

(2017) 03 SIK CK 0005

In the Sikkim High Court

Case No : 34 of 2016

M/s Future Gaming & Hotel Services (P) Ltd. Vs Union of India

Date of Decision : 23-03-2017

Acts Referred:

Constitution of India, Article 265, Article 276 - Taxes not to be imposed save by authority of law - Taxes on professions, trades, callings and employments
Contract Act, 1872, Section 23(2) - What considerations and objects are lawful and what not
Finance Act, 1994, Section 65, Section 105(zzzzn) - Definitions
Service Tax Rules, 1994, Rule 7C, Rule 6(7C)

Citation : (2017) 03 SIK CK 0005

Hon'ble Judges : Satish K. Agnihotri, Meenakshi Madan Rai

Bench : Division Bench

Advocate : A.R. Madhavrao, ?Pragya Awasthi, ?Laxmi?Chakraborty, Manju Rai, B.K. Gupta, Santosh Kr. Chettri

Final Decision : Allowed

Judgement

1. Assailing the legality and validity of the amendments made in the Finance Act, 1994 (Service Tax) by the Finance Act, 2016, whereunder the Section 65B was amended, as being ultra vires the Constitution of India under Entry 34 and Entry 62 of List II of the Seventh Schedule of the Constitution of India; also seeking a declaration that the transactions in buying and selling lottery tickets are not liable to Service tax under the provisions of the Finance Act, 1994 as amended by the Finance Act, 2016 and further seeking for quashing of Notifications No.18/2016-ST dated 01.03.2016, these Writ Petitions are filed by the petitioners, with prayer of incidental and consequential relief.

2. Both the Writ Petitions raise the one and the same questions of law arising from the identical cause of action and, as such, are being considered and disposed of by this common Judgment.

3. The petitioners' firms, incorporated under the Companies Act, 1956, are engaged in business of buying and selling of lottery tickets organized by the Government of Sikkim. An Agreement between the petitioners and the Government of Sikkim was arrived at on 06.06.2016 and 09.11.2012 respectively, enabling the petitioners' firms to purchase lottery tickets in bulk from the Government and re-sell the same to the public at large, through authorized agents, stockists, resellers etc. The validity of the said Agreements is five years. Certain amendments were made time and again in the Finance Act, 1994, which came to be challenged in several cases before this Court and consistent decisions were rendered holding that the Parliament lacks competence to frame the law for imposing service tax on lottery dealers. The issue as to whether the lottery distributors, as the petitioners herein, are agents of the State Government, was also considered and decided in favour of the petitioners holding that they were the outright purchasers and not the agents of the State Government, when the State Government alone is competent to organize a paper lottery or online lottery or both under the provisions of the Lotteries (Regulation) Rules, 2010 and the Lotteries (Regulation) Act, 1998. In the meantime, in the teeth of several decisions as discussed in the following paragraphs, the Parliament came out with an amendment by the Finance Act, 2016 to the following effects: -

"The relevant provisions of the Finance Act, 1994 (as amended by Finance Act, 2016) state as under:

" In Section 65B-

(b) in clause (44), in Explanation, 2, in sub clause (ii), for item (a), the following item shall be substituted, namely- (a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery or any kind, in any other manner, in accordance with the provisions of the Lottery (Regulation) Act, 1998."

4. In furtherance thereof, the petitioners were served an intimation regarding changes vide communication dated 10.06.2016, calling upon the petitioners to make payment of service tax. It is also sought to be questioned in the instant writ petitions.

5. Mr. A. R. Madhavrao, learned Counsel appearing for the petitioners, would contend that there is no change in the legal position even after the amendments made vide the Finance (Amendment) Act, 2016, as laid down by this Court on several decisions. To garner support for his contention, he refers to and relies on a decision of the Supreme Court in Sunrise Associates v. Government of NCT Delhi, (2006) 5 SCC 603 and decisions of this Court in Future Gaming Solution Pvt. Ltd. v. Union of India, 2015 (37) STR 65 (Sikkim), Future Gaming Solution India Pvt. Ltd. v. Union of India, 2014 (36) STR 733 (Sikkim) and Future Gaming & Hotel Services Pvt. Ltd. v. Union of India, 2015 VAT Infoline 449 (Sikkim). It is then contended that the Agreements entered into between the petitioners and

the State Government are valid Agreements in public policy, thus, is not violative and void merely because the consideration is inadequate in the teeth of Section 23 (2) (sic. Sec. 25 (2)) of the Indian Contract Act, 1872, as pleaded by the respondents, as the Agreements were executed in compliance and consonance with the Lotteries Regulation Act, Rules and Model Agreement. The invoices were raised by the State Government, which clearly made procurement of lottery tickets by the petitioners as outright complete sale. Learned Counsel would further contend that the amendment made by the Parliament for imposition of service tax is ultra vires as the lottery falls within the definition of "betting and gambling" and, as such, the same falls in the State List of the Seventh Schedule, thus, seek a declaration that the amended provisions are ultra vires the Constitution and consequential notification be held as null and void and be quashed.

