

The Lottery Story

Date: December 07,2020



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Background

The recent decision of the Supreme Court in the case of **Skill Lotto Solutions Pvt. Ltd. Vs. Union of India & Others [TS-1042-SC-2020-ST]** has brought back the topic of taxation of lotteries in the limelight once again. The Apex Court has upheld the levy of GST on lottery tickets and a number of facets of this decision are interesting and are likely to dominate the debate for some time and may not be the last word on the issue given the wide ramifications and complex aspects of lottery.

Pre-GST Era

Entry 54 empowered States to levy tax on sale of goods and State Legislations specifically excluded actionable claims from the ambit of goods. Section 2(d) of the CST Act also excluded actionable claims. The Supreme Court in the case of **H.Anraj Vs. Government of Tamil Nadu [1]** held that even though lottery ticket is not a physical article it gives the right to participate in a draw and is capable of being bought and sold and hence it is goods. This decision was doubted by the Supreme Court and a Five Member Constitution Bench in the case of **Sunrise Associates Vs. Government of NCT of Delhi [2]** held that lottery ticket is an actionable claim and not goods.

Goods and Service Taxes

Section 2(52) of the CGST Act, 2017 defines 'goods' to mean every kind of movable property other than money and securities but includes *actionable claim*, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

Item 6, Schedule-III of the CGST Act covers actionable claims other than lottery, betting and gambling. Thus actionable claims other than the specific exclusion are neither supply of goods nor supply of services by virtue of Section 7(2) of the CGST Act.

Rule 31A of the CGST Rules as substituted w.e.f. 01.03.2020 vide Notification No.8/2020-CT dated 02.03.2020 provides that the value of supply of lottery shall be deemed to be 100/128 of the face value of the ticket or the price as notified in the official gazette by the organizing State *whichever is higher*. Thus the uniform rate of 28% was ushered as against the differential rate regime that prevailed earlier.

Issue before the Supreme Court

The petitioner was an authorised agent for the sale and distribution of lotteries organised by the State of Punjab and filed a writ petition on the grounds that the definition of 'goods' under Section 2(52) of the Central Goods and Services Tax Act, 2017 and the Notifications 01/2017 - Central Tax (Rate), 01/2017 - Integrated Tax (Rate) and the State Rate Notification of Punjab issued consequentially were ultra vires the Constitution and violative of Articles 14, 19(1)(g), 301 and 304.

Contentions of the Assessee

- Lottery is not goods, and since GST is only leviable on goods under the CGST Act, 2017, the levy of GST on lottery is ultra vires, the Constitution. Article 366(12) in its definition of goods only includes all materials, commodities and articles and does not cover actionable claims.
- The provisions of the CGST Act treating lottery as goods are contrary to the judgement of the

Constitution Bench of the Supreme Court in the case of ***Sunrise Associates vs. Govt. of NCT of Delhi and Ors.***

- The provisions of CGST Act, 2017 are self-contradictory in as much as the definition of actionable claim is as per definition of Transfer of Property Act, which is only the claim and not the goods. Further, under the definition of goods, actionable claims have been included as goods under Section 2(52).
- GST cannot be levied on the face value of lottery tickets as the face value also includes prize money which is to be reimbursed to the winners of the lottery tickets. Placing reliance on the judgement of the Court in ***State of Madras vs. Gannon Dunkerley & Co., (Madras) Ltd.*** [31] where the definition of goods as occurring in the Sale of Goods Act, 1930 was held to be the definition of goods under the Constitution, it was contended that the definition excludes actionable claims from its ambit.
- The Parliament does not have the absolute power to make an inclusive definition of something to be taxed which is not taxable otherwise.
- Item No.6, Schedule III of the CGST Act, 2017 reflects hostile discrimination since actionable claims other than lottery betting and gambling have been treated neither as supply of goods nor supply of services.
- The observations made in ***Sunrise Associates*** that lotteries are actionable claims are only *obiter dicta* and not the ratio of the judgement.

