W. P. Nos. 16432 to 16436 of 2014 and M. P. Nos. 2 to 2 of 2014.

N. Inbarajan for the petitioner.

A. N. R. Prathap, Government Advocate (T), for the respondents.

ORDER

R. MAHADEVAN J.—Challenging the orders dated May 15, 2014 passed by the first respondent relating to the assessment years from 2006-07 to 2010-11, the petitioner has come up with these writ petitions. In the impugned assessment orders, the first respondent, after taking note of the defects pointed out by the enforcement wing officials, has proposed to levy tax along with penalty. 1

The learned counsel for the petitioner submitted that the assessing officer, without properly applying his mind on the documentary evidence filed by the petitioner, simply recorded the statement made by the enforcement wing officials and passed the impugned orders relating to the assessment years in question, which are liable to be quashed, in the light of the decision rendered in *Amutha Metals* v. *Commercial Tax Officer* [2007] 9 VST 478 (Mad). The relevant portion of the said decision, for better appreciation, is extracted hereunder (pages 479 and 480 in 9 VST) : 2

> "In these two cases, it is accepted by the assessing officer that for a pre-revision notice, the petitioner has given objections. The objections have to be considered by the assessing officer on their own merits. However, the assessing officer proceeded to the effect that :
>
> '. . . Their objections were examined in detail. The dealers should have placed all the facts before the inspecting officials. But they did not do so. They had given an admitted statement to the effect that the purchases were made from unregistered dealers and sold and that they were not in a position to produce purchase bills. Inasmuch as they had admitted and even paid tax to some extent as per their statement now I find no reason to deviate from the proposals'.
>
> If the reasoning stated by the enforcement officials is taken as correct reason, there is no need for the assessing officer to be there to frame the assessment. The enforcement wing officials themselves would have framed the assessment. Under the statutory provisions, it is expected from the assessing officer to consider the objections and either accept or reject the same by giving valid reasons by applying his mind. The above extract of the reasoning given by the assessing officer is nothing than desperation to pass an order on the basis of D3 proposal. There are ever so many cases where D3 proposals have been deviated by the assessing officer after applying their mind.

Hence, this court is of the view that the assessment orders are passed without considering the objections and by taking note of the D3 proposal of the enforcement officers. Therefore, the orders of assessment have to be set aside and the same are set aside. The assessing officer is directed to consider each one of the objections raised by the petitioners and give reason, except the reason that they have admitted before the enforcement officer and given statement before them with reference to the material made available and with reference to their accounts.

Hence, in both the writ petitions, the impugned orders are set aside and the matters are remitted back to the assessing authority to re-frame the assessment in accordance with the law."

Further, the Division Bench of this court, in its judgment dated December 14, 2018 passed in W. A. (MD) Nos. 558 and 559 of 2013 in the case of the *Assistant Commissioner (CT), Pudukkottai-I Assessment Circle, Pudukkottai* v. *Emerald Stone Expert*, has already dealt with the issue involved herein and held as follows :

"3. This court after considering the fact that the respondent has sold the goods to a company which is located in the special economic zone and it is not disputed that 100 per cent. of the goods were also exported without any exemption, held that section 18(1) of the Tamil Nadu Value Added Tax Act, 2006 gets attracted as the sale falls under section 5(3) of the Central Sales Tax Act, 1956. The writ petitions were thus allowed and the impugned order of the appellant was quashed holding that reversal of income tax concession has been done on a misconception and misreading of the provisions of section 18 of the Tamil Nadu Value Added Tax Act, 2006.

(4) and (5) . . .

6. It is the case of the appellant that the sales which are the subject-matter of the impugned orders do not attract section 18(1)(ii) of the Tamil Nadu Value Added Tax Act, 2006.

7. The learned Additional Government Pleader appearing for the appellant produced before this court, a Government Order in G. O. Ms. No. 528, Commercial Taxes and Religious Endowments (B2) Department, dated November 21, 1997 to the following effect :

'100 per cent. exported oriented units and units located in the Chennai Export Processing Zone (CEPZ) will be fully exempted from payment of sales tax.'

8. In view of the above-stated position, this court is able to see that the order of the learned single judge is well founded and we have no reason to interfere with the same.

9. Accordingly, these writ appeals are dismissed. No costs. Consequently, connected miscellaneous petition is dismissed."

3 Though the first respondent filed a detailed counter-affidavit justifying the impugned assessment orders, the learned Government Advocate (T) appearing for the respondents has not seriously disputed the submissions so made on the side of the petitioner.

4 Considering the facts and circumstances of the case and having regard to the submissions made by the learned counsel on either side and also in the light of the decisions cited on the side of the petitioner, which are squarely applicable to the present case, this court is inclined to set aside the assessment orders passed by the first respondent.

5 Accordingly, the orders dated May 15, 2014 passed by the first respondent relating to the assessment years in question, are set aside. The matters are remitted back to the first respondent for passing orders afresh. The petitioner is directed to file necessary objections with documentary evidence, if any, to the first respondent within a period of two weeks from the date of receipt of a copy of this order. On such filing, the first respondent shall consider the same and pass appropriate orders, on merits and in accordance with law, after affording due opportunity of personal hearing to the petitioner, within a period of three weeks thereafter.

6 All the writ petitions stand disposed of in the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

[2020] 77 GSTR 419 (Ker)

[IN THE KERALA HIGH COURT]

STATE OF SIKKIM AND ANOTHER

v.

STATE OF KERALA AND OTHERS

C. K. ABDUL REHIM and **T. V. ANILKUMAR** JJ.

April 30, 2020.

HF ▶ Petitioner

LEGISLATIVE POWERS—STATE LEGISLATURE—TAX ON LOTTERY—NO POWER IN STATE TO TAX ACTIVITY OF CONDUCT OF LOTTERY OF ANOTHER STATE—ACTIVITY HAS NO DIRECT NEXUS WITH SALE OF TICKETS TAKING

PLACE WITHIN STATE—SALE OF LOTTERY TICKETS NOT TAXABLE AS SALE OF GOODS—TAX ON LOTTERIES CONDUCTED BY STATE OF SIKKIM BY STATE OF KERALA—INVALID—KERALA TAX ON PAPER LOTTERIES ACT (20 of 2005), ss. 2(c), (g), (i), (l), 6 to 10—LOTTERIES (REGULATION) ACT (17 of 1998), ss. 4, 6—CONSTITUTION OF INDIA, art. 246(3) ; SCH. VII, LIST I, ENTRIES 40, 97, LIST II, ENTRIES 34, 62.

ESTOPPEL—NO ESTOPPEL AGAINST STATUTE—THAT PETITIONERS HAVE PAID TAX UNDER CHALLENGE—NOT GROUND TO NON-SUIT PETITIONERS.

JUDICIAL PRINCIPLES—PROSPECTIVE OVERRULING—HIGH COURT CANNOT DECLARE STATUTE PROSPECTIVELY INVALID.

The Kerala Tax on Paper Lotteries Act, 2005 is invalid.

A lottery ticket merely represents a chance or right to a conditional benefit of winning a prize, and that the right to participate in the draw is part of the composite right of the chance to win, and that right is an actionable claim. The sale of lottery tickets does not involve any sale of goods. It is nothing else but an actionable claim and no sale of goods is involved, within the meaning of the sales tax laws.

Under article 246(3) of the Constitution, the Legislature of any State has power to make laws for such State or any part thereof. There is no power at all to make any law with respect to any event happening in other States.

"Lottery" is defined under the Kerala Tax on Paper Lotteries Act, 2005, as a scheme intended for distribution of prizes by lots or by chance, by which a person purchases the ticket for participating in the chance for winning a prize. The activity of formulating the scheme of a lottery includes various components, right from organising the lottery, notifying the scheme, printing of the tickets, distribution and marketing of the tickets, draw of the lot, selection of the prize winning ticket and distribution of prizes, etc. Section 4 of the Lotteries (Regulation) Act, 1998 stipulates the conditions subject to which lotteries may be organised by any State. It insists, inter alia, that the State Government which organises the lottery should print the lottery tickets bearing imprint and logo of the State in such manner that the authenticity of the lottery ticket is ensured. It further provides that, the State Government shall sell the tickets either through distributors or selling agents. It also insists that the proceeds of the sale of the lottery tickets shall be credited into the public account of the State. A further condition is that, the State Government itself shall conduct the draws of all the lotteries and the place of draw shall be located within the State concerned. Prize money remaining unclaimed shall become property of that Government. Section 6 of the 1998 Act

imposes a prohibition in organising the lottery and in conducting or promoting it in any manner, contravening provisions of section 4 of the 1998 Act.

In the organising and conduct of the lottery by the State of Sikkim the only part of the activity which takes place within the State of Kerala is the distribution and marketing of tickets, probably through advertisements, enumerating the prize money as well as the price of the ticket and the date of draw, etc. Even assuming that the expression "tax on paper lotteries" contained in the charging section indicates the whole lot of activity of the conduct of lotteries, the levy of tax is on the organising State or on the person appointed by that State for selling the lottery tickets within the State of Kerala. A person so appointed cannot be construed as a person responsible for organising and conducting the lottery. The measure of tax is the draw, which takes place outside the territory of the State. The rate of tax is to be fixed based on the number and type of draws. The draws are conducted by the organising State within its territory. But the person appointed for sale of the lottery is insisted upon, by virtue of the provisions contained in section 10, to make payment of the tax in advance, based on the draws proposed to be taking place in the organising State. Section 10 insists that the promoter pays the full amount of tax in advance based on the particulars of the draws, which are intended to be conducted by the organising State, during the month commencing from the next succeeding month. Since the definition of the word "promoter" includes the State which is organising the lottery, it becomes obligatory on the part of the State which organises the lottery to pay the tax, if the person appointed for sale of the ticket fails to pay the tax in advance. The definition of "promoter" contained in section 2(i) of the 2005 Act does not provide any clarification as to whether the organising State has to pay tax with respect to any particular lottery under any particular scheme with respect to which that State is not intending to market the tickets within the State of Kerala. Nowhere it is stated in the 2005 Act that the person appointed for selling the lottery tickets in the State of Kerala, need not pay tax with respect to any scheme of lottery of the organizing State, the tickets of which are not intended to be sold within the State of Kerala. Neither the Act nor the Rules framed thereunder is clear as to whether they will be exonerated from the liability for payment of tax with respect to any scheme of lottery, the tickets on which are not intended to be sold within the State of Kerala.

The tax under the 2005 Act is not levied based on the amount of tickets sold in the State of Kerala. Going by the provisions of the Act, merely because the promoter, who includes the distributor appointed by the State of Sikkim is selling the tickets of the lottery within the State of Kerala, the entire activity

of the lottery, except the marketing of a portion of the tickets, which is taking place in the State of Sikkim, cannot be taxed by the State of Kerala. Because of the mere marketing of tickets within the State of Kerala, it cannot be held that a territorial nexus is established in order to impose tax on the lottery organized and conducted in a different State.

STATE OF BOMBAY *v.* R. M. D. CHAMARBAUGWALLA [1957] AIR 1957 SC 699 *applied.*

The charge is created on the activity of lottery and the levy is attempted on a lottery organised and conducted in a State which is outside the territory of the State of Kerala, by assigning the reason that the tickets are marketed also in the State of Kerala, which is an activity permitted by virtue of the regulatory law made by the Union Government. The charging section or any other provision of the Act is not at all clear as to what is the charge and which is the incidence of taxation. If the tax is imposed on the sale of lottery tickets conducted in the State of Kerala, then it will offend the law. If the taxation is on the entire activity of organisation and conduct of the lottery, it becomes extra territorial, because, except marketing a portion of the tickets in the State of Kerala, the entire activity takes place in other States. Assuming that there is nexus established with the activity taking place in the other State, the tax is not imposed limited to the money which is being collected from the State of Kerala. Considering the definition of "promoter" which includes the person appointed for selling the lottery tickets within the State of Kerala, the tax is sought to be imposed on the basis of the draws taking place outside the territory and which is being done by the organizing State. The draw of each scheme of the lottery takes place based on the whole lot of tickets sold in the State of Sikkim and other States as well. Therefore the activity of conduct of the lottery or the measure upon which tax is sought to be levied, cannot be said to have any direct nexus with the sale of tickets taking place within the State of Kerala.

There cannot be res judicata in matters relating to challenge against a statute on the grounds of Constitutional vires.

There can be no estoppal against a statute. Payment of tax before filing of the writ petition cannot be a ground to apply the doctrine of estoppel. Even otherwise, so long as the law is not declared invalid, the assessee has to comply with it, and due to such compliance, no estoppel arises. Simply because the petitioners were paying tax for the previous periods, there can be no scope to apply the doctrine of contemporanea expositio or constructive res judicata. The petitioners cannot also be non-suited on the doctrine of estoppel.

The doctrine of prospective overruling cannot be applied by the High Court.

