REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3239 OF 2009
(Arising out of SLP (C) No. 6083 of 2008)

Union of India & Ors. … Appellants

Versus

M/s Martin Lottery Agencies Ltd. … Respondent

SUPREME COURT OF INDIA
यतो धर्मस्ततो जयः
JUDGMENT

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

2. Whether sale, promotion and marketing of lottery tickets would be exigible to 'Service Tax' within the meaning of the provisions of Section 65(105) of the Finance Act, 1994 (hereinafter called and referred to for the sake of brevity as 'the Act') is the question involved in this appeal which arises from a judgment and order dated 18.9.2007 passed by the High Court of Sikkim in Writ Petition (C) No. 19 of 2007.

3. Respondents are agents of the State of Sikkim. The State Government floated "schemes" whereby the total number of tickets therefor was

prescribed. In terms of the said schemes, the respondent purchases all lottery tickets in bulk form on "all sold basis". It pays Rs.70 per ticket for the face value of Rs.100/-. In turn, it sells the ticket to its principal stockists on "outright" and "all sold basis": It makes a profit out of the margin out of the difference between the amounts received from the principal stockists and the amounts paid to the State Government. The principal stockists in turn sell the tickets to the sub-stockist and who in turn sell to the agents. The retailers purchase tickets from the agents and in turn sell the same to the ultimate participants of the draw.

4. Indisputably, the entire transaction is governed by the Lottery (Regulation) Act, 1998. It is neither in doubt nor in dispute that having regard to the circular letter issued by Commissioner (Service Tax), Ministry of Finance, CBEC dated 14.01.2007, the nature of transactions between the distributor and the State Government do not constitute a sale.

However, it was concluded that the activities of the distributor are that of promotion or marketing of lottery tickets for their client (i.e. the State Governments) and, thus, would be exigible to service tax under the heading 'business auxiliary service'.

Pursuant to and/or in furtherance of the said opinion of the Board, the Superintendent of Central Excise, Gangtok Range, Gangtok by a letter dated

30.04.2007 directed the respondent to obtain registration and pay service tax under the heading 'business auxiliary service' in terms of the provisions of the said Act.

5. The legality and/or validity of the said notice was questioned before the High Court of Sikkim by the respondent by way of a Writ Petition. By an order dated 13.8.2007, the Chief Justice of the said High Court while declining to grant an interim order made certain observations to the effect that the activities undertaken by respondent cannot but be promotion or marketing, in the following terms:

> "(sic) can be sold in the market for that face value, is itself a promotional or marketing service. The contract between a principal producer and its large distributor or promotional distributor can have a lot of flexibility. It will all depend on the business negotiations by the two parties, as to whether the goods are being taken by the distributor as an agent, and retained as such, or whether the goods will be purchased outright by the distributor from the manufacturer, at a reduced price, the distributor thereafter taking all responsibility for the goods purchased, in return for, or inconsideration of, the reducing in the wholesale price of goods.
>
> If, we repeat if, the writ petitioner is a distributor or a selling agent, then there is no problem, notwithstanding section 4(c) of the 1998 Act, of the writ petitioner reselling the lottery tickets in the open market even upto the full face value of Rs. 100/-, or for a lesser price but above Rs.70/-, even though it bought the tickets itself for Rs.70/-. Is this a promotion of the lottery

marketing of lottery tickets produced or provided by the State? If it is not, then what is the difference between a person buying lottery tickets of face value of Rs.100/- at Rs.100/- from the State Government directly, and a person who is buying it at a reduced price? Is the reduced price of Rs.30/- in relation to goods, originally belonging to the State Government, a reduction for the purpose of marketing and further sale, and is it for the purpose of marketing, which the true and core business activity of the writ petitioner? Is the business violability of the writ petitioner dependent only on the middleman succeeding in getting a market for the original goods, and is the margin of 30% sufficient to cover this type of business venture?

These questions might merely be asked today but need not be answered today without hearing parties fully.

I am of the opinion that on a balance of circumstances it appears that the essence of activity, properly so called, cannot but be promotion or marketing.

Order and observations, however worded, are without prejudice to the rights and contentions of the parties. There will be no interim order. Appearance of parties before the Department will take place and decisions might be given and even levy might be made. However, decisions given will ultimately abide by the result of the writ. Since both the parties are also solver, no interim order is called for.

