

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 14th OCTOBER, 2015

D.B. : HON'BLE MR. JUSTICE SONAM PHINTSO WANGDI, JUDGE
HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.39 of 2015

Petitioner : M/s Future Gaming &
Hotel Services (Private) Limited,
a Private Limited Company registered
under the Companies Act, 1956,
having its registered office
at 355-359, Daisy Plaza,
6th Street,
Gandhipuram,
Coimbatore,
Tamil Nadu
and Branch Office at
Samdrupling Building,
Kazi Road,
Gangtok,
East Sikkim.

Through: Mr. P. Ravichandran,
Manager,
Samdrupling Building,
Kazi Road, Gangtok,
East Sikkim.

VERSUS

Respondents : 1. Union of India
through its Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi.

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and

M/s. Summit Online Trade Solutions Private Limited and Others vs. Union of India and Others

2. The Commissioner of Service Tax, Siliguri,
C. R. Building,
Harendra Mukherjee Road,
Hakimpara Siliguri HO,
District: Darjeeling,
West Bengal.
3. The Superintendent,
Central Excise & Service Tax,
Gangtok Range,
Gangtok,
East Sikkim.
4. The State of Sikkim
through the Chief Secretary,
Government of Sikkim,
Gangtok,
East Sikkim.
5. Sikkim State Lotteries,
Government of Sikkim
through the Director,
State Lotteries,
Baluwakhani
Gangtok,
East Sikkim.

Application under Articles 226 and 227 of the Constitution of India

Appearance

Mr. A. R. Madhav Rao, Advocate with Mr. Rajat Mittal,
Mrs. Laxmi Chakraborty and Ms. Rogena Gurung,
Advocates for the Petitioner-Company.

Mr. D. K. Singh, Advocate with Mr. Jigmi P. Bhutia,
Advocate for Respondents No. 1, 2 and 3.

Mr. J. B. Pradhan, Additional Advocate General with
Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant
Government Advocates for Respondents No. 4 and 5.

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WP(C) No.40 of 2015

- Petitioners** :
1. M/s. Summit Online Trade Solutions Private Limited, a Company registered under the Companies Act, through its Director Mr. Naresh Mangal, Baluwakhani, Gangtok, East Sikkim.
 2. Mr. Naresh Mangal, Director, M/s. Summit Online Trade Solutions Private Limited, Baluwakhani, Gangtok, East Sikkim.
 3. Mr. Prem Kishore Parashar, Officer-in-Charge, M/s. Summit Online Trade Solutions Private Limited, Baluwakhani, Gangtok, East Sikkim.

Versus

- Respondents** :
1. Union of India through Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi.
 2. The Superintendent, Central Excise & Service Tax, Gangtok Range, Government of India, Jeewan Theeng Marg, Gangtok, East Sikkim.

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3. The Commissioner,
Central Excise & Service Tax,
Government of India,
Gangtok Division,
Siliguri Commissionarate,
C.R. Building,
Hakimpara Siliguri HO,
District: Darjeeling,
West Bengal.
4. The State of Sikkim
through the Secretary,
Finance, Revenue & Expenditure Department,
Government of Sikkim,
Gangtok,
East Sikkim.

Application under Article 226 of the Constitution of India

Appearance

Mr. Surajit Dutta, Advocate with Ms. Binita Chettri,
Advocate for the Petitioners.

Mr. D. K. Singh, Advocate with Mr. Jigmi P. Bhutia,
Advocate for Respondents No. 1, 2 and 3.

Mr. J. B. Pradhan, Additional Advocate General with
Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant
Government Advocates for Respondent No.4.

J U D G M E N T

Following Judgment of the Court was delivered by

Wangdi, J.

1. These Writ Petitions are taken up together to
be disposed off by this common judgment as the facts

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and circumstances and questions involved for determination are common.

2. Both the Petitioners are Companies incorporated as Private Limited Companies under the Indian Companies Act, 1956, who are engaged in the business of sale of paper and online lottery tickets respectively organised by the Government of Sikkim. Petitioner in WP(C) No.39 of 2015, namely, M/s. Future Gaming Solutions Pvt. Ltd., dealing with paper lottery tickets, entered into an Agreement dated 24-01-2015 [Annexure P-1 (collectively)] for 5 (five) years whereby Petitioner procures the lottery tickets in bulk from the Government and resells the same to the public at large through various agents, stockists, resellers, etc., whereas the Petitioner in WP(C) No.40 of 2015, namely, M/s. Summit Online Trade Solutions Pvt. Ltd., dealing with online lottery tickets, entered into an Agreement with the State of Sikkim on 09-05-2005 followed by a Supplementary Agreements dated 25-04-2008 and 09-11-2015 [Annexure P-1 (collectively)]. Mutual terms and conditions concerning the sale and purchase of lottery tickets between the State

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Government and the Petitioners are governed and regulated by the contractual stipulations contained in the aforesaid Agreements.

3. The Petitioners are aggrieved by the enforcement of the provision of Finance Act, 1994, as amended by the Finance Act, 2015, upon them with effect from 01-06-2015. By the amendment, certain changes were brought to various Clauses under Sections 65B, 66D and 67 of the Finance Act, 1994, by which the Respondent No.1, the Union of India through its Secretary, Ministry of Finance, Department of Revenue, Government of India, sought to make service tax applicable to the Petitioner-Companies.

4. In the Writ Petitions, the Petitioner Companies, *inter alia*, challenge the jurisdiction of the Respondents No.1, 2 and 3 and the legality of their actions in enforcing provisions of the Finance Act, 1994 as amended by the Finance Act, 2015, upon the Petitioner-Companies with effect from 01-06-2015.

5. As a consequence of the amendment, the Respondents No.2 and 3 issued the impugned letter

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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 bringing to their notice that service providers in respect of services provided by lottery distributors and selling agents were amenable to service tax as prescribed under Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994. It is the case of the Petitioners that the amended provisions of the Finance Act, 1994, as a consequence of the Finance Act, 2015, do not cover the activities of the Petitioners which involve purchase and sale of lotteries. The impugned letters dated 25-05-2015, 18-05-2015 and 12-06-2015 respectively and the action of the Respondents seeking to enforce the provisions of Finance Act, 1994 (as amended by the Finance Act, 2015) are illegal and without jurisdiction.

6. It is averred that the activities of the Petitioners involve purchase of lottery tickets in bulk from the State Government and selling them to stockists, resellers, etc., by adding a profit margin. The stockists, resellers, etc., in turn sell these tickets to retailers which in turn sell them to the ultimate

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participants of the draw. It has been stated that the transaction by which tickets are sold to the Petitioner-Companies by the Government of Sikkim is one of sale and purchase of lottery tickets and not one of rendering services. Thus, the Petitioners being not involved in rendering services, the provisions of the Finance Act, 1994 (as amended by the Finance Act, 2015) have no application on the activities undertaken by them.

7. It is next averred that tax cannot be imposed by a Parliamentary Law on lottery tickets in view of List II of Seventh Schedule of the Constitution of India under Entry 34 of which the subject-matter of "betting and gambling" and the subject-matter of "taxes on betting and gambling" under Entry 62, fall within the sole competence of the State Legislature and, therefore, the levy of service tax is *ultra vires* the Constitution of India. The impugned letter dated 25-05-2015 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 and the action of the Respondents to enforce the provisions of the Finance

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Act, 1994 (as amended by the Finance Act, 2015) are thus illegal and without jurisdiction.

8. It is next contended that vide Notification No.7/2015-ST dated 01-03-2015, Annexure P4, in WP(C) No.39 of 2015, service tax under reverse charge is imposed on the services provided by the selling or marketing agent of lottery tickets to the Petitioners. It is stated firstly, that the activity of the agents of the Petitioners are not covered under Notification No.7/2015-ST as they are not engaged in providing any services but, in buying and selling of tickets from the Petitioners. The liability cast upon the Petitioners vide Notification No.7/2015-ST to discharge service tax on reverse charge basis is not sustainable as the activity of selling or marketing agent is not covered under service tax being an activity pertaining to actionable claims which also amounts to betting, gambling and lottery under the negative list. It is asserted that the activity of the agent to the distributors/Petitioners who buy and sell tickets from the Petitioners/distributors is squarely covered under "betting and gambling" under List II to the Seventh Schedule to the Constitution of

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India which is a subject-matter of State Legislature and not that of the Union Government.

9. It is then contended that the compounding scheme or optional composite scheme for payment of service tax introduced by way of Sub-Rule (7C) of Rule 6 in the Service Tax Rules, 1994, as amended, does not enable charging of service tax if the levy under the main Act fails as held in *Future Gaming Solutions India Private Limited vs. Union of India and Others : 2014 (36) STR 733 (Sikkim)* (hereinafter referred to as "Future Gaming Case 2014"). It is further stated that the Petitioners obtained service tax registration under the Finance Act, 1994, and opted for payment of service tax under the compounding scheme provided under Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994, under protest. It had been made clear by the Petitioners that since Appeal against the judgment of this Court in *Future Gaming Case 2014* (supra) and *Future Gaming Solutions Private Limited vs. Union of India and Others : 2015 (37) STR 65 (Sikkim)* (hereinafter referred to as "Future Gaming Case 2015") were pending in the Hon'ble Supreme Court of India and no order of stay on those judgments

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had been passed, any attempt on the part of the Respondents to charge service tax would be illegal in view of the decision in *Mafatlal Industries Ltd. and Others VS. Union of India and Others : (1997) 5 SCC 536.*

10. The Petitioners further state that although this Court vide judgment dated 22-06-2015 in *WP(C) No.45 of 2015* in the matter *Mrs. J. Geetha VS. State of Sikkim and Others*, the proceedings undertaken by the State in respect of lottery including the appointment of the distributors who were the Petitioners herein, was set aside, the draws concluded till 22-06-2015 remain unaffected which was clarified by order dated 24-06-2015 in Review Petitions No.04 and 05 of 2015 permitting the State Government to conduct the proposed draws till 12-07-2015 for which the tickets were already in circulation. Therefore, it is the contention of the Petitioners that though the agreement dated 24-01-2015 entered into between the Petitioner in *WP(C) No.39 of 2014* and agreement dated 09-05-2005 followed by a supplementary agreements dated 25-04-2008 and 09-11-2015 in *WP(C) No.40 of 2014* the State Government had been set aside, service tax

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liabilities on the Petitioners, on the draws conducted till 12-07-2015 still remained. Further, the Petitioners having obtained centralised registration under service tax in the State of Sikkim in respect of lotteries of the State of Sikkim sold in other States and of others States in the State of Sikkim, it had a valid cause of action to agitate the issue before this Court.

11. It is the contention of the Petitioners that the provisions construed by this Court in *Future Gaming Case 2014* (supra) and *Future Gaming Case 2015* (supra) have since been amended with the objective of levying service tax on the distributors or selling agents of lottery. But, the amendments have not overcome the law laid down in those cases. Relying upon *Delhi Cloth & General Mills Co. Ltd. and Another VS. State of Rajasthan and Others : (1996) 2 SCC 449*, it is submitted that when a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. It is asserted that in the amendments, the collection of service tax on the

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activities of the Petitioners and their agents have not been validated by the amendments brought to the Finance Act, 1994 vide the Finance Act, 2015. Having regard to the fact that the term "actionable claim" defined under Section 65B of the Finance Act, 1994, have the same meaning assigned to it in Section 3 of the Transfer of Property Act, 1882, whereby it has been defined, *inter alia*, as a claim "to any beneficial interest in moveable property not in the possession" of the claimant, it is submitted that in the context of the lottery ticket, it would mean a claim to any beneficial interest in moveable property which is not in the possession of the claimant and that such a beneficial interest may be contingent.