STATE OF H. P. *v.* NURPUR PRIVATE BUS OPERATORS' UNION [1999] 9 SCC 559 *and* SOMAIYA ORGANICS (INDIA) LTD. *v.* STATE OF UTTAR PRADESH [2001] 123 STC 623 (SC) ; [2001] 251 ITR 20 (SC) *relied on.*

Held, *that if refund of the tax levied illegally was to be made, it could only be claimed by the State of Sikkim, which was the ultimate person who had borne the liability. The distributor had not passed on the liability to the consumers. No materials to prove that the liability had been ultimately borne by the State had been brought, nor had it been proved through any convincing materials that such liability had been paid by the distributor, out of the commission he had received from the State of Sikkim. At any rate if the State of Sikkim is the ultimate person who borne the liability, the doctrine of unjust enrichment would not apply. On the other hand, if it was the distributor who had borne the liability, proof was required to the effect that the tax had not been recouped from the State of Sikkim. In either case, the refund could not be denied applying the doctrine of unjust enrichment. It was for the appellants to produce materials regarding the person who had borne the real loss or who had ultimately borne the burden of payment of the tax, which was already collected invalidly. The appellants would be entitled to refund of the tax paid from the State Government, on their producing proper accounts and proof as to who had ultimately borne the burden. Such proof being produced, the State of Kerala was liable to make refund.*

Decision of the single judge in State of Sikkim *v.* State of Kerala *(*printed at page 425 infra*) reversed.*

Cases referred to :

All Kerala Online Lottery Dealers Association *v.* State of Kerala [2016] 2 SCC 161 (para 11)

Anraj (H.) *v.* Government of Tamil Nadu [1986] 61 STC 165 (SC) (para 2)

Anraj (H.) *v.* State of Maharashtra [1984] 2 SCC 292 (para 9)

B. R. Enterprises *v.* State of Uttar Pradesh [2000] 120 STC 302 (SC) (paras 6, 13, 17, 20, 24)

Babu Ram *v.* Jacob (C. C.) [1999] 3 SCC 362 (para 37)

Bharati (J. K.) *v.* State of Maharashtra [1984] 3 SCC 704 (para 9)

CIT *v.* OVRSR Arunachalam Chettiar [1965] AIR 1965 SC 1216 (para 35)

Commercial Corporation of India Ltd. *v.* Additional Sales Tax Officer [2007] 10 VST 175 (Ker) (para 2)

Commissioner, Central Excise and Customs *v.* Larsen and Toubro Ltd. [2015] 35 GSTR 168 (SC) ; [2015] 84 VST 403 (SC) (para 27)

Commissioner of Customs *v.* Dilip Kumar and Company [2018] 6 GSTR-OL 46 (SC) (para 27)

Desh Bandhu Gupta & Co. *v.* Delhi Stock Exchange Association Ltd. [1980] 50 Comp Cas 84 (SC) (para 36)

Devilal Modi *v.* Sales Tax Officer [1965] 16 STC 303 (SC) (para 34)

Dunlop India Ltd. *v.* Union of India [1976] 2 SCC 241 (para 35)

Godfrey Phillips India Ltd. *v.* State of Uttar Pradesh [2005] 139 STC 537 (SC) (paras 27, 30)

Golak Nath *v.* State of Punjab [1967] AIR 1967 SC 1643 (para 37)

Govind Saran Ganga Saran *v.* Commissioner of Sales Tax [1985] 60 STC 1 (SC) ; [1985] 155 ITR 144 (SC) (para 27)

His Holiness Kesavananda Bharati Sri Padagalvaru *v.* State of Kerala [1973] 4 SCC 225 (para 17)

Hoechst Pharmaceuticals Ltd. *v.* State of Bihar [1984] 55 STC 1 (SC) (para 14)

Indian Metals & Ferro Alloys Ltd. *v.* Collector of Central Excise [1991] Suppl. (1) SCC 125 (para 36)

Jindal Stainless Ltd. *v.* State of Haryana [2018] 5 GSTR-OL 164 (SC) (paras 17, 20)

Madhuram Agarwal *v.* State of Madhya Pradesh [1999] 8 SCC 667 (para 27)

Mafatlal Industries Ltd. *v.* Union of India [1998] 111 STC 467 (SC) (paras 38, 39)

Municipal Corporation of City of Thane *v.* Vidyut Metallics Ltd. [2009] 20 VST 680 (SC) (para 35)

N. V. Marketing Pvt. Ltd. *v.* State of Maharashtra (Writ Petition No. 432 of 2007 decided on August 14, 2009—Bombay High Court) (paras 21, 23)

National & Grindlays Bank Ltd. *v.* Municipal Corporation [1969] 1 SCC 541 (para 36)

Somaiya Organics (India) Ltd. *v.* State of Uttar Pradesh [2001] 123 STC 623 (SC) ; [2001] 251 ITR 20 (SC) (para 37)

Sree Mangalmoorthy Marketing *v.* State of Maharashtra [2019] 2 Bombay CR 1 (para 23)

State of Bombay *v.* RMD Chamarbaugwalla [1957] AIR 1957 SC 699 (paras 15, 20, 32)

State of H. P. *v.* Nurpur Private Bus Operators' Union [1999] 9 SCC 559 (para 37)

State of Haryana *v.* Suman Enterprises [1994] 4 SCC 217 (para 10)

State of Kerala *v.* Prabhavathy Thankamma [2009] 3 SCC 511 (para 2)

State of Maharashtra *v.* State of Karnataka [2010] SCC Online Kar. 4528 (para 24)

State of Sikkim *v.* State of Kerala [2020] 77 GSTR 425 (Ker) (paras 1, 6, 13, 41)

State of West Bengal *v.* Kesoram Industries Ltd. [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 (paras 6, 13, 14, 15, 20, 21, 23, 27)

Sunrise Associates *v.* Government of NCT of Delhi [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) (para 2, 6, 28, 29, 30, 33)

Tikokchand Motichand *v.* H.B. Munshi, Commissioner of Sales Tax [1970] 25 STC 289 (SC) (para 38)

Union of India *v.* Harbhajan Singh Dhillon [1972] 83 ITR 582 (SC) (paras 18, 19, 20, 23)

Appeal from the judgment and order dated June 29, 2007 of the Kerala High Court in W. P. (C). No. 12189 of 2007(A) (*State of Sikkim* v. *State of Kerala*). The judgment of the Kerala High Court (C. N. RAMACHANDRAN NAIR J.) ran as follows :

"JUDGMENT

C. N. RAMACHANDRAN NAIR J.—This writ petition is filed challenging the constitutional validity of the Kerala Tax on Paper Lotteries Act, 2005 (hereinafter called 'the Act'). While the first petitioner is the State of Sikkim, the second petitioner is the distributor of paper lotteries appointed by the first petitioner for marketing lottery tickets in Kerala. The Act which came into force in April 2005 provided for levy of tax on paper lotteries at the rate of Rs. 10 lakhs for every 'bumper draw' and at the rate of Rs. 2.5 lakhs for any 'other draw'. The tax for 'other draw' is increased from Rs. 2.5 lakhs to Rs. 5 lakhs per draw by Finance Act, 2007 with effect from April 1, 2007. The second petitioner is registered under the Act as the 'promoter' of the first petitioner's paper lottery in Kerala and is remitting tax for every draw at the rate prescribed under section 6 of the Act. Even though tax was paid without dispute for two years, i. e., 2005-06 and 2006-07, the petitioners have now filed this writ petition challenging the constitutional validity of the statute on account of the increase in rate of tax for 'other draws' effected during this financial year.

I have heard Senior Counsel Mrs. Nalini Chitambaram appearing for the petitioners and senior counsel Dr. Deviprasad Pal appearing for State of Kerala and other respondents. The main ground of challenge is that the

State Legislature lacks legislative competence to make any law on lotteries. The petitioners have referred to item 40 of List I of the Seventh Schedule to the Constitution of India which authorises legislation on 'lotteries organised by the Government of India or the Government of a State'. According to the petitioners, in exercise of powers under entry 40, Parliament has made the Lotteries (Regulation) Act, 1998 which does not provide for any tax on lotteries including paper lotteries. Since the subject is covered by Central legislation, State has no legislative competence to levy tax on paper lotteries is the case of the petitioners. On the other hand it is contended on behalf of the State of Kerala that lottery answers the description of 'gambling' contained in entry 62 of the State List to the Seventh Schedule to the Constitution which provides for 'Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling' and therefore tax on paper lotteries is a State-subject. Though law to regulate lottery business is covered by Parliamentary legislation, taxation of lottery under 'gambling' is the exclusive subject reserved for the State and therefore, the Act is a perfectly valid piece of legislation is the argument of the State.

Another ground of challenge raised in the writ petition is on the validity of section 6 of the Act for the reason that levy of tax is on the 'draw' taking place outside State which is beyond the territorial jurisdiction of the State. Besides this, the petitioners have also contended that provisions of the Act on incidence of tax are vague and incapable of implementation. It is also contended that levy of tax in advance of the draw is also unauthorised. The last contention raised is that the extent of tax demanded is excessive and confiscatory in nature and is therefore a colourable legislation brought out to stop sale of outside State lottery tickets.

So far as the main contention is concerned, that is, lack of legislative competence for the State to levy tax on lotteries, I do not think any discussion by this court is called for because it is a settled position by virtue of decision of the Supreme Court in *B. R. Enterprises* v. *State of Uttar Pradesh* [2000] 120 STC 302 (SC) ; AIR 1999 SC 1867 that lottery is 'gambling'. The Supreme Court specifically referred to State lotteries and described it also as gambling in the following words (page 349 in 120 STC) :

> 'As we have already recorded, the difference between gambling and the trade that a gambling inherently contains a chance with no skill, while trade contains skill with no chance. What makes lottery pernicious is its gambling nature. Can it be said that in the State-organised lotteries this element of gambling is excluded ? There could possibly be no two opinions that even in the State lotteries the same

element of chance remains with no skill. It remains within the boundaries of gambling.'

Therefore, obviously tax on lottery is covered by entry 62 of the State List in the Seventh Schedule to the Constitution. The next question to be considered is whether entry 40 of the Union List in the Seventh Schedule stands in the way of State legislation for tax on lotteries. Senior counsel appearing for the State has referred to the decision in *State of West Bengal* v. *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201, where the Supreme Court has held that power to taxation is different from power to make legislation in the form of regulation. It is specifically held by the Supreme Court in the said decision that even though taxation may be adopted as a method for regulation, the power to tax is not incidental to legislation by way of regulation. Contrary to this, petitioners have relied on exhibit P1 judgment of the Bombay High Court wherein the Bombay High Court has struck down levy of sales tax on lottery based on draw. The decision of the Bombay High Court is not applicable to the facts of this case because what the court has considered therein is levy of tax on lottery as "sale of goods". Incidentally, the court held that draw of lottery cannot be treated as sale of goods for the purpose of taxation. However, in this case it is to be seen that what is taxed is draw of lottery under law made in exercise of statutory power left on the Legislature under entry 62 of the State List which specifically authorises levy of tax among other things on 'gambling'. Going by the above referred decision of the Supreme Court in *Kesoram Industries* case [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201 it is clear that the Constitution does not bar State from making law on taxation in respect of the same subject which is reserved for Parliament for regulatory legislation. In the circumstances, the contention of the petitioners that the power of taxation on lottery is vested in Parliament through entry 40 of the Union List, is not tenable. I uphold the contention of the State that impugned Act is a valid piece of legislation enacted in exercise of authority conferred on the State under entry 62 of the State List.

The next contention raised is with regard to extra territorial operation of the statute. This contention has to be considered with reference to statutory provisions namely, the definition clauses and the relevant charging sections. For easy reference relevant definition clause section 2(l), and charging sections 6 and 7 of the Act are extracted hereunder :

'S. 2(l) "*Promoter*" means the Government of India or Government of a State or a Union Territory or any Country who had entered into a bi-lateral agreement or a treaty with the Government of India for

organizing, conducting or promoting a lottery and includes, any person appointed for selling lottery tickets by the Government in the State of Kerala on it behalf, where such Government is not directly selling lottery tickets in the State.

S. 6. *Levy of tax*.—(1) There shall be levied and collected a tax on paper lotteries at the following rates, namely :—

(a) Ten lakh rupees for every bumper draw ; and

(b) Two lakh fifty thousand rupees in respect of any other draw,

(2) Tax levied under sub-section (1) shall be paid by each promoter.

(3) Where the Government of India or a Government of a State or Union Territory or a Country appoints more than one promoters in the State, one such promoter duly authorised by the respective Government or Country shall pay tax levied under sub-section (1).

S. 7. *Registration of promoters*.—(1) Every promoter selling lottery tickets shall get himself registered under this Act in such manner and on payment of such fees and security within such period as may be prescribed :

Provided that a person ordinarily selling lottery tickets in retail shall not be liable to get himself registered.

(2) The registration may be renewed from year to year on payment of the prescribed fees and security, until it is cancelled ;

(3) Unless the registration is cancelled or renewed, at the expiry of the period of registration, the security may be refunded or released to the promoter after adjusting any or all amount due from him, under this Act.'

On going through the above provisions of the Act it is clear that section 6 is not the sole depository of charging provisions as claimed by the petitioners. The activity that attracts tax is the conduct of lotteries which involves sale of lottery tickets prior to the draw. Under the definition clause of 'Promoter' a person selling lottery tickets in the State of Kerala is a promoter. It is the promoter who is liable to pay tax under section 6(2) of the Act. Section 7 provides for registration of the promoter on payment of fees and on remittance of security to the extent prescribed. Therefore, the levy of tax is not merely on the draw of the ticket which of course takes place outside the State. On the other hand, it is only a measure for levy of tax and what attracts tax under the above charging provisions read with the definition clause is the activity of conduct of lotteries most important part of which namely, marketing tickets by which the right to participate in the

draw is sold to purchasers of tickets, takes place in Kerala. Moreover, though draw is taken outside State, result is published and prize distributed in Kerala. Therefore, the contention of the petitioners that the levy of tax is on the draw which takes place outside the territorial jurisdiction of the State is not correct. Even though the measure of tax is based on draw that takes place outside the State, the activity that attracts tax is the conduct of lottery which as explained above essentially takes place in the State. Therefore, I am of the view that the Act has no extraterritorial operation. This contention is therefore rejected.

The next point argued is that the statute is vague and incapable of enforceability. The second petitioner by taking registration as promoter within the State and by paying tax for two years proved beyond doubt that the statute is free from any vagueness as alleged. Even without requirement of any proceedings issued by any authority under the Act, the second petitioner has admittedly remitted above Rs. 50 crores in the course of last two years for all the draws conducted by the first petitioner. Therefore, the allegation of vagueness against the statute is only to be rejected and I do so.

Another contention raised by the petitioners is that the tax is levied in advance of the incidence of levy, i. e., draw of the lottery. As already held, draw is only the method for selecting the winner of the lottery. However, prior to the draw tickets are extensively sold to purchasers who are the participants in the draw. Draw is the ultimate culmination of the gambling activity in lottery. What is taxed is the gambling activity which starts with printing and distribution of tickets and ends up with the draw, declaration of result and payment of the prize money. So long as the levy of tax is properly authorised by the Act, it makes no difference at what stage tax is levied. The provisions pertaining to stage of levy, collection and recovery are generally made taking into account possible evasion. Collection of tax in advance of the draw probably helps to prevent possible evasion of tax after the draw because the party can leave the State after conclusion of sale of ticket in the State. Therefore, the provision for advance collection of tax does not affect the validity of the Act. Petitioners have no case that at any time a draw for which tax is paid was cancelled. Therefore, their apprehension that taxable event may not take place for tax paid draws is out of place and is therefore rejected.

The next contention raised by the petitioners is that the impugned Act is a colourable legislation to levy tax on sale of lottery tickets. The petitioner has referred to the decision of the Supreme Court in *Sunrise Associates* v. *Government of NCT of Delhi* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; [2006] 5 SCC 603 wherein the Supreme Court held that lottery

cannot be assessed to sales tax as the transaction does not involve sale of goods. According to the petitioners, the impugned Act levies a virtual tax on sale of lottery tickets. However, the respondents contended that sale of tickets or sales turnover have nothing to do with the Act and the measure of tax is solely based on every draw irrespective of as to what is the sales turnover achieved for the sale of ticket. I do not think the impugned Act is colourable legislation inasmuch as it levies tax on every draw of lottery at specific rate per draw and is not related to sale of lottery tickets.