6. In opposition, Mr. B. K. Gupta, learned Counsel appearing for the respondents 1, 2 and 3, would submit that the service tax is not imposed on lottery but on the services rendered by the distributors or selling agents for marketing, promoting and organizing lottery since the lottery is not exigible to Service tax as the lottery is conducted by the State of Sikkim and the State of Sikkim is not liable to pay any service tax. The Supreme Court held in *Sunrise Associates* (supra) that lottery ticket is an actionable claim and, as such, it is included in the negative list and there is no imposition and levy of service tax on lottery. Mr. Gupta would further contend that the definition of "service" as per clause (44) in Section 65B, in Explanation 2 in sub-clause (ii) provides for services rendered by a lottery distributor or selling agent on behalf of the State Government in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing of lottery of any kind or in any manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998 and, as such, the services provided by the petitioners herein fall within the ambit of service tax. Further, it is contended that under the provisions of the Lotteries (Regulation) Act, 1998, the transaction between the State Government and the petitioners herein, is on the principal to agent basis. Any other contrary contract may be hit by the provisions of the Indian Contract Act, 1872. Learned Counsel would further reiterate that pursuant to Rule 7C of the Service Tax Rules, 1994, the distributors or his selling agents are liable to pay service tax for the taxable service of promoting, marketing, organizing or assisting any organizing lottery. The service tax was imposed not for the purpose of earning revenue but in the larger interest of society. It is not disputed by learned Counsel that Entry No. 92-C incorporated by the Constitution (88th Amendment) Act, 2004, in the Union List of the Seventh Schedule has not yet been brought into force. However, the Parliament is competent to levy service tax on sale of lottery for the services rendered in organizing lottery under the residual Entry No.97 of Union List (List I). The validity of levy of service tax on services has been upheld by the Supreme Court in *Federation and Association of Hotels and Restaurants Association of India v. Union of India*, (1989) 3 SCC 634. It is further stated that

Explanation 2 of Section 65B (44) contemplates imposition of service tax on any activity carried out by a lottery distributor or a selling agent on behalf of the State Government. Mr. Gupta would further urge that under provisions of Section 268A, which has been inserted later on, the Parliament is competent to impose service tax. Learned Counsel would also submit that the conduct of lottery itself is known as "service" in the international context and classifiable under the Heading No.96920 of the UN-CPC classification.

7. We have heard the learned counsel appearing for the parties, perused the pleadings and examined the documents appended thereto.

8. Article 268A of the Constitution of India, providing for levy of service tax by Union and collected and appropriated by the Union and the States, was inserted by the Constitution (Eighty-eight Amendment) Act, 2003. However, the same was later on omitted by the Constitution (One Hundred and First Amendment) Act, 2016. Accordingly, Entry 92C in List I - Union List of the Seventh Schedule of the Constitution for legislation to levy service tax was inserted by the same Eighty-eighth Amendment. However, the same was never notified. In the meantime, along with the omission of Article 268A, Entry 92C was also omitted by the Constitution (One Hundred and First Amendment) Act, 2016.

9. Finance Act, 2012 provides for imposition of service tax on all the activities except those specified in the negative list or otherwise, etc. The relevant clause reads 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;

.....

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

.....

(44) "service" means any activity carried on by a person for another for consideration, and includes a declared service but shall not include-

(a) any 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;

66B. Charge of service tax

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, other 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.

66D. Negative list of services

The negative list shall comprise of the following services, namely: -

.....

(i) betting, gambling or lottery;

....."

Lottery being in the negative list was exempted from payment of service tax.

10. The first petitioner assailed the constitutional validity of clause (zzzzn) of sub-section 105 of Section 65 of the Finance Act, 1994, as inserted by Finance Act, 2010, whereby a new category i.e. "to any person, by any other person, for promotion, marketing, organizing or in any other manner assisting in organizing 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", is placed under the ambit of "taxable service". The relevant amendment, thus introduced, reads as under: - "(105) "taxable service" means any service provided or to be provided,-

.....