Returnable on 17.8.2007 when further orders might be prayed for by either party."

The said writ petition was posted for hearing on 18.9.2007 and by reason of an order of the said date, the writ petition was allowed, directing:

> "Affidavits have not been called for although the leaned Advocate General asked for time. Here the learned Advocate General is appearing as Assistant Solicitor General. Time to file affidavit was refused by me since the issue is one of pure law. This order is to be read as a sequel to the order already passed by this Court on 13.8.2007. The basic facts are set out there. The arguments this time centered round whether lottery tickets are goods or not. The statutory provisions which are material in this regard are extracted in my earlier order. On the authority of the Constitution Bench of the Supreme Court which delivered its judgment in the Sunrise Associates Case (2006) 5 SCC 603 lottery tickets have to be held to be actionable claims. As such those would not be goods within the meaning of the definition clause in the Sale of Goods Act. If the lottery tickets are not goods, the writ petitioners cannot be said to be rendering any service in relation to the promotion of their client's goods, or marketing of their client's goods, or sale of their client's goods.
>
> The writ petition succeeds on this simple point. The impugned notice dated 30.4.2007 (Annexure P-3 of the writ petition) is accordingly quashed. There will be no order as to costs."

6. Mr. Mohan Parasaran, learned Additional Solicitor General of India appearing for the appellant, would submit:

(i) The High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that the notice

had been issued in terms of sub-clause (ii) of Section 65(19) of the Act and not sub-clause (i) thereof.

(ii) As United Nations-Central Product Classification (UN-CPC) Heading 96920 contains 'gambling and betting' services and covers 'organization of lotteries' and, thus, the activities of organizing lotteries being internationally recognized, should be considered as a service and, thus, the High Court committed a serious illegality in relying upon the decision of this Court in Sunrise Associates vs. Govt. of NCT of Delhi & Ors. reported in (2006) 5 SCC 603.

(iii) Explanation appended to Section 65 (19) being clarificatory and/or declaratory in nature must be held to have a retrospective operation.

(iv) Entries 34 and 62 of List II of the Seventh Schedule of the Constitution of India does not create any kind of fetter on the powers of the Parliament to impose service tax on the assessee who provide the service of promotion and marketing of lotteries. The aforementioned two entries empower the State Legislature to impose tax on betting and gambling and other luxuries. In the instant case, however, what is sought to be taxed under sub-clause (ii) of clause (19) of Section 65 of the Finance Act, 1994 is the services rendered by

an assessee to its client in promoting and marketing of lotteries organized by the State Government and not anything else.

(v) A transaction may involve two taxable events in its different aspects, as has been held by the Constitution Bench of this Court in Federation and Association of Hotels and Restaurants Association of India v. Union of India reported in [(1989) 3 SCC 634], in terms whereof whereas, on the one hand, service tax can be levied on the services provided by the respondent to the Government of Sikkim in promoting and marketing of lotteries; the State Government is also empowered to impose tax on the organization and conduct of lotteries in the State in exercise of its powers under Entries 34 and 62 of the List II of the Seventh Schedule read with Articles 245 and 246 of the Constitution of India, despite the fact that the same transaction creates two taxable events, namely, the organization of the lotteries itself and secondly the services rendered in the promotion and marketing of lotteries.

(vi) In view of a recent decision of this Court in Gujarat Ambuja Cements Ltd. v. Union of India reported in (2005) 4 SCC 241, tax was not sought to be imposed on 'betting' or 'gambling' or 'entertainments' or 'amusements' as provided in the Entries 34 and 62 of List II of the

Seventh Schedule to the Constitution of India, but on the services rendered in respect thereof.

7. Mr. Harish N. Salve, learned Senior Counsel appearing on behalf of the respondent, on the other hand, urged :

(i) Even UN-CPC or the classification provided for therein has no bearing to an Act enacted by the Parliament of India. Whereas UN-CPC regards lottery tickets as goods; the Indian laws do not. In any event, lottery has been brought within the concept of 'service' treating it to be goods, which is against the purport of the said term; having been held by this Court in Sunrise Associates (Supra) as merely an 'actionable claim'.

(ii) As conduct of lotteries has been held by this Court to be *res-extra commercium*, no service can be said to be rendered by the State to the society at large and, thus, the provisions of the Act will have no application in the instant case.

