2025 INSC 181

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.4289-4290 OF 2013

UNION OF INDIA & OTHERS .... APPELLANTS

VERSUS

FUTURE GAMING SOLUTIONS PVT. LTD. & ANOTHER ETC. .... RESPONDENTS

WITH

CIVIL APPEAL NOS.9506-9507 OF 2013

CIVIL APPEAL NOS.2172-2173 OF 2016

CIVIL APPEAL NO.16118 OF 2017

CIVIL APPEAL NO. OF 2025
(Arising out of SLP (C) No.18565 of 2014)

CIVIL APPEAL NO. OF 2025
(Arising out of SLP (C) No.30629 of 2014)

CIVIL APPEAL NO. OF 2025
(Arising out of SLP (C) No.14111 of 2015)

CIVIL APPEAL NO. OF 2025
(Arising out of SLP (C) No.19200 of 2017)

CIVIL APPEAL NO. OF 2025
(Arising out of SLP (C) No.23945 of 2017)

J U D G M E N T

NAGARATHNA, J.

I N D E X

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Leave granted in SLP (C) No.18565 of 2014; SLP (C) No.30629 of 2014; SLP (C) No.14111 of 2015; SLP (C) No.19200 of 2017 and SLP (C) No.23945 of 2017.

2. This batch of cases assail various orders of the High Court of Sikkim passed in several writ petitions which were filed by the respondent-assesses. The appellant is the Union of India in all these cases except in SLP (C) No.19200 of 2017. For immediate reference, the following table which has been provided by learned counsel for the Union of India would indicate the details:

Sl. No.	Case No(s).	Name of the Assessee(s)	Impugned Judgment & Order Dated	Amendment Year
1	C.A. NOS.4289-4290/2013	1. Future Gaming Solutions Pvt. Ltd. 2. Summit Online Trade Solutions Pvt. Ltd	29.11.2012	2010
2	C.A.NOS. 9506-9507/2013	1. Summit Online Trade Solutions Pvt. Ltd. 2. Future Gaming Solutions India Pvt. Ltd.	10.05.2013	2010
3	SLP(C) No. 18565/2014	Future Gaming Solutions India Pvt. Ltd.	24.09.2013	2012
4	SLP(C) No. 30629/2014	Summit Online Trade Solutions Private Limited	13.05.2014	2012
5	SLP(C) No. 14111/2015	Tashi De Lek Gambling Solutions Pvt. Ltd.	15.07.2014	2012

Sl. No.	Case No(s).	Name of the Assessee(s)	Impugned Judgment & Order Dated	Amendment Year
6	C.A. NOS.2172-2173/2016	1. Future Gaming & Hotel Services Pvt. Ltd. 2. Summit Online Trade Solutions Pvt. Ltd.	14.10.2015	2015
7	SLP(C) No. 19200/2017	Future Gaming & Hotel Services (P) Ltd.	23.03.2017	2016
8	SLP(C) No. 23945/2017	Summit Online Trade Solutions (P) Ltd.	23.03.2017	2016
9	C.A. No. 16118/2017	Future Gaming & Hotel Services (P) Ltd.	23.03.2017	2016

2.1 The petitioners before the High Court (respondents-assessees herein) are companies incorporated as private limited companies under the Companies Act, 1956. The respondents-assessees herein are engaged in the business of the sale of paper and online lottery tickets organised by the Government of Sikkim. They entered into respective agreements with the State of Sikkim.

2.2 Since these cases assail the amendments made to the provisions of the Finance Act, 1994 from time to time commencing from the year 2012, the factual backdrop of these cases shall be in accordance with the amendments made to the Act and shall be stated chronologically.

History of this controversy:

3. The Parliament introduced service tax through the Finance Act, 1994 under Chapter V, which took effect on 01.07.1994. Later, through the Finance Act, 2003, the Finance Act,1994 was amended to include a new category of taxable services, namely "Business Auxiliary Service," under sub-section (19) of Section 65, effective from 01.07.2003. Pursuant to this amendment, the Service Tax Department issued notices to the respondents-assessees herein, under the amended Finance Act in 2007, requiring them to register under the said Act for payment of service tax.

3.1 Being aggrieved, the respondents-assessees herein approached the High Court in ***W.P. (C) No.19 of 2007,*** titled ***Martin Lottery Agencies Ltd. vs. Union of India,*** challenging the levy of service tax upon the sale of lottery tickets. *Vide* judgement dated 18.09.2007, the High Court allowed the writ petition filed by the respondents-assessees herein declaring that service tax was not payable on the activity undertaken by the respondents-assessees herein.

3.2 The aforesaid judgment came to be challenged before this Court in ***Civil Appeal No.3239 of 2009***. During the pendency of the Civil Appeal, the Finance Act, 1994 was further amended with the introduction of an "Explanation" to Section 65(19)(ii) of the Finance Act, 1994. The Explanation is reproduced hereunder: -

> "Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo; [Explanation inserted vide Finance Act, 2008 w.e.f. 16th May, 2008]"

3.3 In ***Union of India vs. Martin Lottery Agencies Ltd, Civil Appeal 3239 of 2009*** reported in ***(2009) 12 SCC 209***, this Court delivered its judgment on 05.05.2009 holding that the High Court had rightly set aside the notices issued to the respondents-assessees herein. However, this Court held that the Explanation to Section 65(19)(ii) of the Finance was a substantive law and declared it to be prospective in operation. Regarding the validity of the Explanation, the issue was left open.

3.4 The respondents-assessees herein, again, approached the High Court by filing ***Writ Petition (C) No.36 of 2009*** titled ***M/s. Future Gaming Solutions Pvt. Ltd. vs. Union of India*** challenging the validity of the Explanation to Section 65 (19)(ii) of the Finance Act, 1994. The High Court dismissed the writ petitions *vide* judgement dated 30.07.2010. Being aggrieved by this dismissal, the respondents-assessees herein approached this Court by filing a Special Leave Petition, being ***SLP (C) No.26771 of 2010***. The same was converted as a ***Civil Appeal No.2782 of 2012***.

Recently this Court (this very Bench) in ***Civil Appeal Nos.2842-2848 of 2012*** titled as ***K. Arumugam vs. UOI dated 08.08.2024*** reported in ***2024 SCC Online SC 2278 ("K. Arumugam")*** and batch including ***Civil Appeal No.2782 of 2012*** allowed the appeals preferred by the respondents-assessees herein and set aside the order passed by the High Court dated 30.07.2010 and held that lottery tickets being actionable claims and not being goods within the meaning of sub-clause (i) of clause (19) of Section 65 of the Finance Act, 1994, would expressly get excluded from the

scope of the said provision. In the circumstances, service tax on the promotion or marketing or sale of lottery tickets which are actionable claims could not have been levied under the said sub-clause.

3.5 However, during the pendency of the above appeal, the Finance Act, 1994 again came to be amended with the deletion of the Explanation to Section 65(19)(ii) and the introduction of a new category of "taxable service" *vide* clause (zzzzn) to sub-section (105) of Section 65 *vide* the Finance Act, 2010 with effect from 01.07.2010. Clause (zzzzn) to sub-section (105) of Section 65 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;"

3.6 Challenging this amended clause (zzzzn) to sub-section (105) to Section 65 of the Finance Act, 1994, the assesses filed writ petitions before the High Court. Primarily, the High Court examined the relevant clauses of the agreements.

3.7 After hearing the rival contentions made by the respective parties, the High Court allowed the writ petitions i.e., W.P. (C) No. 36 of 2011 and W.P. (C). No. 26 of 2011 by way of common judgement and order dated 29.11.2012. The pertinent findings in the judgement dated 29.11.2012 have been culled out hereinunder:

a. The High Court took note of the fact that lottery, per se, falls within the expression "betting and gambling", which is considered pernicious in nature. It receives legal validity only if it is run or authorised by the State Government, subject to the conditions laid down in Section 4 of the Lotteries (Regulation) Act, 1998 which is a Central enactment. The Court further observed that it is the State's privilege that can be partially delegated to another party, provided they adhere to the statutory conditions contained in the regulatory Act.

b. Although no Entry in any of the Lists of the Seventh Schedule specifically provides for levying taxes on lotteries, the power to enact laws for taxing lotteries must be understood as inherent

within the expressions "betting and gambling," as lottery activities fall within this category.

c. The High Court noted that betting and gambling itself is an activity though the lottery ticket is a tangible thing that carries with it the right to participate in the game of chance. Thus, all activities right from the publishing of the lottery tickets to participation in the game of chance, declaration of draw and even distribution of prize to the winner fall within the purview of the expression 'betting and gambling'. Thus the power to levy tax on the organisation, promotion and marketing of lottery being an act of betting and gambling comes within the exclusive domain of Entry 62 - List II of the Seventh Schedule of the Constitution.

d. The High Court applied the test of the principle of pith and substance and observed that the power to levy tax on lotteries, which are considered games of chance and fall under "betting and gambling" in Entry 62 - List II, lies exclusively with the State Legislature. Consequently, Parliament's authority to impose such a tax under its residuary power in Entry 97 - List

I, read with Article 248 of the Constitution, is excluded. The High Court held that while Parliament is competent to levy service tax under Entry 97 – List I, this does not imply that it can impose such a tax on lotteries, as the power to levy taxes on this subject has been conferred on the State Legislature in List II. That the residuary powers of Parliament can only be exercised when no Entry in any of the Lists provide a legislative field. Hence, it is the exclusive legislative domain of the State Legislature to levy tax of any nature on lotteries by virtue of Entry 62 - List II.

e. The High Court further held that when a distributor purchases goods at a commercial price, they are not acting as an agent for the manufacturer.

f. The High Court observed that in the case at hand, the lottery tickets are sold as goods by the State Government to the assesses therein at a discounted price of 70 paise per ticket, compared to the MRP of Re.1. The predominant part of the transaction is a sale of goods. While considering the 30% discount offered to the respondents-assessees herein on the

MRP, the High Court took note that offering such discounts is a normal trade practice in any sale and purchase transaction. If the seller sells the goods at the MRP to the ultimate consumer, intermediaries must receive a discount to cover establishment costs, logistics, and some margin of profit.

g. Upon perusal of various clauses in the agreement, the High Court observed that the State Government appoints stockists or distributors to sell the tickets to ultimate buyers, who purchase them at the MRP. These intermediaries must be provided discounts from the MRP to cover their expenses and ensure a profit margin.

h. The High Court also held that the advertisement expenses incurred for promoting the State lottery are borne by the respondents-assessees herein to promote their own business, not as a service to the State Government. Clause (20) of the agreement further stipulates that the petitioner therein is solely responsible for incurring all advertising expenses, including the publication of lottery results.

i. In light of the above observations, the High Court held that in the case at hand the lottery is organised by the state government through its various stockists etc. but cannot be construed to be a service rendered to the State Government. Hence, the question of service tax does not arise.

3.8 The High Court ultimately concluded as under:

> (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 organizing game of chance including lottery 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."*

3.9 In view of the above conclusions, the petitions were allowed striking down clause (zzzzn) to sub-section (105) of Section 65 of Finance Act, 1994 as introduced *vide* Finance Act, 2010 as *ultra vires* the Constitution having been enacted in contravention to Entry 97 - List I to Seventh Schedule read with Article 248 of Constitution of India. Consequently, all actions of imposing service tax upon the respondents-assessees herein being distributors of lottery organized by State of Sikkim were set aside. Since the respondents-assessees herein had secured registration and had paid service tax under the impugned provision on their own, the judgment was to operate prospectively.

3.10 Being aggrieved by the judgement of the High Court of Sikkim in Writ Petition (Civil) No. 36 of 2011 and other allied writ petitions dated 29.11.2012 allowing the writ petitions filed by the respondents-assessees herein and striking down clause (zzzzn) to sub-section (105) of Section 65 of Finance Act, 1994 as introduced *vide* Finance Act, 2010 as *ultra vires* the Constitution of India being enacted in contravention of Article 248 of the Constitution of India read with Entry 97 - List I to the Seventh Schedule thereto and setting aside all consequential actions of the Revenue in imposing service tax upon the respondents-assessees herein (distributors of lottery organised by State of Sikkim), the Revenue has preferred the present Civil Appeal Nos.4289-4290 of 2013.