(zzzzn) to any person, by any other person, for promotion, marketing, organizing or in any other manner assisting in organizing 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;"

11. A Division Bench of this Court in *Future Gaming Solutions*², considering all aspects of the matter, came to the following conclusion: - "(XXI) From the discussion and consideration of judgments noticed hereinabove, it clearly emerges that where the transaction is purely that of sale and purchase and does not involve any component of service in it, which cannot be clearly segregated and discernible, no Service Tax is payable. However, where two components in a transaction, i.e. "sale" and "service", are capable of compartmentalization so as to segregate the element of service from the transaction of sale, Service Tax may be leviable on the service component in a transaction.

xxxxx xxxxx

(XXXII) In view of the above clarification, it is pleaded on behalf of the petitioners that receipt of consideration for providing "taxable service" is one of the essential ingredients to establish that any service is a "taxable service". It is submitted that in the instant case, the Government does not pay any consideration in any form for the activities to be performed by the petitioner for promotion of the sale by advertisement etc. To the contrary, the petitioner is paying the minimum guaranteed sum towards the full sale consideration to the

Government and thus the entire claim of the respondents that the petitioner is providing taxable service is belied by its own circular and understanding of the nature of the petitioner's activity."

12. The Division Bench further considered the competence of Parliament to enact law in exercise of its residuary legislative power under Entry 97, List I to Seventh Schedule of Constitution of India de hors the entries and held as under: -

"19. In view of the above conclusions, we allow these petitions, strike down the clause (zzzzn) to sub-section 105 of Section 65 of Finance Act, 1994 as introduced vide Finance Act, 2010 as ultra vires to Constitution of India having been enacted in contravention to Entry 97, List I to Seventh Schedule read with Article 248 of Constitution of India."

13. We are informed that a Civil Appeal assailing the said Judgment is pending consideration before the Supreme Court of India, without there being any stay of the judgment and order.

14. Again, in 2012, Section 65B was amended by inserting clause 31(A), and also by amending Explanation 2 of Section 66D (negative list), with effect from 01.07.2012, as under: - "(e) after clause (31), the following clause shall be inserted, namely: -

(31A) "lottery distributor or selling agent" means a person appointed or authorized by a State for the purpose of promoting, marketing, selling or facilitating in organizing lottery of any kind, in any manner, organized by such State in accordance with the provisions of the Lotteries (Regulation) Act, 1998 (17 of 1998);

.....

(g) in clause (44), for Explanation 2, the following Explanation shall be substituted, namely: -

"Explanation 2 - For the purpose of this clause, the expression "transaction in money or actionable claim" shall not include -

.....

(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out -

(a) by a lottery distributor or selling agent in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner;

Amendment of section 66D (Negative list).

"Explanation - For the purpose of this clause, the expression "betting, gambling or lottery" shall not include the activity specified in Explanation 2 to clause (44) of section 65B."

15. In pursuance thereafter, the Superintendent of Central Excise and Service Tax, Gangtok Range, Gangtok issued a letter bearing No. V(3)7/ST/FGSI Pvt. Ltd./GTK/2009/295 dated 06.07.2012 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, organizing and assisting in organizing games of chance including lottery services. The said letter came to be assailed in W.P.(C) No. 32 of 2012 (Future Gaming Solutions India Pvt. Ltd. vs. UOI3) by the first petitioner. The Division Bench of this Court, referring to the earlier judgment in Future Gaming Solutions Pvt. Ltd. vs. UOI2, held as under:- "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 subsection (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, organizing, 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/FGSI Pvt. Ltd./GTK/2009/295 dated 6-7-2012 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-S.T., dated 20-6-2012 and the Service Tax Rules is ultra vires the very provision of the Finance Act being in excess of the powers vested therein."

16. Subsequently, the Finance Act, 1994 was again amended on 13.05.2015 by the Finance Act, 2015, with effect from 01.06.2015, whereunder certain changes were made in various Sections, i.e. Sections 65B, 66D and 67, which read as under: - "Amendment of section 65B

105. In the Finance Act, 1994, save as otherwise provided, in section 65B, -

.....

(e) after clause (31), the following clause shall be inserted, namely: -

(31A) "lottery distributor or selling agent" means a person appointed or authorized by a State for the purpose of promoting, marketing, selling or facilitating in organizing lottery of any kind, in any manner, organized by such State in accordance with the provisions of the Lotteries (Regulation) Act, 1998 (17 of 1998);

.....