The petitioners have raised allegation of discrimination and arbitrariness in the legislation, particularly with regard to increase of rate of tax from Rs. 2.5 lakhs to Rs. 5 lakhs per draw in respect of every draw other than bumper draw. This allegation is controverted by the respondents by furnishing details of tax payments made by the Kerala State Lottery Department for each draw of the lottery conducted by them. The petitioners are not disputing the factual position with regard to payment of tax and compliance of the statutory provisions by the State Lottery Department in Kerala. So much so, the allegation of discrimination is unacceptable. So far as the allegation of confiscatory nature of levy is concerned, I do not think there is much scope for this court to examine whether the measure of tax is low or high or what it should be. The petitioners are engaged in extensive marketing of lottery tickets in the State and probably Kerala is their largest market because petitioners themselves admitted that they have around 35000 outlets in the State. From April 2005 to April 2007, i. e., in the course of two years, the petitioners have admittedly paid above Rs. 59 crores towards tax on paper lotteries in the State of Kerala alone. Obviously business is viable for them and that is why business is continued in Kerala. Even now the petitioners and other State Governments and the Kerala State Lottery Department are remitting tax in terms of the revised rate without any difficulty. It is obvious from the business carried on by others similarly placed like the petitioners that the revised rate of tax at Rs. 5 lakhs per draw is quite acceptable to them. Therefore, I am unable to accept the argument that the increase of tax is an indirect way of stoppage of lottery business by other States in Kerala. This argument is also therefore rejected.

The last ground raised by the petitioners is that the State cannot make any law on lotteries of other States and it's executive power under article 298 of the Constitution is not extended beyond the territorial jurisdiction of the State. As already stated above, the tax on lotteries is the tax on gambling and is no way regulatory in nature and no way interfering with or regulating right of another State to carry on business on lottery. The petitioners have also no case that they are subject to any regulation or

control except in regard to levy and recovery of tax in accordance with the Act which applies to all State lotteries including the lottery run by the State Lottery Department of Kerala equally. Since the Supreme Court held that State lottery is also gambling and since State-gambling is not exempted from the scope of levy of tax under entry 62 of Second List of the Seventh Schedule to the Constitution, State law can authorise tax on State-lottery also.

In view of the above findings the W. P. is dismissed."

W. A. No. 648 of 2008(E).

S. K. Bagaria, Senior Advocate, *A. Kumar* and *G. Mini* for the appellants.

C. E. Unnikrishnan, Special Government Pleader (Taxes) and *Pallav Shishodia*, Senior Advocate, for the respondents.

JUDGMENT

The judgment of the court was delivered by

ABDUL REHIM J.—The petitioners in the writ petition, W. P. (C) No. 12189/2007[1], are the appellants herein, challenging judgment of the single judge dismissing the writ petition. The first appellant is the State of Sikkim and the second appellant is the distributor of the paper lotteries organized by the first appellant in the State of Kerala. Constitutional validity of the Kerala Tax on Paper Lotteries Act, 2005 ("the Act", for short) is under challenge in the writ petition. The respondents herein are the respondents in the writ petition, the State of Kerala and its officials. 1

Brief history of the impugned legislation may be worthfull to mention. By virtue of the Finance Act, 2001, introduced with effect from July 23, 2001, the State of Kerala has introduced section 5BA to the Kerala General Sales Tax Act, 1963 ("KGST Act", for short) imposing licence fee on the draw of lotteries, in lieu of tax payable under section 5(1) of the KGST Act. Validity of section 5BA was under challenge before this court. In the decision in *Commercial Corporation of India Ltd.* v. *Additional Sales Tax Officer* [2007] 10 VST 175 (Ker) ; [2007] 2 KLT 397 ; [2007] 2 KHC 427 this court held that section 5BA of the KGST Act is ultra vires and unconstitutional. Even though the State of Kerala filed appeal before the Division Bench, it was dismissed by relying on the dictum laid by the honourable Supreme Court in *Sunrise Associates* v. *Government of NCT of Delhi* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908, in which earlier ruling of the honourable Supreme Court in *H. Anraj* v. *Government* 2

1. Reported as *State of Sikkim* v. *State of Kerala* [2020] 77 GSTR 425 (Ker).

of Tamil Nadu [1986] 61 STC 165 (SC) ; AIR 1986 SC 63 was reversed and it was held that no tax can be levied, collected or demanded in connection with sale of lottery tickets. A special leave petition filed by the State of Kerala against the Division Bench decision was also dismissed by the honourable Supreme Court in the ruling reported in *State of Kerala* v. *Prabhavathy Thankamma* [2009] 3 SCC 511.

3 In the year 2005, the impugned legislation was enacted, with effect from April 8, 2005, in the wake of replacement of the KGST Act by the Kerala Value Added Tax Act, 2003 (KVAT Act). In the KVAT Act there is no imposition of any tax on lotteries. In the preamble of the impugned Act the reasons for introducing the legislation is stated as : "*Whereas it is expedient to provide for the levy and collection of tax on the conduct of paper lotteries in the State of Kerala.*" In the "statement of objects and reasons" it is mentioned that : "*The Government have decided to levy and collect tax on paper lotteries sold in the State of Kerala and to bring a separate legislation for the purpose.*"

4 It may be beneficial to extract relevant provisions of the impugned Act. Section 6 of the Act is the "charging section". Section 7 deals with registration of "promoters". Section 8 deals with "returns and assessment". Section 10 deals with "payment of tax in advance". Sections 6 to 10 of the Act are reproduced hereunder :

"6. *Levy of tax.*—(1) There shall be levied and collected a tax on paper lotteries at the following rates, namely :—

(a) Ten lakh rupees for every bumper draw ; and

(b) Two lakh fifty thousand rupees in respect of any other draw ;

(2) Tax levied under sub-section (1) shall be paid by each promoter.

(3) Where the Government of India or a Government of a State or Union Territory or a Country appoints more than one promoters in the State, one such promoter duly authorized by the respective Government or Country shall pay tax levied under sub-section (1) ;

7. *Registration of promoters.*—(1) Every promoter selling lottery tickets shall get himself registered under this Act in such manner and on payment of such fees and security within such period as may be prescribed :

Provided that a person ordinarily selling lottery tickets in retail shall not be liable to get himself registered.

(2) The registration may be renewed from year to year on payment of the prescribed fees and security, until it is cancelled ;

(3) Unless the registration is cancelled or renewed at the expiry of the period of registration, the security may be refunded or released to the promoter after adjusting any or all amount due from him, under this Act ;

8. *Returns and assessment*.—(1) Notwithstanding anything contained in section 10, every promoter liable to get himself registered under this Act shall submit a return to the Assistant Commissioner for such period, within such period and in such manner containing such particular as may be prescribed.

(2) Before any promoter submits any return under sub-section (1), he shall in the prescribed manner, pay in advance as provided under section 10, the full amount of tax payable by him under section 6 and shall furnish along with the return satisfactory proof of the payment of such tax, and after the final assessment is made the amount of tax so paid shall be deemed to have been paid towards the tax finally assessed.

(3) If the Assistant Commissioner is satisfied that any return submitted under sub-section (1) is correct and complete he shall assess the promoter on the basis thereof.

(4) if no return is submitted by the promoter under sub-section (1) before the period prescribed or if the Assistant Commissioner is satisfied that the return submitted to him is incorrect or incomplete, he shall assess the promoter to the best of his judgment recording the reasons for such assessment :

Provided that before taking action under this sub-section the promoter shall be given reasonable opportunity of being heard.

(5) While making any assessment under sub-section (4), the Assistant Commissioner may also direct the promoter to pay in addition to the tax assessed a penalty equal to two times of the amount of tax due that was not disclosed by the promoter in his return or in the case of failure to submit a return two times of the tax assessed.

9. *Assessment of draw escaping assessment*.—(1) If the Assistant Commissioner has reasons to believe that any draw has escaped assessment to tax or has been assessed at a rate lower than the rate at which it is assessable under this Act, the Assistant Commissioner may, notwithstanding the fact that assessment in respect of such draw was already before him at the time of assessment or reassessment, but subject to the provisions of sub-section (3), at any time within a period of four years from the expiry the period to which the

tax relates, proceed to assess or reassess to the best of his judgment the tax payable by the promoter in respect of such draw after issuing a notice to the promoter and after making such enquiry as he may consider necessary.

(2) In making an assessment under sub-section (1) the Assistant Commissioner may, if he is satisfied that the escapement from assessment is due to wilful non disclosure of the draw by the promoter, direct him to pay in addition to the tax assessed under sub-section (1) a penalty equal to two times of the tax so assessed :

Provided that no penalty under this sub-section shall be directed to be paid unless the promoter has been given a reasonable opportunity of being heard.

(3) In computing the period of limitation for assessment under this section the time during which assessment has been deferred on account of any stay order granted by any court or other authority or by reason of the fact that an appeal or other proceeding is pending shall be excluded :

Provided that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to an assessment or reassessment made on the promoter in consequence of or to give effect to, any finding direction or order made under sections 14, 15, 16 and 18 or any judgment or order made by the Supreme Court, the High Court or any other court.

10. *Payment of tax in advance.*—(1) Subject to such rules as may be prescribed, every promoter shall submit on the first day of every month, if the first day being a holiday, on the immediate next working day, to the Assistant Commissioner a statement containing such particulars, as may be prescribed relating to the draws to be conducted during the month commencing from the next succeeding month and shall pay in advance the full amount of tax payable by him under this Act, in respect of the draws shown in the statement and the amount so payable shall for the purpose of section 12, be deemed to be an amount due under this Act from such promoter.

(2) If default is committed in the payment of tax for any month, whether a statement as required under sub-section (1) is filed or not, or if the amount of tax paid is less than the amount of tax payable for any month, the promoter defaulting payment of tax or making short payment of tax shall, in addition to the tax, pay interest calculated at

the rate of two per cent per month from the date of such default or short payment to the date of payment of such tax.

(3) If no such statement is submitted by a promoter under sub-section (1) before the date specify or if the statement submitted by him appears to the Assistant Commissioner to be incorrect or in complete, the Assistant Commissioner may assess the promoter provisionally for that month to the best of his judgment, recording the reasons for such assessment, and proceed to demand and collect the tax forthwith on the basis of such assessment, the abovesaid tax shall immediately be adjusted towards the security amount paid under sub-section (1) of section 7.

(4) Without prejudice to the actions contemplated under sub-sections (2) and (3) above, the Assistant Commissioner shall cancel the registration of the promoter granted under this Act and on such cancellation of registration, the promoter shall not be entitled to sell lottery tickets within the State :

Provided that before taking action under this sub-sections (3) and (4), the promoter shall be given a reasonable opportunity of being heard :

Provided further that if the promoter makes payment of the defaulted tax with interest the Assistant Commissioner, on application, may register the promoter or such person on payment of registration/renewal fees and security at the prescribed rate."

The term "draw", "bumper draw", "lottery" and "promoter", are defined under section 2, which are extracted hereunder :

"2.(g) 'Draw' means any method by which the prize winning number of numbers are drawn for each lottery, by operation of the draw machine or any other manual mechanical method which selects numbers on a methodology and where the operation is visibly transparent to the viewers ;

2.(c) 'Bumper draw' means special draw of paper lottery conducted in festival seasons special occasions or other circumstances promising more amount as prize than that is promised in usual draw of lotteries.

2.(i) 'Lottery' means a scheme, in whatever form and by whatever name called for distribution of prizes by lot of chance to those persons participating in the chances of a prize by purchasing tickets organized by the Government of India or the Government of a State or any Union Territory or any country having bilateral agreement or treaty with the Government of India.

2.(l) 'Promoter' means the Government of India or Government of a State or a Union Territory or any country who had entered into a bi-lateral agreement or a treaty with the Government of India for organizing, conducting or promoting a lottery and includes, any person appointed for selling lottery tickets by the Government in the State of Kerala on its behalf, where such Government is not directly selling lottery tickets in the State."

5 The main ground of attack against validity of the impugned Act is the lack of legislative competence of the State. It is pointed out that, the subject "lotteries organised by the Government of India or the Government of a State" (hereinafter referred to as "State organised lotteries", for brevity) is within the realm of the legislative competence of the Parliament, by virtue of entry 40 in List I of the Seventh Schedule to the Constitution of India. It is in exercise of that power that the Parliament has enacted the Lotteries (Regulation) Act, 1998. The said legislation does not provide any tax on lotteries, including paper lotteries. Since the subject is covered in the Union List, the State has no legislative competence to levy tax on paper lotteries, is the contention. The above contention was met on behalf of the State of Kerala by pointing out that, conduct of lottery will fall within the description of "gambling" contained in entry 62 of List II of the Seventh Schedule, and therefore the imposition of tax on paper lotteries is within the realm of the State Legislature. Even though the power to regulate the business of lottery is covered within the legislative competence of the Parliament, taxation on lottery, under the cover of "gambling" is an exclusive subject reserved for the State. Therefore the Act is valid, is the contention. Another major ground of attack was against section 6 of the Act, which is the "charging section". It was contended that the tax is on the "draw", which is taking place outside the State, beyond the territorial jurisdiction of the State. Further it is contended that the provisions of the Act, specifically the "charging section", is too vague and is incapable of implementation with respect to the incidence of taxation. Further contention was that the insistence for advance payment of tax is unauthorised and illegal. A contention was also raised that the rate of tax demanded is excessive and confiscatory in nature and therefore it is a colourable legislation brought with an intend to stop sale of lotteries organised by other States, within the State of Kerala.

6 The learned single judge[1] repelled all the abovesaid contentions. Relying on a decision of the honourable Supreme Court in *B. R. Enterprises* v. *State of Uttar Pradesh* [2000] 120 STC 302 (SC) ; AIR 1999 SC 1867 it was found that, even in case of State organized lotteries there exists an element

1. Reported as *State of Sikkim* v. *State of Kerala* [2020] 77 GSTR 425 (Ker).

of "gambling" and therefore the conduct of such lottery will fall within the ambit and scope of "gambling". Hence tax imposed on the lottery by the State Legislature based on the power derived under entry 62 of List II of the Seventh Schedule was found valid. Referring to ruling of the honourable apex court in *State of West Bengal* v. *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201 it was found that, the power to tax is different from the power to make legislation in the form of regulations. The power to tax is not incidental to the legislation by way of regulation. Therefore the Constitution does not bar making of law on tax in respect of the same subject which is reserved for the Parliament for the purpose of regulatory legislation. With respect to contention regarding extra territorial operation, the learned single judge[1], after referring to the "charging section" as well as to section 7 relating to "registration of promoters" read with the definition of "promoter", held that the activity which attract tax is the conduct of lotteries, which involves sale of lottery tickets prior to the draw. The promoter is a person selling lottery tickets in the State of Kerala, who is liable to pay tax under section 6 of the Act. It was held that the levy of tax is not merely on the draw of tickets, which of courses take place outside the State. But "draw" is only a measure of levy of the tax and what attracts the tax is the activity of conduct of lotteries, in which one of the most important part is the marketing of tickets, which takes place within the State of Kerala. Therefore the contention regarding extra territorial operation of the impugned Act was rejected. With respect to the allegation of vagueness in the statute, it was observed that, the second appellant had admittedly registered as a promoter and paid tax since the last two years. Therefore it was found that such a contention cannot be sustained. Challenge against the insistence for collection of advance tax was also negatived by holding that, the draw is only a measure and what is taxed is the gambling activity, which starts with the printing of tickets, distribution of tickets, draw and declaration of the results and payment of the prize money. It is held that it makes no difference at what stage the tax is levied. The collection of tax at the stage of draw is to avoid possible evasion of payment of the tax after conduct of the draw, since there is possibility of the promoter leaving the State after sale of the tickets. Therefore it was found that the advance collection does not affect validity of the Act. Contention that the tax is excessive and confiscatory in nature and therefore the Act is a colourable legislation intended to stop sale of lotteries of other States within the State of Kerala, was rejected by holding that the tax cannot be considered as a tax imposed on the sale of tickets or

1. Reported as *State of Sikkim* v. *State of Kerala* [2020] 77 GSTR 425 (Ker).

on the sale turnover of the promoter. Referring to *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908 it was held that, the sale of lottery cannot be assessed to tax as it does not involve any sale of goods. But in the case of the impugned Act, tax is collected on the conduct of lottery, as being "gambling", based on the measure of "draw", irrespective of the sales or the turnover, and therefore it is not a colourable legislation. It was found that the lottery organised by the State of Kerala is also paying the tax and therefore there exists no discrimination. Learned single judge[1] also found that the appellants are estopped from contending about arbitrariness or confiscatory nature, because the rate was acceptable to them when payments were made since the last more than two years. It is noticed that there was sufficient market and sufficient sales for the tickets sold by the appellants. Hence all the contentions raised in challenge against validity of the Act were rejected and the writ petition was dismissed. In the present appeal, correctness of that judgment is under challenge.