2012 Amendment:

4. During the pendency of the matter before this Court, the Finance Act, 1994, was amended once again by the Finance Act, 2012, whereby several provisions were introduced giving a new dimension to the meaning of 'taxable service' as services that would be taxable thereunder. The relevant provisions of the Finance Act,

1994, as amended, by the Finance Act, 2012, which is effective from 01.07.2012 read 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);
>
> xxx
>
> (34) "negative list" means the services which are listed in section 66D;
>
> xxx
>
> (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,—
>
> xxx
>
> (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 collected in such manner as may be prescribed.
> Negative list of services. 66D.
>
> The negative list shall comprise of the following services, namely:—
>
> xxx

(i) betting, gambling or lottery;

xxx"

4.1 On the introduction of the aforesaid amendments the respondents-assessees herein had intimated to the Revenue *vide* letter Ref. No.FGSIPL/SK/0024/ 12-13 dated 28.06.2012 stating that in view of the change in the legal position the respondents-assessees herein would not be paying service tax with effect from 01.07.2012.

4.2 In response to the above, the Revenue issued letter C. No.V(3)7/ST/FGSIPvtLtd/GTK/2009/295 dated 06.07.2012 stating that as per the Notification. No. 36/2012 ST dated 20.06.2012 read with Rule 6(7C) of the Finance Act, 1994 (as amended), the distributor or selling agents are liable to pay service tax at the rate specified for the taxable service of promoting, organizing or in any other manner assisting in arranging lottery. Being aggrieved by this communication dated 06.07.2012 and the Finance Act, 2012, the respondents-assessees herein approached the High Court by filing Writ Petition No.32 of 2012. The

respondents-assessees herein assailed the Amendment Act of 2012 on the various grounds.

4.3 After hearing the rival parties, the High Court allowed the writ petition filed by respondents-assessees herein before the High Court *vide* order dated 24.09.2013 and set aside the amendments in 2012 made to the Finance Act, 1994. The relevant findings of the High Court are as follows:

a. The High Court held that the lottery being an 'actionable claim' does not fall within the purview of the service tax laws as introduced by the new provisions of the Finance Act, 2012.

b. The High Court found no change in the circumstance as regards the position found in the earlier issues set out above except that clause (zzzzn) of sub-section (105) of Section 65 of the Finance Act, 2010, and the replaced service tax law regime under the Finance Act, 2012, in the form of Section 65B and sub-sections thereunder, Sections 66B and 66D were already dealt with earlier.

c. The High Court observed that 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';

d. Further, the High Court held that activities comprising of promotions, organising, reselling or any other manner assisting in arranging of lottery tickets of the State Lotteries do not establish the relationship of a principal or an agent but rather that of a buyer and a seller. This was in view of the nature of the transaction consisting of bulk purchases of lottery tickets by the respondents-assessees herein 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 respondents-assessees herein.

Thereafter, following the order dated 24.09.2013, the High Court passed orders dated 13.05.2014 and 15.07.2015.

4.4 Being aggrieved by the orders passed by the High Court dated 24.09.2013, 13.05.2014 and 15.07.2015 the Union preferred SLPs

before this Court being SLP (C) No.18565 of 2014, SLP (C) No.30629 of 2014 and SLP (C) No.14111 of 2015, respectively.

***2015 Amendment*:**

5. The Parliament again made amendments to the Finance Act, 1994 *vide* the Finance Act, 2015 The amendment is extracted as below:

> "65B. In this Chapter, unless the context otherwise requires,—
>
> xxx
>
> (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);
>
> xxx
>
> (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,—
>
> xxx
>
> (iii) a transaction in money or actionable claim;
>
> xxx

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

xxx

(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;

xxx

Negative list of services.

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

xxx

(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.

xxx

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;
>
> xxx
>
> Explanation.—For the purposes of this section,— (a) "consideration" includes—
>
> xxx
>
> (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket."

5.1 The aforesaid amendments were challenged by the respondents-assessees herein before the High Court by filing W.P. (C) No. 39 of 2015 and W.P. (C) No. 40 of 2015. By the impugned order and judgement dated 14.10.2015, the High Court allowed the writ petitions filed by the respondents-assessees herein and held as under:

a. The respondents-assessees herein, in buying and selling the lottery tickets are not rendering any 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;

b. In any case, since by the Explanation the scope of Section 66D which is the main provision which is sought to be expanded, is *ultra vires* the Finance Act, 1994, it is accordingly struck down;

5.2 Being aggrieved by this impugned order and judgment dated 14.10.2015, the Union of India approached this Court by filing Civil Appeal Nos.2172-73 of 2016.

2016 Amendment:

6. In the meantime, the Parliament came out with an amendment to the Finance Act, 2016 to the following effect:

> "In Section 65B- (b) in clause (44), in Explanation, 2, in sub-clause (ii), for item (a), the following item shall be substituted, namely- (a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery or any kind, in any other manner, in accordance with the provisions of the Lottery (Regulation) Act, 1998."

6.1 Again, this amendment to the Finance Act, 2016 was challenged before the High Court of Sikkim by the respondents-

assessees herein in Writ Petition No. 34 of 2016 and Writ Petition No.48 of 2016.

6.2 The High Court *vide* impugned order and judgement dated 23.03.2017 allowed the writ petitions and held that the amendments carried out by the Finance Act, 2016, are not capable of being implemented for imposition and levy of service tax on the services allegedly provided by the respondents-assessees herein. The salient findings of the High Court are as follows:

a. The High Court held that taxation is a distinct matter for the purpose of legislative competence and it must flow from the specific Entry provided for levy and imposition of taxes.

b. The relevant service tax leviable is on promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner. The Union Parliament is conferred with the power and competence under Article 268A read with Entry 97 - List I (Union List) to impose and levy service tax on other related activities. Hence, the High Court noted that the impugned amendment brought in Finance Act, 2016 is not unconstitutional. However, the Court noted that

the Division Benches of the High Court in ***W.P.(C) Nos.36 & 23 of 2011 (Future Gaming Solutions Pvt. Ltd. vs. Union of India); W.P.(C) No.32 of 2012 (Future Gaming Solutions India Pvt. Ltd. vs. Union of India)*** and ***W.P.(C) No.39 of 2015 (Future Gaming & Hotel Services Pvt. Ltd. vs. Union of India)*** have categorically held that the Union-Parliament lacks competence to impose service tax and the concerned amendments were held as ultra vires to the Constitution of India. This issue has attained finality and was pending for consideration at that time before this Court.

c. There is no mechanism to ascertain and compute the service rendered by a person for promoting, marketing, selling or facilitating in organizing a lottery of any kind, in any manner, organized by such State in accordance with the provisions of the Lotteries (Regulation) Act, 1998.

6.3 Being aggrieved by the above-impugned judgement and order dated 23.03.2017, the Union of India has approached this Court in SLP (C) No.23945 of 2017 and SLP (C) No. 16118 of 2017. Being aggrieved by the specific findings in judgment dated

23.03.2017 wherein the High Court held that there was no mechanism or methodology to ascertain and compute the services rendered by the respondent-assessees, the respondent-assessee has filed SLP (C) No.19200 of 2017.

Submissions before this Court:

7. Learned Counsel for the Revenue, Sri Chandrashekara Bharathi made the following submissions:

a. The statutory framework governing lotteries, particularly the Lotteries (Regulation) Act of 1998 ("Lotteries Act", for short) and related rules, mandate that the organizing State must be the ultimate seller of lottery tickets to the public, inherently establishing an agency relationship between the State of Sikkim and the respondents-assessees herein in these cases. Article 246(1) of the Indian Constitution empowers Parliament to legislate on lotteries conducted by the government, which it exercised by enacting the Lotteries Act. Section 4(c) of this Act prescribes that the State government must sell tickets "either itself or through distributors or selling agents." Further, Rule 2(1)(c) of the Lotteries (Regulation) Rules, 2010 ("Lotteries

Rules", for short) defines a "distributor or selling agent" as an entity appointed by the organizing State to sell tickets on behalf of the State. Learned counsel argued that the use of terms such as "through" and "on behalf of" in the statute is conclusive evidence of the intended agency relationship, as these terms denote that the respondents-assessees herein are merely facilitating sales on behalf of the State, not as independent principals.

b. The judgment in ***State of Haryana vs. Suman Enterprises, (1994) 4 SCC 217*** held that a State-organized lottery requires the State to retain core control to protect public trust in the scheme. In that case, this Court stated four essential characteristics that distinguish a State-organized lottery: (i) tickets must bear the State's logo, be printed under the State's authority, and be sold directly by the State or its designated agents; (ii) the sale proceeds must be credited to the State's funds; (iii) draws must be conducted by the State; and (iv) unclaimed prize money must revert to the State. By retaining control over these aspects, the State ensures that the public's

trust in the lottery's fairness and legitimacy is maintained. That these characteristics form the backbone of the Lotteries Act, and when combined with statutory language, they mandate an agency relationship between the respondents-assessees herein and the State, which cannot be unilaterally recharacterized as principal to principal.

c. The State of Sikkim's monopoly over the lottery business in the region, as enacted under the Sikkim Lotteries (Prohibition on Running of and Sale of Single Digit and Private Lottery Tickets) Act, 1993, further supports the agency interpretation. Learned counsel cited ***Khoday Distilleries Ltd vs. State of Karnataka, (1995) 1 SCC 574*** and argued that the State can either conduct the monopoly business itself or do so through agents but cannot delegate its core functions to independent entities without compromising the monopoly. The counsel argued that in lotteries, as in the sale of alcohol monopolized by the State, the organizing State cannot delegate its position as the primary seller and principal.

d. As per clauses in the agreements between the State of Sikkim and the respondents-assessees herein, specifically focusing on clauses that indicate a principal-agent relationship, two critical "condition precedents" that help determine whether an agency exists are, namely, (i) the capacity in which the sale is conducted, i.e., whether the respondents-assessees herein are selling the tickets as their own or on behalf of the State; and (ii) the allocation of risk and reward, which lies with the principal in an agency relationship.

e. Various versions of agreements between the State and the respondents-assessees herein, notably those signed in 2004, 2008 and 2009 were referred to. Initially, under the 2004 agreement, the respondents-assessees herein purchased lottery tickets on an "all sold" basis, meaning they bought all tickets upfront and assumed the associated risk. However, subsequent amendments, particularly in 2008 and 2009, shifted this arrangement to an "actual sold" basis, where the respondents-assessees herein took delivery of the tickets without upfront payment, returning unsold tickets to the

State. Additionally, the State's revenue became tied to the actual sales made by the respondents-assessees herein rather than a fixed sum, indicating that the State retained the risk and reward from ticket sales, characteristic of a principal-agent relationship.

f. For online lotteries, the agreements did not involve any physical transfer of tickets to the respondents-assessees herein. Instead, tickets were directly sold by the State to customers through computer terminals managed by the respondents-assessees herein. Learned counsel argued that this arrangement further underscored the agency relationship, as the respondents-assessees herein merely facilitated sales made by the State, with the State bearing the risk associated with prize payouts. It was emphasised that the respondents-assessees herein received a commission calculated as a percentage of total sales after deducting the State's revenue and prize distributions, which aligns with compensation typically earned by agents.

g. Further, the respondents-assessees' argument before the High Court was that they occasionally incurred losses due to unsold tickets or fluctuating demand, thereby bearing risk and acting as principals. Learned counsel for the Revenue sought to rebut this contention by submitting that under the amended agreements, unsold tickets were returned to the State, with no financial obligation on the part of the respondents-assessees herein. In online lotteries, while the respondents-assessees herein may have to temporarily cover prize payouts under INR 10,000/- the risk ultimately remained with the State, which controlled the final prize distribution. That occasional operational costs borne by the respondents-assessees herein, such as those related to maintaining terminals or sub-agent commissions, were incidental to their role as agents and did not alter the fundamental agency relationship.

h. Learned counsel for the Revenue thus concluded that both statutory requirements and the practical structure of the agreements compel the interpretation of the respondents-assessees' role as agents of the State of Sikkim. He asserted

that these agreements, along with judicial precedents and statutory provisions, leave no room for a principal-principal relationship. By mandating that the State remains the ultimate seller and by ensuring that risk and reward lie with the State, the Lotteries Act and the related legal framework firmly establish respondents-assessees' position as agents acting on behalf of the State. Accordingly, it was urged that service tax, calculated on the basis of services provided, should apply to the respondents-assessees herein as agents in line with the legislative intent and legal precedent.