(iii) In view of the decision of this Court in Sunrise Associates (supra), lottery tickets being actionable claims and not goods, the relevant clause attracted in this case would be sub-clause (i) of clause (19) of

Section 65 and not sub-clause (ii) as gambling cannot be equated with 'service'.

(iv) Respondent has merely been purchasing lottery tickets in bulk and re-selling the same to the principal stockists; earning a margin of profit from such transactions and, in that view of the matter, rendition of any kind of service by the State to it does not arise.

(v) In any event, explanation appended to Section 65(19) having only a prospective operation, service tax, if any, can be levied only with effect from 16.5.2008 and not for a period prior thereto.

8. Before adverting to the rival contentions raised before us by the learned counsel for the parties, we may notice the relevant provisions of the Finance Act, 1994 (The Act).

Chapter V of the Act provides for levy of service tax. It is levied on "taxable services" as defined in Section 65(105) thereof. Section 66 is the charging section and Section 68 provides for payment of service tax.

Sub-clauses (i) and (ii) of Section 65(19) which are relevant for our purpose, read as under:-

> "**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"

The term "business auxiliary service" was inserted in the Act by Finance Act, 2003 which came into force on 01.07.2003. The term "business auxiliary service" includes services as a commission agent, but does not include any information technology service or any activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944.

Clause (zzb) of Section 65(105) of the Act defines "taxable service" to mean any service provided to a client, by a commercial concern in relation to business auxiliary service.

"Goods" has been defined in Section 65(50), in the following terms:

> **"Section 65(50)** "goods" has the meaning assigned to it in clause (7) of section 2 of the Sale of Goods Act, 1930."

Section 2(7) of the Sale of Goods Act, 1930 defines "goods" to mean :

> "Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land

> which are agreed to be severed before sale or under the contract of sale."

9. After the Special Leave Petition was filed in this Court, the Parliament by Finance Act, 2008 inserted an explanation in sub-clause (ii) of Section 65(19), which came into force on or about 16.5.2008 and reads as under :

> "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;"

Section 65A which was inserted by Finance Act, 2003 provides for classification of taxable services. Section 66 provides for the charge of service tax.

10. The core question which arises for our consideration is as to whether the explanation appended to sub-clause (ii) of Section 65(19) is clarificatory or declaratory in nature so as to be construed having retrospective effect and retroactive operation.

Sub-clause (i) of clause (19) of Section 65 of the Act refers to 'goods'. What would come within the purview of the definition of 'goods' must be

construed having regard to the provisions of the Sale of Goods Act, 1930 in view of its definition contained in Section 65(50) of the Act.

11. This takes us to another question as regards the source of power of the State to conduct a business. Conduct of business by a State is permissible, inter alia, in terms of Article 298 of the Constitution of India. If it is not otherwise prohibited, the State in exercise of its executive power contained in Article 162 of the Constitution of India may also have the power to conduct a trade or business.

12. For invoking the provisions of Chapter V of the 1994 Act, the basic question which is required to be posed and answered is as to whether the lottery tickets are 'goods' within the meaning of Sale of Goods Act. It is evidently not.

A Constitution Bench of this Court in Sunrise Associates (supra) held to be so. H. Anraj v. Government of Tamil Nadu reported in [(1986) 1 SCC 414] was overruled opining that sale of lottery tickets does not involve sale of goods and that at the highest stage, transfer of it would amount to transfer of an actionable claim.

In Yasha Oversees v. Commr. of Sales Tax & Ors. [(2008) 8 SCC 681], Sunrise Associates (supra) was distinguished, stating :

“37. The decision in Sunrise makes two very significant points and to us it appears that the decision mainly turns on those two points. The first is with regard to the two different meanings of 'property', as highlighted in paragraph 35 of the judgment and the second is with regard to the distinction between *interests in goods* and a contract as highlighted in paragraph 43 of the judgment. In paragraph 35 of the decision the court explained that the word 'property' occurring both in the definitions of 'goods' and 'sale' carries different meanings. In the definition of '*goods*' the word 'property' is used to mean the subject matter of ownership, that is to say, the thing itself. In the definition of 'sale' the same word is used to mean the nature of interests in goods, that is, title or ownership.