7 We heard Sri S. K. Bagaria, senior counsel appearing for the appellants, ably instructed and assisted by Sri A. Kumar, learned counsel on record. On behalf of the respondents, Sri Pallav Shishodia, Senior Counsel addressed arguments as instructed by Sri. C. E. Unnikrishnan, Special Government Pleader (Taxes), State of Kerala.

8 Addressing this court on the question of legislative competence, senior counsel for the appellants had drawn our attention to the following entries in the Seventh Schedule to the Constitution :

> "(a) Entry 40 of List I (Union List)—Lotteries organised by the Government of India or the Government of a State.
>
> (b) Entry 97 of List I (Union List)—Any other matter not enumerated in List II or List III including any tax not mentioned in either of those List.
>
> (c) Entry 34 of List II (State List)—Betting and gambling.
>
> (d) Entry 62 of List II (State List)—Tax on luxuries, including taxes on entertainments, amusements, betting and gambling."

It is pointed out that, by virtue of entry 40 of List I, the State organized lotteries are not covered under the subject of "betting and gambling" contained in entry 34 of List II. The State Legislature is competent to legislate on the general subject of "betting and gambling" in exercise of power conferred under entry 34 of List II. It is true that lottery is a specie of gambling. But the State organised lotteries is a specific subject under

1. Reported as *State of Sikkim* v. *State of Kerala* [2020] 77 GSTR 425 (Ker).

entry 40 of List I. In other words, the contention is that, in view of entry 40 of List I, the State organised lotteries, which is a specie of the general subject of gambling, gets carved out of entry 34 of List II and is covered by a specific entry in the Union List, entry 40 of List I. Thus the expression, "betting and gambling" contained in entry 34 of List II does not include the State organized lotteries. Consequently, in view of the provisions contained in article 246(1) and (3) of the Constitution of India, no Legislature of a State can make law touching upon the subject of State organised lotteries, is the contention.

In support of the abovesaid contention, learned senior counsel for the appellants placed reliance on a decision of the honourable Supreme Court in *H. Anraj* v. *State of Maharashtra* [1984] 2 SCC 292, in which it is held as follows : 9

> "Entry 40 of List I of the Eighth Schedule to the Constitution is 'Lotteries organised by the Government of India or the Government of a State'. Entry 34 of List II of the Seventh Schedule is, 'betting and gambling'. There is no dispute before us that the expression 'betting and gambling' includes and has always been understood to have included the conduct of lotteries. Quite obviously, the subject 'lotteries organised by the Government of India or the Government of a State' has been taken out from the legislative field comprised by the expression 'betting and gambling' and is reserved to be dealt with by Parliament. Since the subject 'lotteries organised by the Government of India or the Government of a State' has been made a subject within the exclusive legislative competence of Parliament, it must follow, in view of article, 246(1) and (3), that no Legislature of a State can make a law touching lotteries organised by the Government of India or the Government of a State. This much is beyond controversy and the Maharashtra Legislature has acknowledged the position, as indeed it must, in section 32 of the Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958. It is an Act to control and tax lotteries and to tax prize competitions in the State of Maharashtra. Section 32 (b) expressly provides that nothing in the Act shall apply to 'a lottery organised by the Central Government or a State Government'. This, as we said, is but a recognition of the prevailing situation under the Constitution. The Constitutional position cannot be altered by an act of the State Legislature."

In *J. K. Bharati* v. *State of Maharashtra* [1984] 3 SCC 704, the above principle has been reiterated by the apex court and held as follows :

". . . . While lotteries organised by the Government of India or the Government of the State have been taken out of entry 34 of List II of the Seventh Schedule by entry 40 of List I, there is no question about the competence of the Legislature of Maharashtra to legislate in respect of the sale or distribution, in the State of Maharashtra, of tickets of all lotteries organized by any agency whatsoever other than the Government of India or the Government of a State."

Evidently in *J. K. Bharati* [1984] 3 SCC 704, the honourable Supreme Court made a distinction between lotteries "organised" by the Government and lotteries which are "authorised" by the Government and organized by institutions and persons other than the Government. It was held that, only the lotteries organized by the Governments (State organised lotteries) which is the subject as carved out of entry 34 of List II, alone is covered by the specific entry in the Union List, entry 40 of List I. It is pointed out that, in the case at hand, it relates to lotteries organized by the first appellant—State of Sikkim and therefore the legislative competence is covered under entry 40 of List I.

10 While deciding the case in *State of Haryana* v. *Suman Enterprises* [1994] 4 SCC 217, a Constitution Bench of the honourable Supreme Court held that, lottery organised by the State would "*quite obviously be outside the regulatory power of any other State*." In the said case, the State of Tamil Nadu took a decision permitting sale of only the lottery tickets of the Government of Tamil Nadu and the lotteries organised by the Government of India or other State Governments, within the State. Private lotteries of any kind are not authorised to be sold within the State of Tamil Nadu. The apex court observed that, the prohibition does not extent to the sale of lottery tickets and lotteries organised by other States.This is the implication arising out of a proper construction of entry 40 of List I and entry 34 of List II of the Seventh Schedule. It is clarified that the power of the State to regulate the sale of lottery tickets not organised by the Union or other States, has to be upheld. If any other State organises a lottery which specifies the essential features which can be classified the said lottery as one "organised" by the State, it would obviously be outside the regulatory power of any other State, under entry 40 of List I, and accordingly the prohibition would not apply.

11 In *All Kerala Online Lottery Dealers Association* v. *State of Kerala* [2016] 2 SCC 161, the apex court held as follows :

"Article 246(1) of the Constitution of India deals with exclusive power of the Parliament to make laws with respect to matters enumerated in List I (Union List) in the Seventh Schedule. As per

article 246(2), Parliament and the Legislature of any State also have power to make laws with respect to any of the matters enumerated in List III (Concurrent List) in the Seventh Schedule. The Legislature of the State has, however, exclusive power to make laws with respect to matters enumerated in List II (State List) in the Seventh Schedule, as per article 246(3) of the Constitution. Also, there being a specific entry dealing with lotteries, the power to legislate on lotteries would be in the exclusive domain of the Parliament, even though it is a form of gambling and would be generally covered under item No. 34 of List II (State List) . . . . ."

12 Contentions on behalf of the appellants based on the decisions cited above is that, the subject of legislation with respect to State organised lotteries is within the exclusive competence of the Parliament under entry 40 of List I. The subject of State organized lotteries, thus gets carved out of the legislative field comprised under the general expression of "betting and gambling" under entry 34 of List II and no Legislature of a State can make any law touching upon the State organised lotteries.

13 The learned single judge[1] has negatived the above contention by holding that the power to taxation is different from the power to make legislation in the form of regulation. Reliance was placed on the decision of *B. R. Enterprises* [2000] 120 STC 302 (SC) ; AIR 1999 SC 1867 that, lottery is "gambling" and therefore obviously tax on lottery is a subject covered by entry 62 of List II of the Seventh Schedule. While answering the question whether the entry 40 of List I will stand in the way of State Legislature imposing tax on lotteries, the learned single judge placed reliance on the decision in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201, wherein it is held that, the power to taxation is different from the power to make legislation in the form of regulation. It is held therein that, even though taxation may be adopted as a method of regulation, the power to tax is incidental to legislation by way of regulation.

14 The learned senior counsel appearing for the respondents/State has drawn attention of this court to the quotations in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201. Referring to an earlier decision of the apex court in *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar* [1984] 55 STC 1 (SC) ; [1983] 4 SCC 45, it is held as follows (pages 752 and 753 in 266 ITR) :

"(1) The various entries in the three Lists are not 'powers' of legislation but 'fields' of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under

1. Reported as *State of Sikkim* v. *State of Kerala* [2020] 77 GSTR 425 (Ker).

article 246. There is no over lapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be 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.

(4) The entries in the List being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the Lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of a Legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in Lists I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three Lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other Legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of

ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the Legislature which enacted it, an incidental encroaching in the field assigned to another Legislature is to be ignored. While reading the three Lists, List I has priority over Lists III and II, and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I."

In *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201, the majority judges in the Constitution Bench decided that, the power to legislate as to the principal matter specifically mentioned in an entry also includes within its expanse the legislation touching on incidental and ancillary matters. However, it is clarified unequivocally and categorically that, taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as distinct matter for purposes of legislative competence. The power to tax cannot be deduced from a general legislative entry as an ancillary power. Entries in List I and II classified into two groups : "*(a) those that are with the main subject of legislation, and (b) those that are the power to tax in relation to the subject of legislation comprised in (a)*". The majority judges held that, it is of paramount significance to note the difference between power of "regulation and control" and the "power of taxation". Power of regulation and control is separate and distinct from the power of taxation and so are the two fields operates for the purpose of legislation. However, the power to tax may be exercised for the purpose of regulating an industry, commerce or any other activity. But, the power to regulate, develop or control would not include within its ken a power to levy a tax or fee, except when it is only regulatory.

According to learned senior counsel for the respondent, entry 62 of List II remains intact even after the power to regulation with respect to the State organised lotteries stands vested in entry 40 of List I. This is because, by virtue of entry 62 of List II the taxing power of the State on "gambling" **15**

remains within the legislative competence of the State and since lottery is covered under "gambling", taxation imposed on lottery is valid and is within the legislative competence of the State. In reply to the above contention, Sri S. K. Bagaria, learned senior counsel for the appellants submitted that, under the scheme of distribution of powers between the union and the States, under Lists I and II, when the subject of State organized lotteries has been specifically assigned to the exclusive domain of the Parliament, and consequently gets carved out of the general expression of "betting and gambling" contained in entry 34 of List II, the very same expression "betting and gambling" in entry 62 of List II cannot be construed to include the State organized lotteries within the competence of the State Legislature, for the purpose of taxing. The taxing entry 62 of List II conferring power upon the State Legislature is limited to levy tax on "betting and gambling," which is within their legislative competence under entry 34 of List II. It is pointed out that, the scheme underlying the division of legislative powers enumerated under the Seventh Schedule to the Constitution, which is summed up by the honourable Supreme Court in para 74 of the judgment in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201is in support of the above view. The principle evolved therein are as follows (page 769 in 266 ITR) :

> "1. In List I, entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of entries shows that while the main subject of legislation figures in the first group ; a tax in relation thereto is separately mentioned in the second.
>
> 2. In list II, entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes.
>
> 3. Taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of article 248 clauses (1) and (2), and of entry 97 in List I to the Constitution. Under the scheme of the entries in the Lists, taxation is regarded as a distinct matter and is separately set out."

It is the contention that, entries 1 to 81 are the main subjects included in the first group of List I and entries 82 to 92 are enumerating the taxation which could be imposed in relation to those subjects which are included in the first group. Likewise, the subjects mentioned in entries 1 to 44 in List II

are the subjects upon which the State could legislate, whereas entries 45 to 63 in that List, which forms the second group dealing with the subject of taxation with respect to those subjects included in the first group. Contention is that, the scheme of division of the legislative competence do not intent to make any taxation legislation upon any subject which is not included in both the lists or upon any of the main subjects with respect to which an extended construction can be recorded as included. In other words, the contention is that, the entries pertaining to taxation laws need to be restricted to the subjects included in the first group in the respective Lists of Union Government and State Governments. Therefore the State Legislature is not competent to make any legislation imposing tax with respect to a subject which is not included in the first group, contained in entries 1 to 44. It is pointed out that, the above distinction in the division of legislative powers is also manifest from article 248 of the Constitution of India and the residual entry 97 in List I of the Seventh Schedule. As long as State organized lotteries remains carved out of the subject of "betting and gambling" included under entry 34 of List II and the subject of State organized lotteries is exclusively included within the domain of the Parliament under entry 40 of List I, there is no power vested with the State to legislate on taxation of the State organized lotteries, is the contention. Learned senior counsel for the appellants also placed reliance upon the Constitution Bench decision of the honourable Supreme Court in *State of Bombay* v. *RMD Chamarbaugwalla*, AIR 1957 SC 699, in support of the above.

Emphasizing the above contentions, learned senior counsel for the **16**
appellants argued that, when one and the same expression is used at different places in a statute, unless the context otherwise requires, those expressions will convey the same meaning. Entries 34 and 62 in List II relate to the very same subject of "betting and gambling". While entry 34 confer powers to formulate legislations of regulative nature, entry 62 confers power on taxation legislation on the same subject. On a co-relation in between the two entries, the context does not require or permit assignment of a different meaning to the expression "betting and gambling", identically contained in both the entries. In other words, the context does not require or permit any expanded meaning to the expression "betting and gambling" in entry 62 of List II, other than what is contained and intended with respect to the same expression, "betting and gambling", used in entry 34 of List II. To be more precise and specific, argument is that, the subject covered under entry 34 is the subject of "betting and gambling", excluding the State organized lotteries, upon which the Parliament alone has got legislative competence under entry 40 of List I. Therefore the expression

"betting and gambling" contained in entry 62 of List II cannot be construed of having any expanded meaning to include taxation on State organized lotteries. Since the State organized lotteries is an exclusive subject upon which the Parliament alone has got legislative competence, the field including legislation imposing any tax, of that particular subject can only be made under entry 97 of List I by virtue of article 248 of the Constitution, as long as there is no taxation entry with respect to the specific subject of the State organized lotteries either under List II or List III.