8. *Per contra*, Sri S Ganesh, learned senior counsel and Sri A.R. Madhav Rao, learned counsel appearing for the respondents-assessees broadly advanced the following submissions:

a. The respondents-assessees herein in these cases operated independently on a principal-to-principal basis and the agreement between the State and the respondents-assessees herein is structured in a way that reflects a buyer-seller relationship and not an agency.

b. The respondents-assessees herein are mandated to pay a guaranteed minimum amount of Rs.8 crores to the State Government irrespective of the number of tickets sold. Additionally, the respondents-assessees herein have to furnish a bank guarantee to secure payment. The State does not indemnify the respondents-assessees herein, in case of any loss. Therefore, indemnification being a hallmark of agency but in the instant cases, the respondents-assessees herein are bearing all the financial risk and the State Government does not indemnify the respondents-assessees herein, then the relationship between the parties has to be principal to principal.

c. Once the respondents-assessees herein purchase tickets from the State, it sells them onward at its discretion to sub-contractors or stockists. The sale proceeds exclusively belong to the respondents-assessees herein. The State government has no privity of contract with the sub-distributors. Therefore, it was argued that the respondents-assessees herein are not operating on behalf of the State Government.

d. That the respondents-assessees herein bear the entire cost of marketing and advertising without reimbursement from the State Government. Further, the respondents-assessees herein appoint stockists and sellers independently at its own risk. Hence, there is no notion of agency involved.

e. Thus, service tax under the Finance Act, 1994 does not arise in the present case since no service is being provided by the respondents-assessees herein. It was argued that the respondents-assessees herein are involved in a purchase and resale arrangement.

f. In ***K. Arumugam***, this Court held that buying lottery tickets and reselling them does not amount to marketing services.

g. Section 67 of the Finance Act requires service tax to be made applicable only when there is consideration for a specific service. In the present case, the margins earned by the respondents-assessees herein do not represent any commission or service. There is no service or consideration in the present case as the transaction is an outright sale at a price lower than the maximum price of each lottery ticket.

h. Lottery tickets constitute actionable claims and thus transactions involving actionable claims are exempted under Section 66D of the Finance Act, 1994. The argument of the Revenue that the lottery ticket is actionable only in the hands of the ultimate buyer is false and baseless. In response, it was submitted that the nature of tickets remains unchanged regardless of ownership, as established in ***Sunrise Associates vs. Government of NCT of Delhi, (2006) 5 SCC 603, ("Sunrise Associates").***

i. That levy of service tax on lottery distributors infringes the State government's exclusive power to legislate on "betting and gambling" under Entry 62 - List II of the Constitution, Buttressing his submissions, learned senior counsel relied on ***Godfrey Philips India Limited vs. State of Uttar Pradesh, (2005) 2 SCC 515*** emphasizing that Parliament cannot use a residuary entry under Entry 97 - List I to impose taxes on subjects reserved for the States.

j. That aspects theory cannot be applied to the present case to justify service tax. The sale of lottery tickets is a single

transaction and cannot be split artificially into a sale and a service.

k. Taxing such transactions as services would create uncertainty for other industries. If every resale of goods could be labelled as a service, it would disrupt the established business practices across sectors.

9. Learned counsel for Union of India addressed and rebutted several contentions made by the respondents-assessees herein to support their claim of operating as principals. One of the key arguments by the respondents-assessees herein was that they were in the "business" of buying and selling lottery tickets, and therefore should be considered independent principals. Learned counsel countered this by referring to ***Sunrise Associates***, which held that the purchase of a lottery ticket confers a conditional interest in the prize money (an actionable claim) to the buyer. Since the respondents-assessees herein do not possess any actionable claim (as they cannot participate in the lottery), they cannot be classified as true "buyers" of lottery tickets. Thus, they are limited to selling tickets only as agents of the State.

Points for Consideration:

10. The following points would arise for our consideration:

a) Whether the impugned judgments of the High Court of Sikkim would call for any interference in these appeals?

b) If not, what order?

At this stage, we state that we need not go into the question regarding the aspect theory/doctrine being made applicable to these cases. This is because we are dealing with the question whether service tax is liable to be paid by the respondent-assessees. According to the appellant- Union of India they are liable to pay service tax as they are rendering a service to State of Sikkim as an agent. On the other hand, it is the case of the respondent-assessees that they are not agents of the Government of Sikkim but their relationship is on principal to principal basis. If we hold that the relationship between the State of Sikkim is of principal-agent then the respondents-assessees herein are liable to pay service tax as an agent. However, this does not detract from the respondent-assessees being liable to pay tax on gambling as the conduct of lotteries is nothing but a gambling activity as per Entry

62 – List II of the Seventh Schedule of the Constitution of India. Therefore, it is necessary for us to consider whether the respondents-assessees are engaged as agents by the principal-Government of Sikkim or the relationship is one of principal to principal.

Relevant constitutional provisions:

11. In order to better understand the controversy in these cases, it would be relevant to advert to the provisions of the Constitution as well as the provisions of the Finance Act, 1994 along with the amendments made which have sought to impose service tax on the respondents-assessees herein in these cases.

11.1 Article 246 of the Constitution of India pertains to the division of subjects between the Parliament and State Legislatures in the form of three lists in the Seventh Schedule of the Constitution, namely List I – Union List, List II – State List and List III – Concurrent List. It would be useful to extract Article 246 of the Constitution as under:

> "246. Subject-matter of laws made by Parliament and by the Legislatures of States.
>
> (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
>
> (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
>
> (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
>
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

11.2 Article 248 deals with Residuary power of Legislatures and the same reads as under:

> "248. Residuary powers of legislation.
>
> (1) Subject to Article 246A, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
>
> (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

At this stage itself, it may be mentioned that the residuary power is reserved to the Parliament to legislate on any subject provided such power is not included in either the Concurrent List or the State List.

11.3 The Finance Act, 1994 was enacted by the Parliament in terms of Article 248 of the Constitution of India read with Entry 97 - List I which reads as under:

> "97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

11.4 It is also pertinent to mention that Entry 92-C - List I which deals with taxes on services was inserted by the Constitution (Eighty-eighth Amendment) Act, 2003, but was not notified and was omitted by the Constitution (One Hundred and First Amendment) Act, 2016 with effect from 16.09.2016. In the circumstances, we observe that the Finance Act, 1994 is relatable to Entry 97 - List I. Subsequently, *vide* the same Constitution (One Hundred and First Amendment) Act, 2016, Article 246A was

inserted as a special provision with respect to goods and services tax.

11.5 For the sake of completion, it would also be relevant to refer to Entries 33 and 34 - List II. Entries 33 and 34 - List II are the regulatory Entries, which read as under:

> "33. Theaters and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.
>
> 34. Betting and gambling."

11.6 Entry 62 - List II (State List) as it stood then, dealt with taxes on luxuries including taxes on entertainment, amusement, betting and gambling, etc. The said Entry has subsequently been amended with effect from 16.09.2016. However, it is not necessary to extract the amended Entry as these appeals pertain to the period prior to 16.09.2016. Entry 62-List II is a taxation Entry. The unamended Entry 62-List II is extracted as under:

> "62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."

11.7 In ***Hoechst Pharmaceuticals Ltd. vs. State of Bihar, (1983) 4 SCC 45,*** it has been observed that taxation is a distinct

matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

11.8 In ***Union of India vs. HS Dhillon, AIR 1972 SC 1061,*** it was observed that the function of Article 246(1), read with Entries 1-96 - List I, is to give positive power to Parliament to legislate in respect of these entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so. Accordingly, it cannot be interpreted that the words "any other matter" occurring in Entry 97 - List I, to mean a topic mentioned by way of exclusion. These words really refer to the matters contained in each of the Entries 1 to 96. The words "any other matter" had to be used because Entry 97 - List I follows Entries 1-96 - List I. It is true that the field of legislation is demarcated by Entries 1-96 - List I, but demarcation does not mean that if Entry 97 - List I confers additional powers, we should refuse to give effect to it. At any rate, whatever doubt there may be

on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms. On its terms the only question to be asked is: Is the matter sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III: No question has to be asked about List I. If the answer is in the negative then it follows that Parliament has power to make laws with respect to that matter or tax.

According to this Court, if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises.

Thus, the wide words of a substantive Article like Article 248 should be given full effect and they cannot be cut down by the wording in the Lists in Schedule VII merely because certain known taxes have not been included therein.

Relevant Case Law on lotteries:

B.R. Enterprises:

12. The nature and characters of lottery was deliberated upon in ***B.R. Enterprises vs. State of UP, (1999) 9 SCC 700 ("B.R. Enterprises"),*** wherein it was held that the lotteries are a form of gambling and in ***R.M.D. Chamarbaugwalla vs. Union of India, AIR 1957 SC 628,*** it was observed that gambling actives are in the very nature and essence res extra commercium. Even though lotteries were permitted under the regulating power of the State, they could not be given the status of trade and commerce "as understood in common parlance". Trade and commerce within the meaning of Articles 301 to 304. That there are three ingredients in the sale of lottery tickets, namely (i) price, (ii) chance, and (iii) consideration. That Entry 62 – List II refers to taxes on betting and gambling and lotteries whether conducted by private agencies or by the State are nothing but gambling. That even though the state may conduct lotteries, the element of chance remains, with no skill involved, while in a trade there is skill involved with no chance. Even if the State conduct lotteries, the element of chance remains,

with no skill involved and even the organisation and conduct of the lotteries by the State Government are within the boundaries of gambling. That the only purpose of having stringent measures *vis-à-vis* lotteries being conducted by the State was to inculcate faith in the participants of such lottery being conducted fairly with no possibility of fraud or misappropriation and deceit and assure the hopeful recipients of high prizes that all is fair and safe. That the object was to assure the participants that the proceeds from the sale of lottery tickets are credited to the public accounts of the State and would not be in the hands of any individual group or association and thus to bring about a transparency in the organisation of the lottery by the State, subject to the regulation. Even then, the activity of conduct of the lottery would remain in the realm of gambling.

Sunrise Associates:

12.1 In the case of ***Sunrise Associates***, the Constitution Bench of this Court speaking through Ruma Pal, J., opined that lottery tickets can be categorized as actionable claims. The relevant paragraphs of the said judgment read as under:

"40. An actionable claim would include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability (see Union of India v. Sri Sarada Mills Ltd. [(1972) 2 SCC 877] , SCC at p. 880). A claim for arrears of rent has also been held to be an actionable claim (State of Bihar v. Maharajadhiraja Sir Kameshwar Singh [(1952) 1 SCC 528 : 1952 SCR 889 : AIR 1952 SC 252] , SCR at p. 910). A right to the credit in a provident fund account has also been held to be an actionable claim (Official Trustee v. L. Chippendale [AIR 1944 Cal 335 : ILR (1943) 2 Cal 325] ; Bhupati Mohan Das v. Phanindra Chandra Chakravarty [AIR 1935 Cal 756 : 40 CWN 102]). In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim.

44. The question is, what is this right which the ticket represents? There can be no doubt that on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of "goods" under the Sale of Goods Act and the sales tax statutes. This was also accepted in H. Anraj [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] when the Court said that to the extent that the sale of a lottery ticket involved a transfer of the right to claim a prize depending on chance, it was an assignment of an actionable claim. Significantly in B.R. Enterprises v. State of U.P. [(1999) 9 SCC 700] construing H. Anraj [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] the Court said: (SCC p. 746, para 52)

> "52. So, we find three ingredients in the sale of lottery tickets, namely, (i) prize, (ii) chance, and (iii) consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket."

State of Karnataka:

12.2 In ***State of Karnataka vs. State of Meghalaya, (2023) 4 SCC 416 ("State of Karnataka"),*** a two-Judge Bench of this Court of which one of us (Nagarathna, J.) was a member and who authored the judgment, observed in paragraphs 159 as under:

> "**159.** Hence under Entry 62 of List II, the specific power to tax an activity which is "betting and gambling" is reserved with the State Legislature and cannot be read within the scope and ambit of Entry 40 of List I which is inherently restricted in its scope."