38. In paragraphs 42 and 43 of the decision, the court examined the nature of a ticket and by giving illustrations of a railway ticket, a ticket to see a cinema or a pawnbroker's ticket pointed out that the tickets were normally evidence of and in some cases the *contract* between the buyer of the ticket and its seller. Being a contract or evidence of a contract, naturally a ticket can not be property either as a thing (of value) in itself or title or ownership to anything. It, therefore, followed that the sale of lottery ticket did not involve transfer of 'property' either in the sense of the thing itself (goods) or in the sense of title or ownership (sale).

39. On purchasing a lottery ticket one merely gets 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 Page 2519 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."

13. In the aforementioned backdrop, it is necessary to consider the submissions of the learned Additional Solicitor General that clauses (1), (2), (8), (10), (16), (18), (25), (29), (36), (39) and (40) of the agreement entered into by and between the State and respondent shows that it is not a case involving simpliciter sale of goods but in effect and substance respondent was rendering service in relation to promotion or marketing of service provided by the State.

14. This gives rise to a question, i.e., Does the State in organizing lottery render any service and, if so, to whom.

The learned Additional Solicitor General submits that service is being rendered to the general public as revenue is generated therefrom. We fail to persuade ourselves to agree with the aforementioned submission. The law, as it stands today (although it is possible that this Court in future may take a different view), recognizes lottery to be gambling. Gambling is *res extra commercium* as has been held by this Court in The State of Bombay v.

R.M.D. Chamarbaugwala [1957 SCR 874] and B.R. Enterprises v. State of U.P. & Ors. [(1999) 9 SCC 700].

15. Contention of Mr. Salve is that where the State involves itself in an illegal activity, it cannot render a service as dealing in lottery is illegal being *res extra commercium*, no services can be rendered. We, as at present advised, do not intend to go into the said issue which is a complex one, in view of the fact that in this case we are primarily required to consider the effect of the explanation appended to clause (19) of Section 65 of the Act. It is also not otherwise necessary to be determined.

We must, however, proceed to determine the said question keeping in view the aforementioned decisions of this Court that holding of lottery being gambling comes within the purview of the doctrine of *res extra commercium*.

16. Organizing lottery by the State is tolerated being an economic activity on its part so as to enable it to raise revenue. Raising of revenue by the State, in our opinion, by itself cannot amount to rendition of any service. It may be true that for the purpose of invoking the provisions of taxing statute, the morality aspect may not be of much consequence but such a question assumes significance for the purpose of ascertaining as to whether the same amounts to rendition of service within the meaning of the aforementioned

sub-clause. The word 'service' has not been defined in the Act. Its dictionary or etymological meaning may or may not be appropriate. We would, however, notice its dictionary meaning :

> "Work done or duty performed for another or others; a serving; as, professional services, repair service, a life devoted to public service.
>
> An activity carried on to provide people with the use of something, as electric power, water, transportation, mail delivery, telephones, etc.
>
> Anything useful, as maintenance, supplies, installation, repairs, etc., provided by a dealer or manufacturer for people who have bought things from him."

17. While the State raises its revenue by controlling dealing in liquor and/or by transferring its privilege to manufacture, distribute, sale etc., as envisaged under Entry 8 of List II of the Seventh Schedule of the Constitution of India, thereby it does not render any service to the society. Service tax purports to impose tax on services on two grounds (1) service provided to a consumer and (2) service provided to a service provider.

18. Service provided in respect of the matters envisaged under clause (19) of Section 65 of the Act must be construed strictly. Before a tax is found to be leviable, it must come within the domain of legitimate business and/or trade. The doctrine of *res extra Commercium* was invoked in the United States of America where keeping in view the nature of right conferred on its

citizens and the concept of imposition of reasonable restrictions thereon being absent, it was held that gambling should be frowned upon being opposed to constitutional jurisprudence. While borrowing the said principle in the Indian context, however, it must be borne in mind that Constitution of India envisages reasonable restrictions in respect of almost all the fundamental rights of the citizens. No citizen has an absolute fundamental right. Whereas the same principle may apply in Australia but it may not apply to the European Countries where gambling and even sale of narcotic drugs subject to licensing provisions, if any, is permissible.

The concept of *res extra commercium* may in future be required to be considered afresh having regard to its origin to Roman Law as also the concept thereof. Conceptually business may be carried out in respect of a property which is capable of being owned as contrasted to those which cannot be. Having regard to the changing concept of the right of property, which includes all types of properties capable of being owned including intellectual property, it is possible to hold that the restrictions which can be imposed in carrying on business in relation thereto must only be reasonable one within the meaning of Clause (6) of Article 19 of the Constitution of India. Right of property although no longer a fundamental right, but, indisputably is a human right. [See Vimlaben Ajitbhai Patel v. Vatslaben

Ashokbhai Patel and Others (2008) 4 SCC 649 and Karnataka State Financial Corporation v. N. Narasimahaiah (2008) 5 SCC 176].

