*supra*) referred above wherein the Supreme Court has held that an actionable claim also answers the description of "goods" and exemption from sales tax is available only because of the exclusion clause contained in the definition of "goods" under the Sale of Goods Act. Relying on this judgment, the contention advanced by the petitioners is that lottery being actionable claim answers the description of "goods" under Section 2(7) of the Sale of goods Act and Section 65(50) of the Finance Act, 1994 and so much so, service tax, if any, payable in relation to the same can be and has to be considered only as "business auxiliary service" falling under sub-clause (i) of sub-section (19) of section 65 of the Act. So much so, the *Explanation* introduced to sub-clause (ii) of Section 65(19) has no relevance and cannot be relied upon for the levy of service tax on service rendered in relation to lottery. It is also contended by the petitioners that they are buying lottery tickets from organisers or distributors of lotteries at discounted rates, say, at 30% less than the retail price and after purchase they are in turn selling the tickets at discounted prices to retailers for sale to persons who intend to participate in the draw. So much so, the real nature of the transaction is purchase and sale of lottery tickets without involving any service that could be taxed under *Explanation* to Section 65(19)(ii) above referred. Various Standing Counsel appearing on behalf of respondents submitted that if argument of the petitioners is accepted, then the amendment introducing *Explanation* to Section 65(19)(ii) becomes redundant and meaningless. Therefore, they contend that the Court should look into the very objective of the amendment which is to get over the decision of the Supreme Court in *Martin Lottery Agencies Ltd.'s* case (*supra*) and since the amendment has achieved the objective of levying tax on service rendered in relation to lottery, it has to be upheld.

After hearing the arguments of counsel for the petitioners and the Standing Counsel and on going through the later judgment rendered by the Chief Justice of the Sikkim High Court in Writ Petition(C) No.21/2009, we are unable to accept the challenge against the constitutional validity of the amendment. It may be noticed that the Honourable Supreme Court, though took note of the above amendment while disposing of the appeal filed against the first judgment of the Sikkim High Court in *Martin Lottery Agencies Ltd.'s* case (*supra*) did not go into the constitutional validity of the amendment. On the other hand, the Honourable Supreme Court observed that if the amendment is valid, it is a substantive

provision which will have only prospective effect. The contention that service rendered in relation to lottery tickets is always covered by sub-clause (i) of Section 65(19) cannot be accepted because the said sub-section deals with only service rendered for promotion or marketing or sale of goods. Since Section 65(50) of the Finance Act, 1994 read with Section 2(7) of the Sale of Goods Act excludes lottery i.e. actionable claim, from the scope of "goods", sub-section (i) obviously has no application. The Supreme Court has in *Sunrise Associates Ltd.'s* case (*supra*) clearly held that lottery ticket is actionable claim and it is only by virtue of the exclusion clause in the above definition in the Sale of Goods Act it is outside the scope of "goods". So much so, the petitioners' contention that liability for service tax in relation to lottery should be considered by keeping in mind the legal position that lottery tickets are goods, cannot be accepted. The remaining question to be considered is only whether the amendment introduced through the *Explanation* above stated serve the purpose of introducing tax on service in relation to promotion and marketing of lottery. In this context the main objection raised by the petitioners is that they are not rendering any service in the purchase and sale of lottery tickets. 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.

We have already taken note of the fact that for the same transaction of marketing lottery petitioners and others have started remitting service tax at compounded rate under the amended provisions of the Finance Act, 1994 with effect from 1.7.2010. We do not know on what basis the petitioners can contend that prior to the introduction of compounding facility there is no service rendered by them in relation to lottery and after the compounding scheme is introduced, what they are doing involves rendering of service. We are also in agreement with the reasoning rendered by the Sikkim High Court in the second judgment above referred for upholding the constitutional validity of the *Explanation* introduced to Section 65(19)(ii) of the Act. Consequently service rendered by the petitioners in relation to lottery could be subject to tax under Section 65(105)(zzb) read with *Explanation* to Section 65(19)(ii) of the Act. Even though petitioners have relied on large number of decisions of the Supreme Court on various aspects of lottery and similar transactions, we do not think any such decision has a direct bearing on the issue raised herein.

For the reasons stated above, we dismiss all the W.P.(C)s.