(g) in clause (44), for Explanation 2, the following Explanation shall be substituted, namely: -

Explanation 2. - For the purpose of this clause, the expression "transaction in money or actionable claim" shall not include-

.....

(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out -

(a) by a lottery distributor or selling agent in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner;

....."

Amendment of section 66D.

107. In Section 66D of the 1994 Act, with effect from such date as the Central Government may by notification in the Official Gazette, appoint, -

.....

(3) in clause (i), the following Explanation shall be inserted, namely:-

Explanation - For the purpose of this clause, the expression "betting, gambling or lottery" shall not include the activity specified in Explanation 2 to clause (44) of section 65B;" Amendment of section 67.

109. In section 67 of the 1994 Act, in the Explanation, for clause (a), the following clause shall be substituted, namely: -

(a) "consideration" includes -

(i) any amount that is payable for the taxable services provided or be provided;

.....

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any or as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets

such ticket.

....."

17. Under the amended provisions, the petitioners were held as service providers in respect of service provided as lottery distributor and selling agents and, as such, amenable to service tax, as prescribed under Rule 6(7C) of the Service Tax Rules, 1994. The said provisions came to be challenged in W.P.(C) No. 39 of 2015 (M/s Future Gaming & Hotel Services (Pvt.) Ltd. vs. Union of India & Ors.) and W.P.(C) No. 40 of 2015 (M/s Summit Online Trade Solutions Pvt. Ltd. vs. Union of India & Ors.). The petitioners therein were intimated vide letters dated 25.05.2015, 18.05.2015 and 12.06.2015, seeking enforcement of the said provisions, which made the petitioners therein to file the aforesaid writ petitions. The Division Bench of this Court considered all aspects in the historical perspective of various decisions handed down by this Court, and allowed the writ petition as under: - "95. For the reasons aforesaid, we hold as follows:

(i) The Petitioners in buying and selling the lottery tickets is not rendering service to the State and, therefore, their activity does not fall within the meaning of "service" as provided under Clauses (31A) and (44) of Section 65B and, therefore, outside the purview of Explanation 2 to the said Section;

(ii) In any case, since by the Explanation the scope of Section 66D which is the main provision which is to be expanded, it would be ultra vires the Finance Act, 1994 and is accordingly struck down;

(iii) The impugned letter dated 25-05-2015 to the Petitioner- Company in WP(C) No. 39 of 2015 and letters dated 18-05- 2015 and 12-06-2015 to the Petitioner-Company in WP(C) No. 40 of 2015 having been issued on an erroneous interpretation of Section 66D of the Finance Act, 1994, as amended by the Finance Act, 2015 requiring the Petitioners to pay tax under the Service Tax Rules, 1994, as amended, in the absence of specific provision in the Finance Act and that Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994, only provides an optional composite scheme for payment of tax and, therefore, does not create a charge of service tax and is a Subordinate piece of Legislation, hereby stands quashed. Resultantly, Circular under D.O.F. No. 334/5/2015-TRU dated 19-05-2015 referred to in the aforesaid letters in the two Writ Petitions also stand quashed; and

(iv) The Respondents, their agents, servants, officers and representatives are restrained directly or indirectly, and in any manner whatsoever, from demanding any amounts by way of service tax or enforcing the provisions of the Finance Act, 1994 on the activity of the Petitioners in relation to lottery tickets."

18. The Finance Act, 1994 was again amended by the Finance Act, 2016, whereunder clause (44) defines "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include the following activities : - (a) an activity which constitutes merely, -

- (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
 - (ii) such transfer, delivery or supply of any goods which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or
 - (iii) a transaction in money or actionable claim;
- (b) a provision of service by an employee to the employer in the course of or in relation to his employment;
- (c) fees taken in any Court or tribunal established under any law for the time being in force.

19. In 2016, by the Finance Bill 2016, further amendments were made in sub-clause (ii) for item (a) in Explanation 2 to clause (44), as under: "(a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998"