12. It is asserted that in *Sunrise Associates vs. Govt. of NCT Delhi and Others : (2006) 5 SCC 603* lottery tickets are actionable claims and this position continues even after the amendments in the Finance Act, 2015. It is further submitted that there is no material difference in the language of the erstwhile definition of "taxable service" as contained in Sub-Clause (zzzzn) of Clause (105) of Section 65 and Clause (44) of Section

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65B of the Finance Act, 1994, as amended by the Finance Act, 2015. The words "in relation to" and "selling" added to Clause (44) of Section 65B in the Finance Act, 2015, do not bring any material change to the provisions as it stood under Sub-Clause (zzzzn) of Clause (105) of Section 65. The expression "in relation to" would connote doing something towards promotion, marketing, etc., of lottery as contrasted to the Legislation earlier covering promotion, marketing, etc. Therefore, the amendments have not overcome the law laid down by this Court in *Future Gaming Case 2014* (supra) and *Future Gaming Case 2015* (supra).

13. The next ground set out to assail the action of the Respondents is that the amendments to the Finance Act, 1994 by the Finance Act, 2015, covers only those parties who are facilitating transaction in actionable claims. It is stated that prior to the amendment, 'service' was defined under Clause (44) of Section 65B to mean any activity carried out by a person for another for consideration and included a declared service, but, did not include an activity which constituted merely a transaction in money or actionable

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claims. It is stated that by the amendment to Clause (44) of Section 65B of the Finance Act, 1994, by the Finance Act, 2015, an Explanation has been inserted to provide that the transaction in money or actionable claim shall not include "..... any activity carried out, for a consideration in relation to, or for facilitation of, a transaction in money or actionable claim". Thus, the amendment contemplates any activity carried out "in relation to" or "for facilitation of" for a consideration, a transaction in actionable claims. In other words, the activity for a consideration has to be in relation to an actionable claim for facilitation of an actionable claim. Thus, relying upon *Association of Leasing and Financial Service Companies VS. Union of India and Others : (2011) 2 SCC 352*, it was submitted that a direct transaction in regard to an actionable claim, i.e., buying and selling of lotteries as is being done by the Petitioners, would not fall under this Clause as it would cover only those parties who are facilitating the transaction in actionable claims. This proposition was also held by this Court in the *Future Gaming case 2015* (supra).

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14. Section 66F of the Finance Act, 1994, further lays down that a reference to a service shall not include reference to a service which is used for providing main service. Therefore, even prior to the amendment brought about vide the Finance Act, 2015, while actionable claim was excluded from the definition of service, the services for facilitating an actionable claim or in relation to an actionable claim would be covered in the definition of service. Referring to the case of *Hardev Motor Transport VS. State of M.P. and Others : (2006) 8 SCC 613*, it was submitted that an explanation, in any view of the matter, cannot enlarge the scope and effect of a provision.

15. The Finance Act, 1994, as amended by the Finance Act, 2015, would cover the activity of the agents who on commission basis are facilitating the transaction in lottery tickets (transaction in actionable claim) or in relation to lottery tickets are carrying out the promotion for a consideration. It would not cover an outright sale and purchase of lottery tickets since in such cases there is nothing in relation to or for facilitation of the transaction in actionable claims, i.e.,

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the lottery tickets. As per the Petitioners, actionable claims are still excluded from the definition of 'service' in the Finance Act, 1994 even under its amendment under the Finance Act, 2015. It is asserted that what is covered under service is any activity carried out for consideration "in relation to" or "facilitation of" a transaction in actionable claims. Thus, activity of direct buying and selling of lottery tickets as carried out by the Petitioners would obviously not come in the category of an activity "in relation to" or "facilitation of" a transaction in actionable claim in view of the decision in *Sunrise Associates Case* (supra) that the activity of buying and selling lottery tickets is itself a transaction in actionable claim.

16. It is stated that the definition of 'service' under Clause (44) of Section 65B of the Finance Act, 1994, vide the Finance Act, 2005, would bring within its ambit only such activity of lottery distributors or selling agents, that is carried out in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner. It is not the mere buying and selling of lottery tickets

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by a distributor or lottery agent that come under the category of any activity for consideration in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner. Since the activity of the Petitioners are not for any consideration its activity would fall outside the scope of the definition of 'service' under the Finance Act, 1994, as amended by the Finance Act, 2015. The Petitioners are not carrying out their activities for someone else but are buying and selling the tickets and, therefore, is not promoting/marketing the lottery tickets for the State Government but is actually doing it for themselves. In other words, where the title to the lottery tickets passes from the State Government to the distributor or selling agents, it cannot be said that there is performance of any activity for consideration in relation to promotion/marketing or in relation to promotion, marketing or organising lottery. Similarly, a distributor is not doing any activity for consideration in relation to selling of lottery. It is re-emphasised that it can never be said that when a person buys or sells the lottery tickets, he is (a) promoting the lottery

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tickets for consideration or (b) marketing the lottery tickets for consideration or (c) doing any activity for consideration in relating to selling the lottery tickets or (d) the lottery distributor cannot be said to be doing any activity for consideration in relation to organising lottery. The organising of lottery is done by the State Government.

17. It is next contended that if mere buying and selling the lottery tickets is to be regarded as an activity for a consideration in relation to a transaction in actionable claim or an activity for consideration for facilitation of a transaction in actionable claim, then even the State Government which is selling the lottery tickets to the distributors would be liable to pay service tax.

18. It is then contended that in the *Future Gaming Case 2015* (supra) it has been held that there is no consideration for any activity of promotion, marketing, organising a lottery or in any other manner assisting in organising lottery. No consideration whatsoever flows from the Government of Sikkim or any third party to the Petitioners in respect of the alleged activity of

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promotion or marketing of the lottery tickets of the Government of Sikkim thereby the question of liability of service tax being fixed upon the Petitioners would not arise. It is submitted that following from the ***Future Gaming Case 2015*** (supra), in the present case also there is no element of service in the activity of the Petitioners and it is only a transaction in actionable claim which is specifically excluded from the definition of 'service'. The attempt on the part of the Central Government to levy tax on betting and gambling is *ultra vires* Entries 34 and 62 of List II of the Seventh Schedule of the Constitution of India. That in ***Future Gaming Case 2015*** (supra) and ***Future Gaming Case 2014*** (supra), this Court has already held that the activity of promoting, marketing, organising or in any other manner assisting in organising games of chance including lottery, is an activity falling under the expression "betting and gambling" which is in the domain of the State Legislature and the Centre has no power to tax such an activity. Thus, the amendments introduced by the Finance Act, 2015, is *ultra vires* the Constitution and, therefore, deserve to be struck down.

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19. Referring to the case of *Association of Leasing and Financial Service Companies* (supra), it is asserted that since service tax can be levied only on that amount which is received for providing services to the State Government, question of levying of service tax on the Petitioners does not arise at all. Further, Circular No. 354/59/2006-TRU dated 10-11-2006 has been relied upon by which the Central Board of Excise and Customs (CBEC) has clarified that service tax can be levied only when a consideration is received for the taxable services provided. This Circular, having been issued under Section 37B of the Central Excise Act, 1994, which is applicable to Finance Act, 1994 in terms of Section 83 of that Act, is binding on the field formations of the department as has been held in various decisions of the Hon'ble Supreme Court including *Commissioner of Central Excise, Mumbai* vs. *Rajpurohit GMP India Limited* : 2008 (231) ELT 577 (SC) and *State of Kerala and Others* vs. *Kurian Abraham (P) Ltd. and Others* : 2008 (224) ELT 354 (SC). It is urged that it would be evident from the terms of the agreement dated 24-01-2015 in WP(C) No.39 of 2015 and agreement dated

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09-05-2005 followed by a supplementary agreements dated 25-04-2008 and 09-11-2015 in WP(C) No.40 of 2014 entered into between the Petitioners and Respondent-State of Sikkim, that the Petitioners procure the lottery tickets from the Government of Sikkim in bulk quantities at a fixed price. Therefore, the transaction between the Petitioners and the Government of Sikkim is on principal to principal basis and the Petitioners are not agents of the Government of Sikkim. The demand of service tax from the Petitioner is, therefore, without jurisdiction.

20. Next, it is contended that Section 66D of the Finance Act, 1994, sets out various items as falling under the 'negative list'. In the erstwhile provision of the Act in 2012, the negative list specifically excluded betting, gambling and lottery from being taxed under the Service Tax Law. However, by the amendment in 2015, an Explanation has been added which reads as follows: -

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

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21. Thus, by insertion of such Explanation, the negative list would cover betting, gambling and lottery. However, under Explanation 2 of Clause (44) of Section 65B, it would not cover activity specified in the Explanation 2 inserted thereunder which reads as follows: -

“Explanation 2.—For the purposes of this clause, the expression “transaction in money or actionable claim” shall not include—

(i)

(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, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner.

.....”

22. The aforesaid newly added provisions seek to charge service tax on an activity for a consideration in relation to or for facilitation of a transaction in actionable claim. It is the case of the Petitioners that since the Petitioners are neither doing any activity for

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consideration in relation to a transaction in actionable claim nor for facilitation of a transaction in actionable claim but are simply buying and selling lottery tickets, the first part of Explanation 2 to Clause (44) to Section 65B has no relevance so far as the Petitioners are concerned.

23. Referring to the *Future Gaming Case 2014* (supra), it is submitted that this Court has held that buying and selling lottery tickets is nothing but a transaction in actionable claim on the strength of the Constitutional Bench decision of the Hon'ble Supreme Court in *Sunrise Associates* (supra). It is then contended that under the Finance Act, 2015, the distributor or the selling agent liable to pay service tax in the activities of the selling agent vide Notification No.7/2015-ST by which Notification No.30/2012 dated 20-06-2012 was amended. As a consequence, the distributor or the selling agent to the State Government is additionally liable to pay service tax liability of the agent immediately below him. Such levy is impermissible as the selling or marketing agent to the Petitioner is also buying and selling lottery tickets as, tickets are being

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sold by the distributor to them in bulk for a price. The agents of the Petitioners are not carrying out any activity for consideration in relation to or for facilitation of a transaction in actionable claim. They are only transacting in actionable claim. Therefore, the liability of payment of service tax under reverse charge mechanism fastened on the Petitioners vide Notification No.7/2015-ST would not arise. It is asserted that the activity carried out by the agent to the Petitioners (distributors) in any case, is also an activity covered under Entry 34 read with Entry 62 of List II of the Seventh Schedule of the Constitution of India and, therefore, tax on such activity can be levied only by the State Government and not by the Centre. The Petitioners are thus not liable to discharge any service tax in regard to an agent who buys the lottery tickets from the State Government and further sells those under reverse charge mechanism vide Notification No.7/2015-ST.

24. Reference was made to *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra), where it has been held that even if the Petitioners have taken

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registration and opted for the computing scheme, there is no estoppel when the Petitioners have taken such registration without prejudice to their stand that they are not liable to pay service tax.

25. It is then contended that in view of Article 246 of the Constitution of India, there is categorical delineation of legislative powers between the State Legislature and the Parliament. Since betting and gambling has been held to fall within the meaning of which lottery in *B. R. Enterprises VS. State to U. P. and Another : (1999) 9 SCC 700* and, "taxes on betting and gambling" fall under Entries 34 and 62 of List II of the Seventh Schedule of the Constitution of India, power to tax on lotteries would clearly fall within the competence of the State Legislature and, therefore, the levy by the Central Government is *ultra vires* the Constitution of India. Although regulation of lotteries organised by the Government of Sikkim would fall within Entry 40 of List I, taxes on lottery (being taxes on betting and gambling) lies in the sole domain of the State Legislature in view of a clear distinction between "a general power of regulation" and "power to tax".

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Relying upon *State of W.B. and Others vs. Purvi Communication (P) Ltd. and Others : (2005) 3 SCC 711, Future Gaming Case 2015* (supra) and the Constitutional Bench judgment in *M/s. R.M.D.C. (Mysore) Private Ltd. vs. State of Mysore : AIR 1962 SC 594* and *State of W. B. vs. Kesoram Industries Ltd. and Others : (2004) 10 SCC 201*, it is stated that under Entry 40 of List I, Parliament is competent to enact only in respect of lotteries as a species of betting and gambling and that such law could only be regulatory in nature and nothing beyond that.