Contentions of the Revenue

- The Writ Petition is not maintainable as lottery is *rex extra commercium* and no right under Article 19(1) (g) and 301 can be claimed with regard to lottery.
- In ***Sunrise Associates***, this Court has held that actionable claim is a movable property and goods in a wider sense and the definition of goods given in Section 2(52) of the CGST Act, 2017 is in accordance with the judgement in ***Sunrise Associates***
- The definition of goods given under Article 366(12) of the Constitution is an inclusive definition. Article 366(12A) defines goods and services tax to mean tax on supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption. Lottery having been judicially held to be an actionable claim is covered within the meaning of term goods under Section 2(52). The Parliament has the competence to levy GST on lotteries under Article 246A of the Constitution. Under Article 279A, the GST Council has approved the levy of GST on lottery tickets, hence, the inclusion of actionable claims in the definition of goods under section 2(52) is in keeping with the legislative and taxing policy.
- The levy on face value is authorised by Section 15(1) read with Section 15(5) of the Act, 2017 and Rule 31(A) of the CGST Rules, 2017 and that the levy of 28% tax on face value is neither discriminatory nor beyond the taxing policy/powers of the State.
- During the pendency of the writ petition, Rule 31A had been amended merging earlier 2 separate rates and that by virtue of Rule 31A sub-rule (2), value of supply of lottery is one and the same. In lieu of the amendment which was not challenged in the present petition, the argument of discrimination in rate of tax is invalid.
- The decision of this Court in ***State of Madras vs. Gannon Dunkerley*** dealt with the definition of the term “sale” and was not concerned with the interpretation of “goods”.

Contentions of the Intervenor

- The taxing power of legislature is traceable to the Constitution alone and that the Legislature cannot tax something that is constitutionally not goods.
- The definition of goods under the GST Act would have to be guided by the definition of goods given under the Constitution. The prize money in a lottery deducted from a lottery claim ought not to be taxed at all and the tax, if at all ought to be levied only on the invoice value, i.e., the transaction value of the lottery ticket or the lottery scheme after deducting the prize money. The lottery ticket has a zero value and is only a chance, which cannot be taxed.

Supreme Court decision

- With regards to the maintainability of the writ petition, the Court held that a writ petition alleging the

violation of Article 14 specifically with respect to a Parliamentary Act can be entertained under Article 32. The Hon'ble Court referred to **Anraj and Ors. Vs. State of Maharashtra**, where it had previously entertained a writ petition with regard to the matter of lottery tickets.

- With reference to what is the legal meaning of goods and whether actionable claim can also be a part of goods, the Court first looked at the concept of goods by analysing the meaning of goods as per Section 2(7) of the Sale of Goods Act, 1930 and Section 311(2) of the Government of India Act, 1935 and the meaning of Actionable Claim as per Section 3 of the Transfer of Property Act, 1882. The definition of goods as contained in the Sale of Goods Act, 1930 in Section 2(7): "goods" means every kind of movable property other than actionable claims and money; whereas definition of goods in Section 2(52) in the Act, 2017 while defining goods as every kind of movable property other than money and securities "but includes actionable claim". Extracting the relevant paragraphs of the judgement in the **State of Madras vs. Gannon Dunkerley & Co. (Madras) Ltd.**

"To sum up, the expression "sale of goods" in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible- and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose tax on the supply of the materials used in such a contract treating it as a sale."