K. Arumugam:

12.3 The Union of India sought to levy service tax on the premise that the activity which the assessees were/are carrying on was a business auxiliary service within the definition of Section 65(19) of the Finance Act, 1994 and therefore, chargeable to service tax. The same was resisted by the assessees by filing writ petitions before the High Courts.

Both the High Courts of Sikkim as well as that of Kerala held against the assessees and opined that service tax is leviable on their activity under the nomenclature of business auxiliary service.

Hence appeals were filed before this Court. The following questions arose for consideration:

> "1. Whether the activity of the appellants – assessees would attract service tax within the scope and ambit of Section 65(19)(ii) read with Section 65(105)(zzb) of the Finance Act, 1994? If not, what relief(s) the appellants are entitled to?
>
> 2. What Order?"

In ***K. Arumugam***, on a plain reading of the Explanation in light of the activity actually carried on by the appellant(s)-assessee(s) therein, it was clear that the outright purchase of lottery tickets from the promoters of the State or Directorate of Lotteries, as the case may be, was not a service in relation to promotion or marketing of service provided by the client, i.e., the State, conducting the lottery. The conduct of lottery is a revenue generating activity by a State or any other entity in the field of actionable claims. The client, i.e., the State was not engaging in an activity of service while dealing with the business of lottery. Explanation to sub-clause (ii) of clause (19) of Section 65 of the Finance Act, 1994 could not bring within sub-clause (ii) activity by assuming it was initially covered under sub-clause (i) thereof but

in fact was not, by virtue of the definition of goods under the very same Act read with Section 2(7) of the Sale of Goods Act, 1930. It was observed that the mere insertion of an explanation could not make an activity a taxable service when it was not covered under the main provision (which had to be read into the said sub-clause by virtue of the legislative device of express incorporation). This is because sale of lottery tickets is not a service in relation to promotion or marketing of service provided by a client, i.e., the State in the instant case. Conducting a lottery which is a game of chance is *ex facie* a privilege and an activity conducted by the State and not a service being rendered by the State. The said activity would have a profit motive and is for the purpose of earning additional revenue to the State exchequer. The activity is carried out by sale of lottery tickets to persons, such as the assessees herein, on an outright basis and once the lottery tickets are sold and the amount collected, there is no further relationship between the assessees herein and the State in respect of the lottery tickets sold. The burden is on the assessees herein to further sell the lottery tickets to the divisional/regional stockists for a profit as

their business activity. It was observed that the activity is not a promotion or a marketing service rendered by the assessees to the State within the meaning of sub-clause (ii) of clause (19) of Section 65 of the Finance Act, 1994. This is because, to reiterate, the States are not rendering a service but engaged in the activity of conducting lottery to earn additional revenue. Moreover, once the lottery tickets are sold by the Directorate of Lotteries - a Department of the State, there is transfer of the title in the lottery tickets to the vendees, who, as owners of the said lottery tickets, in turn sell them to stockists and others. Thus, there is no promotion of the business of the State as its agent. Thus, there is no 'principal—agent' relationship which would normally be the case in a relationship where a business auxiliary service is rendered. The relationship between the State and the appellants is on a principal to principal basis. Thus, there is no activity of promotion or marketing of a service on behalf of the State. Neither is the State, which conducts the lottery, rendering a service within the meaning of the Finance Act, 1994.

Legal Framework:

13. For ease of reference, the provisions relating to imposition of service tax on the sale of lotteries in five different periods namely, from 01.07.2003 to 30.06.2010, from 01.07.2010 to 30.06.2012, from 01.07.2012 to 31.05.2015, from 01.06.2015 to 31.03.2016 and from 01.04.2016 to 30.06.2017 are encapsulated under the respective headings:

"I. PERIOD FROM 01.07.2003 TILL 30.06.2010

No matter is pending in relation to this period as they have been disposed off by this Court in **K. Arumugam v. Union of India & Others (2022 SCC Online SC 2278)**

Provision	**Finance Act**	**With Effect From**
65(105(zzb)	2003	01.07.2003
65(19)	2003	01.07.2003
Explanation inserted to Section 65(19)(ii)	2008	16.05.2008

1. Section 65(105)(zzb)

Taxable Service means any service provided to a client, by a commercial concern in relation to business auxiliary service

2. Section 65(19)

'Business Auxiliary Service' means any service in relation to

i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

ii) promotion or marketing of service provided by the client; or

iii) any customer care service provided on behalf of the client; or

iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services

3. Section 65(19) after Explanation inserted to sub-clause (ii) through Section 90(3) of the Finance Act, 2008

'Business Auxiliary Service' means any service in relation to

i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

ii) promotion or marketing of service provided by the client; or

Explanation- For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

iii) any customer care service provided on behalf of the client; or

iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and

remittance, evaluation of prospective customer and public relation services

II. PERIOD FROM 01.07.2010 TILL 30.06.2012

This period pertains to (i) **Civil Appeal 4289-4290 of 2013** and (ii) **Civil Appeal 9506-9507 of 2013.**

Provision	Finance Act	With Effect From
Removal of Explanation to Section 65(19)(ii)	2010	01.07.2010
Insertion of Section 65(105)(zzzzn)	2010	01.07.2010
Insertion of Rule 7C	Notification 49/2010	08.10.2010

1. Removal of Explanation to Section 65(19)(ii) through Section 76(A)(1) of the Finance Act, 2010

76(A): In Section 65, save as otherwise provided, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint-

(1) in clause (19), in sub-clause (ii), the Explanation shall be omitted

2. Insertion of Section 65(105)(zzzzn) through Section 76(A)(6)(l) of the Finance Act, 2010

Taxable Service means any service provided to any person, by any other person, for promotion, marketing, organizing or in any other manner assisting in organizing games of chance, including lottery, Bingo or Lotto in whatever form or by whatever name called, whether or not conducted through internet or other electronic networks;

3. Section 66 as it existed during the period 01.07.2010 to 30.06.2012

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g), (h), (i), (j), (k), (1), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg), (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzza), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc), (zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzj), (zzzzk), (zzzzl), (zzzzm), **(zzzzn)**, (zzzzo), (zzzzp), (zzzzq), (zzzzr), (zzzzs), (zzzzt), (zzzzu), (zzzzv) and (zzzzw)] of clause (105) of Section 65 and collected in such manner as may be prescribed.

4. Section 67 containing the definition of 'consideration' from 01.04.2006 till 31.05.2015

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its 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;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.--For the purposes of this Section,--

"(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

5. Insertion of Rule 7C to Service Tax Rules, 1994 by clause (2) of Notification 49/2010 dated 08.10.2010

(7C) The distributor or selling agent, liable to pay service tax for the taxable service of promotion, marketing, organising or in any other manner assisting in organising lottery, referred to in sub-clause (zzzzn) of clause (105) of Section 65 of the said Act (hereinafter referred to as the said sub-clause), shall have the option to pay an amount at the rate specified in column (2) of the Table given below, subject to the conditions specified in the corresponding entry in column (3) of the said Table, instead of paying service tax at the rate specified in Section 66 of Chapter V of the said Act:

S.No	Rate	Condition
(1)	(2)	(3)
1.	Rs. 6000/- on every Rs. 10 Lakh (or part of the Rs. 10 Lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is more than 80%
2.	Rs. 9000/- on every Rs. 10 Lakh (or part of Rs. 10 Lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is less than 80%

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

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

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

Explanation.- For the purpose of this sub-rule-

(i) 'distributor or selling agent' shall have the meaning assigned to them in clause (c) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010 and shall include distributor or selling agent authorised by the lottery organising State.

(ii) 'draw' shall have the meaning assigned to it in clause (d) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

(iii) 'online lottery' shall have the meaning assigned to it in clause (e) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

(iv) 'organising state' shall have the meaning assigned to it in clause (f) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

III. PERIOD FROM 01.07.2012 TILL 31.05.2015

This period pertains to (i) **SLP (C) No.18565 of 2014** (ii) **SLP (C) No.30629 of 2014** and (iii) **SLP (C) No.14111 of 2015**

Provision	Finance Act	With Effect From
Insertion of Section 65B(1)	2012	01.07.2012
Insertion of Section 65B(44)	2012	01.07.2012
Insertion of new Charging Section 66B	2012	01.07.2012
Insertion of Negative List Section 66D(i)	2012	01.07.2012
Section 66F	2012	01.07.2012
Cosmetic Amendment to Rule 7C	Notification 36/2012	20.06.2012

1. Insertion of Section 65B(1) through Section 143(C) of the Finance Act, 2012

"actionable claim" shall have the same meaning assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882)

2. Insertion of Section 65B(44) through Section 143(C) of the Finance Act, 2012

"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.-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ia) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution; or

(ii) a transaction in money or actionable claim

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.— For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this Section.

Explanation IA- For the purposes of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged;

Explanation 2.— For the purposes of this Chapter,—

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable

territory shall be treated as establishments of distinct persons.

Explanation 3.— A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;

3. Insertion of new Charging Section 66B through Section 143(F) of Finance Act, 2012

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent, on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

4. Insertion of Negative List Section 66D through Section 143(F) of Finance Act, 2012

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

(a)…(h)

(i) betting, gambling or lottery;

5. Cosmetic Amendment to Rule 7C vide Clause (7)(7) of Notification 36/2012 dated 20.06.2012

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

S.No	Rate	Condition
(1)	(2)	(3)
1.	Rs. 6000/- on every Rs. 10 Lakh (or part of the Rs. 10 Lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is more than 80%
2.	Rs. 9000/- on every Rs. 10 Lakh (or part of Rs. 10 Lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is less than 80%

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

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

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

Explanation.- For the purpose of this sub-rule-

(i) 'distributor or selling agent' shall have the meaning assigned to them in clause (c) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010 and shall include distributor or selling agent authorised by the lottery organising State.

(ii) 'draw' shall have the meaning assigned to it in clause (d) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

(iii) 'online lottery' shall have the meaning assigned to it in clause (e) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

(iv) 'organising state' shall have the meaning assigned to it in clause (f) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

IV. PERIOD FROM 01.06.2015 TILL 31.03.2016

This period pertains to **SLP (C) 18565 of 2014**

Provision	Finance Act	With Effect From
Insertion of Section 65B(31A)	2015	01.06.2015
Substitution of Explanation 2 to Section 65B(44)	2015	01.06.2015
Insertion of Explanation to Section 66D(i)	2015	01.06.2015
Substitution of Section 67	2015	01.06.2015

1. Insertion of Section 65B(31A) through Section 107(e) of the Finance Act, 2015

"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)

2. Substitution of Explanation 2 to Section 65B(44) through Section 107(g) of the Finance Act, 2015

'For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include—

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

(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;

(b) by a foreman of chit fund for conducting or organising a chit in any manner.';

3. Insertion of Explanation to Section 66D(i) through Section 109 of the Finance Act, 2015

66D(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 65B;';

4. Substitution of Clause (a) of Explanation to Section 67 containing the definition of 'consideration' through Section 111 of the Finance Act, 2015

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its 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;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.--For the purposes of this section,--

'(a) "consideration" includes-

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

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

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

V. PERIOD FROM 01.04.2016 TILL 30.06.2017

This period pertains to (i) **SLP (C) No.19200 of 2017** (ii) **SLP (C) No.23945 of 2017** and (iii) **SLP (C) No.16118 of 2017**

Provision	Finance Act	With Effect From
Cosmetic Amendment to Explanation 2 to Section 65B(44)	2016	01.04.2016

1. Cosmetic Amendment to Clause (ii)(a) of Explanation 2 to Section 65B(44)

'For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include—

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

(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 on behalf of the State Government in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner in accordance with the provisions of the Lotteries (Regulation) Act, 1998 (17 of 1998);

(b) by a foreman of chit fund for conducting or organising a chit in any manner.';"

Agreements under consideration:

14. Learned counsel for the respective parties have drawn our attention to certain agreements entered into between the Government of Sikkim and respondent-assessees from time to time. The agreements are two-fold in nature. One set of agreements deal with paper lottery and another set of agreements deal with online computerised lotteries. The clauses relevant for the purpose of the present controversy, i.e., to ascertain whether the agreements are of agency or not are extracted as under:

Paper Lotteries:

(i) <u>Agreement dated 06.10.2004</u>

"**<u>AGREEMENT</u>**

This Agreement is made this day the 6th October 2004 between the Governor of Sikkim through the Secretary to the Government of Sikkim in the Finance Department, (herein after referred to as the Government)… and M/s Martin Lottery Agencies Ltd. represented by its MANAGING DIRECTOR (hereinafter referred to as the Distributor)…

xxx

AND WHEREAS M/s. Martin Lottery Agencies Ltd., has been selected for appointment as Sole Distributor for the above Lottery Schemes by the Government of Sikkim.

xxx

Now it is hereby agreed between parties hereto as under:

1. That the Government shall appoint M/S Martin Lottery Agencies as Sole Distributor for marketing of lottery tickets on all sold basis.