20. In *Municipal Council, Kota, Rajasthan vs. Delhi Cloth & General Mills Co. Ltd., Delhi and others*, (2001) 3 SCC 654, wherein "Dharmada", being levied only on goods brought within municipal limits of Kota, was under challenge, the Supreme Court examined the ambit and scope of levy of taxes, held as under: - "16. Whenever a challenge is made to the levy of tax, its validity may have to be mainly determined with reference to the legislative competence or power to levy the same and in adjudging this issue the nature and character of the tax has to be inevitably determined at the threshold. It is equally axiomatic that once the legislature concerned has been held to possess the power to levy the tax, the motive with which the tax is imposed becomes immaterial and irrelevant and the fact that a wrong reason for exercising the power has also been given would not in any manner derogate from the validity of the tax. In *Jullunder Rubber Goods Manufacturers' Assn. v. Union of India* : (1969)2 SCC 644 this Court while dealing with a challenge to the levy of rubber cess under section 12(2) of the Rubber Act, 1947 as amended in 1960 observed that the tax in the nature of excise duty does not cease to be one such merely because the stage of levy and collection has been as a matter of legislative policy shifted by actually providing for its levy and collection from the users of rubber, so long as the character of the duty as excise duty is not lost and the incidence of tax remained to be on the production or manufacture of goods. Likewise, once the legislature is found to possess the required legislative competence to enact the law imposing the tax, the limits of that competence cannot be judged further by the form or manner in which that power is exercised. In *(Morris) Leventhal v. David Jones Ltd.* : AIR 1930 PC 129 the question arose as to the power of the legislature to impose "bridge tax", when the power to legislate was really in respect of "tax on land". It was held therein as follows:

"The appellants" contention that though directly imposed by the legislature, the bridge tax is not a land tax, was supported by argument founded in particular on two manifest facts. The bridge tax does not extend to land generally throughout New South Wales, but to a limited area comprising the City of Sydney and certain specified shires, and the purpose of the tax is not that of providing the public revenue for the common purposes of the State but of providing funds for a particular scheme of betterment. No authority was vouched for the proposition that an impost laid by statute upon property within a defined area, or upon specified classes of property, or upon specified classes of persons, is not within the true significance of the term a tax. Nor so far as appears has it ever been successfully contended that revenue raised by statutory imposts for specific purposes is not taxation." (emphasis supplied)"

21. In *T.N. Kalyana Mandapam Assn. vs. Union of India and Others*, (2004) 5 SCC 632, wherein the appellants contended that service tax levied on services rendered by mandap-keeper as defined in Sections 65, 66 and 67 amounted to tax on land and was in view of Entries 18 and 49, List II, within the exclusive legislative competence of the State Legislature. The Supreme Court, analyzing the earlier decisions on the issue, held as under:-

"58. A tax on services rendered by mandap-keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities. Section 65 clause (41) sub-clause (p) of the Finance Act, 1994, defines taxable service (which is the subject-matter of levy of service tax) as any service provided to a customer "by a mandap-keeper in relation to the use of a mandap in any manner including the facilities provided to [a customer] in relation to such use and also the services, if any, rendered as a caterer".

The nature and character of this service tax is evident from the fact that the transaction between a mandap-keeper and his customer is definitely not in the nature of a sale or hirepurchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well-established judicial principle that so long as the legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the legislature (*Prafulla Kumar v. Bank of Commerce* : AIR 1947 PC 60). Article 246(1) of the Constitution specifies that Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Articles 246 (3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (State List). In respect of matters enumerated in List III

(Concurrent List) both Parliament and the State Governments have powers to make laws. The service tax is made by Parliament under the above residuary powers."

22. Again in *Gujarat Ambuja Cements Ltd. and Another vs. Union of India and Another*, (2005) 4 SCC 214, the question of imposition of service tax on the customers or clients of goods transport operators and of forwarding and clearing agents came up for consideration. The Supreme Court held as under: "32. Since service tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within the States" exclusive power under Entry 56 of List II. What the Act ostensibly seeks to tax is what it, in substance, taxes. In the circumstances, the Act could not be termed to be a colourable piece of legislation. It is not the case of the petitioners that the Act is referable to any other entry apart from Entry 56 of List II. Therefore the negation of the petitioners" submission perforce leads to the conclusion that the Act falls within the residuary power of Parliament under Entry 97 of List I."

23. In *All India Federation of Tax Practitioners and Others vs. Union of India and others*, (2007) 7 SCC 527, wherein the issue arose for consideration on the constitutional status of levy of service tax and legislative competence of Parliament under Entry 97, List I of Seventh Schedule of Constitution also the competence of Parliament to levy service tax on chartered accountants, cost accountants and architects, having regard to Entry 60, List II of the Seventh Schedule and Article 276 of the Constitution of India, the Supreme Court held as under: "44. Competence to legislate flows from Articles 245, 246 and the other articles in Part XI. A legislation like the Finance Act can be supported on the basis of a number of entries. In the present case, we are concerned with the constitutional status of the levy, namely, service tax. The nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of Parliament and the State Legislatures are subject to constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to taxes on professions, trades, calling, etc. Therefore, Entry 60 of List II and Entries 92-C/97 of List I operate in different spheres."