We may notice that the doctrine of 'franchise' or 'exclusive privilege' has been mentioned in C.S.S Motor Service Tenkari and Ors v The State of Madras represented by the Secretary to the Government of Madras, Home Department and Anr. [AIR 1953 Mad 279]. Therein the connotation of the word "franchise" was noticed from California v. Central Pacific R. Co. [(1888) 32 Law Ed 150] in the following terms:

> "What is a franchise? Under the English Law, Blackstone defines it as 'a royal privilege, or branch of the King's prerogative subsisting in the hands of a subject.' A franchise is a right, privilege or power, of public concern, which ought not to be exercised by private individuals at their mere will and pleasure but should be reserved for public control and administration either by the Government directly or by public agents acting under such conditions and regulations as the Government may impose as the public interest and for the public security."

The doctrine of franchise, thus, would require a thorough relook in view of the change in its concept, as we are governed by the Constitution of India. But this is not the case where we have an occasion to do so.

19. Lottery has been brought within the purview of National Industrial Classification to which we may now advert to. A foreword to the Industrial Classification, relevant for our purpose, reads as under :

> "A standardized system of classification of economic activities is essential for meaningful collection of data relating to such activities. This not only ensures comparability of the data collected within the country from various sources by different agencies but also with the rest of the world. In India, the National Industrial Classification (NIC) is the standard classification followed for classifying economic activities. The NIC is prepared to suit the Indian conditions and follows the principles and procedures laid down in the United Nations' International Standard Industrial Classification (ISIC). It is a constant endeavour of the Ministry of Statistics and Programme Implementation, charged as it is with the responsibility for setting standards for collection, compilation and dissemination of statistical data in India, to establish classification systems as well as updating existing ones. This is necessary to keep pace with the changes in the organization and structure of industries besides accounting for emerging economic activities. The NIC-2004 is the revised version of the earlier classification standard issued in 1998 called the NIC-1998, which was based on ISIC-1990 Rev.3."

20. Lotteries come within the purview of Group 924 class 924(9) and sub-class 924(9)(0) which is in the following terms :

> "Other recreational activities includes fairs and shows of a recreational nature; management and operation of lotteries (bulk and retail sale of lottery tickets are included under wholesale and retail sale respectively); gambling and betting activities;

> activities of casinos; booking agency activities in connection with theatrical productions or other entertainment attractions, recreational fishing and other recreational activities n.e.c."

It also comes within the purview of Section 4 classifying other community, social and personal service activities.

21. If it is brought within the purview of the terms 'entertainment' or 'amusement' as provided for in Entries 34 and 62 of List II of the Seventh Schedule of the Constitution of India, it may come within the purview of service. It is, however, contended that what is being taxed is the services rendered in respect thereof. Services can be rendered in respect of activities of the State if they are permissible in terms of sub-clause (ii) of Clause (19) of Section 65 of the Act and the State itself has been rendering services and not otherwise. While we say so, we are not unmindful of the fact that in terms of the agreement, the respondent not only distributes the lottery tickets printed by the State but also distributes prizes worth less than Rs.5,000/-. It issues an advertisement. It has a right to be consulted in respect of design of a lottery ticket. It may also have a say in the matter of arranging for the lottery. But we are not sure as to how service element of the entire transaction is to be ascertained.

22. Keeping in view the aforementioned backdrop, it has to be determined as to whether the 'explanation' is declaratory or clarificatory in nature.