2. The Government shall run a minimum 5 (five) weekly lottery schemes and 6(six) bumper draws per year for an annual revenue of Rs.5.50 crores per annum.

3. That the agreement shall remain in force for a period of 5 (five) years from 18.10.2004 to the 17.10.2009 (both days inclusive). The period of the agreement may, however, be extended for such further period and upon such terms and conditions as may be at the relevant time, be mutually agreed upon.

xxx

10. That the Government shall deliver the tickets to the Distributor at the destination as may be agreed upon.

11. That the Government shall sell and the Distributor shall buy the full lot of tickets for which the wholesale price of tickets shall be determined consisting of total prize amount as per schemes, actual cost of paper and printing, draw expenses, Government commission.

    However, the prices may change under the following circumstances:

    i. Change in prize structure of lottery schemes.
    ii. Change in paper and printing cost/freight charges.
    iii. Market conditions.

12. That the full payment of tickets printed shall be realized on delivery of tickets at wholesale rates as per clause 11 above.

xxx

25. The Government shall deliver the tickets to the Distributor against full payment for which proper invoice shall be raised indicating amount of wholesale rate and adjustment of prizes upto Rs.5000/- (Rupees five thousand) to be disbursed by the Distributor for each lottery draw.

26. The Distributor shall pay sales tax or any other kind of taxes imposed by the other State Governments on sale of lottery tickets.

xxx"

(ii) Agreement dated 10.08.2009

"**AGREEMENT**

This Agreement is made on this the 10th day of August 2009, between the Governor of Sikkim, through the Additional Chief Secretary, Finance, Revenue & Expenditure Department, Government of Sikkim (hereinafter referred to as the 'Government') ....

AND

M/s Future Gaming Solutions India Pvt. Ltd. (formerly M/s Martin Lottery Agencies Ltd.)... represented by its Managing Director Mr. Martin, Son of Mr. Santiago (hereinafter referred to as the 'Sole Purchaser')...

WHEREAS in pursuant of an open tender called by the Government. The second Party was appointed as the purchaser for sale of conventional weekly paper (3 digit and above) lottery and bumper lottery with denomination

of rupee one and above organised by the Government for a period of five years vide an agreement dated 6th October, 2004.

xxx

And whereas M/s Future Gaming Solutions India Private Ltd., has been appointed as the exclusive Sole Purchaser for the above Lottery schemes by the Government of Sikkim.

Now, therefore, in view of the above changes and amendments the parties are desirous of signing a fresh agreement to govern their respective rights and liabilities in suppression of the earlier agreement dated 06.10.2004 as under:-

Now it is hereby agreed between parties hereto as under:

1. That the Government hereby appoints M/s Future Gaming Solutions India Pvt. Ltd. sole purchaser of conventional paper lottery tickets on actual sold basis.

xxx

4. That in consideration of the appointment of the Second Party as sole purchaser of the conventional paper lottery of the Government for a maximum of 50 (fifty) weekly lottery schemes per day, the sole purchaser shall pay a sum of Rs.8 crores (Rupees Eight Crores) per annum to the Government for the 1st year of the extended period i.e. w.e.f. 18th October, 2009 to 17th October, 2010 and a sum of Rs.10 Crores (Rupees Ten Crores) per annum only from the second year of the extended period effective from 18th October, 2010 to 17th October, 2014. If the sole purchaser proposes to increase the number of scheme above 50 (Fifty) they shall pay to the Government as the state share such the sum of money as may be worked out on the basis of such additional schemes as and as may be mutually agreed upon between the parties.

Provided that if the sole purchaser could not purchase such additional schemes for one complete year (12 months) and discontinues the additional schemes before completion of one year they shall be liable to pay the Government share proportionate to the period of actual scheme only.

5. (a) That the sole purchaser shall provide the Government with a bank guarantee of Rs.10.00 crores (Rupees Ten Crores) as security deposit in favour of the Government of Sikkim. Finance, Revenue & Expenditure Department of a Nationalized Bank / Scheduled Bank one week before coming into force of this agreement;

(b) The Bank Guarantee shall be valid for the duration of the agreement and six months thereafter and shall be liable to be invoked by the Government for failure to deposit the sale proceeds of the tickets of Sikkim State lotteries taken delivery by the sole purchaser and any other charges due and payable by the sole purchaser or for breach of any of the terms and conditions of this agreement.

Provided that the Bank Guarantee shall not be invoked without giving 30 (thirty) days notice in writing directing the sole purchaser to pay the amount due under this agreement to the Government of Sikkim.

(c) Upon failure on the part of the sole purchaser to pay the amount demanded under the notice within 30 (thirty) days of receipt of the notice, the Government shall have the right to invoke the Bank Guarantee to the extent of the amount demanded and not paid. Provided that the shortfall, if any, in the amount of the Bank Guarantee required under this agreement shall be made good by the sole purchaser and shall be

furnished to the Government of Sikkim within a period of 45 (forty five) days from the date of signing of this agreement or at least a day before the commencement of the draws of the lottery, whichever is earlier.

xxx

13. That the Government shall deliver the tickets to the sole purchaser at the destination as may be agreed upon.

14. That the Government shall deliver to and the sole purchaser shall take delivery from the Government whole of the lottery tickets printed for a draw of a particular scheme with a clear understanding that if the sole purchaser is not able to sell the whole tickets, he shall return the unsold tickets to the Government within 15 (fifteen) days from the date of draw, which shall then be destroyed after verification. The whole sale price of tickets sold shall be determined by the Government on the basis of the prize amount, cost of paper, cost of printing, draw expenses, transportation charges and the Government share of revenue as fixed under Clause 4:

Provided that the prices of the tickets may be changed under the following circumstances, namely:-

(i) Change in the price structure of the lottery schemes,
(ii) Change in the paper cost, printing charges and freight, and
(iii) Market conditions.

15. That the full payment of the tickets resold by the sole purchaser shall be realized by the Government from the sole purchaser at wholesale rates as per clause 14 above.

16. That the sole purchaser shall produce the monthly return of sales tax, if any, paid to the respective state

governments wherever the tickets are sold for information of the Government.

xxx

20. That the Government shall immediately after each draw supply to the sole purchaser a copy of the result of the draw duty authenticated by the Director who shall immediately thereafter make arrangements to publicize the result of each draw.

Provided that the sole purchaser is at liberty, on his own cost and expenses to take up any kind of publicity of Sikkim state lotteries including telecast of result on any Satellite T.V. Channel every day, provided the publicity shall in no way undermine the prestige of the Government. No claim for cost on these accounts will be entertained by the Government.

xxx

23. The sole purchaser may appoint stockists, selling agents or sellers for further resale in different parts of the country on his own terms and at his own risk and responsibility.

xxx

25. The sale proceeds/cost of the tickets as may be determined by the Government from time to time may be deposited with the Government as per the directives of the Director, Sikkim State lotteries.

26. The sole purchaser shall pay the full amount for the tickets actually sold by the sole purchaser upon receipt of the invoice from the Government which shall be raised indicating the amount of wholesale rate and adjustment of prizes up to Rs.5000/- (Rupees five thousand) to be disbursed by the sole purchaser for each lottery draw on the lottery tickets actually sold by the sole purchaser.

27. The sole purchaser shall pay State tax or any other kind of taxes imposed by the other State Governments on sale of lottery tickets.

xxx

30. The sole purchaser shall be entitled to appoint stockists, selling agents or 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 stockists, selling agents or 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 obligation towards the State Government under this Agreement.

31. All unclaimed prizes shall be the property of the Government and full accounts of unclaimed prizes shall be rendered by the sole purchaser for prizes up to Rs.5000/- (Rupees five thousand)."

(iii) <u>Agreement dated 24.01.2015</u>

"**<u>AGREEMENT</u>**

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**;

xxx

WHEREAS in pursuant to the Notice Inviting Tender dated November, 15, 2014, M/s Future Gaming and Hotel Services Private Limited has qualified in the technical bid and has quoted the highest assured amount of revenue per draw to the State for 08 (eight) Sikkim State Paper Lottery schemes.

xxx

7. DEPOSITING OF SALE PROCEEDS OF THE TICKETS:

7.1 The Sole Purchaser/Distributor shall purchase the lottery tickets from the Government for further sales, and payments shall be made by the sole Purchaser/Distributor to the Government for such tickets as per the invoice raised by the Government.

7.2 The sale proceeds of the sale of lottery tickets shall be credited by the Sole Purchaser/Distributor into the Treasury or Public Ledger Account or Consolidated Fund of the State of Sikkim or Public Account or Fund as per the invoice raised by the State Government on the Sole Purchaser/Distributor, as prescribed by the State Government.

7.3 The Sole Purchaser/Distributor shall deposit sale proceeds as prescribed, ensuring Guaranteed Revenue as per clause (10) of this Agreement.

7.4 In the event, the Sole Purchaser/Distributor fails to comply with the above conditions, the Government reserves the right to refuse any further sale of lottery tickets to the Sole Purchaser/Distributor, and to suitably encash the bank guarantee executed by the Sole Purchaser/Distributor.

xxx

10. MINIMUM GUARANTEED REVENUE:

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:-

10.1 Minimum guaranteed revenue of the Government of State of Sikkim shall be Rs.15,00,12,800/- Rupees (Fifteen Crores Twelve Thousand and Eight Hundred Only) upto a turnover of Rs. 9,000 Crores Rupees (Nine Thousand Crores) per annum.

10.2 On an additional turnover over and above Rs.9,000 Crores Rupees (Nine Thousand Crores) per annum, the Sole Purchaser/Distributor shall pay 0.25% of the additional turnover to the Government of the State of Sikkim.

10.3 The Sole Purchaser/Distributor shall be required to submit monthly turnover statements of the proceeds and sales of lottery/schemes to the Government of the State of Sikkim by the 15th of the succeeding month.

xxx

15.7 The sole Purchaser/Distributor shall fully indemnify and hold harmless and defend Government and its officers against any financial and legal liabilities on account of violation of the relevant laws and rules in force in country, and all such claims that are solely

attributable to the Sole Purchaser/Distributor, in relation to the sale of lottery tickets during the terms of this Agreement."

(iv) Agreement dated 06.06.2016

"**AGREEMENT**

This Agreement is made on this the 06th day of June, 2016 (Two thousand and sixteen) 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 Private Limited company incorporated under Companies Act 1956, having its registered office at 54, Mettupalayam Road, G.N. Mills Post, Coimbatore – 641029, and having its branch/sales office at, Samdrupling Building, Kazi Road, Gangtok, Sikkim – 737101, represented by its Managing Director Shri S. Martin, son of Shri Santiyago (hereinafter referred to as the 'Sole Purchaser / Distributor')…

xxx

AND WHEREAS the Government and the Sole Purchaser/Distributor (hereinafter referred to as Distributor) decided to enter into an Agreement:

xxx

1. DEFINITIONS:

In the Agreement unless the context otherwise requires:

xxx

1.4 This Agreement will be in line with the Model Agreement circulated by the Ministry of Home Affairs, Government of India vide their letter No. V-17013/1/2010-CSR-1 dated 28th December, 2011 as already specified in the Invitation for Expression of Interest; and the Model Agreement may be referred for purposes of interpretations of this Agreement.

xxx

4.7 All the unsold tickets, if any, at the time of draw, with the Distributor shall be returned by the Distributor to the Director of Lotteries, Government of Sikkim or the Government authorized officials/person.

4.8 The Distributor shall submit the statement of sold tickets for each draw of different schemes to the Director of Lotteries, Government of Sikkim within 09 (Nine) days from the date of draw(s). The State Government will keep a record of the tickets issued to the Distributor."