- The Court pointed out that the definition of goods as per Article 366(12) was never intended to give a restrictive meaning of goods. *"when the Parliament has been conferred power to make law with respect to goods and services, the legislative power of the Parliament is plenary. The observations of this Court in The State of Madras v. Gannon Dunkerley & Co., (supra) at page 426 are clear pointer that although the State Legislature had no legislative competence to enact impugned legislation but Parliament on the strength of residual power could have legislated. We are the view that the judgment of this Court in The State of Madras v. Gannon Dunkerley & Co., (supra) does not lend support to the submission of the learned counsel for the petitioner that Parliament could not have defined the goods in Act, 2017, expanding the definition of goods as existing in Sale of Goods Act, 1930."*
- Looking into the judgement in the case of **Anraj**, where the question arose out of the levy of tax on sale of lottery tickets, this Court came to the conclusion that lottery to the extent that they comprise the entitlement to participate in the draw are "goods" properly so called, and they are not actionable claims. In **Sunrise Associates**, the Court analysed its judgement in **H. Anraj** and came to the conclusion that it had incorrectly held that a sale of a lottery ticket involved a sale of goods. The Court in para 36 stated that *"were actionable claims, etc. not otherwise includible in the definition of "goods" there was no need for excluding them."* The Court reiterated that a sale of lottery ticket also amounts to the transfer of an actionable claim and in paragraphs 46 and 48 of the Judgement held lottery to be an actionable claim.
- With regards to the submissions that the observations made by the Constitution Bench that lottery is an actionable claim is *obiter dicta*, the Supreme Court observed that *"When the Constitution Bench came to the conclusion that the lottery is an actionable claim it was considering the definition of 2(j) itself and what has been held by the Constitution Bench cannot be held to be obiter dicta."*
- The definition of goods under Section 2(52) of the Act, 2017 does not violate any constitutional provision nor it is in conflict with the definition of goods given under Article 366(12). It further held that *Article 366 clause (12) as observed contains an inclusive definition and the definition given in Section 2(52) of Act, 2017 is not in conflict with definition given in Article 366(12).*
- Referring to numerous cases including **Navinchandra Mafatlal Bombay Vs. Commissioner of Income Tax, Bombay City, AIR 1955 SC 58; Navnitlal C. Javeri Vs. K.K. Sen, Appellate, Assistant Commissioner of Income Tax, (1965) 1 SCR 909; Sri Krishna Das Vs. Town Area Committee, Chirgaon, (1990) 3 SCC 645**, the Supreme Court referred to the power to make laws with respect to goods and services tax provided by Article 246A and stated that *the submission of the petitioner that actionable claims have been artificially included in the definition of goods cannot be accepted.*
- With reference to the claim of the petitioner on the ground of hostile discrimination while taxing lottery, betting and gambling and excluding other actionable claims, the Court referred to **State of Bombay vs. R.M.D. Chamarbaugwala and Anr., AIR 1957 SC 699** where the Court considered the nature of activities akin to lottery, betting and gambling. The Court held that *"the prize competitions being of a gambling nature, they cannot be regarded as trade or commerce and as such the petitioners cannot claim any fundamental right under Article 19(1)(g) in respect of such competitions, nor are they entitled to the protection of Article 301."* Later in **Union of India and Ors. Vs. Martin Lottery Agencies**

Limited, (2009) 12 SCC 209, the Apex Court considered the levy of service tax on lottery tickets. It held that *“the law as it stands today, recognises lottery to be gambling, which is res extra commercium.”*

- The Court after considering all the above held that lottery, gambling and betting are well known concepts and have been regulated and taxed by different legislations. *“When the Parliament has included above three for purpose of imposing GST and not taxed other actionable claims, it cannot be said that there is no rationale or reason for taxing above three and leaving others.”*
- The Supreme Court did not accept the contention that the prize money should be abated from the face value of the lottery ticket for levy of GST by relying upon the valuation scheme prescribed under Section 15 of the CGST Act, 2017. The Court held that *“For determining the value of the lottery, now, there is statutory provision contained in Section 15 read with Rule 31A as noted above. Section 15 of the Act, 2017 by sub-section (2) it is provided what shall be included in the value of supply. What can be included in the value is enumerated in sub-clause (a) to (e) of sub-section (2) of Section 15. Further, sub-section (3) of Section 15 provides that what shall not be included in the value of the supply. When there are specific statutory provisions enumerating what should be included in the value of the supply and what shall not be included in the value of the supply, we cannot accept the submission of the petitioner that prize money is to be abated for determining the value of taxable supply. What is the value of taxable supply is subject to the statutory provision which clearly regulates, which provision has to be given its full effect and something which is not required to be excluded in the value of taxable supply cannot be added by judicial interpretation.”*
- With reference to the arguments based on taxing statutes of other countries, the Supreme Court observed that *“The taxing policy and the taxing statute of various countries are different which are in accordance with taxing regime suitable and applicable in different countries. The issue which has been raised before us has to be answered by looking into the statutory provisions of the Act, 2017 and the Rules framed therein which govern the field.”*
- With reference to the prayer of the Petitioner, to grant liberty to challenge the Notifications dated 21.02.2020 and 02.03.2020 by which rate of GST for lottery run by the State and authorised by the State have been unified at 28%, the Court accepted the prayer of the petitioner to challenge the notifications separately in appropriate proceedings.