23. Clause 19 was inserted in Section 65 of the Act in the year 2003. The notice dated 30.4.2007 shows that according to the authorities clause (i) was attracted and not clause (ii) of the said provision. The Board issued a clarification on 17.1.2007 which is in the following terms:

> "Decision : Commissioner (ST) explained the issue of service tax liability on promotion, marketing, distribution of paper lottery. Under the contractual arrangement, the State Government print lottery tickets and deliver them to distributor. The distributor is free to publicize for promotion, marketing of the lottery tickets received and distribute the same through sub-distributors. The State Governments do not receive back the unsold lottery tickets and the prizes, if any, on such unsold tickets could be collected by the distributor. The draws are held by the State Governments.
>
> Board noted that the Lotteries (Regulation) Act, 1998, governs the activity of organizing, conducting or promoting a lottery. As per sub-section (c) of Section 4, '*the State Government shall sell the tickets either itself or through distributors or selling agent'*. This provision thus forbids resale of tickets that have been sold by the State Government. Accordingly, the nature of transaction between the State Government and distributor is not in the nature of sales. The activities of the distributor are that of promotion or marketing of lottery tickets for their clients i.e. the State Governments. Hence, Board decided that the services of distributor fall under the 'business auxiliary service' and, therefore, be chargeable to service tax. The value of taxable service shall be taken into account as the total face value of the tickets sold minus (a) the total cost of the tickets paid by the distributor to the State Government and (b) the prize money paid by the distributor. In

> other words, the value is the mark up between the buying and selling of lottery tickets."

24. A bare perusal of the said circular letter would clearly show that lottery tickets were considered to be goods. It is with that mindset, the circular was issued. However, it must have been realised that resale of lottery tickets by the distributor or by others is not permissible. Whether sub-clause (ii) of clause (19) of Section 65 had been applied in case of any other distributor or agent of such lottery tickets is not known. If the assertion of Mr. Salve that nobody had demanded tax under the second clause is correct, we do not know why the principle of 'small repairs' by inserting an explanation was taken recourse to. The explanation, in our opinion, cannot be said to be a simple clarification as it introduces a new concept stating that organizing of the lottery is a form of entertainment. Introduction of such new concept itself would have a constitutional implication. In the year 2003, while amending the provisions of 1994 Act, the Constitution was also amended and Article 268A and Entry 92C in List I were inserted. The courts are in future required to determine whether a service tax within the meaning of Entry 92C would cover sale of lottery or it would come within the purview of residuary entry containing Entry 97 List I. If it is held to be a taxing provision within the purview of Entry 97, the same will have a bearing on the States. The Explanation so read appears to be a charging provision. It states about taxing need. It can be termed to be a

sui generis tax. If it is a different kind of tax, the same may be held to be running contrary to the ordinary concept of service tax. It may, thus, be held to be a stand alone clause. A constitutional question may have to be raised and answered as to whether the taxing power can be segregated. If by reason of the said explanation, the taxing net has been widened, it cannot be held to be retrospective in operation.

No doubt, the explanation begins with the words 'for removal of doubts'. Does it mean that it is conclusive in nature? In law, it is not. It is not a case where by reason of a judgment of a court, the law was found to be vague or ambiguous. There is also nothing to show that it was found to be vague or ambiguous by the executive. In fact, the Board circular shows that invocation of clause (ii) had never been in contemplation of the taxing authorities.

25. In fact, rendition of service for the purpose of imposition of service tax is imperative in character. It must be a part of economic activity. Whereas the economic activity has three characteristics – tax on production; tax on sales and tax on service. The concept of the Value Added Tax comes from the generic expression so as to include not only taxes on sales but also taxes on service as service has become segment of the economic activity.

26. We are informed at the Bar that, in fact, States of Tamil Nadu and Karnataka have barred lottery.

We have been taken through the budget speech of the Hon'ble Minister of Finance for 2008-2009, the relevant portion whereof is as under :

> "**5.4** ***Business Auxiliary Service*** **:**
>
> 5.4.1 Services provided in relation to promotion or marketing of service provided by the client is leviable to service tax under business auxiliary service. Organization and selling of lotteries are globally treated as supply of service. Lotteries (Regulation) Act, 1998 enables State Governments to organize, conduct or promote lotteries. Lottery tickets are printed by the State Governments and are sold through agents or distributors. Tickets are delivered by the State Government to the distributors at a discounted price as compared to the face value of the tickets. Services provided by the distributors or agents in relation to promotion or marketing of lottery tickets are leviable to service tax under the existing business auxiliary service.
>
> 5.4.2 Lotteries fall under the category of games of chance. Games of chance are known under various names like lottery, lotto, bingo etc. and are also conducted through internet or other electronic networks.
>
> 5.4.3 To clarify as removal of doubts, an explanation is added under business auxiliary service stating that services provided in relation to promotion or marketing of games of chance organized, conducted or promoted by the client are covered under the existing definition of business auxiliary service. Amendment is only for removal of doubts and field formations are, therefore,

> requested to ensure that service tax is collected on such services."