Online Computerised Agreement:

At this stage, we extract the relevant clauses of the agreement dated 09.05.2005 and the supplementary agreement dated 25.04.2008 between the State of Sikkim and assessee-M/s Sugal

and Damani Enterprises Pvt. Ltd. for sale of online computerized network lottery, as under:

"AGREEMENT

This Agreement made at Gangtok, this the 9th day of May 2005, between the Governor of Skim, through the Principal Secretary to the Government of Sikkim in the Finance Department, revenue and expenditure……

AND

M/S Sugal & Damani Partnership firm having its Head office at 6/35W.E.A, Karol Bagh, NEW DELHI-110005… represented by its partner…

Whereas the Government with an objective to generate/raise revenue/funds for the State of Sikkim has decided to appoint additional Marketing agent for Computerized Network Lottery by selling lottery tickets to a variety of users through a process of On-Line Computerized Lottery System, which will also provide a venue for healthy entertainment and the Government intends to utilize the funds generated from the sale of the said Computerized Network Lottery tickets for good causes for health, education, infrastructure development and anti-poverty programs, and other developmental activities etc;

And Whereas the Government has received offer from M/S Sugal & Damani for appointment as Marketing Agent for the said Computerized Network Lottery.

xxx

"Agent" means the Sole Distributor and any person acting on behalf of the Sole Distributor as a stockists, sub-stockists, distributor or seller of any Lottery forming part of the Lottery Business.

“Agency" means the appointment by the State of the Sole Distributor for marketing/selling of Lotteries on behalf of the State (including the sale and distribution of tickets either itself or through us distributors or stockist/sub-stockist).

xxx

“Sub-agent/Retailer" means a person appointed by the Marketing Agent above or by any other person(s) duly authorised the Marketing Agent, to operate the lottery terminals and with whom the Marketing Agent (or any other person duly authorized by the agent as detailed above) has entered into a bilateral agreement to operate the lottery terminals or sell tickets.

xxx

10. CONSIDERATION

In consideration of the arrangement as agreed and contained in this deed of Agreement between the Government and the Marketing Agent, the Marketing Agent has agreed as under:

a. Minimum guaranteed revenue to the government of Sikkim will be 1% of the turnover up to Rs. 1000 crores or Rs. 10 crores p.a. whichever is higher.

b. On additional turnover over and above Rs.1000/- crores the Marketing Agent will pay 0.50% of the additional turnover to the state government.

xxx

12. REALISATION OF SALE PROCEEDS

The Marketing Agent shall deposit the Sale Proceeds (except prizes payable up to Rs.5000/-) with the Government on a monthly basis, along with account

statement of such sale proceeds supported by record/document.

xxx

16. CONDUCTING OF STATE ON-LINE COMPUTERIZED NETWORK LOTTERY

a) The State On-line Computerizes Network Lottery shall be organised, conducted or promoted by the Government through the Marketing Agent.

b) On-line computerized Network Lottery tickets shall be made available to the public through various retailers/sub-agents appointed by the Marketing Agent who will enter into bilateral agreements with these retailer/sub-agents. The date and time of the draw shall be indicated on the tickets themselves.

xxx

23. RELATIONSHIP BETWEEN MARKETING AGENT AND THE STATE GOVERNMENT

The relationship between the Marketing Agent and the Government will be one of Principal and Agent as defined in the Indian Contracts Act, 1872 as amended.

xxx

28. BANK GUARANTEE

(a) The Marketing Agent shall execute in favour of the Government a Bank Guarantee Rs. 1.5 Crores (rupees one crores fifty lakhs) for the performance of the agreement. The Bank Guarantee shall be executed as Security Deposit of a Nationalised Bank in favour of the Principal Secretary to the Government of Sikkim, Finance, Revenue and expenditure Department.

SUPPLEMENTARY AGREEMENT

This supplementary agreement is made on this the 25th day of April, 2008 between the Governor of Sikkim, through the Additional Chief Secretary to the Government of Sikkim, Finance, Revenue and Expenditure Department…

AND

M/s. Sugal and Damani Enterprises Pvt. Ltd., a Joint Stock Company registered under the Companies Act, 1956,… represented by ….

Whereas Marketing Agent vide agreement dated 9th May, 2005 (hereinafter referred to as the said agreement) had agreed to conduct Sikkim State Online Lottery and among other terms and conditions, vide clause 10 of the said agreement the Marketing Agent had agreed to pay a sum of Rs.10 crores (Rupees ten crore) per annum as Minimum Assured Revenue @ Rs.1% of the turnover up to Rs.1000 crore and on additional turnover over and above Rs.1000 crore @ Rs.0.50% of the turnover to the Government;

And whereas the Marketing Agent submitted that the sale of Online Lottery has reduced due to imposition of Lottery Tax in Maharashtra State by the Government of Maharashtra and banning of all types of lottery in Karnataka State by the Government of Karnataka w.e.f. 1" April, 2007 and requested the Government to review the minimum assured revenue vide their applications dated 25th September, 2007 and dated 16th January, 2008.

"10. CONSIDERATION:-

In consideration of the arrangement as agreed and contained in this deed of Agreement between the

Government and the Marketing Agent, the Marketing Agent has agreed as under:

Minimum guaranteed revenue to the Govt. of Sikkim will be 1% of the turnover up to Rs. 1000 Crores or Rs. 10 crores p.a. whichever is higher.

On additional turnover over and above Rs.1000 crores the Marketing Agent will pay 0.25% of the additional turnover to the State Government."

The other terms and conditions of the aforesaid agreement shall remain unchanged."

Agency:

15. Before proceeding to answer the contentions advanced at the Bar on the nature of relationship between the Government of Sikkim and the respondents-assessees herein, it would be useful to refer to the concept of agency. This is because if the relationship is in the nature of an agency (on the premise that the latter are rendering service to the State Government on the basis of the agreements entered into between the parties), then service tax is liable to be paid by the respondents-assessees herein under the Finance Act, 1994.

15.1 The relevant provisions of the Indian Contract Act, 1872 read as under:

"182."Agent" and "principal" defined.— An "agent" is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the "principal".

183. Who may employ agent.— Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

184. Who may be an agent.— As between the principal and third person any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

185. Consideration not necessary.— No consideration is necessary to create an agency.

186. Agent's authority may be expressed or implied.— The authority of an agent may be expressed or implied.

187. Definitions of express and implied authority.— An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

188. Extent of agent's authority.— An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

> An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.
>
> xxx
>
> **191. "Sub-agent" defined.—** A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.
>
> xxx
>
> **222. Agent to be indemnified against consequences of lawful acts.—** The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him."

15.2 According to Bowstead and Reynolds on Agency, 23rd Edition, agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties and the other of whom similarly manifests assent so as to act or so acts pursuant to the manifestation. Thus, the one on whose behalf the act or acts have to be done is called the principal and the other who is to act is called the agent. Any person other than the principal and the agent

may be referred to as the third party. The authority of the agent to act on behalf of the principal constitutes a power to affect the principal's legal relations with third parties. Such authority could be called actual authority or apparent authority. Thus, the essence of agency is that a person acts on the principal's behalf. Therefore, the term agency is used to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. Usually, the legal relations so created will be contractual in nature. Conversely, the mere fact that a person does something in order to benefit another and the latter is relying on the former to do so or may have requested or even contracted for performance of the action, does not make the former the agent of the latter. The centrality to agency is the conferral of authority to alter legal relations; as such in common law, being an agent is not a status but a description of a person, while and only so long as the person is exercising such authority. Thus, where one person (the principal), requests or authorises the other (agent), to act on his behalf and the other agrees to do so, the law recognises that such agent has power to affect the principal's

legal position by acts which, though performed by the agent, are to be treated in certain respects as if they were acts of the principal. It is common to regard control by the principal as a defining characteristic of agency. Thus, agency is termed as acting on behalf of the principal and subject to principal's control.

15.3 An agency has to be distinguished from other relationships such as an agent and trustee; agent and bailee; agent and employee; agent and independent contractor; agent and seller; agent and buyer; agent and borrower; agent and person supplying services.

15.4 Suppliers of the goods of a manufacturer, whether on a retail or wholesale basis, who have some form of concession as a regular stockist, distributor or franchisee, are often described as agent, selling agent, main agent, etc. for the manufacturer of goods which they supply. However, nowadays the distributor actually buys from the manufacturer and resells it to his own customers. In such cases, the term 'agent' is used in a complimentary sense only, i.e., not to transact any business on behalf of the principal, except as regards purchase of the goods from the principal. Such

a relationship is quite different from an agency. The distinction between an agent and the buyer for resale normally turns on whether the person concerned acts personally to make such profit as can be made, or is remunerated by pre-arranged commission. A supplier who fixes the resale price is likely to be a buyer for resale. If a party takes a profit on the resale, it will make him a seller. On the other hand, if a commission is paid on the resale, then, he is likely to be an agent.

15.5 In Benjamin's Sale of Goods, Eleventh Edition, Sweet & Maxwell, it has been stated that sale has to be distinguished from a contract of agency. When goods are delivered to another for sale to a third party, the recipient may be an outright buyer, or may take the goods on sale or return, or may merely be the supplier's agent to sell the goods, or an agent on a *del credere* commission, i.e., an agent who guarantees to the principal that the buyer will duly pay the price.

15.6 To determine the nature of the transaction, the whole agreement must be looked into as "the test is ultimately one of substance rather than form". However, there are certain indicators.

It is not conclusive that the consignee should be described in the contract as an “agent” or even “sole agent”, or conversely that the transaction should be called a “sale”, although the way in which the parties label the transaction will, typically, play a significant part in the court’s determination of the issue. Also, certain stipulations may be consistent with both sale (and especially sale or return) and agency, and, therefore, cannot be taken as indicative of either; for instance, the transfer to the consignee of the property in goods shipped upon the acceptance of drafts. It is, however, evidence towards a sale that the recipient is entitled to sell at whatever price the recipient thinks fit, accounting to the supplier only for a predetermined sum, and this interpretation is given further support, if the recipient is free to alter or improve the goods. Where the consignee pays wholesale prices for the goods, he is likely to be acting as a principal in the sale. If the consignee sells (whether for cash or on credit) to a retail purchaser, this immediately gives rise to a debt to the supplier for the listed price, the transaction becomes quite inconsistent with agency, including

del credere agency, and would be consistent only with sale or return.

Case Law:

16. Learned counsel for the respective parties relied upon the following cases in support of their submissions:

16.1 In ***Bhopal Sugar Industries Ltd. vs. STO, (1977) 3 SCC 147, ("Bhopal Sugar Industries Ltd.")*** the question was whether the contract was one of agency or sale. This Court held that the question will have to be determined having regard to the terms and recitals of the agreement, the intention of the parties as may be spelt out from the terms of the document and the surrounding circumstances and having regard to the course of dealings between the parties. While interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. The mere fact that the word "agent" or "agency" is used or the words "buyer" and "seller" are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. In this case, the point for consideration was whether at

the time when the appellant was consuming high speed diesel oil and petrol for its own purposes, was it doing so as the owner of these articles or merely as an agent under an agreement with Caltex Company. If the relationship was of an agent, then the usage of those articles or properties by the appellant therein would amount to a sale so as to be exigible to sales tax. On the other hand, if the diesel or petrol was used by the appellant therein as an owner of those articles, then sales tax would have been paid by the appellant therein when property had passed on to it and were received by the appellant therein.

16.1.1 In this context, this Court observed that a contract of agency differs essentially from a contract of sale inasmuch as an agent, after taking delivery of the property, does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Furthermore, since the agent is not the owner of the goods, if any loss is suffered by the agent then he is to be indemnified by the principal. It was further observed that while interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. Thus,

the mere formal description of a person as an “agent” or “buyer” is not conclusive, unless the context shows that the parties clearly intended to treat a buyer as a buyer and not as an agent.

16.1.2 It was further observed on an examination of the terms of the contract therein that Hispeedol (petroleum product) had been sold to the appellant therein and not held by it merely as an agent of the Caltex Company. Therefore, the agreement therein contained some elements of agency but having regard to the fact that the appellant therein was consuming the Hispeedol or petrol for its own purpose, it was acting as an owner of the goods and if it consumed the same for its own purposes, it was not doing so as agent but as owner which it was fully entitled to do. Therefore, it would not constitute a sale so as to be exigible to sales tax.