24. In *Karnataka Bank Ltd. vs. State of Andhra Pradesh and Others*, (2008) 2 SCC 254, wherein levy and realization of tax on the persons as defined under clause 2 (j) of the Andhra Pradesh Tax on Professions, Trades, Callings and

Employments Act, 1987 was under consideration. The Supreme Court examined the legal position comprehensively and held that Article 265 of the Constitution prohibits the levy or collection of tax except by an authority of law which means only a valid law.

25. In *M/s Hoechst Pharmaceuticals Ltd. and Others vs. State of Bihar and others*, (1983) 4 SCC 45, the Supreme Court examining the ambit and scope of Article 254 of the Constitution and observed as under: - "67. Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is "repugnant" to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act, will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that state and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the "same matter". Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together : See *Zaverbhai Amaldas v. State of Bombay* : AIR 1954 SC 752; *M. Karunanidhi v. Union of India* : (1979) 3 SCC 431 and *T. Barai v. Henry Ah Hoe* : (1983) 1 SCC 177."

and further held:

"74. It is equally well settled that the various entries in the three Lists are not "powers" of legislation, but "fields" of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further,

the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control."

26. In the instant petitions, we are concerned with the amendments made in the Finance Act, 1994 by the Finance Act, 2016. The previous Division Benches in the cases (supra) have come to a conclusion that no service tax is imposable and leviable on lottery, but we are dealing with the service tax on related activities in distribution and sale of lottery tickets.

27. On gleaning through various amendments made from 2010 onwards, it is evident that the service tax was intended on promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner. By the impugned amendment a cosmetic change has been made in the Amendment Act, 2010, as initially the words "any person or any other person" was used. In 2015, it was modified to the extent that any activity carried out, for a consideration, in relation to or for facilitation of, a transaction in money except an actionable claim excluding the activity carried out (a) by a lottery distributor or selling agent in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner. The lottery distributor or selling agent is a person appointed or authorized by a State for the purpose of some activities. By the impugned amendment the words "a person appointed or authorized by a State for the purpose of" were substituted by the words "by a lottery distributor or selling agent on behalf of the State Government,". The substitution does not make substantial changes and the intention remains the same in pith and substance.

28. In the case on hand, Article 268A, which was incorporated by the Constitution (Eighty-eighth Amendment) Act of 2003, has recently been omitted by the Constitution (One Hundred and First Amendment) Act, 2016. Entry 92C was inserted by the same constitutional amendment, but admittedly never notified, as pleaded by the learned counsel appearing for the parties and the same has also been omitted by the Constitution (One Hundred and First Amendment) Act, 2016. Thus, reliance can be placed on Entry 97 invoking competence to impose service tax. However, Article 268C confers power and competence on the Union-Parliament to levy service tax on the service providers for consideration.

29. In T.N. Kalyana Mandapam Assn. and All India Federation of Tax Practitioners⁷, the Supreme Court held that service tax was made by the Parliament under the residuary powers.

30. It is deducible from the aforesaid cases that the Union - Parliament is competent to impose service tax for the services rendered for consideration by a person. It is well settled principles as laid down in the cases (supra) that entries in the three lists are fields of legislation. Taxation is a distinct matter for the

purpose of legislative competence and it must flow from the specific entry provided for levy and imposition of taxes. The relevant service tax leviable is not on the lottery as also submitted by the respondents, but on promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner.

31. For the analysis and reasons mentioned hereinabove, we are of the considered and conscience view that the Union- Parliament is conferred with the power and competence under Article 268A read with Entry 97, List I (Union List) to impose and levy service tax on other related activities, as aforestated. The impugned amendment brought in Finance Act, 2016 is not unconstitutional.

32. It is apposite to state that the Division Benches of this Court in W.P.(C) Nos. 36 & 23 of 2011 (Future Gaming Solutions Pvt. Ltd. Vs. Union of India); W.P.(C) No. 32 of 2012 (Future Gaming Solutions India Pvt. Ltd. Vs. Union of India) and W.P.(C) No. 39 of 2015 (Future Gaming & Hotel Services Pvt. Ltd. Vs. Union of India) have categorically held that the Union-Parliament lacks competence to impose service tax and the concerned amendments were held as ultra vires to the Constitution of India. Thus, question arises as to whether this Division Bench can take a contrary view when the judgments rendered by the Division Benches have attained finality on the issues therein and are pending consideration in appeals before the Supreme Court of India.