26. It is further submitted that Parliament would have been empowered to levy such tax under Entry 97 of List I to the Seventh Schedule of the Constitution of India if the subject-matter of the Legislation is not covered under any of the Entries under Lists II and III of the Seventh Schedule. Article 248 which is the source of the power of the Parliament to make any law clearly provides that it can do so only in respect of matters not enumerated in the "State List" or the "Concurrent List". It does not extend to make law for imposition of tax on matters listed in List II and List III respectively. Reference in this regard was made to

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Union of India vs. *Shri Harbhajan Singh Dhillon* : (1971) 2 SCC 779, *Kesoram Industries Ltd.* (supra), *Future Gaming Case 2015* (supra). It is further stated that Entry 92C of List I to the Seventh Schedule of the Constitution which provides for taxes on services has not been notified till date and, therefore, even under that provision the Parliament has no competence to levy service tax.

27. Next, it is contended that the entire transaction between the Petitioner and the State-Respondent No.4 is that of sale and purchase and no service is being rendered by the Petitioners reiterating that the entire transaction is on principal to principal basis under an agreement dated 24-01-2015 in WP(C) No.40 of 2015 and agreement dated 09-05-2005 followed by supplementary agreements dated 25-04-2008 and 09-11-2012 in WP(C) No.40 of 2015 by which the Petitioners purchase lottery tickets from the Government of Sikkim, resells them to agents, stockists, resellers, etc., and in such process earn a profit, being the difference between the sale and the purchase price. By the said agreements, the Petitioners are appointed the sole purchasers of the

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lottery tickets organised by the Government of Sikkim and unsold tickets are returned to Government of Sikkim. The agreements permit the purchaser to take up any kind of publicity, etc., at its own cost and expenses without any contribution from the State Government. It further grants liberty to the Petitioners/sole purchasers to appoint stockists, selling agents or sellers for further resale of lottery tickets in different parts of the country on their own terms, risk and responsibility. Clause 2.3 of the agreement in WP(C) No.39 of 2015 makes the sole purchaser, i.e., Petitioner, entirely responsible for appointment of stockists, selling agents or sellers for the sale of lottery tickets and that the Government of Sikkim would have no privity of contract with any such stockists, selling agents, etc.

28. Relying upon *Sunrise Associates Case* (supra), it is submitted that the sale of lottery tickets involves and implies the transfer of property and other rights in the lottery tickets from the Government of Sikkim to the Petitioners at the first stage and thereafter from the Petitioners to the agents, stockists, resellers, etc., and

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so on, ultimately to the final consumer which is analogous to the sale of goods.

29. Referring to the distinction between "an agent" and "a purchaser" as defined in *Benjamin's Sale of Goods, 8th Edition*, it was submitted that where the distributor or the purchaser acts as a wholesaler on payment of the total sale price, he is a buyer and not an agent. Reliance was also placed upon *Alwaye Agencies VS. Dy. Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam : 1988 (Supp) SCC 394*. Relying upon *Bowstead & Reynolds on Agency, 16th Edition; Mahindra and Mahindra Limited VS. Union of India and Another : 1984 (16) ELT 76 (Bom), Pioneer Tools and Appliances (P) Ltd. VS. Union of India : 1989 (42) ELT 384 (Bom)*.

30. It is submitted that when the entirety of transaction as in the present case is on a principal to principal basis, no demand of service tax would arise. Referring to the case of *Laghu Udyog Bharati and Another VS. Union of India and Others : (1999) 6 SCC 418* and *All India Federation of Tax Practitioners and Others VS. Union of India and Others : (2007) 7 SCC 527*, it was submitted that

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a transaction of sale as in the present case is not amenable to service tax.

31. Thus, it is the Petitioners' case that unless there is a service element, no question of levy of service tax on the particular transaction would arise. It is asserted that when in the case of the Petitioners there is no service element and the entire transaction is one of purchase and sale, question of applicability of the provisions of the Finance Act, 1994, which levies service tax would not arise at all.

32. Referring to *Bharat Sanchar Nigam Ltd. vs. Union of India* : (2006) 3 SCC 1; *Imagic Creative (P) Ltd. vs. Commissioner of Commercial Taxes and Others* : (2008) 2 SCC 614 and *Indian Railways Catering and Tourism Corporation Ltd. vs. Government of NCT of Delhi* : 2010 (20) STR 437 (Del), it was urged that sale and service are mutually exclusive and, therefore, a sale transaction is not covered within the ambit of service tax. It is further contended that in view of the decision in *State of Bombay vs. R.M.D. Chamarbaugwala and Another* : 1957 SCR 874 and *B. R. Enterprises* (supra) and *Union of India and Others vs.*

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Martin Lottery Agencies Limited : (2008) 12 SCC 209, organisation of lottery is in the nature of *res extra commercium* and not a business or trade and, therefore, by organisation of lottery no services are being rendered by the Government and as such, it cannot be said that lottery is a service to bring it within the purview of service tax.

33. Relying upon the *State of Kerala vs. Maharashtra Distilleries : (2005) 1 SCC 1*, it is stated that where the State parts with its privilege in trade, what is charged by the State is its privilege price. By purchasing lottery tickets on actual sold basis, the Government of Sikkim is parting with its privilege and the price paid is the consideration paid to the State for parting its privilege as in the case of trade in liquor. The question of service under such circumstances would not arise.

34. Relying upon a plethora of judgments of the Hon'ble Supreme Court including *Girdhari Lal Nannelal vs. The Sales Tax Commissioner, M.P. : (1976) 3 SCC 701* and various High Courts, it was submitted that the burden of proof that there is taxable service which is

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on the Respondents has not been discharged by them.

35. It was next contended that the levy and collection of service tax on the activity of the lotteries is without authority and sanction of law and, therefore, violative of Article 265 of the Constitution of India which prescribes that no tax can be levied or collected except by the authority of law. It is submitted that the Petitioner have been required to pay service tax by their letter dated 25-05-2015 on the basis of the Service Tax Rules, 1994 (as amended) which is a Subordinate Legislation. As per the Petitioners, in the Constitutional Scheme and in terms of Article 265 it is trite that tax cannot be levied by way of Subordinate Legislation. Reliance on this has been placed on *State of Kerala VS. Madras Rubber Factory Limited : (1998) 1 SCC 616*, *Cooperative Sugars (Chittur) Ltd. VS. State of T. N. : 1993 (Supp) 4 SCC 42* and *Bimal Chandra Banerjee VS. State of Madhya Pradesh Etc. : (1970) 2 SCC 467*.

36. It is then contended that the impugned letter dated 25-05-2015 issued by the Respondent No.3 and

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letter dated 18-05-2015 issued by the Respondent No.2 are without jurisdiction and does not stand legal scrutiny. The Petitioners have been required as per the letter to pay service tax under Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994 which only provides an optional composition scheme for payment of service tax and does not create a charge of service tax. It is in fact only a piece of Subordinate Legislation being the Rules framed by the Respondents in exercise of its powers under the Finance Act, 1994 and, therefore, cannot go beyond it having regard to the well-settled position that Subordinate Legislation cannot override the Statutory Legislation. Although, the Service Tax Rules, 1994, provides an alternative scheme for payment of service tax, unless there is levy of service tax under the statutory provisions, in this case the Finance Act, 1994, the alternate scheme cannot be extended so as to provide for the levy of tax. It is further submitted that levy of tax cannot be inferred from Notifications and Service Tax Rules, 1994. Reliance on this has been placed on *Sales Tax Officer, Navgaon and Another vs. Timber and Fuel Corporation*

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: (1973) 2 SCC 292, *International Packing Industry* VS.
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1987 (32) ELT 317 (AP) and *Japan Dyeing Works* VS.
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Delhi).

37. The Petitioners next propound that a validating act can cure the statute only if it has the competence to validate the statute in question. It is submitted that the amendment to Clause (44) of Section 65B of the Finance Act, 1994, vide the Finance Act, 2015, has been carried out in order to overcome the decision of this Court in *Future Gaming Case 2015* (supra) whereby it has been held that all activities right from the publishing of the lottery tickets till the participation in the game of chance, declaration of draw and even distribution of prize to the winner fall within the purview of expressions "betting and gambling". Thus, power to levy tax on organisation, promotion and marketing of lottery being an act of betting and gambling would fall within the exclusive domain of Entry 62 of List II. Relying upon *Delhi Cloth & General Mills Co. Ltd. Case* (supra), it was submitted that

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when a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. Thus, relying upon *Future Gaming Solutions Case 2015* (supra) it is submitted that since the cause for ineffectiveness or invalidity was not removed by way of amendment to Clause (44) of Section 65B, service tax cannot be levied under the Finance Act, 1994 as amended by the Finance Act, 2015.

38. It is then submitted that the interpretation adopted by the Respondents on the proposed amendments in the Finance Act, 1994 by the amendment Act 2015, vide their Circular dated 19-05-2015 is erroneous in stating that the objective of the amendments in the Finance Act, 1994 was to make it explicitly clear that while lottery *per se* is not subject to service tax, the services by lottery distributor or selling agents in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind in any other manner in relation to lottery, will

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be taxable. The decision in *Future Gaming Case 2014* (supra) was referred to on this wherein similar TRU Circular dated 26-07-2012 fell for consideration by this Court and it had been held that the interpretation of the Circular was erroneous. It is alleged that the collection of service tax on the activity undertaken by the Petitioners is arbitrary, illegal and is violative of Articles 19(1)(g) and 300A of the Constitution of India.

39. The counter-affidavit filed on behalf of the Respondents No.1 to 3, appear to be largely rhetorical with little substance. On a careful reading of the counter-affidavit, the only thing that could be deciphered was that service tax in respect of service provided or agreed to be provided by a selling or marketing agent of lottery tickets to a lottery distributor or selling agent ought to be given judicial consideration in the larger public interest in the light of the Article 268 and Entry 92C in List I of the Seventh Schedule to the Constitution of India. It is stated that this provision would clearly indicate that the Parliament is duly empowered to enact law in relation to service tax in respect of service provided or agreed to be

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provided by a selling or marketing agents of lottery tickets to a lottery distributor or selling agent. It is further stated that the levy of service tax is a sovereign function of the Parliament with the object of collecting revenue under its taxing power to effectively used for correcting economic disparity and inequality as laid down in *State of Madras vs. N. K. Nataraja Mudaliar : (1968) 3 SCR 821 (856)*. That the action of the Respondents is inspired by Articles 38 and 39(b)(c) of the Constitution of India. That the intention of introducing the Finance Act, 2015, by the Parliament is to levy service tax in respect of service provided or agreed to be provided by a selling or marketing agent of lottery tickets to a lottery distributor or selling agents. The power to enact the law is covered by the residual Entry 97 of List I. At the same time, it is also stated that subject of 'lottery' is expressly covered by Item No.40 of Union List (List I) thereby settling the controversy as regards the power to levy service tax for good.

40. It is next contended that service tax is levied not on lottery but on the services rendered for marketing, promoting and organising lottery by the

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Petitioners. It is because of this that although lottery is conducted by the State of Sikkim, it is the Petitioners who have been charged with the tax as it is rendering the service of promoting and marketing in relation to lottery. Conceding to the ratio laid down in *Sunrise Associates Case* (supra) that lottery ticket is an actionable claim, it is stated that the department does not charge any service tax on lottery ticket, there being difference between "lottery ticket" and 'lottery'. It is the Respondents' case that while lottery ticket is an actionable claim and is thus goods, lottery on the other hand is a game and thus a service and, therefore, has been included in the negative list. It is stated that the department was not charging service tax on lottery but on the supporting services of lottery, i.e., promoting and marketing of lottery which are provided by the supporting service providers. Reference in this regard has been made to Section 66F(1) of Finance Act, 1994, which provides that "unless otherwise, specified, reference to a service shall not include reference to a service for providing main service".

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41. The Respondents further state that the Government of Sikkim is a seller of lottery tickets and the Petitioners its buyers providing marketing and promoting facilities for sale of lotteries. It is clarified that the State of Sikkim is a seller of lottery tickets and the buyer is the individual who buys the lottery tickets and it is not the Petitioners who are the buyers as claimed by them. Therefore, the function of the Petitioners are that of middlemen and as such their services are chargeable to service tax and would bring them within the definition of 'service' under Clause (44) of Section 65B. It is emphasised that the Petitioners' carry out the activity for the State of Sikkim for which they obtain financial consideration. It is further stated that the Petitioners facilitate 'service' provided or agreed to be provided by a selling or marketing agent of lottery tickets to a lottery distributor or selling agents by distributing, stocking, engaging the sub-brokers and sub-stockists, advertising, transporting, collecting money from the buyers and depositing the collected money back to the Government after retaining their consideration, etc. Apart from this, the

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Petitioners pay the minimum guarantee amount to the Government of Sikkim for providing proper service is not an advance towards purchase price of lottery tickets. This activity of the Petitioners as per the Respondents is chargeable to service tax.