27. The speech of the Hon'ble the Finance Minister would have been relevant for the purpose of opining as to whether the court independently would have arrived at a conclusion that organizing lottery would amount to rendition of service but not otherwise. As it is not possible for us to arrive at the said conclusion, we have no other option but to hold that by inserting the explanation appended to clause (19) of Section 65 of the Act, a new concept of imposition of tax has been brought in. The Parliament may be entitled to do so. It would be entitled to raise a legal fiction, but when a new type of tax is introduced or a new concept of tax is introduced so as to widen the net, it, in our opinion, should not be construed to have a retrospective operation on the premise that it is clarificatory or declaratory in nature.

28. There cannot be any doubt whatsoever that speech of the Hon'ble Finance Minister in the House of the Parliament may be taken to be a valid tool for interpretation of a statute. It was so held in K.P. Varghese v. Commissioner of Income-tax, Ernakulam & Anr. [(1981) 4 SCC 173 at 184], in the following terms :

> "Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but

> the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible."

{See also Commissioner of Wealth Tax, Punjab, J & K, Chandigarh, Patiala v. Yuvraj Amrinder Singh and Ors. [(1985) 4 SCC 608]}

29. It is, however, also well settled that the statute must be interpreted keeping in view the words used in it. We must notice that in Virtual Soft Systems Ltd. v. Commissioner of Income Tax, Delhi-I [(2007) 9 SCC 665], a Bench of this Court has held :

> "**24.** Section 271 of the Act is a penal provision and there are well-established principles for the interpretation of such a penal provision. Such a provision has to be construed strictly and narrowly and not widely or with the object and intention of the legislature."

30. Mr. Parasaran has referred to Commissioner of Income Tax, Bombay & Ors. v. Podar Cement Pvt. Ltd. & Ors. [(1997) 5 SCC 482] to contend that clarificatory statute would be retrospective in nature. On legal principle, there may not be any quarrel with the said proposition. Therein, however,

this court was considering a case where two interpretations of Section 22 of the Income-tax Act were possible. It was opined that if one interpretation is possible and the same is clear, the next thing to be considered would be what would be the effect of the amendment. Referring to Benion's Statutory Interpretation and G.P. Singh's Principles of Statutory Interpretation, it was held :

> "An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law."

It furthermore noticed the decision of the Constitution Bench in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas and Anr. [(1968) 3 SCR 623], wherein it was opined that an Explanatory Act is generally made to supply an obvious omission or to clear up doubts as to the meaning of previous Act. We are herein not concerned with such a situation.

In W.P.I.L. Ltd., Ghaziabad v. Commissioner of Central Excise, Meerut, U.P. [(2005) 3 SCC 73], whereupon again Mr. Parasaran placed strong reliance, this Court, while dealing with an exemption notification which is a piece of subordinate legislation, held:

> "Such a notification merely clarified the position and makes explicit what was implicit. Clarificatory notifications have been issued to end the dispute between the parties."

31. The question as to whether a Subordinate Legislation or a Parliamentary Statute would be held to be clarificatory or declaratory or not would indisputably depend upon the nature thereof as also the object it seeks to achieve. What we intend to say is that if two views are not possible, resort to clarification and/or declaration may not be permissible. This aspect of the matter has been considered by this Court in Virtual Soft Systems Ltd. v. Commissioner of Income Tax, Delhi-I [(2007) 9 SCC 665], holding :

> "It may be noted that the amendment made to Section 271 by the Finance Act, 2002 only stated that the amended provision would come into force with effect from 1.4.2003. The statute nowhere stated that the said amendment was either clarificatory or declaratory. On the contrary, the statue stated that the said amendment would come into effect on 1.4.2003 and therefore, would apply to only to future periods and not to any period prior to 1.4.2003 or to any assessment year prior to assessment year 2004-2005. It is the well settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statue itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory.
>
> Even if the statute does contain a statement to the effect that the amendment is declaratory or

> clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods."