16.2 Reference could also be made to ***Sri Tirumala Venkateswara Timber and Bamboo Firm vs. Commercial Tax Officer, Rajahmundry, AIR 1968 SC 784,*** wherein this Court observed that there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal. The essence of a contract of sale is the

transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as an agent for the proceeds of the sale. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods, and will therefore be liable to account for the sale proceeds. That in certain trades the word "agent" is often used without any reference to the law of principal and agent. But the true relationship of the parties in such a case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship.

16.3 In ***Moped India Ltd. vs. Assistant Collector of Central Excise, Nellore, (1986) 1 SCC 125,*** one of the questions was whether the commission allowed in respect of different varieties of mopeds to the dealers could be regarded as a trade discount or not. The contention was that the commission allowed to the dealers was a trade discount and was, therefore, liable to be deducted in

determining the excisable value of the mopeds. In the agreement, the amount was referred to as “commission” but the label given by the parties could not be determinative because it was for the Court to decide whether the amount was a “trade discount” or not, whatever be the name given to it. Having regard to the terms of the agreement, this Court held that it was on a principal to principal basis. That under the agreement, mopeds were sold by the appellants therein to the dealers and the dealers did not act as agents of the appellants for the purpose of effecting sales on behalf of the appellants therein. Having regard to various clauses of the agreement considered in the said case, it was held that the relationship between the appellants and the dealers therein was on a principal to principal basis and therefore, the amount allowed to the dealers in respect of different varieties of mopeds was a trade discount. The appellants therein charged to the dealers the price of the mopeds sold to them less the amount of Rs.110, Rs.145 and Rs.165 as commission in respect of different varieties of mopeds. These amounts allowed to the dealers were clearly ‘trade discount’

liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the mopeds.

16.4 In ***Alwaye Agencies vs. Deputy Commissioner of Agricultural Income Tax and Sales Tax, (AIR 1988 SC 1250),*** the assessee-firm was appointed as distributor by the Travancore Cochin Chemicals Ltd. (Company) to effect the sale of certain chemical manufactured by the said company in the area covered by the Kerala State under an agreement entered into on 11.02.1967. This Court examined whether under the agreement, the assessee firm was an agent of the said company, or whether under the agreement the assessee firm was really a purchaser of the goods which were booked by it. In the Agreement, the stipulation was that the distributor had the right of the sale of the product within the stipulated area. Bulk supplies were effected in wagon load or lorry-load by the said company direct to the customer, but only provided that the distributor arranged the payment as per the agreement and also took the responsibility to bear entirely the resultant effects and risk from the said direct dispatches. Though the company had fixed the price at which the

goods were to be sold to the customers, it did not lead to the conclusion that the distributor was merely an agent. Under the agreement, what the distributor received was described as a “rebate” and not a “commission” as one would normally accept in the agreement of agency. Significantly, the supplies were made to the distributor against payment either immediate or deferred as provided in the agreement, and even when the goods were destined directly to the customer, it was the distributor who had to guarantee to arrange the payment. That where there was some time lag between the sending of the goods and the payment, the goods were to be insured at the cost of the assessee therein. This Court observed that this circumstance clearly showed that in respect of the goods dispatched under orders placed by the distributors, the latter really acted as purchasers of the goods which they in turn sold to the customers and did not merely act as agents of the said company. That in respect of these transactions, the goods dispatched passed to the distributor on the bills being endorsed and handed over to the distributors. Consequently, the appeal was dismissed.

16.5 This Court considered the nature of the agreement being one of sale or one of sole selling agency in the case of ***Snow White Industrial Corporation vs. Collector of Central Excise, (1989) 3 SCC 351.*** One of the clauses of the agreement was that unsold stocks lying with the seller (Gillanders) had to be returned to the appellants therein at the time of termination of contract by either of the parties. In the aforesaid context, it was held that the agreement was for a sole selling agency and not as an outright sale.

16.6 In ***M.S. Hameed vs. Director of State Lotteries, (2001) 249 ITR 186 (Ker),*** the facts were that the petitioner therein received in bulk quantities of lottery tickets from the State Government. They were given a discount which was on a slab system, such as for the purchase of 50,001 and above tickets, there was a 28% discount. The petitioners contended that the tickets purchased were thereafter distributed to other agents and sub-agents on commission basis. That after purchase of the tickets, it was not for the Government to look out as to how they were distributed and there was no control over the affairs thereafter. That there was only payment of the price of the ticket fixed as

payable by the principal, and no commission or discount was paid to them by the Government. That Section 194G of the Income Tax Act, which imposes liability on the person responsible for paying to any person who is or has been stocking, distributing, purchasing or selling lottery tickets, any income by way of commission, remuneration, on such tickets in all amounts exceeding Rs.1000, to deduct income tax thereon at the rate of 10%, had no application. Hence, the demand of tax was without jurisdiction. The Kerala High Court considered the question whether the amount received as commission or discount or any incentive or as a margin is income or earning which was taxable at the hand of the assessee concerned, coming under the purview of Section 194G of the Income Tax Act. It was observed that if the face value of the lottery ticket was Re. 1, the petitioner therein would receive it at Rs. 0.72 paise and could sell at any price and it was not the State's business to enquire into the matter at all. It was observed that the deduction under Section 194G was on any person responsible for paying to any person any income by way of commission, etc. who purchased or sold or stocked lottery tickets, in this case, the State

Government. The deduction was to be made at the time of credit of such income to the account of the payee or at the time of payment of such income. The Kerala High Court observed that when the deduction is contemplated at the time of the payment to the person concerned but it is shown that there was no payment to the agent at the time of purchase of the ticket, the section automatically becomes inapplicable. That the ticket is given on a discount of 28%, can by no imagination be pressed into service for an interpretation that, nonetheless, 10% of 28 paise is deductible as tax. Thus, it was held that Section 194G was not applicable. The Kerala High Court held that since the lottery tickets were sold at a discounted price, the purchasers were sought to be taxed as agents which could not be the case as there was no transaction under an agency and the petitioner therein were not liable to be covered under Section 194G of the Income Tax Act.

16.7 ***Ahmedabad Stamp Vendors Association vs. Union of India, (2002) 257 ITR 202 (Guj),*** raised a question with regard to whether, the petitioners therein being stamp vendors were agents of the State Government who were being paid commission or

brokerage or whether the sale of stamp papers by the Government to the licensed vendors was on principal to principal basis involving a contract of sale. Reference was made to ***Bhopal Sugar Industries Ltd.*** and also to the meanings of the expressions "commission" and "discount". The licensed vendors have to pay for the price of the stamp paperless the discount at the rates provided varying from 0.5% to 4%. It was not that the stamp vendor collected the stamp papers from the Government, sold them to the retail customers and then deposited the sale proceeds with the Government less the discount. The liability of the stamp vendor to pay the price less the discount was not dependent upon or contingent to sale of stamp papers by the licensed vendor. The licensed vendor was not entitled to get any compensation or refund of the price if the stamp papers were lost or destroyed. The crucial question was whether the ownership in the stamp papers passed to the stamp vendor when the Treasury Officer delivered stamp papers on payment of price less discount. Clause (b) of sub-rule (2) of Rule 24 of Gujarat Stamps Supply and Sales Rules, 1987 indicated that the discount which the licensed vendor had obtained

from the Government was on purchase of the stamp papers. Consequently, it was held that the discount made available to the stamp vendors under the provisions of the aforesaid 1987 Rules did not fall within the expression "commission" or "brokerage" under Section 194H of the Income Tax Act, 1961.

16.8 In ***Bharti Cellular Limited (Now Bharti Airtel Limited) vs. Assistant Commissioner of Income Tax, (2024) 8 SCC 608,*** the assessees therein were cellular mobile service providers and the issue related to the liability to deduct tax at source under Section 194-H of the Income Tax Act, 1961 on the amount which, as per the Revenue, was a commission payable to an agent by the assessees under the franchise/distributorship agreement between the assessees and the franchisees/distributors. Though the matter was under the provisions of the Income Tax Act and Section 194-H of the said Act which imposes the obligation to deduct tax at source by any person responsible for paying at the time of credit or at the time of payment, whichever is earlier, to a resident, any income by way of commission or brokerage, nevertheless, the law of agency was considered. This was specially in the context of the

expression "acting on behalf of another person". Referring to Section 182 of the Contract Act which defines "agent" and "principal", it was observed that agency is a triangular relationship between the principal, agent and the third party. In order to understand the relationship, one has to examine the *inter se* relationship between the principal and the third party and the agent and the third party. In this regard, it was observed that certain factors or aspects must be taken into consideration while examining whether a legal relationship of a principal and agent exists, as under:

(a) "The essential characteristic of an agent is the legal power vested with the agent to alter his principal's legal relationship with a third party and the principal's co-relative liability to have his relations altered.

(b) As the agent acts on behalf of the principal, one of the prime elements of the relationship is the exercise of a degree of control by the principal over the conduct of the activities of the agent. This degree of control is less than the control exercised by the master on the servant, and is different from the rights and obligations in case of principal to principal and independent contractor relationship.

(c) The task entrusted by the principal to the agent should result in a fiduciary relationship. The fiduciary relationship is the manifestation of consent by one person to another to act on his or her behalf and

subject to his or her control, and the reciprocal consent by the other to do so.

(d) As the business done by the agent is on the principal's account, the agent is liable to render accounts thereof to the principal. An agent is entitled to remuneration from the principal for the work he performs for the principal."

16.8.1 It was further observed that three other relevant aspects or considerations should be noted. First, is the difference between "power" and "authority". The second consideration is that the primary task of an agent is to enter into contracts on behalf of his principal, or to dispose of his principal's property. The third consideration is that the substance of the relationship between the parties, notwithstanding the nomenclature given by the parties to the relationship, is of primary importance.

16.8.2 In this case, three distinct relationships were considered which are different from the relationship of an agency. The first is the difference between an agent and a servant which is not relevant for this case. Next, the difference between a principal-agent and principal-principal relationship was considered with reference to ***Bhopal Sugar Industries Ltd.*** It was observed that an agent, after

taking delivery of the property, does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Therefore, if the agent is not the owner of the goods and if any loss is suffered by the agent, he is to be indemnified by the principal. This is unlike a contract of sale where title to the property passes on to the buyer on delivery of the goods for a price paid or promised. The buyer then becomes the owner of the property and the seller has no vestige of title left in the property. Third is the case of independent contractor, wherein if the party is concerned about acting for himself and making the maximum profit possible, he is usually regarded as a buyer or an independent contractor and not as an agent of the principal. This would be true even when certain terms and conditions have been fixed relating to the manner in which the seller conducts his business.

16.8.3 Distinguishing the relationship of a principal with independent contractor from that of an agency, it was observed that an independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract. On the other hand, an agent is not completely free from control, and

the relationship to the extent of tasks entrusted by the principal to the agent is fiduciary. Sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship, it may not be an agency. It was further observed that the distinction is that independent contractors work for themselves even when they are employed for the purpose of creating contractual relations with the third persons. It was further observed that the term "agent" should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal's property; viz. an independent contractor who may, incidentally, also affect the legal position of his principal in other ways.

Agreements:

17. The relevant Clauses of the agreements which were adverted to before this Court have been extracted above.

17.1 In the agreement dated 10.08.2009, the respondent-assessee (M/s Future Gaming Solutions Pvt. Ltd.) is referred to as an **exclusive sole purchaser** of the conventional weekly paper

lottery and bumper lottery with denomination of rupee one organised by the Government of Sikkim on **actual sold basis**. In consideration of the appointment of the respondent-assessee herein as sole purchaser, a sum of Rs.8 crores (Rupees Eight Crores) per annum had to be paid by the respondent-assessee herein to the Government for the first year of the extended period effective from 18.10.2009 to 17.10.2010 and a sum of Rs.10 crores (Rupees Ten Crores) per annum for the second year of the extended period effective from 18.10.2010 to 17.10.2014. This was the minimum payment that had to be made by the sole purchaser to the Government of Sikkim for parting with the lottery tickets. The sole purchaser had to provide in favour of the Government of Sikkim with a bank guarantee of Rs.10 crores (Rupees Ten Crores) as a security deposit, which was to deliver the tickets to the sole purchaser at the destination as may be agreed upon.