A different perspective

While the Supreme Court has categorically upheld the levy of GST on lottery tickets as well as the non-exclusion of prize money from the value, it is respectfully submitted that certain key arguments do not seem to have been taken and hence not considered by the Supreme Court. These are

- A Three Member of the Supreme Court in the case of **Yasha Overseas Vs. Commissioner of Sales Tax** [4] explained the decision in **Sunrise Associates** and in para 39 of the judgement observed that *on purchasing a lottery ticket one merely get a claim to a conditional interest in the prize money that is not in the purchaser's possession and the right would therefore squarely fall within the definition of actionable claim. The Constitution Bench decision in Sunrise further held that Anraj wrongly split up the right accruing to the purchaser of a lottery ticket. The right was one and indivisible. But even assuming the right to participate in the draw to be a separate right there would still be no sale of goods within the meaning of sales tax laws because the draw itself could not be any movable property and the participation in the draw was only with the object to win the prize. The transfer of the right would thus be of a conditional beneficial interest in movable property that is not in possession, in other words once again an actionable claim.*
- While there can be no quarrel on the scope of Schedule-III; the specific exclusions from actionable claim in the context of the levy, one important question that was not raised and hence was not answered was *whether there is a supply for consideration under Section 7(1) of the CGST Act and whether prize money can constitute consideration.*
- The European Court of Justice in the case of **Odvolací Finanční Ředitelství Vs. Pavlína Bašťová** [5], has held that settled case law is to the effect that supply of services as a transaction for consideration requires that there must be a direct link between that supply and the consideration actually received by the taxable person. Prize money won by a horse belonging to a taxable person cannot be characterized as effective consideration for the supply of the horse by its owner to a horse race organizer.
- Section 7(1) of the CGST Act, 2017 refers to 'supply for consideration' which is the same as deployed in Australia GST. The Federal Court of Appeal Australia General Division in the case of **AP Group Limited Vs. Commissioner of Taxation** [6] has observed that the definition of 'supply' and 'consideration', even if read literally as part of that requirement do not result in the omission of the word 'for'. *The consideration must be 'in connection with' the supply but the supply must also be 'for' the*

consideration.

- Section 2(24)(ix) of the Income Tax Act, 1961 was inserted by Finance Act, 1972 to bring *any winning from lotteries, crossword puzzles, races including horses, card games and other games of any sort or from gambling or betting of any form or nature whatsoever* within the scope of 'income'. While the receipt of prize money has the character of income, can it be said that there is a supply by the organizer and the prize money has the character of consideration for such supply?
- There is always a possibility of the prize winning ticket remaining unsold in the hands of the agent. In the context of applicability of Section 194B of the Income Tax Act (TDS provisions), the Guwahati High Court in the case of **ACIT Vs. Director of State Lottery** [7] followed the decision of the Bombay High Court in the case of **Commercial Corporation of India Ltd. Vs. ITO** [8] and held that the unsold tickets in the hands of the agent cannot be said to be the winner of the lottery since the agent did not purchase the ticket and the ticket did not participate in the lottery. The income accruing to the agent on unsold / unclaimed tickets is income from business and does not constitute winning from lotteries and does not fall within Section 2(24)(ix) to attract Section 194B.
- Section 15(1); Section 15(4) of the CGST Act, 2017 and Rules, if any would come into the picture in the context of valuation of taxable supply. Therefore, supply is imperative for valuation to apply.
- A Three Member Bench of the Supreme Court in the case of **State of West Bengal Vs. Calcutta Club** [TS-779-SC-2019-VAT] [9] stressed on the importance of 'consideration' and in the context of service tax, the Court held that there has to be an activity carried out by one person for another for consideration.

[1] (1986) 61 STC 165

[2] (2006) 5 SCC 603

[3] (1959) SCR 329

[4] (2008) 8 SCC 681

[5] (ECJ Case C-432/15)

[6] (2013) FCAFC 105

[7] (2002) 255 ITR 236

[8] (1993) 201 ITR 348

[9] [TS-779-SC-2019-VAT]