32. We are also not unmindful of the fact that the said decision has been overruled in Commissioner of Income Tax-I, Ahmedabad v. Gold Coin Health Foods Pvt. Ltd. [(2008) 11 SCALE 497]. A bare perusal of the said decision would, however, show that a Three Judge Bench of this Court noticed that the Act intended to make the position explicit which otherwise was implicit. The Bench went back to the provisions of the Original Act to hold that the clarification issued by the Parliament was in tune with the actual interpretation of the original provision. In that view of the matter, it was held :

> "As noted by this Court in Commissioner of Income Tax, Bombay & Ors. v. Podar Cement Pvt. Ltd. & Ors. [(1997) 5 SCC 482 = 2002-TIOL-445-SC-IT] the circumstances under which the amendment was brought in existence and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and, whether it will have retrospective effect or it was not so.

33. We may also notice that in that judgment itself a distinction has been made with a clarificatory provision and a substantive provision to opine that Explanation 4 was clarificatory in nature and not a substantive provision.

To the same effect is the decision of this Court in SEDCO Forex International Drill. Inc. & Ors. v. Commissioner of Income, Tax, Dehradun & Anr. [(2005) 12 SCC 717]. The explanation which was in question was added by Finance Act, 1983 with effect from 1979 was to the following effect:

> "*Explanation.*—For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be regarded as income earned in India."

Similar expression is to be found in the instant case. However, in SEDCO the question which arose for consideration was interpretation of the words 'off period'. While considering the question as to whether salary for the off period was taxable as arising out of services rendered in India, this Court noticed that there was a reasonable nexus between salary earned for the off period and the services rendered in India.

34. The Gujarat High Court in CIT v. S.G. Pgnatal [(1980) 124 ITR 392 (Guj)] held that words 'earned in India' occurring in clause (ii) must be interpreted as "arising or accruing in India" and not "from service rendered

in India". Opining that the High Court proceeded on an incorrect hypothesis, it was held :

> "The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However the respondents have urged the point before us.
>
> In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in **CIT v. S.G. Pgnatale** (supra) was followed in 1989 by a Division Bench of the Gauhati High Court in **Commissioner of Income Tax v. Goslino Mario** reported in [(2002) 10 SCC 165]. It found that the 1983 Explanation had been given effect from 1.4.1979 whereas the year in question in that case was 1976-77 and said :
>
>> ". . . it is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has(sic) somehow remained pending on April 1, 1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand"."

35. Reverting to the decision of a Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker)] wherein Gujarat High Court's judgment was followed, this Court noticed that explanation was not held to be a

declaratory one but thereby the scope of Section 9(1)(ii) of the Act was widened. The law in the aforementioned premise was laid down as under :

> "17. As was affirmed by this Court in **Goslino Mario** (supra), a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. [See also: **Reliance Jute and Industries. v. CIT** [(1980) 1 SCC 139]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section (See: Sonia Bhatia v. State of U.P. [(1981) 2 SCC 585 at 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force (See: Shyam Sunder v. Ram Kumar [(2001) 8 SCC 24 (para 44)]; Brij Mohan Laxman Das v. CIT[(1997) 1 SCC 352 at 354], CIT v. Podar Cement [(1997) 5 SCC 482 at 506]. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used are 'it is declared' or 'for the removal of doubts'.
>
> 18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in **S.G. Pgnatale** (supra) by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

> 19. When the Explanation seeks to give an artificial meaning 'earned in India' and bring about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively."
>
> (Emphasis supplied)

36. It is, therefore, evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect.

The notice issued to the assessee by the appellant has, thus, rightly been held to be liable to be set aside. Subject to the constitutionality of the Act, in view of the explanation appended to this, we are of the opinion that the service tax, if any, would be payable only with effect from May, 2008 and not with retrospective effect.

37. In a case of this nature, the Court must be satisfied that the Parliament did not intend to introduce a substantive change in the law. As stated hereinbefore, for the aforementioned purpose, the expressions like 'for the removal of doubts' are not conclusive. The said expressions appear to have been used under assumption that organizing games of chance would be rendition of service. We are herein not concerned as to whether it was constitutionally permissible for the Parliament to do so as we are not called

upon to determine the said question but for our purpose, it would be suffice to hold that the explanation is not clarificatory or declaratory in nature.

38. For the views we have taken, we have no other option but to hold that the High Court judgment albeit for different reasons warrants no interference. This appeal is dismissed with costs. Counsel fee assessed at Rs.1,00,000/-.

……………………………….J.
[S.B. Sinha]

..…………………………..….J.
[Cyriac Joseph]

New Delhi;
May 5, 2009