17.1.1 Clauses (14) to (16) are significant in this agreement. Clause (14) stated that the Government of Sikkim shall deliver to and the sole purchaser shall take delivery from the Government whole of the lottery tickets printed for a draw of a particular scheme

with a clear understanding that if the sole purchaser was not able to sell the whole tickets, he shall return the unsold tickets to the Government within 15 days from the date of draw, which would then be destroyed after verification. This was to avoid any possible misuse of the lottery tickets leading to questioning of a draw of lottery in a particular scheme. That the wholesale prices of the tickets sold was to be determined by the Government on the basis of the prize amount, cost of paper, cost of printing, draw expenses, transportation charges and the Government share of revenue as fixed under clause (4) extracted above. That the prices of the tickets could be changed under certain circumstances. Also, the State Government could realise the full payment of the tickets resold from the sole purchaser at wholesale rates as per clause (14) referred to above. The wholesale rate of the tickets sold by the State Government to the sole purchaser had to be paid after actually selling the same. That, for information of the Government, the sole purchaser had to produce monthly return of sales tax, if any, paid to the respective State Governments wherever the tickets are sold.

17.1.2 That the sole purchaser could at his own cost and expenses give publicity to Sikkim State lotteries through various media platforms, both print and electronic, without seeking any reimbursement from the State Government. Further, the sole purchaser could appoint stockists, selling agents or sellers for further resale in different parts of the country on his own terms and at his own risk and responsibility. That this did not entail any privity of contract between the State Government and such entities. As a result, the sole purchaser's obligation towards the State Government was not discharged despite appointment of stockists, selling agents or other sellers. Unclaimed prize was the property of the State Government and the full accounts of unclaimed prizes had to be rendered by the sole purchaser for prizes up to Rs.5,000/- (Rupees Five Thousand). The sole purchaser had to maintain proper books of accounts and get the same audited and the State Government had the right to inspect the books of accounts maintained by the sole purchaser, if deemed necessary.

17.1.3 Having regard to the aforesaid terms and conditions of this agreement including the nomenclature used to describe the

respondent-assessee herein, it clearly emerges that the respondent-assessee was not an agent of the State Government but purchased the lottery tickets at his own risk for the purpose of selling it through stockists, etc. The unsold lottery tickets had to be returned to the State Government in order to avoid misuse of the same and in order to ascertain the number of tickets sold. The prices of tickets were determined as wholesale prices which were as per clause (14) and paid by the respondent-assessee herein to the State Government in terms of clause (4).

17.2 Agreement dated 24.01.2015 between the State of Sikkim and M/s. Future Gaming and Hotel Services Private Limited has described the said assessee as a **sole purchaser/distributor/ promoter**. Clause (7) of the said agreement states that the sole purchaser/distributor shall purchase the lottery tickets from the Sikkim Government for further sales, and payments shall be made by the sole purchaser or distributor to the Government for such tickets as per the invoice raised by the Government. The sale proceeds for sale of lottery tickets had to be credited by the sole purchaser or distributor into the treasury etc. of the State of

Sikkim as per the invoice raised by the State Government on the sole purchaser or distributor. The sole purchaser or distributor had to deposit the sale proceeds ensuring Guaranteed Revenue. Clause (10) of the agreement spoke of Minimum Guaranteed Revenue which was Rs.15,00,12,800/- up to a turnover of Rs.9000 crores per annum and on an additional turnover over and above Rs.9000 crores per annum, the sole purchaser or distributor had to pay 0.25 per cent of the additional turnover to the Government of Sikkim. For that purpose, the sole purchaser or distributor has to submit monthly turnover of the proceeds of the sale of lottery/schemes to the Government of Sikkim by 15th of the succeeding month. The annual financial and systems' audit of the various lottery schemes had to be conducted by the Government to ensure that the Act and the Rules are not violated. Also, the sole purchaser or distributor had to get its accounts audited internally and have reconciliation of the records from time to time. The sole purchaser or distributor had the responsibility to indemnify the State Government against all claims in relation to the sale of lottery tickets during the term of the agreement.

17.3 The agreement dated 06.06.2016 between the State of Sikkim and M/s Future Gaming and Hotel Services Private Limited also describes the assessee as **a sole purchaser/ distributor**. This agreement was stated to be in consonance with the model agreement circulated by the Ministry of Home Affairs, Government of India by letter dated 28.12.2011. Under the said Agreement, all unsold tickets, if any, at the time of draw with the sole purchaser or distributor had to be returned to the Director of Lotteries, Government of Sikkim or the authorized officer. Also, a statement of sold tickets for each draw of different schemes had to be submitted by the Distributor to the Director of Lotteries within nine days from the date of draw. Under this agreement also, the distributor on its own terms and on its own risk and responsibility had to appoint Area Distributors/Stockists to sell the lottery tickets of the Government of Sikkim in discharge of its obligation under the Agreement. This agreement also had the guaranteed revenue clause under which the distributor had to deposit the guaranteed revenue to the Government as per their bid rate quoted in the tender.

17.4 We have perused the agreements between the Government of Sikkim and the respondent-assessee with regard to online computerised lottery. The clauses of the said agreement are similar in substance to the clauses of the agreement with regard to paper lotteries which have been discussed above. Merely because the online agreement uses the expression "marketing agent", it would not imply that respondent-assessee is an agent within the meaning of the expression under the provisions of the Contract Act dealing with agency. Hence, on a consideration of the agreements for the sale of online lottery tickets in juxtaposition with the agreement for the sale of paper lotteries, we find that there is a great similarity in the clauses of the agreement and hence, agreement concerning sale of online lottery tickets also is one between principal and principal and not between principal and agent.

17.5 Recently, this Court in ***K. Arumugam*** observed that conducting a lottery which is a game of chance, is an activity conducted by the State and not a service being rendered by the State which would enable the engaging of an agent such as respondents-assessees herein for the purpose of rendering of such

a service. That the assessees who buy the lottery tickets on outright sale basis have the burden of selecting them through stockists for a profit as their business activity. The differential in the price paid to the State for the lottery tickets that are made available to the assessee to sell and the sale price is the profit of the assessee. Thus, there is no promotion of the business of the State which conducts lotteries as an agent. Consequently, there is no principal-agent relationship, rather it is one of principal to principal. The conclusions in ***K. Arumugam*** are apposite to these cases also.

Controversy between the Parties:

18. The parliamentary amendments made to the Finance Act, 1994, for the purpose of imposing service tax on the respondents-assessees herein as 'business auxiliary service' under sub-section 19 of Section 65 of the said Act effective from 01.07.2003 and by way of the insertion of the Explanation to Section 65(19)(ii) of the Finance Act, 1994 culminated in the judgment of this Court in ***K. Arumugam.*** In the said case, this Court held that the relationship between the Government of Sikkim and the assessees therein was not that of principal and agent but one of principal and principal.

Therefore, up to the year 2010, the *lis* between the parties ended with the judgment in ***K. Arumugam***.

18.1 For the period from 01.07.2010 till 30.06.2012, amendment was made to Section 65(105) by insertion of clause (zzzzn) which defined promotion, marketing, organizing or in any other manner assisting in organizing games of chance, including lottery, bingo or lotto in whatever form or by whatever name called, whether or not conducted through internet or other electronic networks as a "taxable service". The Sikkim High Court observed that the said clause essentially means the conducting of lotteries within the scope and ambit of betting and gambling as per Entry 62 - List II of the Seventh Schedule of the Constitution and therefore, on the very same activity of betting and gambling, service tax cannot be levied.

18.2 The High Court further held that when a sole purchaser/distributor/promoter purchases the lottery tickets from the State Government for the purpose of onward sales through stockists etc., it was not acting as an agent of the State Government but in its own right as a principal. Thus, the relationship between

the State Government and the sole distributor was one between a principal and principal and not one between principal and agent. That various clauses of the Agreement indicated that the sole distributor was acting in its own right on purchase of the lottery tickets for onward sales, having regard to the Lotteries Act which is a Central Government legislation and bearing in mind the faith of the general public/customers in the lottery schemes conducted by the Government of Sikkim. It was only for the above purposes that various clauses of the agreement sought to enhance transparency in the lottery business, which was a part of the revenue earning endeavours of the State of Sikkim through various lottery schemes. In the circumstances, the High Court set-aside the demands for payment of service tax made by the Central Government.

18.3 At the same time, the Finance Act, 2012, by an amendment of Finance Act, 1994, introduced the Negative List under Section 66D which comprised of various services on which no service tax could be levied or collected. The List included the activity of betting, gambling or lottery. Hence, no service tax on the conduct

of the lottery could be levied by the Central Government. However, in 2015, another amendment was made to the Finance Act, 1994 by substituting Explanation 2 in clause (44) of Section 65B, wherein the expression "transaction in money or actionable claim" was defined to not include, *inter alia,* 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, *inter alia,* by a lottery distributor or selling agent in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing of lottery of any kind in any other manner. The expression "lottery distributor or selling agent" was defined by inserting clause (31A) to Section 65B to mean a person appointed or authorized by a State for the purposes of promoting, marketing, selling or facilitating in organizing lottery of any kind, in any manner, organized by such State in accordance with the provisions of the Lotteries (Regulation) Act, 1998. Since "betting, gambling or lottery" was included in the Negative List, an Explanation was inserted to Section 66D(i) to say that the said expression "betting, gambling or lottery" shall not include the activity specified in

Explanation 2 to clause (44) of Section 65B. Thus, the intent of the Parliament was that any transaction in an actionable claim (lottery being an actionable claim) would not include an activity carried out for the distribution of lottery by the distributor. In other words, such activity of the distributor would not amount to the activity of betting, gambling or lottery.

18.4 We do not think that such a meaning could be attributed to the activity of the distributor involved in the selling of lottery or facilitating or organizing of lottery in any manner. The expression "betting, gambling or lottery" in the Explanation to Section 66D(i) has to be given its true intent and meaning as conducting a lottery is nothing but an activity coming within the scope of betting and gambling. This is by the application of the principle of *noscitur a sociis* where the expression "lottery" takes its meaning from "betting and gambling". Although a lottery ticket is nothing but an actionable claim, the conduct of a lottery scheme is nothing but a betting and gambling activity. Therefore, it is only Entry 62 – List II which enables the imposition of tax by the State Government. The activity of betting and gambling which includes conducting of

a lottery is regulated under Entry 34 – List II, with Entry 62 – List II being the taxation entry.

18.5 By way of Finance Act, 2015, clause (a) of the Explanation to Section 67 containing the definition "consideration" was amended to include, *inter alia,* any amount retained by the lottery distributor or selling agent from gross sale of lottery tickets in addition to the fee or commission, if any, or, as the case may be, the discount received, i.e., the difference in the face value of the lottery ticket and the price at which the distributor or selling agent gets that ticket. The said amendment would have no consequence and bearing on the substantive provisions for the reasons that we have stated above. This is because the distributor buys at wholesale price from the State Government and sells it at a higher price to the retailer.

18.6 Thereafter, the amendment made to clause [ii(a)] of the Explanation 2 to Section 65B(44) in the year 2016 that the expression "transaction in money or actionable claim" would 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, *inter alia,* by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, etc. in accordance with the provisions of the Lotteries (Regulation) Act, 1998 is only an innocuous amendment which is only cosmetic in nature.

18.7 In the circumstances, we find that at each stage, the amendments made to the Finance Act, 1994, in order to impose service tax on the sole distributor/purchaser of the lottery tickets (respondents-assessees herein) have been unsuccessful. We have reasoned that the amendment to the said definition would in no way detract from the substance of the relationship between the State Government and the sole distributor or purchaser of the lottery tickets which is one of principal to principal and not of principal-agent. There being no agency and no service rendered by the respondents-assessees herein as an agent to the Government of Sikkim, service tax is not leviable on the transactions between the purchaser of the lottery tickets (respondents-assessees herein) and the Government of Sikkim.

19. The detailed analysis of the relevant provisions of the Finance Act, 1994, and amendments made thereto in light of the clauses of the Agreements highlighted during the course of submissions as well as the judgments of this Court, would not persuade us to take a different view from what the Sikkim High Court has taken.

20. In view of the aforesaid discussion, we find no merit in the appeals filed by the Union of India and others. Hence these appeals are dismissed. The appeal filed by the assessee is disposed accordingly.

Parties to bear their own costs.

.....J.
(B.V. NAGARATHNA)

.....J.
(NONGMEIKAPAM KOTISWAR SINGH)

New Delhi;
February 11, 2025.