17 In support of the contention that the same expression used in two different entries in the same List must be given the same meaning, learned senior counsel for the appellants placed reliance on the decision in *B. R. Enterprises* [2000] 120 STC 302 (SC) ; AIR 1999 SC 1867. In para 75 of the said judgment it is held as under (page 353 in 120 STC) :

> ". . . . . Significantly, the different use of words in the two articles is for a purpose, if the field of two articles are to be the same, the same words would have been used. It is true, as submitted, that since 'trade' is used both in articles 298 and 301, the same meaning should be given. To this extent, we accept it to so, but when the two articles use different words, in a different set of words conversely, the different words used could only be to convey different meaning. If different meaning is given then the field of the two articles would be different. So, when instead of the words 'trade and commerce' in article 301, the words 'trade or business' is used it necessarily has different and wider connotation than merely 'trade and commerce'. . . ".

Learned senior counsel Sri S. K. Bagaria also placed reliance on a decision of the honourable Supreme Court in *Jindal Stainless Ltd.* v. *State of Haryana* [2018] 5 GSTR-OL 164 (SC) ; [2017] 12 SCC 1 to support the principle that, when the same words or phrases are used in different parts of the Constitution, the same meaning should be ascribed to such words, unless the context demands otherwise. In para 976.3 of the said judgment it is held as under (page 698 in 5 GSTR-OL) :

> "It is well-known principle of statutory interpretation of Constitution that when the same words or phrases are used in different parts of the Constitution, the same meaning should be ascribed to such word unless the context demands otherwise. It is sufficient to refer to judgment of this court in *His Holiness Kesavananda Bharati Sri Padagalvaru* v. *State of Kerala* [1973] 4 SCC 225. Justice 'Hegde and Mukherjea' in para 640 had reiterated the above principle as : '. . . it is one of the accepted rules of construction that the courts should presume that ordinarily the Legislature uses the same words in a

statute to convey the same meaning. If different words are used in the same statute, it is reasonable to assume that, unless the context otherwise indicates, the Legislature intended to convey different meanings by those words. This rule of interpretation is applicable in construing a Constitution as well . . .'."

It is pointed out that, even though the abovementioned quote is from the minority judgment, there is no difference of opinion expressed with respect to the rule of interpretation.

In summing up the arguments based on the ground of legislative com- **18**
petence, it is pointed out that, the State organized lotteries, even though will fall under the general expression of "betting and gambling", have been treated as a separate class and category and the said subject has been assigned exclusively to the Parliament to legislate, under entry 40 of List I. Therefore the scheme of division of legislative powers on the subject of State organized lotteries, between List I and List II is quite clear, that the said subject stands exclusively assigned to List I and will not be covered under the expression of "betting and gambling" under List II, either under entry 34 or under entry 62. Supplementing to the above argument, it is further contended that, the legislation imposing tax on State organized lotteries covered under entry 40 of List I will fall exclusively within the Union List under entry 97 of List I, read with article 246(1) and article 248. It is pointed out that, entry 97 in List I enumerates the subjects which are not included in List II or List III, including any taxation on any subject mentioned in either of those Lists. Therefore it is pointed out that, since tax on State organized lotteries are not covered under entry 62 of List II and since the same is not otherwise enumerated any where in the List II or List III, the power to levy tax on State organized lotteries falls exclusively within the domain of the legislative competence of the parliament under entry 97 of List I. In this regard, learned senior counsel for the appellants also placed reliance on a decision of the honourable Supreme Court in *Union of India* v. *Harbhajan Singh Dhillon* [1972] 83 ITR 582 (SC) ; [1971] 2 SCC 779. The issue decided therein was regarding validity of section 24 of the Finance Act, 1969, through which wealth tax on capital value of agricultural land was introduced. Entry 86 of List I enumerates the subject, "*Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies*". Entry 49 of List II deal with "*Taxes on lands and buildings*". The decision of the High Court in that case was that, when by virtue of entry 86 of List I, the power to impose wealth tax on agricultural land remains withdrawn from the competency of the Parliament, it was not open to enact such a law in exercise of the legis-

lative competence vested under entry 97 of List I. The High Court held that the impugned Act in its pith and substance was intended to impose tax on capital value of the assets including agricultural land, which stood excluded from the power under entry 86 of List I. The Supreme Court, however, allowed the appeal filed by the Union of India and held inter alia as follows (pages 593, 595-597, 614-616 and 677 in 83 ITR) :

> "17. There does not seem to be any dispute that the Constitution-makers wanted to give residuary powers of legislation to the Union Parliament. Indeed, this is obvious from article 248 and entry 97, List I. But there is a serious dispute about the extent of the residuary power. It is urged on behalf of the respondent that the words 'exclusive of agricultural land' in entry 86, List I, were words of prohibition, prohibiting Parliament from including capital value of agricultural land in any law levying tax on capital value of assets. Regarding entry 97, List I, it is said that if a matter is specifically excluded from an entry in List I, it is apparent that it was not the intention to include it under entry 97, List I ; the words 'exclusive of agricultural land' in entry 86 by themselves constituted a matter and, therefore, they could not fall within the words 'any other matter' in entry 97, List I.
>
> . . . .
>
> 20. It may be that it was thought that a tax on capital value of agricultural land was included in entry 49, List II. This contention will be examined a little later. But if on a proper interpretation of entry 49, List II, read in the light of entry 86, List I, it is held that tax on the capital value of agricultural land is not included within entry 49,List II, or that the tax imposed by the impugned statute does not fall either in entry 49,List II or entry 86 List I, it would be arbitrary to say that it does not fall within entry 97, List I. We find it impossible to limit the width of article 248 and entry 97, List I by the words 'exclusive of agricultural land' in entry 86, List I. . . .
>
> 21. 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 is on 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 nega-

tive, then it follows that Parliament has power to make laws with respect to that matter or tax.

. . . .

24. We are compelled to give full effect to article 248 because we know of no principle of construction by which we can cut down the wide words of a substantive article like article 248 by the wording of an entry in Schedule VII.

. . . .

82. In our view the High Court was right in holding that the impugned Act was not a law with respect to entry 49, List II, or did not impose a tax mentioned in entry 49, List II. If that is so, then the legislation is valid either under entry 86, List I, read with entry 97, List I, or entry 97, List I, standing by itself.

. . . .

86. Therefore, it seems to us that the whole of the impugned Act clearly falls within entry 97, List I. We may mention that this court has never held that the original Wealth-tax Act fell under entry 86, List I. It was only assumed that the original Wealth-tax Act fell within entry 86, List I and on that assumption that entry was analysed and contrasted with entry 49, List II. Be that as it may, we are dearly of the opinion that no part of the impugned legislation falls within entry 86, List I.

87. However, assuming that the Wealth-tax Act, as originally enacted, is held to be legislation under entry 86, List I, there is nothing in the Constitution to prevent Parliament from combining its powers under entry 86, List I, with its powers under entry 97, List I. There is no principle that we know of which debars Parliament from relying on the powers under specified entries 1 to 96, List I, and supplement them with the powers under entry 97, List I and article 248, and for that matter powers under entries in the Concurrent List.

. . . .

90. It was contended that the case of residuary powers was different but we are unable to see any difference in principle. Residuary power is as much a power as the power conferred under article 246 of the Constitution in respect of a specified item.

. . . .

212. The residuary field of legislation no longer lies barren or unproductive. It has already yielded fruitful sources of taxation like the

Gift-tax Act, the Expenditure-tax Act and borrowings as under the scheme of annuity deposits."

19 Based on the discussions contained in *Harbhajan Singh Dhillon* [1972] 83 ITR 582 (SC) ; [1971] 2 SCC 779, it was contended that, when the enactment levying tax is not included within any of the entries in List II or List III, it would be arbitrary to say that it does not fall under entry 97 in List I. The Constitution makers wanted to give residuary powers of legislation to the Parliament, as obvious from article 248 and entry 97 of List I. Even though the field of legislation is demarcated under entries 1 to 96 of List I, if entry 97 of List I confers additional powers, the court should not refuse to give effect to it, because, on interpretation of the residuary entry and the provisions of article 248, it enables such wider interpretation. If the subject of legislation of taxation is not covered by List II or List III, the Parliament has got power to make laws with respect to matters of tax under entry 97 of List I, irrespective of whether the subject is included in List I. Applying the aforesaid principle in the present case, the State organized lotteries being a subject specifically covered under entry 40 of List I, which consequently remained out of the legislative subjects under entry 34 of List II, the Parliament alone has got legislative competence to impose tax under entry 97 of List I read with article 246(1) and article 248 of the Constitution. Such legislative competence cannot be negated by construing entry 62 of List II to include therein the subject of State organized lotteries within it. The expression "betting and gambling" contained in entry 62 of List II, which does not specifically mention about State organized lotteries, has to be read in the clear Constitutional scheme of distribution of powers. The subject of legislation with respect to the State organized lotteries, being exclusively assigned to the domain of Parliament under entry 40 of List I, and being not covered under entry 34 of List II, cannot be construed as to be included in the taxation entry of 62 of List II, under the general subject of "betting and gambling". In view of the Constitutional scheme, the subject of State organized lotteries, not having been enumerated in List II, the legislative competence to levy tax on the said subject is exclusively within the domain of the Parliament under entry 97 of List I. Therefore it is contended that the State Legislature is lacking competence to impose tax on State organized lotteries under entry 62 of List II.

20 Sri Shishodia, learned senior counsel for the respondent/State, contended that, the entries relating to the general subjects of legislation are different from those relating to taxation. In support of the proposition, he also placed reliance on the decisions in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201, *RMD Chamarbaug-*

walla, AIR 1957 SC 699, *Jindal Stainless Ltd*. [2018] 5 GSTR-OL 164 (SC) ; [2017] 12 SCC 1 and *Harbhajan Singh Dhillon* [1972] 83 ITR 582 (SC) ; [1971] 2 SCC 779. It is vehemently argued that, in the present case the scope and ambit of the expression "betting and gambling" in entry 62 of List II is different from the scope and ambit of entry 34 of List II and entry 40 of List I. It is argued that, despite wearing the apparel of State organized lotteries, the lotteries covered under entry 40 of List I is nothing but "betting and gambling". It is pointed out that, in *B. R. Enterprises* [2000] 120 STC 302 (SC) ; AIR 1999 SC 1867, referring to *RMD Chamarbaugwalla*, AIR 1957 SC 699, it is held by the honourable Supreme Court that, lotteries organized by the State are also gambling and cannot be construed to be trade and commerce. But the dispute in the present case is completely different, namely, about the scope and ambit of the expression "betting and gambling" in entry 62 of List II. An issue of the said nature has never arisen for consideration in the aforesaid judgments of the honourable Supreme Court. On the other hand, the principle that the same expression used in the same legislation should construe the same meaning, unless the context otherwise require or permit, should be given acceptance. Therefore we are persuaded to accept the contention of the appellants that the State organized lotteries, being a subject remaining carved out of entry 34 of List II and stood included in entry 40 of List I, is not a subject available for the purpose of imposing tax under entry 62 of List II. This is especially because, the expression used "betting and gambling" is common in both entry 34 and entry 62 of List II. The said expression used in both the entries in List II cannot be given different meaning. Nor it can be said that the context requires or permits such different meanings to be construed. The argument on behalf of the State of Kerala that, for the purpose of taxation the entry need to be construed with a different meaning, cannot be accepted, especially in view of the legislative competence remaining with the Parliament under entry 97 of List I read with article 248 of the Constitution. This is especially because of the specific observation contained in *Harbhajan Singh Dhillon* [1972] 83 ITR 582 (SC) ; [1971] 2 SCC 779 that the residuary field of legislation no longer lies barren or unproductive. It has already yielded fruitful sources of taxation like the gift tax, expenditure tax, etc.

During course of the argument it was pointed out that, validity of a **21**
similar enactment, as that of the one impugned herein, was considered by the High Court of judicature at Bombay in the judgment rendered by a Division Bench of that court in a batch of writ petitions decided on August 14, 2009 *N. V. Marketing Pvt. Ltd.* v. *State of Maharashtra* (Writ Petition No. 432 of 2007) and connected cases. Validity of the Maharashtra Tax on

Lotteries Act, 2006 was under challenge in those cases based on the ground of lack of legislative competence. The charging section in the said enactment was specific to the effect that the tax is intended to be levied and collected on the "lottery schemes" specified under provisions of the charging section itself. The High Court of Bombay found that, definition of the term "lottery" contained in the Act describe the meaning of lottery as a scheme. It was held that it is the scheme of lottery which is being taxed. With respect to the argument that the State organized lotteries stands excluded from the ambit and scope of the term 'betting and gambling' contained in entry 62 of List II of the Seventh Schedule, it was found that the argument is misconceived and is against settled law, because it was found as against the dictum laid down in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201 Observation was that, because of entry 40 of List I, the State Legislature does not have power to legislate in relation to the State organized lotteries, under entry 34 of List II. But because of that the State Legislature will not lose its power under entry 62 of List II to impose tax in relation to State organized lotteries under entry 62 of List II, treating it as "betting and gambling". It was found that the power to tax is not an incidental power and the power of the Parliament to impose tax under the residuary entry of 97 in List I can be exercised only if that power is not specifically vested in the State Legislature by any of the entries contained in List II. After referring to paragraphs 100 to 107 in the judgment in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201 the Division Bench of the High Court of Bombay observed that, it is clear that if the power to tax in relation to a subject is clearly mentioned in List II of the Seventh Schedule, the same would not be available to be exercised by the Parliament based on assumption of the residuary power. It was found that the State Legislature would have got, because of entry 34 of List II, competence to legislate in relation to organisation and regulation of lotteries by the State Governments. But the State Legislature cannot make law under entry 34 of List II in that respect because of entry 40 in List I. It remains that the State Legislature remains to be competent to enact law regulating lotteries other than State organised lotteries. It was interpreted by the High Court of Bombay that the competence to legislate in relation to organisation and regulation of lotteries, which remain with the State Legislature bringing it under the term "betting and gambling", is excluded only with respect to State organized lotteries. But on a perusal of entry 62 of List II it is evident that it confers legislative competence on the State Legislature to impose tax among other things on betting and gambling. It was found that there was

no specific entry in List I, like that of entry 40, conferring legislative competence on the Parliament to impose tax on betting and gambling. Therefore the State organised lotteries will not stand excluded from the meaning of the term betting and gambling occurring in entry 62 of List II and therefore the State Legislature is conferred with power to impose tax in relation to State organized lotteries. Referring to *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201 observation made by the Division Bench of the High Court of Bombay is that, the Parliament cannot be said to have power to impose tax in relation to lotteries by virtue of the residuary entry 97 of List I of the Seventh Schedule of the Constitution. Hence the challenge based on the legislative competence was negatived.