33. It is beneficial to refer to the observations made by the Supreme Court in this respect in Union of India & Anr. vs. Raghubir Singh (Dead) by LRs. Etc., (1989) 2 SCC 754, the Constitution Bench of the Supreme Court held as under: - "28. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless, for compelling reasons, that is not conveniently possible."

34. Again in Pradip Chandra Parija and others vs. Pramod Chandra Patnaik and others, (2002) 1 SCC 1, a Constitution Bench of the Supreme Court reiterated the same principles of law.

35. Further, in Chandra Prakash and Ors. Vs. State of U.P. and Anr., (2002) 4 SCC 234, the Constitution Bench of the Supreme Court, referring to earlier decisions, laid down guiding principles as under: - "22. A careful perusal of the above judgments shows that this Court took note of the hierarchical character of the judicial system in India. It also held that it is of paramount importance that the law declared by this Court should be certain, clear and consistent. As stated in the above judgments, it is of common knowledge that most of the decisions of this Court are of significance not merely because they constitute an adjudication

on the rights of the parties and resolve the disputes between them but also because in doing so they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in the case of Raghbir Singh held that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or smaller number of Judges. It is in furtherance of this enunciation of law, this Court in the latter judgment of Parija (supra) held that- "But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified."

In the aforestated background, we are hard put to take a contrary view.

36. There is another aspect that the Union of India is competent to impose and levy service tax on the services rendered by a person, however, for want of proper mechanism service tax is not enforceable on respondents. This issue came up for consideration in National Mineral Development Corporation Ltd. vs. State of M.P. and Another, (2004) 6 SCC 281, and the Supreme Court came to the conclusion that "when it is clear from the computation provision that it is meant to supplement the charging provision and is, on its own, a substantive provision in the sense that but for the computation provision the charging provision alone would not work. The computing provision cannot be treated as mere surplusage or of no significance; what necessarily flows therefrom shall also have to be given effect to".

37. In Union of India and others vs. Martin Lottery Agencies Limited, (2009) 12 SCC 209 , examining the judgment and order arising from this Court, wherein the question of imposition of service tax on lottery tickets was under consideration, the Supreme Court observed as under: - "22. Service tax purports to impose tax on services on two grounds (1) service provided to a consumer, and (2) service provided to a service provider. Service provided in respect of the matters envisaged under clause (19) of Section 65 of the Act must be construed strictly. Before a tax is found to be leviable, it must come within the domain of legitimate business and/or trade.

xxxx xxxx

29. Services can be rendered in respect of activities of the State if they are permissible in terms of sub-clause (ii) of clause (19) of Section 65 of the Act and

the State itself has been rendering services and not otherwise. While we say so, we are not unmindful of the fact that in terms of the agreement, the respondent not only distributes the lottery tickets printed by the state but also distributes prizes worth less than Rs.5000. It issues an advertisement. It has a right to be consulted in respect of design of a lottery ticket. It may also have a say in the matter of arranging for the lottery. But we are not sure as to how service element of the entire transaction is to be ascertained."

38. A Division Bench of this Court examining this aspect in *Future Gaming Solutions Pvt. Ltd.*² held as under: -

(XXX) Rule 6 of the Service Tax Rules, 1994 provides modes for payment of Service Tax. The Government of India issued Notification No.49/2010-Service Tax, dated 8th October, 2010 introducing sub-rule 7(C) under Rule 6 providing for the mode of payment of Service Tax as regards the promotion, marketing, organizing or in any manner assisting in organizing lottery is concerned. The relevant extract of the said Rules reads as under:-

"7(C) The distributor or selling agent, liable to pay Service Tax of promotion, marketing, organizing or in any other manner assisting in organizing lottery, shall have the option to pay an amount at the rate specified in column (2) of the Table given below, subject to the conditions specified in the corresponding entry in column (3) of the said Table, instead of paying service Tax at the rate specified in Section 66B of Chapter V of the said Act :

TABLE

Rate Condition

Rs.7000/- on every Rs.10 Lakh (or part of Rs.10 Lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw. If the lottery or lottery scheme is one where the guaranteed prize payout is more than 80%.

Rs.11000/- on every Rs.10 Lakh (or part of Rs.10 Lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw. If the lottery or lottery scheme is one where the guaranteed prize payout is less than 80%.

Provided that in case of online lottery, the aggregate face value of lottery tickets for the purpose of this sub-rule shall be taken as the aggregate value of tickets sold, and Service Tax shall be calculated in the manner specified in the said Table.

Provided further that the distributor or selling agent shall exercise such option within a period of one month of the beginning of each financial year and such option shall not be withdrawn during the remaining part of the financial year.