42. On this, reliance was placed to the case of *P. Murleedharan VS. Union of India : 2012 (28) STR 344 (Kerala)* whereby it has been held that the distribution and marketing the lottery tickets is service and they are chargeable to service tax. It is reiterated that the Petitioners are not the buyers recruited as marketing agent by the State to conduct, organise and promote State Lotteries in accordance with the provisions contained in the Lotteries (Regulation) Act, 1998 and the Lotteries (Regulation) Rules, 2010 and also the Rules framed by the State Government from time to time. By referring to the opening recitals of the agreement entered into between the Petitioners and the State Government dated 09-11-2012 in WP(C) No.40 of 2015, it is emphasised that the Petitioners are the distributors of the Sikkim State Lotteries within the

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meaning provided under Section 4(c) of the Lotteries (Regulation) Act, 1998.

43. It is contended that the levy of service tax is not a subject-matter which is covered under List II but under the residuary power of the Parliament under Entry 97 of List I thereby making the Union Parliament competent to pass laws relating to service tax. The object of excluding the activity carried out by lottery distributor or selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery in any manner, is to expressly declare that while lottery ticket *per se* is not subject to service tax, services in relation to lottery is. This, therefore, justifies issuance of the impugned letters dated 18-05-2015 and 12-06-2015 under the statutory provisions under D.O.F. Circular No.334/5/2015-TRU dated 19-05-2015.

44. It is asserted that the Petitioners apart from referring to Notification No.25/2012 dated 20-06-2015, have not challenged Notification No.6/ 2015-ST dated 01-03-2015 which came into effect from 01-04-2015

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by which Item No.(c), (d), (e) have been omitted and the exemption withdrawn with a view to broaden the tax base. By issuing letters dated 18-05-2015 and 12-06-2015 being Annexure P3 (collectively) in WP(C) No.40 of 2015, the Respondents have acted as per the due process of law for implementation, administration and enforcement of service tax in respect of service provided or agreed to be provided by selling or marketing agent of lottery tickets to a lottery distributor or selling agent, requesting the Petitioners to obey and comply with the law. That the judgments in *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra) are matters which are *sub judice* in the Apex Court in SLP (C) No.11842-11843 of 2013 and SLP(C) No.33760-33761 of 2013 (CC No.19095 of 2013 and 19096 of 2013). It is reiterated that the Petitioners are liable to pay service tax because of the nature of the services provided by them.

45. It is asserted that by Explanation added to Section 66D(i), it has been clarified that the expression "betting, gambling or lottery" shall not include the activity specified in Explanation 2 to Clause (44) of

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Section 65B. Explanation 2 inserted by the Finance Act, 2015 dated 14-05-2015 to Clause (44) of Section 65B, provides that for the purpose of the clause the expression "transaction in money" or "actionable claim" shall not include 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 by a lottery distributor or selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind in any other manner.

46. It is further stated that the new definition of lottery distributors or selling agents added by Clause (31A) Section 65B of the Finance Act, 2015 defines "lottery distributors" or "selling agent" to mean a person appointed or authorised by the State for the purpose of promoting, marketing, selling or facilitating in organising lottery of any kind in any manner organised by such State in accordance with the provisions of the Lotteries (Regulation) Act, 1998. Therefore, since the Petitioners' activities fall within the definition of "lottery distributor" or "selling agent" they

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are amenable to charging section under the service tax law. This position is further confirmed when Sub-Rule (7C) Rule 6 of the Service Tax Rules, 1994 makes the distributor or selling agent liable to pay service tax for the taxable service of promoting, marketing or organising or in any other manner assisting in organising lottery. It is stated that for the purpose of Sub-Rule (7C) of Rule 6 "distributors or selling agent" shall have the same meaning assigned to them in Clause (c) of Rule 2 of the Lotteries (Regulation) Rules, 2010 notified vide GSR 278(e) dated 01-04-2010 and shall include distributor or selling agent authorised by the lottery organising State. It is re-emphasised that while the Respondents are neither denying nor contending that lottery is an actionable claim as service tax has not been charged or demanded on lottery *per se* but, is being charged on the services rendered by the Petitioners in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery in any kind or in any other manner.

47. It is submitted that even in the case of the second Writ Petition in the matter of M/s. Summit

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Online Trade Solution Private Limited, the Petitioner is a marketing agent as per agreement dated 09-11-2012 entered into between the Government of Sikkim and the Petitioner in WP(C) No.40 of 2015 under the Lotteries (Regulation) Act, 1998 and the Lotteries (Regulation) Rules, 2010. It is asserted that the Parliament has power to make laws with respect to any matter for any part of the territory of India notwithstanding that the matter is one enumerated in the State List. Since levy of service tax is not a subject-matter covered under List II but under the residuary power of the Union Parliament under Entry 97 of List I, the Union Parliament is competent to pass laws relating to service tax in respect of services rendered by the Petitioners which amounts to service provided or agreed to be provided by a selling or marketing agent of lottery tickets to a lottery distributor engaged by the Government of Sikkim under agreements executed from time to time. Such activities has been left out in the negative list services under Sections 66D(i) by the Finance Act, 2015 by Section 109(3) thereof. It is, therefore, submitted that

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the impugned letters dated 18-05-2015 and 12-06-2015 are justified as being issued under the statutory provisions in Circular D.O.F. No.334/5/2015-TRU dated 19-05-2015.

48. Mr. A. R. Madhav Rao, Learned Advocate, appearing on behalf of the Petitioner in WP(C) No.39 of 2015, opening his arguments submitted that this Court had examined similar provisions contained in the Finance Act, 2010, as involved in the present case and held that the Petitioners were not rendering any service and that the service tax provisions were hit by Entry 62 of List II of the Seventh Schedule of the Constitution of India and not saved by Entry 97 of List I of the Constitution of India which is only a residuary entry. Comparing the present Rules with the ones in 2010, the words used earlier were "for" promotion, marketing, etc., whereas in 2015, the word "for" is replaced by "in relation to" promotion, marketing, etc. In addition to this, selling of lottery has been introduced. It is submitted that these minor changes have not made any difference to the finding in *Future Gaming Case 2015* (supra) to bring the activity of buying

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and selling activities of lottery tickets by the Petitioners within the service tax net. Analysing the provisions in question, it is submitted that by introducing an Explanation any activity for consideration in relation to or for facilitation of a transaction in actionable claim is sought to be excluded from actionable claim while actionable itself is excluded from being a service.

49. Referring to the case of *Sunrise Associates* (supra), it was submitted that the legal position that buying and selling of lottery tickets is nothing but actionable claim has since been crystallised. Thus, following from this decision, in buying and selling lottery tickets the Petitioners are but indulging in actionable claim and not facilitating or doing any activity for a consideration in relation to actionable claims. It is, therefore, contended that the first portion of the Explanation does not bring the Petitioners under the service tax net. Even going by the decision in *Future Gaming Case 2015* (supra), no service is being rendered by the Petitioners to the State Government. The Petitioners are rather buying and selling the tickets as their own commercial venture which would be

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evident from the various contract clauses in the Agreement entered between the State Government and the Petitioners. The promotion of lottery tickets by way of advertisement is purely at the option and the discretion of the Petitioners devoid of any compulsion placed upon them by the State Government. The Petitioners also do not nor can they claim any reimbursement of the expenditure borne by them towards advertisement from the State Government.

50. Referring to the amendment of 2015, it was submitted that what is ousted from an actionable claim is the activity carried out by a lottery distributor or selling agent in relation to promotion, marketing, etc., or facilitating in organising lottery of any kind, in any other manner. It is urged that the Petitioners would not fall under this Clause as it is not doing any activity for consideration in relation to promotion, marketing, organising or selling of lottery or for facilitating in organising lottery of any kind. All that the Petitioners are doing is that they are buying and selling the lottery tickets and, therefore, no service is being rendered. He would submit that the definition of 'service' as doing

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any activity by a person for another for a consideration as provided under amended provision in Clauses (31A) and (44) of Section 65B, is much wider than the definition earlier construed by this Court in *Future Gaming Case 2015* (supra) whereby it has been held that "taxable service" means any service provided for or to be provided to any person by any other person and that definition of 'service' by itself is not satisfied in buying and selling of lottery tickets.

51. The impugned letter dated 25-05-2015 is based upon the Tax Research Unit Circular dated 19-05-2015 to charge service tax on the Petitioners which justifies the levy for buying and selling of lottery tickets on the ground that the objective of making the exclusion in charging service tax by the amendment of 2015 is to make it explicitly clear that while lottery *per se* is not subject to service tax, the services in relation to lottery as mentioned earlier, would be taxable. It is asserted that there are no such services being rendered by the Petitioners in relation to lottery activity carried on by it to make them liable for payment of service tax and that, even otherwise, as Entry 62 pertaining to

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taxes on betting and gambling falls under the State List, the provisions are liable to be struck down as being *ultra vires* the Constitution.

52. In the Explanation under Section 67 introduced by the Finance Act, 2015 at Clause (a) thereunder, consideration has been defined to include any amount retained by the lottery distributor or selling agent from the gross sale amount of lottery tickets in addition to the fee or commission or, as the case may be, the discount received being the difference on the face value of the lottery ticket and the price at which the distributor or selling agent gets such ticket. It is submitted that to take the consideration as discount is clearly misplaced in view of the decision of this Court in *Future Gaming Case 2015* (supra) by which this proposition was turned down relying upon the Division Bench decision of the Hon'ble Kerala High Court dated 07-04-2004 in the matter of *The Commissioner of Income Tax, Thiruvananthapuram and Another vs. Shri M. S. Hameed and Others* which decision was affirmed by the Hon'ble Supreme Court. It is submitted that in *M. S. Hameed* (supra) the income tax authorities sought to enforce

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tax deduction at source terming the discount on the face value of the tickets as commission which proposition was turned by the Kerala High Court holding that the assumption of realising discount by the buyer of the lottery tickets was totally unfounded. Mr. Rao drew the attention of this Court to the various portions of the judgment in *Future Gaming Case 2015* (supra) to which re-emphasise point more particularly, the following: -

“(ah) The facts of the present case are clearly distinguishable as noticed in the earlier part of the discussion. We have opined that the State Government is not paying any consideration to the petitioners nor the petitioners are rendering any service to the State. To the contrary the petitioners are paying minimum guaranteed amount for the purchase of entire lot of lotteries at the discounted price of 70 paise against the MRP of Re.1/- to the State. The nature of discount has already been discussed in detail.

(ai) It has been held by the Hon’ble Supreme Court in **All India Federation of Tax Practitioners** (Supra) that the service is an activity and service tax is in the nature of VAT i.e. Value Added Tax. The Hon’ble Supreme Court in **State of Bombay vs R.M.D. Chamarbaugwala** (supra) has also defined the betting and gambling as an activity.

(aj) In **T.N. Kalyanamandapam Association’s** case (supra) the clear view of the Hon’ble Supreme Court is that the predominant activity of the service provider was rendering of service and levy

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of service tax on 60% of the gross value was upheld and similarly in **Assn. of Leasing & Financial Service Companies** case levy of service tax on 10% of the gross contract value was upheld being a tax on component of service.

