



**THE HIGH COURT OF SIKKIM: GANGTOK**  
(Civil Extra Ordinary Jurisdiction)

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SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE  
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**W.P. (C) No. 25 of 2021**

M/s Future Gaming Solutions India Pvt. Ltd.,  
A Private Limited Company registered under  
the Companies Act, 1956 having its registered  
office at Samdrup Building, Kazi Road,  
Gangtok Sikkim- 737 101.

Through:  
Mr. P. Ravichandran,  
Sikkim Branch Manager &  
Authorised Signatory.

..... Petitioner

**Versus**

1. Union of India,  
Through its Secretary,  
Ministry of Finance,  
Department of Revenue,  
North Block, Delhi  
Pin: 110 001.
2. The Commissioner (appeals)  
CGST & Central Excise,  
Siliguri Appeals,  
C.R. Building, Hakimpara  
Haren Mukherjee Road,  
Siliguri – 734 001.

.....Respondents

Application under Article 226 and Article 227 of the  
Constitution of India.

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**Appearance:**

Ms. Laxmi Chakraborty, Advocate for the Petitioner.

Ms. Sangita Pradhan, Deputy Solicitor General of  
India along with Ms. Natasha Pradhan and Ms. Sittal  
Balmiki, Advocates for the Respondents.  
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Date of Hearing : 27.11.2024  
Date of Order : 27.11.2024

## **ORDER (ORAL)**

### **Bhaskar Raj Pradhan, J.**

1. On instructions received by the learned Deputy Solicitor General of India appearing for the respondents submits that the judgment rendered by the Supreme Court in ***K. Arumugam vs. Union of India & Ors ETC.***<sup>1</sup> squarely covers the present case and the writ petition may be disposed of in terms of this judgment. This is the stand taken by the learned Counsel for the petitioner as well.

2. The writ petition seeks the following reliefs:-

- “(i) Declare that the Parliament in exercise of its residuary power under Entry 97, List I to Seventh Schedule of Constitution of India lacks legislative competence to impose any tax including “service tax” on the activities of the Petitioner under the Explanation to Section 65(19)(ii) of the Finance Act, 1994.*
- (ii) Strike down the Explanation to Section 65(19)(ii) of the Finance Act, 1992 introduced w.e.f. 16.05.2008 by Finance Act, 2008 as being ultra vires to Entry 62 of List II of the Constitution of India;*
- (iii) Consequently, set aside the Order-in-Appeal No.227/SLG-CE/2020-21 dated 31.03.2021 passed by the Commissioner of CGST & Central Excise, Siliguri Appeals, Siliguri and direct refund of Rs.1,00,00,000/- (Rupees One Crore) which was deposited under protest by the*

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<sup>1</sup> 2024 SCC OnLine SC 2278



*Petitioner with the Respondent No.2 (vide 2 TR-6 challan bearing nos.01/2009-10 dated 23.06.2009 and 02/2009-10 dated 24.06.2009) alongwith interest as per law.”*

**3.** In **K. Arumugam** (supra). the Supreme Court had formulated the following questions:-

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

*2. What Order?”*

**4.** The questions were answered in the following manner:-

*“6.8 On a reading of clause (19) of Section 65 of the Finance Act, 1994 and on analyzing the same, it is evident that tax on a business auxiliary service is relatable to (i) any service concerning promotion or marketing or sale of goods, produced or provided by, or belonging to the client and (ii) promotion or marketing of service provided by the client.*

*6.9 The definition of goods has also been noted in clause (50) of Section 65 of the Finance Act, 1994 which refers to clause (7) of Section 2 of the Sale of Goods Act, 1930. The expression “goods” under the Sale of Goods Act expressly excludes actionable claims as well as money. This Court in Sunrise Associates has held that lottery tickets are actionable claims. Therefore, as lottery tickets would not come within the meaning of the expression goods under clause (7) of Section 2 of the Sale of Goods Act, 1930, they would also not come within the scope and ambit of clause (50) of Section 65 of the Finance Act, 1994. If that is so, they would also not come within the scope and ambit of clause (19)(i) of Section 65 of the Finance Act, 1994. Lottery tickets being actionable claims and not being goods within the meaning of sub-clause (i) of clause (19) of Section 65 of the Finance Act, 1994, would expressly get excluded from the scope of the said provision. In the circumstances, service tax on the promotion or marketing or sale of lottery tickets which are*

*actionable claims could not have been levied under the said sub-clause.*

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

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

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

*The Explanation, therefore, cannot over-ride the main text of the provision as the Explanation which*



*was sought to remove doubts is in fact contrary to the main provision which defines business auxiliary service and also contrary to the judgment of this Court in Sunrise Associates and having regard to clause (50) of Section 65 of the Finance Act, 1994.*

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

**7.** *The High Courts have lost sight of the definition of 'goods' in clause (50) of Section 65 of the Act while interpreting the expression "lottery". As already noted, the definition of 'goods' in clause (7) of Section 2 of Sale of Goods Act, 1930, that is expressly incorporated in clause (50) of Section 65 of the Act, which expressly excludes actionable claims. This Court has by the Constitution Bench in Sunrise Associates opined that lottery tickets are actionable claims. The High Courts have also lost sight of the fact that the sale of lottery tickets by the State is a privileged activity by itself and not rendering of a service for which the assesseees are rendering promotion or marketing service.*

**8.** *In view of the above discussion, the appeals filed by the appellants-assesseees are liable to be allowed and are **allowed** by setting aside the impugned judgments of the High Courts of Sikkim and Kerala.*

**9.** *Having regard to the mandate of Article 265 of the Constitution of India, the appeals are allowed with all consequential reliefs to the appellants.*

**10.** *It is needless to observe that if any representations are made seeking refund of the amounts paid, the same shall be considered expeditiously by the concerned departments of the respondents."*

5. It is seen that the judgment rendered by the Supreme Court covers the issues raised by the petitioner and therefore, they are entitled to the relief to the extent permissible in view of the judgment of the Supreme Court in **K. Arumugam** (supra). It is accordingly ordered. The Writ Petition (C) No 25 of 2021 stands disposed along with the interim application.

**( Bhaskar Raj Pradhan )**  
**Judge**

Approved for reporting : **Yes**  
Internet : **Yes**

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