

(2010) 07 SIK CK 0001

In the Sikkim High Court

Case No : Writ Petition (C) No's. 21, 30 and 36 of 2009

Tashi Delek Gaming Solutions Pvt. Ltd. and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-07-2010

Acts Referred:

Citation : (2013) 60 VST 391

Hon'ble Judges : Barin Ghosh, C.J

Bench : Single Bench

Advocate : Indranil Nandi, Debashish Kundu, Satyakam Chakraborty, Ms. Manita Pradhan, E.R. Kumar, Arjun Garg, Ashim Chhetri, Dhurba Tewari, A.R. Madhav Rao, Mrs. L. Chakraborty, A. Krishna Rao and Mrs. Manju Rai, for the Appellant; A. Moulik , Ms. K.D. Bhutia, Karma Thinlay Namgyal, Government Advocate and S.K. Chettri, Assistant Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Barin Ghosh, C.J.—In a notice dated April 30, 2007 issued to Martin Lottery Agencies Ltd., it was held out by the Central Revenue that the nature of the transactions between the State Government and distributors in relation to lottery tickets is not in the nature of sale, but the activity of the distributors are that of promotion or marketing of lottery tickets for their client, i.e., the State Government and as such, the Board of Revenue has decided that the service of distributors falls under the category of "business auxiliary service" and therefore, are chargeable to service tax. The said notice was challenged by Martin Lottery Agencies Ltd. in a writ petition filed in this court, registered as W.P. (C) No. 19 of 2007. Central Revenue, despite opportunity given, did not file counter to the writ petition. On September 18, 2007, this court noticing the judgment of the Constitution Bench of the honourable Supreme Court rendered in *Sunrise Associates Vs. Govt. of NCT of Delhi and Others*, , where it was held that lottery tickets are actionable claims, held that lottery tickets would not be "goods" within the meaning of the definition clause in the Sale of Goods Act and if lottery tickets are not goods, writ petitioner, i.e., Martin Lottery Agencies Ltd., cannot be

said to be rendering any service in relation to the promotion of their client's goods, or marketing of their client's goods, or sale of their client's goods (See Martin Lottery Agencies Ltd. Vs. Union of India (UOI),). There is no dispute that liability to pay tax if any of Martin Lottery Agencies Ltd. accrued by a reason of the Finance Act, 1994. At the time when the aforementioned writ petition was decided, clauses (i) and (ii) of sub-section (19) of section 65 of the said Act was as follows:

"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

2. It is thus apparent that while this court dealt with the writ petition, it concluded the same by noticing clause (i) of sub-section (19) of section 65 of the Act and did not take notice of clause (ii) of sub-section (19) of section 65 of the Act (See Martin Lottery Agencies Ltd. Vs. Union of India (UOI),).

3. Against the judgment rendered by this court in the aforementioned writ petition (See Martin Lottery Agencies Ltd. Vs. Union of India (UOI),), the Central Revenue took the matter before the honourable Supreme Court. The honourable Supreme Court by rendering its judgment in the case of Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., , dealt with the same. While the matter was pending before the honourable Supreme Court, by the Finance Act, 2008, which came into force on or about May 16, 2008, an Explanation to the effect as follows was inserted after clause (ii) of subsection (19) of section 65 of the Finance Act, 1994:

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, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

4. It was contended before the honourable Supreme Court in Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., , that where the State Government involves itself in an illegal activity it cannot render a service, as dealing in lottery is illegal being *res extra commercium*, no services can be rendered. The honourable Supreme Court expressly held that it does not intend to go into the said issue. It, however, observed that the said issue is a complex one and that the honourable Supreme Court at that stage was primarily required to consider the effect of the said Explanation. It held that while the State raises its revenue by controlling dealing in liquor and/or by transferring its privilege to manufacture, distribute, sale, etc., as envisaged under entry 8 of List II of the Seventh Schedule to the Constitution of India, thereby it does not render any

service to the society. It also held that service tax purports to impose tax on service on two grounds (1) service provided to a consumer, and (2) service provided to a service provider and service provided in respect of the matters envisaged under sub-section (19) of section 65 of the Act must be construed strictly and before tax is found to be leviable, it must come within the domain of legitimate business and/or trade. The honourable Supreme Court ultimately proceeded to declare that the above Explanation thus inserted brought about a change effectively in the existing law and thereby introduced a substantive law and the liability if any accrued thereon would accrue with effect from May, 2008 and not with retrospective effect. The honourable Supreme Court did not go into the question of constitutional validity of the said Explanation and expressly left the same to be decided and ultimately upheld the judgment of this court, though for different reasons.