22 From the findings rendered by the High Court of Bombay as enumerated above, it is evident that the issue was not analysed based on the contention that, whether the term "betting and gambling" contained in entry 34 and entry 62 of List II need be construed as carrying different meanings. Since the issue has not been considered in that perspective, we are not persuaded to follow the analysis adopted by the High Court of Bombay. We are in respectful disagreement with the findings rendered by that court when the issue is analysed on the basis of its real perspective as mentioned above.

23 It is noticed that, from the judgment of the High Court of Bombay in *N. V. Marketing* (Writ Petition No. 432 of 2007 decided on August 14, 2009) a review was sought for before that court. In the decision in *Sree Mangalmoorthy Marketing* v. *State of Maharashtra* [2019] 2 Bombay CR 1 the review petitions were dismissed by that court by reiterating the findings in the original judgment, that under entry 62 of List II of the Seventh Schedule the State Legislature has got power to impose tax in relation to State organized lotteries also, by treating it as "betting and gambling". It was observed that, contention that the Parliament alone has got legislative competence to levy tax under article 248 by taking recourse to entry 97 of List I, did not find favour. While considering the review it was observed that, opinion of the Division Bench that there is no force in the contention because the power to tax is not an incidental power and under the residuary power the Parliament will be entitled to impose tax only if that power is not specifically vested in the State Legislature by any entry in List II, need to be upheld. In support of such a conclusion the Division Bench sought assistance from the ruling in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201. It was found that, if any power to tax is clearly mentioned in List II, the same would not be

available to be exercised by the Parliament based on the assumption of residuary power. Relying on the decision of the apex court in *Harbhajan Singh Dhillan* [1972] 83 ITR 582 (SC) ; [1971] 2 SCC 779 it is held that, the power to legislate in respect of a matter, does not carry with it the power to impose tax under the Constitutional scheme. Therefore, the grounds raised seeking review of the judgment was declined. Here also, we find that the question whether entry 64 of List II covers State organized lotteries within the ambit and scope of "betting and gambling" contained therein, was not considered, based on the argument that the term "betting and gambling" could not have different meaning in entry 34 and entry 62 of List II of the Seventh Schedule. Hence we are not persuaded to adopt a similar view.

24 The validity of yet another similar enactment, the Karnataka Tax on Lotteries Act, 2004, was challenged before the High Court of Karnataka in a batch of writ petitions. A Division Bench of that court in *State of Maharashtra* v. *State of Karnataka* [2010] SCC Online Kar. 4528—judgment dated December 27, 2010) decided the issue. It was held that, since the State organized lotteries has been made a subject within the exclusive legislative competence of the Parliament, the State has no legislative competence to make any law touching the subject of State organized lotteries. It was observed, when we look at entry 62 of List II, though it refers tax on "betting and gambling", it does not specifically include lotteries organized by the State. Referring to entry 97 of List I, it was observed that, it refers to any other matters not enumerated in List II or List III, including any tax not mentioned in either of those List. Since the honourable Supreme Court in the decision in *B. R. Enterprises* [2000] 120 STC 302 (SC) ; AIR 1999 SC 1867 held that, even though the State organized lotteries will fall within the realm of "gambling", there is no change in the character between lotteries under entry 34 of List II and under entry 40 of List II. But, when the State organized lotteries are covered under entry 40 of List I, such lotteries cannot be read into the State List by taking assistance of any entry. Therefore it was held that, State has no legislative competence to enact the impugned law. The impugned enactment was set aside in that case. That court also held that, taxation imposed is extra territorial in operation and cannot be sustained. The amounts deposited by the petitioners in those cases were directed to be refunded. It is pertinent to note that, in the decision of the High Court of Karnataka, the issue was in fact analysed in a more or less similar manner as discussed hereinabove. The conclusion is to the effect that, when the subject of State organized lotteries stands within the realm of competence of the Parliament, the State cannot legislate on the subject, even for the purpose of imposition of tax on such lotteries. The above view

is indirectly emphasizing the conclusions arrived by this court in the foregoing paragraphs that, the term "betting ad gambling" cannot be considered to have different meaning and the context does not require any such interpretation. Hence we are of the opinion that the conclusions arrived on the issue of legislative competence, as discussed in the foregoing paragraphs of this judgment, need to be reaffirmed. Therefore we are persuaded to hold that, the State of Kerala was lacking legislative competence to impose tax under the impugned Act on State organised lotteries by deriving its source of power from entry 62 of List II of the Constitution.

Next issue agitated is regarding the ambiguities, uncertainties and vague- **25**
ness with respect to the charge of the taxation. Sri S. K. Bagaria, senior counsel for the appellants pointed out that, the preamble of the enactment would make it clear that the levy was intended to be imposed on the conduct of paper lotteries in the State of Kerala. Whereas in the "statement of objects and reasons" it is mentioned that the intention is to levy and collect tax on paper lotteries sold in the State of Kerala. But the charging section, section 6 extracted hereinabove, would indicate that, the levy and collection is a "tax on paper lotteries". Firstly it is contended that, there is no "taxing event" mentioned in the charging section. The expression "tax on paper lotteries" without mentioning the "taxing event" is meaningless, is the contention. The ambiguity is that, the provision is not clear as to whether the tax is on paper lotteries brought within the State of Kerala or stocked within the State of Kerala or sold within the State of Kerala. Therefore there is complete uncertainty with respect to the taxing event. Sub-clauses (a) and (b) of sub-section (1) of section 6 provides about the amount payable with respect to "bumper draw" and ordinary "draw". Those are only measure of the taxation, but does not indicate about any taxing event or chargeability. The measure by itself cannot create the liability, is the argument. The definition of the term "bumper draw" and "draw" contained in section 2, have nothing to do with chargeability of the taxing event. Further, if it is assumed that the chargeability is on the "draw", the same is held only in the State of Sikkim and not in the State of Kerala, making the event totally extra territorial. It is pointed out that, definition of the term "lottery" contained in the impugned enactment only define the expression "lottery". It has nothing to do with the chargeability or the taxing event. Sub-section (2) of section 6 provides that, the tax levied under sub-section (1) shall be paid by the promoter. Sub-clause (3) therein provides that if the organizing State appoints more than one promoter in the State of Kerala, one such promoter duly authorised by the respective State shall pay the tax levied under sub-section (1). But sub-section (1) of

section 6 is not specific with respect to the chargeability or on the incidence of taxation. Therefore sub-section (2) or sub-section (3) does not create any chargeability or payability, apart from sub-section (1). There is complete ambiguity, uncertainty and vagueness in the charging section itself and it fails to create any charge or in providing any taxing event. Consequently the enactment fails to create any charge which is leviable and collectable, is the contention.

26 Learned senior counsel for the appellants made an attempts to illustrate the well settled principles with respect to requirement of certainty in the charging section in fiscal statutes. It is contended that, the statue must be clear and unambiguous in conveying the essential components of the taxation, namely, the taxable event attracting the levy, person on whom the levy is imposed, the rate at which the tax is to be imposed, the measure and value to which the rate should be applied, etc. Contention is that, if there is any ambiguity regarding any one of these ingredients in a taxing statute, then the provision with respect to the taxing cannot be sustained. If the provision is ambiguous and fails in prescribing the liability to pay the tax in clear terms, and if there exists any vagueness in that respect, there cannot be any levy of tax. In this respect, the charging section needs to be interpreted on its own plain language without any additions or subtractions. If the subject is not within the letter of the law, the subject is free, however apparently within the spirit of that law the case might otherwise appear to be. The subject of taxation cannot be by way of inference or analogy. But it should be clear and unambiguous from the plain words of the statute itself. Any interpretation which does not follow from the plain language of the statute is not permissible. Assumption with respect to intention of the Legislature is not permissible. No governing purpose of the statute more than what is stated in its plain language cannot be used in judging legality of the charging section, is the argument.

27 In support of the above contention, learned senior counsel for the appellants placed reliance on a decision of the honourable Supreme Court in *Govind Saran Ganga Saran* v. *Commissioner of Sales Tax* [1985] 60 STC 1 (SC) ; [1985] 155 ITR 144 (SC) ; [1995] (Suppl.) SCC 205, in which it is held as follows (page 4 in 60 STC) :

> "The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to

which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

The learned senior counsel further placed reliance on a decision of the honourable Supreme Court in *Madhuram Agarwal* v. *State of Madhya Pradesh* [1999] 8 SCC 667. A Constitution Bench of the honourable apex court while dealing with vires of the provisions in Madhya Pradesh Municipality Act, 1961, held as follows :

". . . . In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the Legislature. The statute should clearly and unambiguously convey the three components of the tax law, i. e., the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the Legislature to do the needful in the matter.

'. . . if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be'."

Similarly in *Commissioner of Customs (Import), Mumbai* v. *Dilip Kumar and Company* [2018] 6 GSTR-OL 46 (SC) ; [2018] 9 SCC 1 the honourable Supreme Court observed that (pages 62, 64 and 65 in 6 GSTR-OL) :

". . . . We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well settled that in a taxation statute, there is no room for any intend-

ment ; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used ; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute. . . .

'. . . . (i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed ; it cannot imply anything which is not expressed ; it cannot import provisions in the statute so as to supply any deficiency ; (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section ; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly'."

The learned senior counsel for the appellants also placed for consideration some of the observations made of the honourable Supreme Court in *Kesoram Industries Ltd.* [2004] 266 ITR 721 (SC) ; [2004] 2 RC 298 ; [2004] 10 SCC 201 which are as follows (pages 779, 781 and 782 in 266 ITR) :

". . . . It is well-settled that power to tax cannot be inferred by implication ; there must be a charging section specifically empowering the State to levy tax. . . . (para 98)

. . . .

There is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpreted by expanding its width as to include therein the power to tax by implication or by necessary inference. . . . (para 104)

. . . . A taxing statute is to be strictly construed. The well established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means : 'The subject is not to be taxed without clear words for that purpose ; and also that every Act of Parliament must be read according to the natural construction of its words'. In a classic passage Lord Cairns stated the principle thus : 'If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown seeking to recover the

tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute'. Viscount Simon quoted with approval a passage from Rowlatt, J. expressing the principle in the following words : 'in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'." (para 105)

The senior counsel further placed reliance on a decision of the honourable Supreme Court in *Commissioner, Central Excise and Customs, Kerala* v. *Larsen and Toubro Ltd.* [2015] 35 GSTR 168 (SC) ; [2015] 84 VST 403 (SC) ; [2016] 1 SCC 170. In paragraph 14 of the said judgment, it is held as under (para 15, page 187 in 35 GSTR) :

". . . This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts."

Learned senior counsel also placed reliance on the ruling, *Godfrey Phillips India Ltd.* v. *State of Uttar Pradesh* [2005] 139 STC 537 (SC) ; [2005] 2 SCC 515. In paragraph 57 of the judgment it is held (para 58, page 564 in 139 STC) :

"The submission of the assessees proceeds on two premises : the first that taxation of an object can only be with reference to a taxable event and second—that all taxable events have been covered by the legislative entries. As far as the first premise is concerned, it may be that a tax on a thing or goods can only be with reference to a taxable event, but there is a distinction between such a tax and a tax on the taxable event. In the first case the subject matter of tax is the goods

and the taxable event is within the incidence of the tax on the goods. In the second the taxable event is the subject matter of tax itself."

Summing up the contentions on the point, Sri S. K. Bagaria argued that, simply by mentioning as "tax on paper lotteries" no charge is created in the charging section, because no taxing event at all is mentioned in the said provision. The taxing event or the taxable event should be one, which on its occurrence creates or attracts the liability of tax. Identification of the subject matter of the tax is to be found based on the charging section alone. The liability or chargeability should be specific on the taxable event, which does not exist earlier or accrue at any later point of time. The necessary ingredients of a charging section essential for creating a valid charge, as laid down by the honourable Supreme Court in the above cited decisions, are not satisfied in section 6 of the impugned Act and there is complete uncertainty, ambiguity and vagueness in the charging section itself, is the argument. Going by the principle remaining settled, the said provision does not create any charge nor it provides any taxing event. In the absence of there being any valid charge the Act itself fails and is liable to be set aside, is the contention.

28 Sri Pallav Shishodiya, learned senior counsel for respondents had resisted the above contention by pointing out that, taxation is not on the sale of the lottery tickets and that the impugned Act is not in any manner violating the dictum laid by the honourable Supreme Court in *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908. It is conceded that the State cannot impose any taxation on the sale of lotteries organized by other States or by the Union Government, because it is held in *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908 that there is no sale of goods involved and the lottery ticket cannot be termed as goods amenable to trade or commerce. But the impugned Act is intended to levy and collect tax on the conduct of paper lotteries. Referring to the charging section it is contended that, the "tax is on paper lotteries". Attention is drawn to the definition of "lottery" contained in section 2(i) of the Act. It provides that lottery is a scheme by which the prize by lot or chance is distributed to those persons participating in the chances of a prize by purchasing tickets organized by the State. Therefore it is an activity by which the chance for getting the prize is distributed. Referring to *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908 it is pointed out that, what is transferred by sale of a lottery ticket is the transfer of an actionable claim. It is a "chance to win", which is being transferred on collecting price of the ticket. It is argued that the whole lot of activity under the scheme of lottery

is being taxed. Therefore there is no ambiguity with respect to the charging section, is the contention. The activity of conduct of the lottery is the taxable event upon which the charge and the levy is based and the draw is only a measure to fix the rate of tax. The word used in the preamble of the impugned Act that the legislation is to provide for levy and collection of tax on the conduct of paper lotteries in the State of Kerala, cannot be construed in a narrow campus. It would cover all the gamut of activities including organizing the scheme, printing of tickets, distribution and sale of tickets, draw of lots, payment of prize money, etc. The word "conduct of paper lotteries" contained in the preamble would indicate the whole lot of activity, either in its entirety or in part thereof. Therefore the language of the charging section is totally unambiguous and the taxable event attracting the levy of tax is certain and clearly spelled out, is the argument.

Per contra, Sri. Bagaria pointed out that, history of the legislation would **29** reveal that the impugned Act was introduced when the validity of section 5(BA) of the KGST Act was challenged. The impugned Act came into force on April 8, 2005, at a point of time prior to settlement of the law on the point, by the honourable Supreme Court in *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908 which was decided only on April 28, 2006. Therefore it is evident that the enactment was introduced only with an intention to levy tax on the sale of lottery tickets of paper lotteries in the State of Kerala. The abovesaid aspect is clear and evident from the "statement of objects and reasons" appended to the legislation, which clearly says that the Government have decided to levy and collect tax on paper lotteries sold in the State of Kerala. It is pointed out that, it remains well settled that no tax can be imposed on the sale of lottery tickets within the State of Kerala. Therefore it is clear that, at the time when the impugned legislation was enacted, the State Legislature proceeded on the basis that it could levy tax on the sale of lotteries. From a conjoined reading of the charging section and the provisions fixing liability on the promoter and compelling the promoter to make advance payment of the tax, it is clear that, under the guise of imposing tax on lotteries, what the State Legislature has introduced is a levy of tax on the sale of paper lotteries in the State of Kerala. It is pointed out that the liability for payment of tax is also fixed on the promoter. Going by the definition of "promoter", it includes any person appointed by the organizing State for selling lottery tickets in the State of Kerala, on behalf of the organizing State. Therefore it is clear that the tax is sought to be levied from the promoter who is selling lottery tickets within the State of Kerala. Hence the impugned legislation, in its pith and substance, seeks only to levy tax on the sale of

paper lotteries in the State of Kerala, which is clearly held to be unsustainable by the honourable Supreme Court in *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908 The fact that the impugned Act was enacted prior to the judgment of the Supreme Court would clearly indicate that the legislation was brought on the basis of an erroneous assumption that sales tax could be levied on the sale of paper lotteries within the State of Kerala.

