

Government wins Lottery

(G. Natarajan, Advocate, Swamy Associates)

In the case of Skill Lotto Solutions Vs Union of India¹, the Hon'ble Apex Court has upheld the levy of GST on lottery tickets and probably this is the first judgment from the Hon'ble Supreme Court on the vires of levy of GST.

The main argument before the Hon'ble SC was that the definition of "goods" under Section 2 (52) of the CGST Act, 2017 which specifically included "actionable claims" is contrary to the definition of "goods" under Article 366 (12) of the Constitution. This argument was negated by the Hon'ble Supreme Court as the constitutional definition is inclusive and does not exclude actionable claim from it. Though the definition of "goods" under various sales tax laws excluded "actionable claims", it is held that nothing prevents the Parliament from including it in the definition of goods, for the purposes of levy of goods and services tax, under Article 246 A of the Constitution.

"34. The Constitution framers were well aware of the definition of goods as occurring in the Sale of Goods Act, 1930 when the Constitution was enforced. By providing an inclusive definition of goods in Article 366(12), the Constitution framers never intended to give any restrictive meaning of goods.

*37. We are of the view that the judgment of this Court in **The State of Madras v. Gannon Dunkerley & Co., (supra)** does not lend support to the submission of the learned counsel for the petitioner that Parliament could not have defined the goods in Act, 2017, expanding the definition of goods as existing in Sale of Goods Act, 1930.*

49. We are of the view that definition of goods under Section 2(52) of the Act, 2017 does not violate any constitutional provision nor it is in conflict with the definition of goods given under Article 366(12). Article 366 clause (12) as observed contains an inclusive definition and the definition given in Section 2(52) of Act, 2017 is not in conflict with definition given in Article 366(12). As noted above the Parliament by the Constitution (One Hundred and First Amendment) Act, 2016 inserted Article 246A. a special provision with respect to goods and services tax. The Parliament was fully empowered to make laws with respect to goods and services tax. Article 246A begins with non obstante clause that is "Notwithstanding anything contained in Articles 246 and 254", Which confers very wide power to make laws. The power to make laws as conferred by Article 246A fully empowers the Parliament to make laws with respect to goods and services tax and expansive definition of goods given in Section 2(52) cannot be said to be not in accord with the constitutional provisions".

¹ W.P. (Civil) No. 961 of 2018.

The question whether lottery is an “actionable claim” or not has been answered by the Hon’ble Supreme Court in the affirmative, by relying on the decision of the constitution bench of the Court in *Sunrise Associates* case².

*“48. The Constitution Bench in **Sunrise Associates** has categorically held that lottery is actionable claim after due consideration which is ratio of the judgment. When Section 2(52) of Act, 2017 expanded the definition of goods by including actionable claim also, the said definition in Section 2(52) is in the line with the Constitution Bench pronouncement in **Sunrise Associates** and no exception can be taken to the definition of the goods as occurring in Section 2(52)”.*

The argument that levying GST only on three actionable claims, viz., lottery, betting and gambling and keeping all other forms of actionable claims outside the ambit of the levy is discriminative is also negated by the Hon’ble SC on the ground that the policy decision of the Government in taxing certain actionable claims cannot be faulted. Further, the above three actionable claims are “res extra commercium” and hence no discrimination can be alleged.

“70. Lottery, betting and gambling are well known concepts and have been in practice in this country since before independence and were regulated and taxed by different legislations. When Act, 2017 defines the goods to include actionable claims and included only three categories of actionable claims, i.e., lottery, betting and gambling for purposes of levy of GST, it cannot be said that there was no rationale for including these three actionable claims for tax purposes. Regulation including taxation in one or other form on the activities namely lottery, betting and gambling has been in existence since last several decades. When the parliament has included above three for purpose of imposing GST and not taxed other actionable claims, it cannot be said that there is no rationale or reason for taxing above three and leaving others.

*71. It is a duty of the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The Constitution Bench in **State of Bombay Vs. R.M.D. Chamarbaugwala and Anr. (supra)** has clearly stated that Constitution makers who set up an ideal welfare State have never intended to elevate betting and gambling on the level of country's trade or business or commerce. In this country, the aforesaid were never accorded recognition of trade, business or commerce and were always regulated and taxing the lottery, gambling and betting was with the objective as noted by the Constitution Bench in the case of **State of Bombay Vs. R.M.D. Chamarbaugwala and Anr.(supra)**, we, thus, do not accept the submission of the petitioner that there is any hostile discrimination in taxing the lottery, betting and gambling and not taxing other actionable claims. The rationale to tax the aforesaid is easily comprehensible as noted above. Hence, we do not find any violation of Article 14 in Item No. 6 of Schedule III of the Act, 2017”.*

² 2006 (5) SCC 603

The plea for levy of GST, after excluding the prize money component and levying GST only on the value excluding the collection towards prize money has also been negated by relying on the scheme of valuation prescribed under Section 15 of the CGST Act, 2017. The practice of such exclusion in several other countries need not necessarily to be followed in India, ruled the Hon'ble SC.

“78. For determining the value of the lottery, now, there is statutory provision contained in Section 15 read with Rule 31A as noted above. Section 15 of the Act, 2017 by sub-section (2) it is provided what shall be included in the value of supply. What can be included in the value is enumerated in sub-clause (a) to (e) of sub-section (2) of Section 15. Further, subsection (3) of Section 15 provides that what shall not be included in the value of the supply. When there are specific statutory provisions enumerating what should be included in the value of the supply and what shall not be included in the value of the supply we cannot accept the submission of the petitioner that prize money is to be abated for determining the value of taxable supply. What is the value of taxable supply is subject to the statutory provision which clearly regulates, which provision has to be given its full effect and something which is not required to be excluded in the value of taxable supply cannot be added by judicial interpretation”.

81. Learned counsel for the petitioner has also relied on various taxing statutes of other countries, wherein the petitioner submits that prize money of the lottery ticket are not being computing for levy of tax. He has referred to provisions of United Kingdom-Value Added Tax, 1994; Excise Tax Act of Canada; Goods and Services Tax Act of Singapore; Goods and Services Act, 1985 of New Zealand and Sri Lanka-Value Added Tax Act, 2002. When the levy of GST, determination of taxable value are governed by the Parliamentary Act in this country, we are of the view that legislative scheme of other countries may not be relevant for determining the issue which has been raised before us. The taxing policy and the taxing statute of various countries are different which are in accordance with taxing regime suitable and applicable in different countries. The issue which has been raised before us has to be answered by looking into the statutory provisions of the Act, 2017 and the Rules framed therein which govern the field.

Thus it is a clear win for the Government on all fours in the first pronouncement of the Apex Court on the vires of GST.

(Published in www.taxscan.in on 04.12.2020)