(ak) In the present case, undisputedly the lottery ticket is sold as a good by the State Government to the petitioners at the discounted value of 70 paise per ticket as against its gross value/ MRP of Re.1/-. The predominant part of the transaction is sale of goods. While considering the discount of 30% to the petitioners on the MRP, we have held that the discount is a normal trade practice in any transaction of sale and purchase. If the seller sells the goods at the MRP to its ultimate consumer, no intermediary will sell the goods unless he gets a discount to meet the expenditure for establishment, logistics and some component of profit. The State Government is unable to sell the tickets to the ultimate buyers and for that purpose the petitioners are appointed as stockists or distributors on payment of full sale consideration on discounted price. Further the sale by the petitioners to their stockists, selling agents etc is on discounted price from MRP after keeping the establishment and other expenditure and margin of profit for themselves. The last sale to the consumer of the lottery is on the MRP of Re.1/- per ticket. Thus, all the intermediaries have to be given discount from MRP for the purpose of meeting their expenditure and some component of profit. The advertisement etc. is only to popularize the State lottery but that does not mean that it is a service rendered to the State Government. As argued by Mr. Madhav Rao, this is for promotion of their own sale at their own expense without recovering it from the State Government. In any case service tax is being levied and collected on the gross amount without even isolating the discounted cost of lottery ticket. Thus in the present case there does not seem to be any circumstance where the activity of

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sale of State organized lottery by the petitioners through its various stockists, agents etc. can be construed to be the service rendered to the State Government so as to enable the Central Government to impose service tax on any component or element of the transaction between the State and the petitioners.”

53. It was further submitted that this Court by referring to Entries 34 and 62 of List II to Seventh Schedule of the Constitution of India and Entries 40 and 97 of List I of the said Schedule and after considering a conspectus of decisions of the Hon'ble Supreme Court including *R.M.D. Chamarbaugwala* (supra), held that betting and gambling envisaged under Entry 62 is itself an activity, though the lottery ticket is a tangible thing which carries with it right to participate in the game of chance. Thus, all the activities right from the publishing of the lottery tickets till participation in the game of chance, declaration of draw and even distribution of prizes to the winner fall within the purview of the expression “betting and gambling”. Thus, power to levy tax on organisation, promotion and marketing of lottery ticket being an Act of betting and gambling falls within the exclusive domain of Entry 62 of List II. In that case, it was also held that the

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Parliament would have had the legislative competence to impose tax including the service tax upon lotteries but for Entry 62 List II whereunder it is the exclusive legislative domain of the State Legislature to levy tax on any nature on the lotteries.

54. The Learned Counsel stressed upon the above extracted portion of the decision in *Future Gaming Case 2015* (supra) to submit that this Court had held that there is no service being rendered and the State Government is not paying anything for any service. Mr. Rao would submit that even in the later case of *Future Gaming Case 2014* (supra), this Court while construing the provisions introduced in 2012, had held that definition of service itself excluded actionable claim which fell outside the purview of the definition of service. Further, a Subordinate Legislation could not bring in the levy by way of Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994 which Rule has been retained even in 2015 with enhanced rates. Even on the contention of the Respondents that the new provision only dealt with the activity of the Petitioners of promoting, organising or in any other manner

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assisting in arranging sale of lottery ticket and not on lottery *per se*, it had been held that there was no such activity to render it taxable as rendering service and further, the proposition of the Respondents that it would fall under bundled services with reference to Section 66F was also turned down.

55. Thus, in view of the aforesaid two decisions of this Court, the activities of the Petitioners of buying and selling cannot be subjected to service tax. The Learned Counsel would submit that if one is to go by Explanation 2 to Clause (44) of Section 65B and the Explanation to Section 66D, then the Petitioners are carrying out activities in actionable claim transaction and, if the same were to be construed "as in relation to" or "in facilitating of a transaction" in actionable claim, then even the State Government selling the lottery tickets to the Petitioners would be liable to party to pay service tax. It is his submission that mere buying and selling tickets, i.e., actionable claim, cannot be considered as a transaction "in relation to an actionable claim" or "facilitation of transaction in actionable claim". Likewise the activity of the

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Petitioners would remain as “betting and gambling or lottery” and does not metamorphose into an activity for consideration “in relation to promotion, marketing, organising, selling of lottery or facilitating in organizing lottery of any kind, in any other manner” as provided in Explanation 2 to Clause (44) of Section 65B as introduced by the Finance Act, 2015.

56. Referring to the decision in *Delhi Cloth & General Mills Co. Ltd.* (supra), it was submitted that by introduction of Explanation in the Finance Act, 2015, the Respondents cannot get over the judgments of this Court in *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra). It was urged that by way of Explanation one cannot deem a law but only facts, and then only inferences of law may be drawn from such facts. Thus, by introduction of the Explanation in 2015 one cannot deem what is legally an actionable claim not to be an actionable claim. Likewise one cannot deem what is betting and gambling and lottery to be other than betting and gambling or lottery. It is submitted that in view of *B. R. Enterprises* (supra) where lottery is nothing but betting and gambling, it would not be

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permissible to hold otherwise which is what has been the consequence by the introduction of various amendments brought about by the Finance Act, 2015. The recent unreported decision of the Hon'ble Gujarat High Court dated 26-03-2015 in Special Applications No.10903 and 13134/2009 in the matter of ***Niko Resources Limited*** vs. ***Union of India and Others*** wherein an Explanation introduced to get over the binding judgment was under consideration, it was held, *inter alia*, that such object cannot be achieved only by introducing a *non obstante* clause. The decision in ***Hardev Motor Transport*** (supra) was also relied upon to propound that an Explanation cannot unseat the main provisions itself as was being sought to be done by the amendments in 2015.

57. Addressing us on the impugned Notification No.7/2015-ST amending the basic Notification No.30/2012-ST by which distributor or marketing agent has been made liable to pay whole of the service tax in respect of the activities of the selling agent to whom tickets are being sold by distributor or selling agent under reverse charge, it was submitted that since

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selling or marketing agents to the Petitioners are also buying and selling lottery tickets, the relationship which the Petitioners have with the State Government would also subsist between the Petitioners/Distributors and the selling or marketing agents as the agents are only transacting in actionable claim and actionable claim being excluded from the definition of 'service', the agents to the Petitioners cannot be liable to service tax. The agents of the Petitioners are not carrying out any activity for consideration in relation to or for facilitation of a transaction in actionable claim. Therefore, as per the Learned Counsel, the liability of payment of service tax under reverse tax mechanism as provided under Notification No.7/2015-ST dated 01-03-2015 cannot be fastened on the Petitioners. It is further submitted that the activity carried out by the agent to the Petitioners/Distributors, in any case, is also an activity covered under Entry 34 read with Entry 62 of List II of the Seventh Schedule to the Constitution of India and, therefore, such tax can be levied only by the State Government and not by the Centre.

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58. It is next contended that Notification No.30/2012-ST dated 20-06-2012, as amended by Notification No.7/2015-ST dated 01-03-2015, would not make the Petitioners liable for the activities of the agent as the definition of 'service' excludes a transaction in actionable claim. The levy of service tax on the agent of the distributor is not attracted since such a person is only indulging in buying and selling the lottery tickets and, therefore, would not be covered under Explanation 2 introduced to the definition of 'service' under Clause (44) of Section 65B of the Finance Act, 1994, as amended by the Finance Act, 2015. This is because under Explanation 2 it is only "any activity carried out for a consideration in relation to, or facilitation of, a transaction in money or actionable claim would not be covered as transaction in money or actionable claim".

59. As already noted, the submission of the Learned Counsel is that the agent to the Petitioners/Distributors is only buying and selling the lottery tickets are had not carrying out any activity for consideration in relation to the transaction in actionable

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claim or facilitation thereof. The Learned Counsel would submit further that the agent to the Petitioners/Distributors would also not be covered by Clause (a) in Explanation 2 as that pertains only to a lottery distributor. In Section 66D providing for negative list of services, the Explanation inserted thereto by the Finance Act, 2015 excludes from the negative list, the activity specified in Explanation 2 to Clause (44) of Section 65B. Thus, even the Explanation to 66D would not apply on the activity of the agent to the Petitioners/Distributors for the reasons aforesaid. Therefore, the reverse charge levied on the Petitioners for the activities of their selling or marketing agents would be unsustainable in law.

60. Mr. Surajit Dutta, Learned Counsel appearing on behalf of the Petitioner in WP(C) No.40 of 2015 while adopting the arguments of Mr. Rao, Learned Counsel for the Petitioner in WP(C) No.39 of 2015, only chose to supplement by submitting as follows: -

(i) The amendments brought to the Finance Act, 1994 vide the Finance Act, 2015, which are new in the

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present case has to be considered in the light of the definition of 'lottery' provided under Section 2(b) of the Lotteries (Regulation) Act, 1998, by which it is a scheme, in whatever form and by whatever name called, for distribution of prizes by luck of chance made those persons participating in the chances of a prize by purchasing tickets. In other words, it includes the entire activities connected with lottery.

(ii) The provisions of Section 4(c) of the Lotteries (Regulation) Act, 1998, that the State Government shall sell tickets either itself or through distributor or selling agents, will have to be understood in the context of the agreement entered between the Petitioner and the State Government. It is, therefore, the agreement that is required to be considered in order to understand as to whether the activity carried on by the Petitioners would fall within the mischief of the new provisions brought in by the Finance Act, 2015.

(iii) It is further submitted that the agreement entered into between the Petitioner and the State Government would clearly reveal that the transaction is

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purely of buying and selling of the lottery tickets. The Petitioner purchases in bulk for a price from the State Government thereby severing all relations between them. The Petitioner then in its turn sells it to his stockists, resellers, etc., and down the line in the same manner. There is no privity of contract between the State Government and the stockists and the sellers. Thus, there is no element of consideration as set out in Clause (44) of Section 65B of the Finance Act, 2015.

(iv) It is further submitted that Section 66D which sets out the negative list is a generic provision the core of which cannot be expanded by an Explanation. The dominant object of Section 66D is to exclude lottery which could not have been set at naught by inserting an Explanation to the contrary. Reference in this regard to ***S. Sundaram Pillai, etc. vs. V. R. Pattabiraman : (1985) 1 SCC 591*** and ***Swedish Match AB and Another vs. Security and Exchange Board of India and Another : (2004) 11 SCC 641.***

(v) The other aspect is that the activities of the Petitioner is being sought to be excluded from the negative list firstly, by inserting an Explanation to

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Section 66D which in turn relies upon the Explanation 2 added to Clause (44) of Section 65B.

61. Mr. D. K. Singh, Learned Counsel, appearing on behalf of the Respondents No.1 to 3, submitted that the Respondents by issuing the impugned letters had only asked the Petitioners to obey and comply with the law to pay service tax on the activities that they were carrying out, which, as per the Respondents, amounted to rendering of service. It is submitted that the power to levy service tax is vested in the Union Parliament under Entry 92C of List I in the Seventh Schedule to the Constitution of India. This considered along with Article 268A of the Constitution of India would in his submission, render the imposition of the levy of service tax by the Respondents as legal and valid. It is submitted that the decision of this Court in *Future Gaming Case 2015* (supra) in holding that Entry 92C under List I in the Seventh Schedule to the Constitution of India has not been notified is incorrect in view of the finding in the various decisions of the Hon'ble Supreme Court including *All India Federation of Tax Practitioners* (supra).

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62. It was then submitted that the Lotteries (Regulation) Act, 1998, was enacted to curb the evil attached to it for which harsh measures were felt essential. It is then submitted that it was in the exclusive domain of Parliament alone to enact a law in respect of lottery and no State Legislature under Entry 34 would have the power to do so. He would strongly rely upon *H. Anraj and Others Etc. vs. State of Maharashtra : (1984) 2 SCR 440* to impress upon us that it is the Union Parliament under Entry 40 of List I of the Seventh Schedule to the Constitution which alone can enact a law on lottery. He would specifically emphasise the following paragraph: -

“Entry 40 of List I of the VIIth Schedule to the Constitution is "Lotteries organised by the Government of India or the Government of a State". Entry 34 of List II of VIIth Schedule is, "Betting and gambling". There is no dispute before us that the expression "Betting and gambling" includes and has always been understood to have included the conduct of lotteries. Quite obviously, the subject 'Lotteries organised by the Government of India or the Government of a State' has been taken out from the legislative field comprised by the expression "Betting and gambling" and is reserved to be dealt with by Parliament. Since the subject 'Lotteries organised by the Government of India or the Government of a State' has been made a subject within the exclusive legislative competence of Parliament, it

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must follow, in view of Act. 246(1) and (3), that no legislature of a State can make a law touching lotteries organised by the Government of India or the Government of a State. This much is beyond controversy and the Maharashtra legislature has acknowledged the position, as indeed it must, in Section 32 of the Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958. It is an Act to control and tax lotteries and to tax prize competitions in the State of Maharashtra. Section 32(b) expressly provides that nothing in the Act shall apply to "a lottery organised by the Central Government or a State Government". This, as we said, is but a recognition of the prevailing situation under the Constitution. The Constitutional position cannot be altered by an act of the State legislature."