30 While evaluating the above contentions we take note of the position of law remaining well settled through various decisions of the honourable Supreme Court, including the Constitutional Bench decision in *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908 that a lottery ticket merely represents a chance or right to a conditional benefit of winning a prize, and that the right to participate in the draw is part of the composite right of the chance to win, and that right is an actionable claim. The sale of lottery tickets does not involve any sale of goods. In spite the lottery tickets representing a chance or a right to a conditional benefit of winning the prize, it was held that, it is nothing else but an actionable claim and no sale of goods is involved, within the meaning of the sales tax laws. Contention on behalf of the respondent is that the predominant element of taxation is the "chance to win" and the State is not taxing any actionable claim. In so far as the 'chance to win' is concerned, as contended by the appellants, that itself is neither taxable nor it is taxed under the impugned legislation. According to the appellants, there is no question of taxing any "chance to win" or any so-called "predominant element" or any "attribute" of the transaction. It is pointed out that there is no legislative history of any tax being levied only with reference to an "attribute", as held in *Godfrey Phillips (India) Ltd.* [2005] 139 STC 537 (SC) ; [2005] 2 SCC 515. Hence it is reiterated that, apart from wording of the charging section "tax on paper lotteries", the taxable event upon which the charge is to be imposed is totally absent. There is no much dispute that the draw is only a measure provided for the purpose of fixing the quantum of tax and it cannot be said that tax is levied on the draw. Hence the draw also cannot be considered as a taxable event.

31 While evaluating the issue regarding validity of the charging section and with respect to its alleged vagueness, uncertainties or ambiguities, even on accepting the contentions of the respondents that the taxable event is the entire activity of the scheme of lottery, it is necessary for this court to consider whether the impugned Act is extra territorial in operation. Under article 246(3) of the Constitution, Legislature of any State has power to make laws for such State or any part thereof. There is no power at all to

make any law with respect to any event happening in other States. As defined under the Act, the lottery is a scheme intended for distribution of prize by lot or by chance, by which a person purchases the ticket for participating in the chance for winning a prize. The activity of formulating the scheme of a lottery includes various components, right from organizing the lottery, notifying the scheme, printing of the tickets, distribution and marketing of the tickets, draw of the lot, selection of the prize winning ticket and distribution of prizes, etc. Section 4 of the Lotteries (Regulation) Act, 1998 stipulate conditions subject to which lotteries may be organised by any State. Inter alia, it insists that, the State Government which organises the lottery should print the lottery tickets bearing imprint and logo of the State in such manner that the authenticity of the lottery ticket is ensured. It further provides that, the State Government shall sell the tickets either through distributors or selling agents. It also insists that the proceeds of the sale of the lottery tickets shall be credited into the public account of the State. Further condition is that, the State Government itself shall conduct the draws of all the lotteries and the place of draw shall be located within the State concerned. It is also made clear that, with respect to the prize money remaining unclaimed, it shall become property of that Government. Section 6 of the said Act imposes a prohibition in organising the lottery and in conducting or promoting it in any manner, contravening provisions of section 4 of the said Act. In the case at hand, it cannot be disputed that, organising and conduct of the lottery by the first respondent/State of Sikkim is what is sought to be taxed. In this context, question arose as to whether the activity in organisation and conduct of the lottery is in any manner done within the territorial limits of the State of Kerala. The only part of the activity which takes place within the State of Kerala is the distribution and marketing of tickets, probably through advertisements, enumerating the prize money as well as the price of the ticket and the date of draw, etc. In the above context, even assuming that the expression "tax on paper lotteries" contained in the charging section indicates the whole lot of activity of the conduct of lotteries, whether the taxable event falls within the territorial limits of the State of Kerala, is the question posed. Can a part of the activity of distribution and sale of tickets within the State of Kerala alone can be taxed under the guise of the term "tax on paper lotteries", contained in the charging section? In other words, whether any taxable event is taking place within the State. Can the events taking place within the State be presumed by co-relating with other activities with respect to the conduct of lottery taking place outside the State, to attract territorial competence ? The said questions need to be analysed based on the scheme

provided in the Act for levy and collection of the tax. As already mentioned, the levy of tax is on the organising State or on the person appointed by that State for selling the lottery tickets within the State of Kerala. A person so appointed cannot be construed as a person responsible for organizing and conducting of the lottery. Further it has to be noted that the measure of tax is the draw, which takes place outside the territory of the State. The rate of tax is to be fixed based on the number and type of draws. The draws are conducted by the organizing State within their territory. But the person appointed for sale of the lottery is insisted upon, by virtue of provisions contained in section 10, to make payment of the tax in advance, based on the draws proposed to be taking place in the organising State. Section 10 insists upon that the promoter should pay the full amount of tax in advance based on the particulars of the draws, which are intended to be conducted by the organizing State, during the month commencing from the next succeeding month. Since the definition of the word promoter includes the State which is organising the lottery, it has became obligatory on the part of the State which organises the lottery to pay the tax, if the person appointed for sale of the ticket fails to pay the tax in advance. The definition of promoter contained in section 2(i) of the Act does not provide any clarification as to whether the organizing State need to pay tax with respect to any particular lottery under any particular scheme with respect to which that State is not intending to market the tickets within the State of Kerala. Nowhere it is stated in the impugned Act that the person appointed for selling the lottery tickets in the State of Kerala, need not pay tax with respect to any scheme of lottery of the organizing State, the tickets of which are not intended to be sold within the State of Kerala. Neither the Act nor the Rules framed thereunder is clear as to whether they will be exonerated from the liability for payment of tax with respect to any scheme of lottery, the tickets on which are not intended to be sold within the State of Kerala. It is submitted on behalf of the respondents that the apprehension expressed as above is ill-founded and misconceived and is based on artifice of ambiguities to the charging section. It is submitted that in the matter of actual levy and collection of tax under the Act, from the date of inception of the legislation till the time when the first appellant was banned from carrying on lottery business within the State of Kerala, no such dispute has arisen. In other words, it is assured that the levy and collection of tax will be made only with respect to the draws of the schemes for which tickets are marketed within the State of Kerala. The above aspect would again persuade this court to draw an inference that, what is sought to be taxed indirectly is the sale of the lottery tickets within the State of Kerala,

which is prohibited by virtue of the law settled by the honourable apex court. Sri Pallav Shishodiya submitted that, even assuming that such a contention can be considered, it only relates to accessibility of the tax with respect to any particular draw, and is not one concerned with validity of the legislation. But the question become relevant for considering the aspect as to which is the "event of taxation" or the "instance of taxation" upon which the charge is made and also as to whether the taxation becomes extra territorial in nature.

Learned senior counsel for the respondent/State submitted that, con- **32**
tention regarding extra territorial operation of the Act, cannot be accepted. As contended earlier, it is pointed out that, what is sought to be taxed is the whole lot of activity of the lottery organized by the State concerned. If any part of the said activity takes place within the State of Kerala, then it has to be presumed that a territorial nexus is established. Since part of the activity, which is distribution and marketing of lottery tickets, is happening within the State of Kerala, there is a territorial nexus with respect to organisation and conduct of the lottery by the other State, is the contention. In this regard reliance was placed on the decision in *RMD Chamarbaugwalla*, AIR 1957 SC 699, wherein it is held as follows :

> "The next point urged by the petitioners is that under articles 245 and 246 the Legislature of a State can only make a law for the State or any part thereof and, consequently, the Legislature over stepped the limits of its legislative field when by the impugned Act it purported to affect men residing and carrying on business outside the State. It is submitted that there is no sufficient territorial nexus between the State and the activities of the petitioners who are not in the State.
>
> The doctrine of territorial nexus is well established and there is no dispute as to the principles. As enunciated by learned counsel for the petitioners, if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involves a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection.
>
> It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the territorial connection. In other words, if the connection is sufficient in the sense mentioned above, the extent of such connection affects merely the policy and not the validity of the legislation. Keeping these principles in mind we have to ascertain if in the case

before us there was sufficient territorial nexus to entitle the Bombay Legislature to make the impugned law.

The question whether in a given case there is sufficient territorial nexus is essentially one of fact. The trial court took the view that the territorial nexus was not sufficient to uphold the validity of the law under debate. The court of appeal took a different view of the facts and upheld the law. We find ourselves in agreement with the court of appeal. The newspaper 'sporting star' printed and published in Bangalore is widely circulated in the State of Bombay.

The petitioners have set up collection depots within the State to receive entry forms and the fees. They have appointed local collectors. Besides the circulation of the copies of the 'sporting star', the petitioners print over 40,000 extra coupons for distribution which no doubt are available from their local collectors. The most important circumstance in these competitions is the alluring invitation to participate in the competition where very large prizes amounting to thousands of rupees and sometimes running into a lakh of rupees may be won at and for a paltry entrance fee of say four annas per entry.

These advertisements reach a large number of people resident within the State. The gamblers, euphemistically called the competitors, fill up the entry forms and either leave it along with the entry fees at the collection depots set up in the State of Bombay or send the same by post from Bombay. All the activities that the gambler is ordinarily expected to under take place, mostly if not entirely, in the State of Bombay and after sending the entry forms and the fees the gamblers hold their soul in patience in great expectations that fortune may smile on them.

In our judgment the standing invitations, the filling up of the forms and the payment of money take place within the State which is seeking to tax only the amount received by the petitioners from the State of Bombay. The tax is on gambling although collected from the promoters. All these, we think, constitute sufficient territorial nexus which entitles the State of Bombay to impose a tax on the gambling that takes place within its boundaries and the law cannot be struck down on the ground of extra territoriality."

33 On the facts of the above cited decision, the cardinal difference is that, all the activities that the gambler is undertaking takes place, mostly if not entirely, in the State of Bombay. It is held that the question whether there is sufficient territorial nexus is essentially one of fact. It is found on the facts of the said case that a major part of the activities takes place in the State of

Bombay. What is sought to be taxed is only the amount received by the petitioners therein from the State of Bombay. Whereas in the case at hand, tax is not levied based on the amount of tickets sold in the State of Kerala. Probably such a taxation could not also be made validly, in view of the law remaining settled by the honourable Supreme Court. Going by provisions of the Act impugned herein, merely because the promoter, who includes the distributor appointed by the first appellant/State of Sikkim is selling the tickets of the lottery within the State of Kerala, the entire activity of the lottery, except the marketing of a portion of the tickets, which is taking place in the State of Sikkim, cannot be taxed by the State of Kerala. Going by the principle enumerated in the above cited decision, when analyzed on the facts of the case at hand, it cannot be said that, because of the mere marketing of tickets within the State of Kerala, it cannot be held that a territorial nexus is established in order to impose tax on the lottery organized and conducted in a different State. Further, as already observed, the charge is created or rather said to have been created, on the activity of lottery and the levy is attempted on a lottery organised and conducted in a State which is outside the territory of the State of Kerala, by assigning the reason that the tickets are marketed also in the State of Kerala, which is an activity permitted by virtue of the regulatory law made by the Union Government. Conclusion of the discussions is that, the charging section or any other provision of the Act is not at all clear as to what is the charge and which is the instance of taxation. If the tax is imposed on the sale of lottery tickets conducted in the State of Kerala, then it will offend the law remaining settled in *Sunrise Associates* [2006] 3 VST 151 (SC) ; [2006] 145 STC 576 (SC) ; AIR 2006 SC 1908. If it is accepted that the taxation is on the entire activity of organisation and conduct of the lottery, it becomes extra territorial, because, except marketing a portion of the tickets in the State of Kerala, the entire activity takes place in other States. Further, even assuming that there is nexus established with the activity taking place in the other State, the tax is not imposed limited to the money which is being collected from the State of Kerala. Considering the definition of "promoter" which includes the person appointed for selling the lottery tickets within the State of Kerala, the tax is sought to be imposed on the basis of the draws which are taking place outside the territory and which is being done by the organizing State. The draw of each scheme of the lottery takes place based on the whole lot of tickets sold in the State of Sikkim and other States as well. Therefore the activity of conduct of the lottery or the measure upon which tax is sought to be levied, cannot be said to have any direct nexus with the sale of tickets taking place within the State of Kerala.

Hence the contention that the Act is intended to introduce an indirect taxation on the sale of lottery tickets within the State of Kerala, has to be accepted. If it is a tax on the sale of lottery tickets, the same is prohibited under law. If it is something prohibited under law, the same cannot be done through an indirect method. If it is tax on other activity of organising and conducting of the lottery, then it becomes extra territorial. Hence, considering the provisions of the charging section and also considering the territorial application and further considering the law remaining settled prohibiting taxation on the sale of lottery tickets, we are inclined to sustain the challenge made against the impugned Legislature on the points urged as above.

34 Sri Pallav Shishodia, learned senior counsel for the respondents, raised contention that the appellants are not entitled to challenge validity of the enactment, in the writ petition concerned, based on principles of "estoppel" "contemporanea expositio" and "constructive res judicata". It is pointed out that the second appellant had approached this court earlier challenging validity of section 10 of the impugned Act, which is insisting for payment of advance tax, by contending that the said provision is invalid. It is pointed out that the contentions in that case was negatived by this court. Therefore it is contended that out that the appellants are precluded from filing any fresh writ petition challenging the constitutional vires of the impugned legislation. Hence it is contended that the writ petition is hit by the doctrine of "constructive res judicata". According to the learned senior counsel, the appellants ought to have taken all the grounds in the earlier writ petition itself. He placed reliance on a decision of the honourable Supreme Court in *Devilal Modi* v. *Sales Tax Officer* [1965] 16 STC 303 (SC) ; AIR 1965 SC 1150, in support of the above proposition. First of all, we may take note that the earlier writ petition was filed only by the second appellant. The State of Sikkim (first appellant herein) was not a party in the said writ petition. Further, there cannot be "res judicata" in matters relating to challenge against a statute on the grounds of constitutional vires. In *Devilal Modi* [1965] 16 STC 303 (SC) ; AIR 1965 SC 1150 the factual circumstance was completely different. The assessee in that case challenged validity of the tax imposed with respect to a particular year, in a writ petition filed. The court declined the challenges and an appeal against the said order was also dismissed by the honourable Supreme Court, on merits. The assessee attempted to raise two more additional grounds before the Supreme Court, which was not allowed because those were not taken before the High Court. Subsequently, on the same issue and with respect to the same assessment, another writ petition was filed. It was held that,

after judgment of the Supreme Court it was no more open to the assessee to file a new writ petition challenging the same impugned order on some other grounds. We do not find such a situation here. In the present writ petition the challenge is against the constitutional vires of a statute on various grounds including the legislative competence of the State. Hence it cannot be said that the doctrine of "constructive res judicata" would apply in the case at hand.