Provided also that the distributor or selling agent shall exercise such option for financial year 2010-11, within a period of one month of the publication of this sub-rule in the Official Gazette or, in the case of new service provider, within one month of providing of such service and such option shall not be withdrawn during the remaining part of that financial year."

The petitioners' case falls in Sl. No. 2, the prize money being less than 80%.

(XXXI) On a conjoint reading of Sections 66, 67 and Rule 7(C) it appears that the Service Tax payable by a service provider for promotion, marketing, organizing or in any manner assisting in organizing lottery is @12% or assessed in the manner indicated in the table above on the value of the service provided or to be provided. In respect of the online lotteries the aggregate value of the lottery ticket is to be taken as the value of the service on which Service Tax is payable. In respect of the paper lottery also the same mode has been adopted and gross value of the lottery ticket has been taken as the valuation for the purpose of levy of Service Tax. During the course of argument, Mr. Razzak after seeking instructions admitted that the Service tax is being charged at the gross value of the lottery ticket i.e. Re. 1/- or in the manner prescribed in the Rule 7(C) as introduced vide Notification dated 8th October, 2010. It is relevant to note that according to Mr. Razzak's submission the 30% discount allowed by the State Government to the petitioners is for rendering service, whereas admittedly 70 paise is the price of the lottery ticket. According to respondents own case only 30% of the gross value can be taken as the valuation for providing service if at all the activity of petitioners is to be construed as a service falling within the definition of "taxable service". The Ministry of Finance (Department of Revenue), Central Board of Excise and Customs, Government of India has also issued a clarificatory circular dated 10-11-2006 laying down the criterion for levy of Service Tax. The relevant extract is reproduced hereunder:-

"4. To levy Service Tax, the following criteria are to be satisfied :

- * The service provided or to be provided satisfies the definition of taxable service.
- * There should be receipt of consideration for the taxable service provided."

(XXXII) In view of the above clarification, it is pleaded on behalf of the petitioners that receipt of consideration for providing "taxable service" is one of the essential ingredients to establish that any service is a "taxable service". It is submitted that in the instant case, the Government does not pay any consideration in any form for the activities to be performed by the petitioner for promotion of the sale by advertisement etc. To the contrary, the petitioner is paying the minimum guaranteed sum towards the full sale consideration to the Government and thus the entire claim of the respondents that the petitioner is providing taxable service is belied by its own circular and understanding of the nature of the petitioner's activity."

39. Again in Future Gaming Solutions India Pvt. Ltd.³ it is found that there is no mechanism to ascertain and compute the service rendered by a person for promoting, marketing, selling or facilitating in organizing lottery of any kind, in any manner, organized by such State in accordance with the provisions of the Lotteries (Regulation) Act, 1998.

40. It is submitted by the learned counsel appearing for the Petitioners that as

per the agreement, the invoice provided for sale proceeds to the extent of Rs.67,34,800/-. The components of the sale proceeds are given as under: -

Draw charges per day- 70,100/- (Minimum Guarantee Revenue) x 8 (No. of draws) Rs.5,60,800/-

Admin charges - 3000 x 8 (No. of draws) Rs. 24,000/-

Printing charges of Rs.3500 per lac of lottery tickets Rs.10,50,000/-

Taxable prize money above Rs.10,000/- Rs.51,00,000/-

Add: Other charges Rs.67,34,800x 7 (each day draw is under a different name) - Rs.4,71,43,600/- Rs. 65,000/-

Add - Non-taxable prize money up to Rs.10,000/- is Rs.20,09,85,206/- x 7 (each day draw is under a different name) Rs.140,69,02,721/-

Total - Rs.145,41,11,321/-

41. It is further submitted that there is no payment of any consideration for incidental activities like advertisement etc. and there is no denial of the fact by the respondents that there is any methodology to distinguish the consideration paid for the services for the purposes as aforesaid. In such view of the matter, when consideration is unascertainable for the services rendered by a distributor or selling agent, the service tax is not imposable and liable to be set aside.

42. For the reasons and analysis made hereinabove, we allow the writ petitions partly and hold that the amendments carried out by the Finance Act, 2016, are not capable to being implemented for imposition and levy of the service tax on the services allegedly provided by the petitioners. Consequently, the impugned letter dated 10.06.2016 issued by respondent No.3, the circular dated 29.02.2016 and Notification No. 18/2016-ST are quashed.

43. Resultantly, the writ petitions are allowed to the above extent. No order as to costs.