63. It was his contention that since the subject "lotteries organised by the Government of India or the Government of a State" has been made a subject within the exclusive legislative competence of Parliament, no Legislative of a State can make a law touching that subject in view of Articles 246(1) and (3) of the Constitution of India. Reference in this regard was also made to *Lachmandas Balachand, Paradise Lottery Centre and Others* vs. *The State of Andhra Pradesh and Others* : *AIR 1975 AP 50*, the relevant portions of which reads as under: -

"4. Now Entry 40 in List I is "Lotteries organised by the Government of India or the Government of a State."

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Entry 34 of List II is "betting and gambling." The expression "betting and gambling" has always been understood to include the conduct of lotteries and this was not disputed before me by the learned counsel. There is an apparent overlapping between Entry 40 in List I and Entry 34 in List II. It must follow that out of the field of legislation comprised by the expression "betting and gambling" (including the conduct of lotteries), lotteries organised by the Government of India or the Government of a State are taken out and reserved to be dealt with by the Parliament. No Legislature of a State can, therefore, make a law touching lotteries organised by the Government of India or the Government of a State."

As per the Learned Counsel, the aforesaid decisions would negate the view expressed by this Court in *Future Gaming Case 2015* (supra).

64. It is further submitted that under Entry 62 dealing with taxes on betting and gambling, the State Legislature cannot enact a law on taxation of lottery since the subject-matter is not inheres in the concept of gambling in Entry 62 of the State List. Entry 92C in List I having not been enforced taxation on lottery would be covered by the residuary power under Entry 97 of List I because admittedly the power of Parliament to regulate lottery under Entry 40 does not include the power of tax. By referring to the various States Laws

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on gambling, it was submitted that the activity of gambling are governed by distinct statutes in force in those States. Even in the State of Sikkim, as per the Learned Counsel, there are old laws in vogue on the subject. It is submitted that the levy of service tax is a sovereign function of Parliament which is covered by the residuary power under Entry 97 of List I. That wide latitude is available to the Legislature in passing such law having regard to the complexities involved in the formulation of taxation policy. Taxation, as per the Learned Counsel, is not mere source of raising money to defray expenses of Government but, is a fiscal tool to achieve fiscal and social objective including reduction in inequalities and the goals laid down in Article 38 of the Constitution of India. Reference in this regard is made to *Elel Hotels and Investment Limited and Another vs. Union of India* : (1989) 3 SCC 698 and *Sri Srinivasa Theatre and Others vs. Government of Tamil Nadu and Others* : (1992) 2 SCC 643.

65. Referring to and relying upon *R. S. Joshi vs. Ajit Mills Ltd. and Another* : AIR 1977 SCC 2279, it was submitted that when examining a Legislation from the

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angle of *vires*, the Court has to be resilient and not rigid, forward looking and not static and, be liberal and not verbal. It is a settled principle of law enunciated in ***V. M. Syed Mohammad & Co. and Another VS. State of Andhra : AIR 1954 SC 314*** that if there is any manner of doubt as to the constitutionality of a law, the Court generally tend to resolve it in favour of its validity. The Learned Counsel would remind this Court by relying upon ***State of Bihar and Others etc. etc. VS. Bihar Distillery Ltd. etc. etc. : AIR 1997 SC 1511*** that an Act of Parliament represents the will of the people and cannot be lightly declared as unconstitutional.

These are the submissions which can be considered as having some substance in the argument placed by Mr. D. K. Singh, Learned Counsel on behalf of the Respondents No.1 to 3.

66. Upon examining the pleadings, the documents available on the records and hearing the rival contentions of the Learned Counsel for the parties, one cannot but get a sense of *deja vu* as one of us (*Wangdi, J.*) was a part of the Bench which decided ***Future Gaming Case 2015*** (supra) and authored the

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decision in *Future Gaming Case 2014* (supra). In the present case, except for certain changes brought about to Sections 65B, 66D and 67 of the Finance Act, 1994 which would be a subject-matter for consideration in these Writ Petitions in the light of what have been decided earlier in the two rounds of litigation on the subject, the questions that have been raised and urged on behalf of the parties are identical.

67. We have set out the pleadings and the oral submission of the parties *in extenso* to demonstrate the width of the area that was covered but, the primary question that falls for determination is as to whether by the amendments to these provisions that shall be dealt with in detail later, is as to whether or not the activity of the Petitioners of promoting, organising or assisting in arranging the sale of lottery tickets of the Government of Sikkim is a taxable service falling within the purview of the Finance Act, 1994 as amended by the Finance Act, 2015. The cognate question that would then arise is as to whether there is an element of service in the activity of the Petitioners. These were the very questions that arose in the two previous

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cases. The other question that has cropped up in the present cases is also as to whether the Union Parliament has the competence to pass a law on service tax on lottery when there is no taxing provision in List I of the Seventh Schedule to the Constitution of India, particularly, when under Entry 62 of List II vests the State Legislature to levy tax on betting and gambling having regard to the fact that betting and gambling would bring within its ambit lotteries also. This was also the question that had fell squarely for consideration in the previous two cases.

68. This Court in *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra) has set at rest beyond any pale of doubt the following: -

- (i) That lottery consists of whole gamut of activities commencing from the buying and selling of lottery between the State Government and the Petitioners, between the Petitioners and the Stockists and then between the Stockists and the sellers, then between the sellers and the buyers and ultimately winning of the prize.
- (ii) That lottery is an actionable claim;

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- (iii) That “actionable claim” is defined under Section 3 of the Transfer of Property Act, 1882;
- (iv) That actionable claim is left out from the purview of service tax in the negative list by virtue of Section 66D of the Finance Act, 1994, as amended by the Finance Act, 2010 and the Finance Act, 2012;
- (v) That lotteries fall within the meaning of “betting and gambling” as provided in Entry 34 of List II following the jurisdiction in ***R.M.D. Chamarbaugwala Case*** (supra) and, therefore, by virtue of Entry 62, “taxes on betting and gambling” lies in the exclusive domain of the State Legislature;
- (vi) That buying and selling of lottery tickets is nothing but actionable claim following the decision in ***Sunrise Associates Case*** (supra);
- (vii) That in the garb of a Subordinate Legislation, i.e., Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994, it is not permissible to charge service tax as it would be beyond the scope of the parent Legislation. All the more so as Sub-Rule (7C) of Rule 6 only provides an optional composition scheme for payment of service tax and that unless there is levy of service tax under the statutory provisions, the alternate

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scheme cannot be extended so as to provide for such levy.

69. The above findings in the two cases of *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra) are no doubt under examination of by the Hon'ble Supreme Court in the Special Leave Petitions filed by the Respondents but, there being no order of stay, the findings would still prevail until such time it is set aside. Thus, so far as the question on the legislative competence of the Union Parliament to levy service tax in concerned, it is no more *res integra* subject of course to the final decision of the Hon'ble Supreme Court. For the present, it is settled that the Union Parliament has no such competence in view of the specific findings of this Court on this question in the two cases referred to earlier. We may, therefore, not delay ourselves on this.

70. In our view, the crucial question that would require determination is as to whether there has been any change on the finding of this Court in *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra) that the activities of the Petitioners would not

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constitute 'service' in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind and in any other manner by introduction of the Explanation 2 to Clause (44) of Section 65B by the Finance Act, 1994 as amended vide the Finance Act, 2015. In *Future Gaming Case 2015* (supra) the challenge was to the amended Sub-Clause (zzzzn) to Clause (105) of Section 65 of the Finance Act, 1994, which 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, organising 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;”

71. This provision was assailed on the following two grounds:

“10.

(A) that the activity being performed by the petitioners does not fall within the purview of “Taxable Service”, the transaction between the petitioners and the State of Sikkim simpliciter being a purchase and sale of lottery tickets or at the best an actionable claim; and

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- (B) the conduct of lottery is an act of “betting and gambling”, the same being a game of chance, the State Legislature under entry 62 of List II of Schedule 7 to the Constitution of India has exclusive competence to enact law to impose taxes. The Parliament under its residuary legislative power under entry 97 of List I, Schedule 7 to the Constitution of India lacks legislative competence to levy any tax in respect to the activity falling under entries 34 and 62 of List II.”

72. In *Future Gaming Case 2015* (supra) this Court after examining the entire scheme of the Constitution and the various decisions of the Hon’ble Supreme Court concluded as follows: -

- “(i) In the backdrop of discussion on Ground (A) we have no hesitation to conclude that the activities of the lottery distributors i.e. the petitioners herein do not constitute a service and thus beyond the purview of “taxable service” as statutorily defined under clause (zzzzn) of sub-section 105 of Section 65 of the Finance Act, 1994 as amended vide Finance Act, 2010.
- (ii) The activity of promotion, marketing, organizing or in any other manner assisting in organising game of chance including lottery is an activity included in the expression “betting and gambling” as incorporated under Entry 34 and 62 of List II to Seventh Schedule of Constitution of India.
- (iii) The activity of promotion, marketing, organizing or in any other manner assisting in organising game of chance including lottery

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being an activity of "betting and gambling" under Entry 62, List II to Seventh Schedule of Constitution of India, the State Legislature alone is competent to levy any tax on such activity under Entry 62.

- (iv) The Parliament has the competence and jurisdiction to levy taxes on any subject matter including "service tax" under Entry 97, List I, read with Article 248 of the Constitution of India except where such powers are traceable to any of the entries in List II and III to Seventh Schedule of Constitution of India.
- (v) Power to tax the activity of "betting and gambling" as explained above being within the exclusive domain of State Legislature under Entry 62, List II, 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 such activity."

73. Upon such conclusion Sub-Clause (zzzzn) to Clause (105) of Section 65 of the Finance Act, 1994 introduced by Finance Act, 2010 was struck down as being *ultra vires* the Constitution of India having been enacted in contravention to Entry 97 of List I of the Seventh Schedule read with Article 148 of the Constitution of India.

74. In the next *Future Gaming Case 2014* (supra) the very same questions arose in view of the

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amendment brought to the Finance Act, 1994 by the Finance Act, 2012, the provisions that were assailed are 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 (4 of 1882);*

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

.....
(44) *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*

(a) *an 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;*

Charge of service tax on and after Finance Act, 2012.

66B. *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*

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collected in such manner as may be prescribed.

Negative list of services.

66D. *The negative list shall comprise of the following services, namely:—*

.....
(i) *betting, gambling or lottery;*
....."
[emphasis supplied]

75. It may be noted that the challenge to these provisions were exactly the same as those in the *Future Gaming Case 2015* (supra) reproduced under paragraph 71 (A) and (B) above. The core question that called for determination in the latter case, as noted already, was as to whether or not the activity of the Petitioners of promoting, organising or assisting in arranging the sale of lottery tickets of the Government of Sikkim is a taxable service falling within the purview of the Finance Act, 1994 as amended by the Finance Act, 2015.

76. This question also has been squarely dealt in *Future Gaming Case 2015* (supra) which was then considered and followed in *Future Gaming Case 2014* (supra). The following portions of the decision in *Future*

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Gaming Case 2014 (supra) will answer the question as to whether or not the activity of the Petitioners of promoting, marketing or assisting in arranging the sale of lottery tickets of the Government of Sikkim is a taxable service falling within the purview of the Finance Act, 1994 as amended by the Finance Act, 2015.

“45. On behalf of the Petitioner, the challenge to the amendment of 2012 to the Finance Act, 1994, is multi-pronged but, in our view, the question that would clinch the issue would be as to whether or not the Petitioner is an agent of the Government of Sikkim in pursuance to the agreement dated 10-08-2009 in respect of the sale of lottery tickets. However, we find that this question which was also directly in issue stands fully answered in the judgment of this Court dated 29-11-2012 in WP(C) No.36 of 2011 in the matter of *M/s. Future Gaming Solutions Pvt. Ltd. (supra)* and, therefore, it need not delay us much except to recapitulate hereafter on some of the essential aspect of the finding.