5. While this court held that Martin Lottery Agencies Ltd. has no liability under clause (i) of sub-section (19) of section 65 of the Act, the honourable Supreme Court did not hold that Martin Lottery Agencies Ltd. incurred any liability under clause (ii) of sub-section (19) of section 65 of the Act. It declared, subject to the constitutionality of the Act, in view of the Explanation appended, service tax, if any, would be payable only with effect from May, 2008 and not with retrospective effect. At the same time, it did not uphold the constitutional validity of the said Explanation.

6. In the present writ petition validity of the said Explanation has been challenged. It was urged that the Constitution Bench of the honourable Supreme Court in Sunrise Associates Vs. Govt. of NCT of Delhi and Others, has held actionable claim as goods, but the same was excluded from the meaning of "goods" dealt with in the Sale of Goods Act, 1930 and the State taxation laws considered in the said judgment and that lottery ticket is a kind of actionable claim. It was submitted that if lottery is goods, then it cannot be service. In terms of sub-section (50) of section 65 of the Act "goods", in relation to the Act, has the same meaning assigned to it in the Sale of Goods Act, 1930. Therefore, in terms of the said Act, actionable claim including lottery ticket is excluded from the meaning of "goods".

7. It was submitted that sub-section (105) of section 65 of the Act defines "taxable services". It was contended that although sub-section (105) of section 65 of the Act categorizes different kinds of activities as service provided, but it has not been provided there that dealing with actionable claims or organizing lottery is a service provided and that would be a taxable service. It was contended that if the activity of organizing lottery is service provided then having regard to the fact that the State Government is organizing lotteries should be held to be liable to pay service tax, but no provision has been made in the Act in that regard. It was stated that until date no State Government has been asked to pay service tax on lotteries. It was submitted that in terms of clause (zzb) of sub-section (105) of section 65 of the Act, service provided to a client by any person

in relation to business auxiliary service would be deemed to be taxable service and at the same time in terms of clause (ii) of sub-section (19) of section 65 of the Act any service in relation to promotion or marketing of service provided by the client would be deemed to be business auxiliary service. Therefore, it is the client who has to render service and in relation to such service if any service is provided to promote or market the same, the later service would come within the meaning of business auxiliary service. It was contended that if the client is not providing any service there is no question of rendering any service in relation thereto. It was also contended that the true meaning of the judgment of the honourable Supreme Court in the case of Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., , is that no service is provided by the State in relation to lottery and accordingly providing any service in relation to promotion or marketing of the same does not arise.

8. The learned counsel appearing on behalf of the Central Revenue expressly submitted that service is rendered by organizing lottery. It was submitted that lottery amuses or entertains the ultimate buyer of lottery tickets and in relation thereto service is rendered by organizing lottery. If that be so the Explanation does not effectively change the existing law. In such event it should be deemed that what was there in clause (ii) of subsection (19) of section 65 was merely clarified in the Explanation. However, it has been held by the honourable Supreme Court in the case of Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., that the same was not the situation. The logical conclusion, therefore, would be that a game of chance organized, conducted or promoted by the client is not service provided by the client as mentioned in clause (ii) of sub-section (19) of section 65 of the Act.

9. Further in the case of B.R. Enterprises Vs. State of U.P. and Others, , the honourable Supreme Court, has in no uncertain terms, held that lottery is gambling. It is a vice. The excitement of a lottery ticket holder after purchase of lottery ticket until the draw may amuse or entertain the holder, but such excitement being in connection with a vice cannot be taken in a civilized society either as amusement or as entertainment. Accordingly, an activity in organizing such an excitement cannot be treated as service. Amongst various observations made in Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., , there is an observation that activity that of lottery may be brought within the purview of "entertainment" or "amusement". This observation was made taking note of certain portion of UN-CPC. It was not brought to the notice of the honourable Supreme Court that the said part of UN-CPC was not accepted by this country, documentary proof thereof is on the record of these cases.

10. In the circumstances, the Explanation must be deemed to be a substantive law introduced thereby and that is also the conclusion of the honourable Supreme Court in the case of Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., . In other words, the Explanation should not be looked at in connection with service provided by the client as mentioned in clause (ii) of sub-

section (19) of section 65 of the Act.

11. At this juncture, it would be appropriate to remember that the honourable Supreme Court in the case of Union of India (UOI) and Others Vs. Martin Lottery Agencies Ltd., , has held that the expression like "for the removal of doubts" is not conclusive. In other words, the Explanation which has effectively changed the existing law may be read as a substantive law without reading the expression "for the removal of doubts". In the Explanation it has been declared "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 other words, games of chance, organized, conducted or promoted by the client have not been declared as service. What has been declared as service is any service provided in relation to promotion or marketing thereof. The concept of service in the Explanation is totally alien to the concept of service in clause (ii) of sub-section (19) of section 65 of the Act. In other words, while the service rendered in promotion or marketing of service provided by the client is business auxiliary service in terms of clause (ii) of sub-section (19) of section 65 of the Act and is accordingly taxable service provided to the client in relation to business auxiliary service in terms of clause (zzb) of sub-section (105) of section 65 of the Act; service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client is business auxiliary service and accordingly is taxable service in terms of clause (zzb) of sub-section (105) of section 65 of the Act. Therefore, although the client is not providing any service by organizing or conducting or promoting games of chance, any service provided in relation to promotion or marketing of the same would become taxable service.

12. It was urged that organizing or conducting or promoting games of chance is res extra commercium and accordingly the same is illegal.

13. The word "extra commercium" means beyond commerce, i.e., which cannot be bought or sold, such as public roads, rivers, titles of honour, etc. There is no dispute that an action of organizing or conducting or promoting games of chance as that of lottery by a State Government is also res extra commercium. While by doing so the State Government also does not render any service to any one; except to itself by generating revenue, but it cannot be contended that the action is illegal, particularly, having regard to law applicable to the Indian society guided by the Constitution of India, inasmuch as entry 40 of List I of the Seventh Schedule to the Constitution of India specifically empowers the Parliament to make laws pertaining to lotteries organized by the Government of India or the Government of a State. Organization of lotteries by a State is, thus, a permissible activity of the State. The learned counsel appearing on behalf of the petitioners also accept that organizing or conducting or promoting games of chance as that of lottery by the State Government is not illegal.

14. It was submitted by placing reliance on the judgment of the honourable Supreme Court rendered in the case of All India Federation of Tax Practitioners

and Others Vs. Union of India (UOI) and Others, , that service which can be said to be a taxable service must add value to the product or the service. To that there cannot be any dispute. However, I think, if the Explanation is read, as it should be read, independently then the value addition, if any, by rendering service to the action of the client in organizing or conducting or promoting games of chance as that of lottery would be taxable service. It was contended that tickets are priced by State Government at Rs. 1 each, which are purchased by the petitioner at Rs. 0.70. It was submitted that the price of the activity is paid at the discounted rate and accordingly there is no question of value addition. The fact remains that lottery tickets are purchased not for their consumption but for the purpose of marketing the same. In order to market lottery tickets the petitioner is required, in terms of the agreement it has with the State Government, to put up and the petitioner in fact puts up advertisements. It thereby entices the ultimate buyer of lottery tickets to purchase the same. It thus promotes the activity of its client, the State Government, in organizing lottery. In the matter of enabling its client to sale a lottery ticket worth Rs. 1 at Rs. 1 to the ultimate buyer of lottery tickets the petitioner renders service thus. The value of lottery tickets without the promotional and marketing activity of the petitioner is 70 paise, which by reason of marketing and promotional activity of the petitioner becomes Rs. 1 when the same reaches the ultimate purchaser of lottery tickets. The petitioner thus makes a value addition to the activity of organizing or conducting or prompting games of chance as that of lottery by the State Government from 70 paise to Rs. 1 by providing marketing and promotional service thereto by its activities as above. There is thus value addition by the petitioner in relation to game of chance, organized, conducted or promoted by the client of the petitioner, namely, the State Government.

15. It was not urged that the residuary clause contained in List I of the Seventh Schedule to the Constitution of India or entry 92C thereto does not authorize levy of service tax on service provided in relation to an activity which though may not be service or which may be *res extra commercium*, but a legal and permissible activity.

16. The word "petitioner" used above should mean all the three writ petitioners.

17. I, accordingly, conclude the matter and dismiss the writ petitions. Stay prayed for is refused.