46. We find that the pleadings and oral submissions placed before us on the question are identical and repeat of those placed in WP(C) No.36 of 2011. The decisions as well as other precedents cited before us and the commentaries referred to apart from the various terms and conditions of the very agreement dated 10-08-2009 highlighted in the present case, are found to have been considered in detail. We also find that *Sunrise Associates (supra)* has been taken note of where the Hon'ble Supreme Court has held lottery tickets to be 'goods' in the wider sense of the term though it is an 'actionable claim' and that it is only on account of the statutory exclusion from the definition of goods in various State

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Sales Tax Laws that it has been held not to be 'goods'. Decision of this Court in WP(C) No.19 of 2007 in the matter of ***M/s. Martin Lottery Agencies Limited (supra)*** has been referred to and notice taken of the conclusion arrived at therein by relying upon ***Sunrise Associates (supra)*** that lottery ticket is an 'actionable claim' and, therefore, outside the purview of 'service' and that the Appeal filed by the Union of India being Civil Appeal No.3239 of 2009, was dismissed and the decision of this Court was not interfered with.

47. We have also noted that for arriving at a conclusion as to whether the Petitioner having been appointed as a distributor can constitute an agency, we have accepted the argument that distributor as the purchaser acts as a wholesaler on payment of total sale price, he is a buyer and not an agent. We had also accepted the proposition founded on ***Pioneer Tools and Appliances (P) Ltd. (supra)*** that in the light of the terms of the agreement the State Government had no concern with the further sale of the ticket by the Petitioner except for it to comply with the regulatory provisions contained in the Lotteries (Regulation) Act, 1988, and the Rules framed thereunder and that the State Government was not concerned with the amount of discount or margin or profit left by the Petitioner for their stockists or selling agents. That clause 30 of the agreement made this all the more clear while unambiguously stipulating that the State Government shall have no privity of the contract with the stockists, selling agents or the ultimate purchaser of lottery tickets in the street making it the sole responsibility and liability of the purchaser in case of any dispute or claim. Distinction between agents and purchaser defined in ***Benjamin's Sale of Goods, 8th Edition*** and ***Bowstead & Reynolds on Agency, 16th Edition 1996 (supra)*** were also taken note of and referred to while considering this question. Decisions in ***Alwaye Agencies (supra)***; ***Gordon Woodroffe (supra)***; ***Bharat Sanchar Nigam Ltd. (supra)***;

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Imagic Creative (P) Ltd. (supra) and *Indian Railways C. & T. Corpn. Ltd. (supra)* were also analysed for determination of the very question. Upon consideration of all these it was ultimately concluded that where the transaction is purely that of sale and purchase from which the component of service cannot be clearly segregated and is undiscernible, no service tax is payable and that where the two components of 'sale' and 'service' are capable of compartmentalisation service tax may be leviable on the service component in a transaction.

48. On the related question regarding the discount of 30% provided on the MRP of the lottery ticket which as per the Respondents was a commission provided to the Petitioner in lieu of the service rendered by them, we had taken note of *Mahindra and Mahindra Ltd. (supra)*; *Pioneer Tolls and Appliances (P) Ltd. (supra)*; *Philips India Ltd. vs. Collector of Central Excise, Pune : (1997) 6 SCC 31*; *Collector of Central Excise, Boroda vs. Besta Cosmetics Ltd. : 2005 (183) ELT 122 (SC)*; a Division Bench judgment of the Kerala High Court dated 07-04-2004 in the matter of *The Commissioner of Income Tax, Thiruvananthapuram and Another vs. Shri M. S. Hameed and Others* and *Commissioner of Income Tax vs. Jai Drinks Pvt. Ltd. : 2011 (336) ITR 383 (Delhi)*, to ultimately hold that on the undisputed position that the lottery ticket is sold as a good by the State Government to the Petitioner at the discounted value of 75 paise per ticket as against its gross value/MRP of Rupee One, is a discount provided in a normal trade practice in any transaction of sale on purchase and, that the activity of the Petitioner of sale of the State Lottery through its various stockists, agents, etc., cannot be construed to be a service rendered to the State Government to fall within the purview of the service tax in the absence of any element of service in such activity.

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49. In *Martin Lottery Agencies (supra)*, following the legal proposition that the activity of the lottery is *res extra commercium* laid down in *R.M.D. Chamarbaugwala (supra)* and *B. R. Enterprises (supra)* as being gambling, doubt was expressed "as to how service element of the entire transaction is to be ascertained". The decision in *P. Muraleedharan (supra)* relied upon on behalf of Respondents No.1 to 3 no doubt rejected the contention that the Petitioner were not rendering any service in relation to marketing of lottery in the portion of the judgment extracted earlier. However, we find this in conflict with an earlier decision dated 07-04-2004 in *M. S. Hameed (supra)*, also of a Division Bench of that very Court, the relevant portion of which is reproduced below for convenience: -

"Whether tax can be deducted or collected at source from the persons who received bulk quantity of lottery tickets at a commission or at a discounted price invoking Section 194 G of the Income Tax Act, 1961 (in short 'the Act') considering the nature of transactions between the petitioners and Government is the question to be decided in this case.

4. Here, State is not responsible for paying any amount to lottery agents. Lottery ticket is sold at a reduced price to bulk purchasers depending upon the offtake as mentioned in Ext.P4. Anybody is entitled to purchase it in bulk at that rate. Therefore, petitioners are not agents strictly. On payment of sale price, ticket is sold at that price. Whether it is further sold to their sub agents or they directly sell to to the public is not the Government's look out. Even if bulk tickets purchased by the petitioners remains unsold, Government is not bound to pay anything to them. It is the loss of the petitioners. Sold tickets will not be taken back by the Government. As per the terms in Ext.P1, Government is not responsible for paying anything to the petitioners. Section 194G authorises only the deduction at source if Government is liable to pay any commission or any remuneration to the lottery agents. Unlike Section 206C, Section 194G is not giving any permission to collect tax from the buyer. If Government pays remuneration or commission or any amount (by whatever

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name it is called) to the lottery agents, Section 194G will apply. Here, Government is selling the tickets to the petitioners at a reduced price considering the bulk quantity they are purchasing, in order to boost up the sale of lottery tickets on commercial consideration. But that is outright sale. It is a well-settled principle that in a taxing Statute, one has to look merely at what is clearly said. There is no room for any intendment.

There is no equity or presumption as to tax. When Government is not responsible for paying commission or remuneration to the petitioners when it is selling lottery at a reduced price, there is nothing for deduction and paying balance after deducting at source is not possible in these transactions.”

50. Although this decision was rendered in the context of Section 194G of the Income Tax Act, 1961, providing for deduction of income tax at source at the rate of 10%, it would be equally germane for consideration in the present case also in so far as the finding that the Petitioners are not agents and that the Government is not responsible for paying commission or remuneration. SLP (C) No.10985 of 2004 in *M. S. Hameed's case* was dismissed and, therefore, by implication the finding that the Petitioner is not an agent of the Government of Sikkim in the sale, promotion, etc., of its lottery tickets still holds the field. In any case, the finding of *M. S. Hameed's case* is in consonance with the decision of this Court in WP(C) No.36 of 2011 wherein apart from holding that the Petitioner was not an agent of the Government in relation to the sale of lottery, it has categorically been decided that there is no element of service in such activity

51. Following from the above, we are of the view that the basis upon which the Respondents No.1 to 3 are seeking to impose service tax upon the Petitioner under the Amendment Act of 2012 to the Finance Act, 1994, on the erroneous premises that the Petitioner is a service provider engaged in assisting in arranging sale of lottery ticket for the Government of Sikkim is clearly unsustainable.”

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77. However, since in the present case, we are dealing with the Finance Act, 1994, as amended by the Finance Act, 2015, it would be necessary to examine as to whether the position set out above stands altered. Upon examination of the existing agreements between the Petitioners and the Government of Sikkim, the constitutional scheme and a catena of decisions of the Hon'ble Supreme Court as well as the finding of this Court in the *Future Gaming Case 2014* (supra) held as under: -

"70.

- (i) In the light of Sub-Section (1) to Section 65B read with Sub-Section (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, organising, 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

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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/FGSIPvtLtd/ GTK/ 2009/295 dated 06-07-2012 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-ST dated 20-06-2012 and the Service Tax Rules is *ultra vires* the very provisions of the Finance Act being in excess of the powers vested therein."

78. Based on the above, it was held by us that transaction in lottery tickets are not liable to service tax under the provisions of the Finance Act, 1994 as amended by the Finance Act, 2012, thereby quashing the impugned letters in that case issued by the Respondents.

79. In our view, the primary finding in both the cases is that the activities of the lottery distributors,

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i.e., the Petitioners, did not constitute a service and thus beyond the purview of taxable service as the activity of the Petitioners comprising of promotion, organising, reselling or in any other manner assisting or arranging the lottery tickets of the State, did not establish the relationship of principal and agent but rather that of a buyer and a seller on principal to principal basis in view of the nature of the transaction being bulk purchase of the lottery tickets by the Petitioners from the State Government on full payment of price as a natural business transaction and, other related features and there being no privity of contract between the State Government and the Stockists, agents, resellers, etc., under the Petitioners. The question that would arise in the present case is as to whether the primary finding of this Court in the two decisions would also apply in the facts of the present case having regard to the amendment to the Finance Act, 1994 brought about by the Finance Act, 2015.

80. This being the crucial question, we may reproduce the relevant amendments which are as follows: -

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“65B. In this Chapter, unless the context otherwise requires,—

.....

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

.....

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

(a) an activity which constitutes merely,—

.....

(iii) a transaction in money or actionable claim;

.....

Explanation 2.—For the purposes 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, organising, selling of

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lottery or facilitating in organising lottery of any kind, in any other manner;

.....

Negative list of services.

66D. The negative list shall comprise of the following services, namely:—

.....

- (i) betting, gambling or lottery;

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

.....

Valuation of taxable services for charging service tax

67. (1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value, then such value shall,—

- (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

.....

Explanation.—For the purposes of this section,—

- (a) "consideration" includes—

.....

- (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or

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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.”

81. On a close examination of the provisions reproduced above, it becomes quite evident that the object of the amendment was to get over our finding in the *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra) which also would be evident from the impugned letter bearing No.V(3)7/ST/FGSIPvtLtd/GTK/2009/344 dated 25-05-2015 which is reproduced below: -

“

Your attention is invited to the Circular under D.O.F. No.334/5/2015-TRU dated 19.05.2015, issued by the Tax Research Unit, Department of Revenue, Ministry of Finance, Govt. of India (copy enclosed) in relation to the changes effective from 01.06.2015 in respect of service relating to lottery. An explanation has been added in entry (i) of section 66D to specifically state that “betting, gambling or lottery” shall not include the activity carried out by a lottery distributor or selling agents in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of kind, in any other manner. It has been clarified in the said circular that the objective of making these exclusions was to make it explicitly clear that while lottery per se is not subject to service tax, aforesaid services in relation to lottery will be taxable. This will come into effect from 01.06.2015. IN respect of services

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provided by lottery distributors and selling agents, the service provider has also been allowed to pay service tax at an alternate rate to the conditions as prescribed under Rule 6(7C) of the Service Tax Rules, 1994.

This is brought to your notice for favor of your kind information and necessary compliance, please.

.....”

82. As would appear from the provisions reproduced above, Clause (31A) has been specifically inserted under Section 65B to include definition of “lottery distributor” or “selling agent”. Under Clause (44) ‘service’ has been defined to mean any activity carried out by a person or another for consideration and includes a declared service but shall not include an activity which constitutes merely a transaction in money for actionable claim. In order to overcome the finding of this Act in the earlier judgments, Explanation 2 appears to have been inserted to Clause (44) of Section 65B by which the transaction in money or actionable claim as provided under Clause (44) excluded any activity carried on for a consideration in relation to or for facilitation of, a transaction in money or actionable claim, including the activity carried out, *inter alia*, by a lottery distributor or selling agent in

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relation to promotion, marketing, organising, selling lottery or facilitating in organising lottery of any kind in any other manner. Similarly, in Section 66D which provide for the negative list of service another Explanation is found to have been inserted by which the activity specified in Explanation 2 to Clause (44) of Section 65B has been specifically excluded. On a bare reading the most crucial provision, in our view, appears to be Clause (44) of Section 65B of the Finance Act, 1994, which defines 'service' that would require examination in order to ascertain as to whether the activity of the Petitioners would fall within the meaning of 'service' and, therefore, liable to levy of service tax under the Finance Act, 1994. 'Service' has been defined under Clause (44) as meaning any activity carried out by a person for another for consideration. Thus, the principal requirement that are embedded in these provisions clearly appears to be (a) that the activity should be carried out by a person for another and (b) that such activity should be for a consideration.

83. In *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra) it has been held most

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unequivocally, *inter alia*, that the activity of the Petitioners comprising of promotion, organising, reselling or any other manner assisting in arranging the lottery tickets of a State Lottery does not establish the relationship of a principal and an agent but that of a buyer and a seller on principal to principal basis there being bulk purchase of lottery tickets by the Petitioners from the State Government on full payment on a discounted price as a natural business transaction and other related features and, of there being no privity of contract between the State Government and the Stockists, agents, sellers, etc., under the Petitioners. In our view, in this case also the very same conclusion would be applicable as the nature of the relationship between the Petitioners and the State Government and the Petitioners and the Stockists, agents, resellers, etc., does not appear to have been altered.

84. Whether or not there has been any change or not in such relationship can be ascertained from the relevant portions of the agreement dated 24-01-2015 in WP(C) No.39 of 2015 which reads as under: -

“

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This Agreement is made on this the **24th day of January, 2015** between the Governor of Sikkim, through the Principal Secretary, Finance, Revenue and Expenditure Department, Government of Sikkim (hereinafter referred to as the "Government") which expression shall unless excluded by or repugnant to the context means and includes its successors in office and assigns of the **FIRST PART**

AND

M/s. Future Gaming and Hotel Services Private Limited, a company having its registered office at 54, Mettupalayam Road, G. N. Mills Post, Coimbatore – 641029 Tamilnadu, and having its branch/sales office at Kazi Road, Gangtok, Sikkim- 737101, represented by its Managing Director, Mr. S. Martin, son of Mr. Santiago (hereinafter referred to as the 'Sole Purchaser / Distributor') which expression shall, unless excluded by or repugnant to the context means and includes its successors and assigns of the **SECOND PART**;

.....

WHEREAS M/s. Future Gaming and Hotel Services Limited has agreed to be appointed as the Sole Purchaser/Distributor to market and sell tickets of such lottery schemes as are allotted to them by the Government.

.....

2. **APPOINTMENT OF SOLE PURCHASER/DISTRIBUTOR/PROMOTER**

Notwithstanding anything contained hereinafter, the Government, the Sole Purchaser/Distributor, Promoter and their distribution network shall all be jointly and severally liable to ensure that all provisions of the Act and Rules are strictly followed:

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- 2.1 The Government based on the report and recommendations of the Tender Selection Committee hereby appoints M/s Future Gaming and Hotel Services Private Limited as Sole Purchaser/Distributor, exclusively for paper lottery tickets to market 8 (eight) weekly lottery schemes per day promoted by the State of Sikkim as as permitted by the Government under the Lotteries (Regulation) Act, 1998 and Lotteries (Regulations) Rules, 2010 for a period of 5 (five) years w.e.f. 01-02-2015 to 31-01-2020 (both days inclusive).
- 2.2 The appointment of the Sole Purchaser/Distributor is not transferable.
- 2.3 The Sole Purchaser/Distributor on his own terms and at his own risk and responsibility shall be entitled to appoint Sub/Area Distributor/Promoter, Sub/Area Stockists, sellers in the discharge of any obligations hereunder or as a result of this agreement. However, the Government shall have no responsibility or liability towards such Sub-Area Distributor/Promoter, sub/Area stockists, sellers, and shall have no privity of contract with them. Any dispute whether as result of non-payment or otherwise shall not discharge the Sole Purchaser's/Distributor's obligation towards the State Government under this Agreement.
- 2.4 All the relevant Acts, Rules and Regulations of the Government of India and the Government of Sikkim pertaining to lotteries shall be binding on the Sole Purchaser/Distributor.
- 2.5 It shall be the responsibility to the Sole Purchaser/Distributor to ensure that its Sub/Area Distributor/Promoter, Sub/Area Stockists, Sellers adhere to the provisions of the Act, Rules and all other procedures, regulations etc.

.....

10. **MINIMUM GUARANTEED REVENUE:**

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With regard to the provisions of this Agreement, the Sole Purchaser/Distributor has agreed to deposit the Minimum Guaranteed Revenue to the Government as under: -

.....

13. **ADVERTISEMENT AND PROMOTIONS:**

13.1 The Sole Purchaser/Distributor may use all necessary advertisement and promotion to create and enhance the image for the lottery schemes of the State of Sikkim. These shall include coverage through press and advertisement and promoting through direct mail and publicity through events like road shows, etc.

13.2 All publicity in respect of the lotteries shall be at the option of the Sole Purchaser/Distributor. However, the Sole Purchaser/Distributor shall ensure that the manner in which the lotteries of the State are portrayed in written, visual or electronic media do not tarnish the image of the Government.

13.3 All costs towards such publicity shall be exclusively borne by the Sole Purchaser/Distributor.

.....”

85. As would appear from the clauses of the agreement extracted above, the Petitioner is in fact a wholesaler as held in *Future Gaming Case 2015* (supra) and the relationship between the Petitioner and the Government of Sikkim is on a principal to principal basis. The very words used in the recital that the Petitioner “has agreed to be appointed as the sole

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Purchaser/Distributor to market and sell tickets of lottery schemes” would reveal that the Petitioner is not an agent of the Government of Sikkim who is carrying on the activity of marketing or selling of lottery on a consideration of promotion of a commission or the like. Thus, we are inclined to agree with the submission of Mr. Rao that the interpretation of TRU Circular dated 19-05-2015 as reproduced earlier is clearly erroneous as the department has failed to take note of the definition of ‘service’ provided under Clause (44) of Section 65B alluded to earlier.

86. Thus, as we find no change in the circumstance by introduction of the new provisions by the Amendment Act of 2015 from that which existed earlier in *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra), we have no hesitation to hold that the findings of this Court in *Future Gaming Case 2014* (supra) still continue to hold good. The activity carried out by the Petitioners in relation to promotion of marketing, organising, selling of lottery or facilitating in organising lottery of any kind in any other manner, would clearly not fall within the meaning of ‘service’ as

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provided under Clause (44) of Section 65B as the two essential elements (a) that the activity should be carried out by a person for another and (b) that such activity should be for a consideration, are unmistakably lacking.

87. This position appears to be further reinforced by Circular No.354/59/2006-TRU dated 10-11-2006 by which it has been clarified by the Central Board of Excise and Customs that the service tax can be levied only when a consideration is received for taxable services provided. The Circular having been issued in terms of Section 37B of the Central Excise Act, 1994 (as applicable to Finance Act, 1994) in terms of Section 83 of the Finance Act, 1994, would be binding on all field formations of the department in view of the various decisions of the Hon'ble Supreme Court including *Rajpurohit GMP India Ltd.* (supra) and *Kurain Abramham (P) Ltd.* (supra) referred to by Mr. Rao.

88. The other aspect of the matter is the impugned letter dated 25-05-2015 in WP(C) No.39 of 2015 and letter dated 18-05-2015 and 12-06-2015 in

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WP(C) No.40 of 2015 appears to have been issued on the strength of Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994, to require the Petitioners to pay service tax. In *Future Gaming Case 2014* (supra) we have held that Sub-Rule of (7C) Rule 6 only provides on optional composition scheme for payment of service tax which by itself does not create a charge of service tax and that this Rule is only a piece of Subordinate Legislation framed under the rule making power provided in the Finance Act, 1994 and, therefore, in view of the position of law that Subordinate Legislation cannot be override the statutory provisions, Sub-Rule (7C) of Rule 6 cannot go beyond the provision of the Finance Act, 1994. While holding this, we have placed reliance upon *Tahir Hussain vs. The District Board, Muzaffarpur : AIR 1954 SC 630*; *Hukum Chand Etc. vs. Union of India and Others : AIR 1972 SC 2427*; *Jagat Talkies Distributors vs. Deputy Commissioner of Police : (2010) 170 DLT 659 (Del)* and *Union of India vs. S. Srinivasan : JT (2012) 5 SC 618*. This provision has not changed even now and, therefore, the finding would apply even in this case.

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89. As noted earlier, the amendments in question have been carried out by the Parliament in order to overcome the decisions of this Court in the *Future Gaming Case 2015* (supra) and *Future Gaming Case 2014* (supra) which we have alluded to in detail. We agree with Mr. Rao that it is trite that when a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. We may in this regard, refer to the decision of the Hon'ble Supreme Court while dealing with a similar circumstance in the case of *Delhi Cloth and General Mill* (supra) referred to on behalf of the Petitioner.

90. We are also in agreement with Mr. Dutta that the main object of Section 66D is to exclude actionable claim which includes lottery. This obviously is being said to be set at naught by Explanations.

91. It is a settled position of law that an Explanation cannot enlarge the scope of a provision in

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Hardev Motor Transport (supra), it has been observed as

under: -

"31. The role of an Explanation of a statute is well known. By inserting an Explanation in the Schedule of the Act, the main provisions of the Act cannot be defeated. By reason of an Explanation, even otherwise, the scope and effect of a provision cannot be enlarged. It was so held in *S. Sundaram Pillai, etc. v. R. Pattabiraman* [(1985) 1 SCC 591] in the following terms: (SCC p.613, para 53)

"53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment,
....." "

Thus, even if we assume that the law has been validly passed, the amendment to the Finance Act,

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1994 by the amendment Act, 2015, cannot be held to be valid and, therefore, is liable to be struck down.

92. On the contention as regards the reverse tax levied on the Petitioners on the activity of their selling or marketing agents in pursuance of amendment to Notification No.30/2012-ST dated 20-06-2012 introduced by Notification No.7/2015-ST dated 01-03-2015, even this question is found to have been dealt with in *Future Gaming Case 2014* (supra) as would be evident from paragraphs 47 and 48 reproduced earlier. Since the selling and marketing agents purchase the tickets from the Petitioners/Distributors as goods on payment of price leaving the former charged with all the liabilities down the line to the second tier agents it cannot, in our view, be considered as an activity carried out for consideration in relation to or for facilitation of a transaction in money carried out by a lottery distributor or a selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind in any other manner as provided under Explanation 2 to Clause (44) of Section 65B. There is no dispute of the fact that like the

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Petitioners/Distributors in the first tier who purchase the lottery tickets in bulk as goods for price from the State Government, the second tier comprising of the selling and marketing agents also purchase from the Petitioners/Distributors lottery tickets in bulk as goods on payment of price severing all other relations. There is no privity of contract between the Petitioners/Distributors and the sellers and buyers down the line after the second tier. Thus, the levy of reverse service tax vide Notification No.30/2012-ST dated 20-06-2012 as amended by Notification No.7/2015-ST dated 01-03-2015 is clearly unsustainable and liable to struck down.

93. For these reasons, we are of the considered opinion that the other contention raised by Mr. Rao would be quite redundant and, therefore, not necessary to be dealt with.

94. Insofar as the submission of Mr. D. K. Singh, Learned Counsel for the Respondents No.1 to 3 and the decision cited by him appear to be purely academic having only a remote connection with the matter *in lis* and, therefore, do not deem it necessary to deal with those and, therefore reject them as irrelevant.

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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 sought 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

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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.

96. In the result, the Writ Petitions are allowed in terms of the prayers contained therein.

97. No order as to costs.

Sd/-
(M. M. Rai)
Judge
14-10-2015

Sd/-
(S. P. Wangdi)
Judge
14-10-2015

Approved for reporting : **Yes**

Internet : **Yes**