35 Sri Shishodia pointed out that, the second appellant, as promoter was paying the tax due under the impugned legislation without any objections, for last more than two years since the date of filing of the writ petition. He pointed out that, the first appellant-State of Sikkim had given necessary authentification with respect to appointment of the second appellant as promoter. They, in fact, made a request to the tax authorities to accept the advance payment of tax offered by the promoter. Therefore the appellants are estopped from challenging validity of the statute in the present writ petition, is the contention. It is also contended that the doctrine of "contemporanea expositio" would apply in the case of the appellants. Here again, this court notices that, challenge in the writ petition is against constitutional vires of the statute on various grounds agitated. There can be no estoppel against a statute. Payment of tax by the appellants made before filing of the writ petition can never be taken a ground to apply the doctrine of estoppel. Even otherwise, so long as the law is not declared as invalid, the assessee has to comply with the same, and due to such compliance, no estoppel is arises. In taxation laws there is no estoppel. Learned senior counsel for the respondents placed reliance on certain rulings in resisting the arguments on the ground of estoppel, such as *CIT* v. *OVRSR Arunachalam Chettiar*, AIR 1965 SC 1216, *Municipal Corporation of City of Thane* v. *Vidyut Metallics Ltd.* [2009] 20 VST 680 (SC) ; [2007] 8 SCC 688 and *Dunlop India Ltd.* v. *Union of India* [1976] 2 SCC 241.

36 Placing reliance on the doctrine of "contemporanea expositio", learned senior counsel for the respondents/State cited the rulings in *National & Grindlays Bank Ltd.* v. *Municipal Corporation [1969] 1 SCC 541, Desh Bandhu Gupta & Co.* v. *Delhi Stock Exchange Association Ltd.* [1980] 50 Comp Cas 84 (SC) ; [1979] 4 SCC 565 and *Indian Metals & Ferro Alloys Ltd.* v. *Collector of Central Excise* [1991] Suppl. (1) SCC 125. In all these decisions the mistaken construction of the statute was from the side of the implementing authorities, which are the Municipal Corporation, Government or the Department concerned. Such is not the position in the present case. Simply because the appellants were paying tax for the previous periods, there can be no scope to apply the doctrine of contemporanea

expositio or constructive res judicata. The appellants cannot also be non-suited on the doctrine of estoppel.

37 Incidentally, learned senior counsel for the respondents/State argued that, even if this court finds that the impugned legislation is invalid due to its constitutional vires, there can only be a prospective overruling. In other words, even if the impugned Act is held as illegal and ultra vires, such decision should be applied only prospectively, from the date of the judgment. The above argument is resisted by Sri Bagaria by pointing out that, the doctrine of prospective overruling cannot be utilized by the High Court and it can be invoked only by the Supreme Court. Once the High Court declares the law as invalid the collection made under such law also stands invalidated. He placed reliance on the decision of the Constitution Bench of the Supreme Court in *State of H. P.* v. *Nurpur Private Bus Operators' Union* [1999] 9 SCC 559. In paragraph 10 of the said judgment it is stated as follows :

> "The High Court, in the judgment afore-mentioned, held that the levy and realisation of tax on the basis which had been held to be invalid by it 'for the period between April 1, 1991 and September 30, 1992 shall not stand invalidated . . . We propose to direct that the declaration made by us today shall be applicable prospectively and with effect from October 1, 1992 alone'. Some operators challenge the correctness of this. *They are right, for the doctrine of prospective overruling cannot be utilised by the High Court. Once the High Court came to the conclusion, rightly, that the concerned provisions were invalid, it was obliged to so declare and, consequently, the collections made thereunder stood invalidated*." (emphasis[1] supplied)

The aforesaid proposition was reiterated by the honourable Supreme Court in the ruling in *Somaiya Organics (India) Ltd.* v. *State of Uttar Pradesh* [2001] 123 STC 623 (SC) ; [2001] 251 ITR 20 (SC) ; [2001] 5 SCC 519. Referring to a passage from the judgment in *Golak Nath* v. *State of Punjab* AIR 1967 SC 1643 it was reiterated as follows (pages 634 and 635 in 123 STC) :

> ". . . we would like to move warily in the beginning. We would lay down the following propositions : (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution ; (2) *it can be applied only by the highest court of the country, i.e., the Supreme Court* as it has the constitutional jurisdiction to declare law binding on all the courts in India ; (3) the scope of the retroactive operation of the law declared by the Supreme Court

1. Here italicised.

superseding its 'earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it." (emphasis[1] supplied)

From the rulings cited above, it is evident that the expression "prospective overruling" implies an earlier judicial decision on the same issue, which was otherwise final. Such is not the position in the present case. There is no earlier judgment on the issues involved. Further, the special features necessary for application of the said doctrine, as held in the case cited is not existing in present case. The doctrine of prospective overruling is an exception to the normal principle of law and it apply in cases relating to labour welfare, service matters, etc., where the retrospectivity about the change of law can cause disruptive and unfair consequences. Such is not the position in the case of a fiscal statute, wherein the constitutional validity is decided. In the judgment in *Babu Ram* v. *C. C. Jacob* [1999] 3 SCC 362 it is held by the honourable Supreme Court as follows :

"The prospective declaration of law *is a devise innovated by the apex court to avoid reopening of settled issues and to prevent multiplicity of proceedings*. It is also a devise adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. . . . ." (emphasis[1] supplied)

The situation as contemplated cannot be said to be present in the case at hand. Therefore the doctrine of prospective overruling cannot be applied in the matter, by this court.

The issue lastly considered is with respect to claim for refund of the tax **38**
amount already paid by the appellants/writ petitioners. On behalf of the respondents it is submitted that, the tax due under the impugned legislation was paid by the second appellant, who is the distributor appointed by the first appellant–State and the liability has already been passed on to the customers, who purchased the lottery tickets. Therefore refund of the amount, if ordered, would amount to an unjust enrichment, which cannot be allowed. Per contra, the appellants contended that, the amount of tax realised represent the collections made invalidly and illegally, which the State of Kerala has recovered without jurisdiction. It is pointed out that the amount realised as tax belongs to the State of Sikkim and it form part of the public exchequer of that State. Therefore there cannot be any scope for denying refund based on the doctrine of "unjust enrichment". The position of law on this point remains well settled through a Constitution Bench

1. Here italicised.

decision of the honourable Supreme Court in *Mafatlal Industries Ltd.* v. *Union of India* [1998] 111 STC 467 (SC) ; [1997] 5 SCC 536. The honourable apex court had settled the various propositions on the issue, with a rider that those propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In paragraph 108(ii) and (iii) it is held as follows (pages 546 and 547 in 111 STC) :

"(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground ; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case ; this is the ratio of the opinion of Hidayatullah, C. J. in *Tilokch and Motichand* case [1970] 25 STC 289 (SC) and we respectfully agree with it. Such a claim is maintainable both by virtue of the declaration contained in article 265 of the Constitution of India and also by virtue of section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (c) of sub-section (1) of section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in proposition (i) above or in a suit or writ petition in the situations contemplated by proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional

obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that amount is retained by the State, i. e., by the people. There is no immorality or impropriety involved in such a proposition."

The dictum laid is that, if the petitioner alleges and establishes that he has not passed on the liability to another person, his claim for refund need to be allowed. It is also mentioned that the claim for refund is neither an absolute right nor an unconditional obligation, but is subject to the above requirements. It is also mentioned that the burden is on the claimant to establish that he has not passed on the liability to anybody. When the real loss or prejudice is suffered by a person who has ultimately borne the burden, it is only that person who can legitimately claim the refund. When such a person does come forward or in a case where the refund is not possible to such a person, it is just and appropriate that the amount is retained by the State, i. e., by the people of the State. It is observed that, there is no immorality and impropriety involved in such a case.

Factual contention on behalf of the respondents seems to be that, the **39** refund, if made, will amount to unjust enrichment to the distributor (second appellant), who is the promoter in the case at hand. But we are of the opinion that if the refund is required to be made, it can only be claimed by the State of Sikkim, who is the ultimate person who had borne the liability. The factual situation is in dispute. According to the respondents, it is the second appellant who paid the tax. It is submitted that he might have passed on the liability to the end consumer. On the other hand, contention of the appellants is that, the liability of the tax paid to the State of Kerala has never been passed on to the end consumer or to any selling agents, because the price of the lottery tickets is fixed when the scheme is notified and is uniformly applicable to all the States where the tickets are sold. Going by provisions contained in the Lottery (Regulation) Act, 1998 and the Lottery (Regulation) Rules, 2010 it is evident that, the proceeds of sale of the lottery tickets has to be credited to the public account of the organising State. It also provides that, the unclaimed prize money shall also become property of the Government. Rule 3(10) of the Lotteries (Regulation) Rules provides that, the organising State shall charge a minimum

amount of Rs. 5,00,000 per draw for bumper draw of the lotteries and for all other forms of lotteries a minimum of Rs. 10,000 per draw. Rule 3(17) of the abovesaid Rules provides that, the organizing State shall ensure that proceeds of the sale of the lottery tickets, as received from the distributor or selling agents or any other source, are to be deposited in the public ledger account or in the consolidated fund of the organising State. Rule 4 of the said Rules deals with appointment of distributor or selling agents. Sub-rule (4) therein provides that the organising State shall pay to the distributors or selling agents any commission due to them. The distributor is also bound to return the unsold tickets to the organising State with full account details. Evidently the price of the lottery tickets is fixed by the organising State and the distributor gets only the commission. If the distributor has paid any amount of tax under the impugned legislation, it cannot be taken that the liability has been passed on to the end consumer. It is clear that the liability in this regard is ultimately borne by the organising State. Since the ultimate liability with respect to payment of tax was borne by the State of Sikkim (the first appellant) the refund cannot be denied based on the doctrine of "unjust enrichment". Sri Bagaria, learned senior counsel for the appellants contended that, in the given situation the doctrine of unjust enrichment is not applicable, because the person who borne the liability is the State of Sikkim much emphasis is given to the observations contained in *Mafatlal Industries Ltd.* [1998] 111 STC 467 (SC) ; [1997] 5 SCC 536, that, "*the doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.*" It is pointed out that, in view of the statutory provisions contained in the Lotteries (Regulation) Act as well as in the Lotteries (Regulation) Rules mentioned as above, there can be no question of applicability of the doctrine of "unjust enrichment". It is pointed out that, while organising the lottery, all the details of the scheme, including the price of the ticket is pre-decided by the Sikkim Government and it is notified. Such pre-decided factors include, name of the scheme, price of the lottery tickets, total number of tickets to be printed, gross value to the tickets printed, name and particulars of the distributor and promoter, prize structure including number of prizes and amount of prizes, method and place of draw and the total amount offered as prize money, etc. The price of the lottery tickets cannot be changed on the basis of any tax charged in any of the States in which the tickets are sold. Therefore it is evident that the liability has not been passed on to the customer of the lotteries. It is pointed out that, the State of Sikkim cannot be said to be gaining any unwanted or unmerited monetary benefit, if the refund if effected. When

the money in question belongs to a State and the dispute is in between two States, the doctrine of "unjust enrichment" cannot be applied.

From the factual scenario evaluated and found as above, it is clear that **40** the distributor has not passed on the liability to the consumers. But, as pointed out by the respondents, the writ petitioners have not furnished any materials to prove that the liability has been ultimately borne by the first appellant-State. Nor it is proved through any convincing materials that such liability has been paid by the second appellant—distributor, out of the commission he had received from the State of Sikkim. At any rate, as contended, if the State of Sikkim is the ultimate person who borne the liability, there cannot be contended that the doctrine of unjust enrichment will apply. On the other hand, if it is of distributor who had borne the liability, proof is required to the effect that the same has not been recouped from the State of Sikkim. In both the case, we are of the considered opinion that the refund cannot be denied by applying the doctrine of "unjust enrichment". But at the same time, it is for the appellants to produce materials regarding the person who had borne the real loss or who had ultimately borne the burden of payment of the tax, which is already collected invalidly. Proof regarding quantity of the tax collected is also not available. Therefore we hold that the appellants will be entitled for refund of the tax paid from the State Government, on their producing proper accounts and proof as to who had ultimately borne the burden. Such proof being produced, the State of Kerala is held liable for making refund.

Based on the findings rendered hereinabove, we are persuaded to allow **41** the writ appeal and to set aside the impugned judgment of the single judge. Hence, the above writ appeal is hereby allowed. The impugned judgment of the single judge in W. P. (C) No. 12189/2007(A)[1] is hereby set aside. The Kerala Tax on Paper Lotteries Act, 2005 is hereby declared as unconstitutional and invalid. The appellants will be at liberty to make claim for refund of the tax already collected by the State of Kerala from the appellants under the said Act, on producing proper accounts and proof. If any such claim is received it is for the first respondent, State of Kerala, to consider the same and to pass appropriate orders making refund of the amount due, based on evaluation of such proof. The refund if any due shall be effected without any delay, on submission of such claim.

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1. Reported as *State of Sikkim* v. *State of Kerala* [2020] 77 GSTR 425 (Ker).

[2020] 77 GSTR 476 (AP)

[IN THE ANDHRA PRADESH HIGH COURT]

MAHENDRA KUMAR INDERMAL

v.

DEPUTY ASSISTANT COMMISSIONER (ST), VIJAYAWADA AND OTHERS

J. K. MAHESHWARI C. J. and **NINALA JAYASURYA** J.

March 6, 2020.

HF ▶ Assessee

GOODS AND SERVICES TAX—SEARCH AND SEIZURE—PROHIBITION ORDER—TAX AUTHORITIES—ORDER OF PROHIBITION BY DEPUTY ASSISTANT COMMISSIONER NOT CONTAINING REFERENCE TO ORDER OF AUTHORISATION IN WRITING—NOT LEGAL—LIABLE TO BE QUASHED—CENTRAL GOODS AND SERVICES TAX ACT (12 of 2017), s. 67(2)—CENTRAL GOODS AND SERVICES TAX RULES, 2017, r. 139(4).

Under the provisions of section 67(1) of the Central Goods and Services Tax Act, 2017, power of inspection is specified to an officer not below the rank of Joint Commissioner. The officer for the purpose of search as specified in section 67(1) (a) and (b) may authorize in writing any other officer of Central tax for inspection of any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown, as the case may be. Similar is the provision of section 67(2) of the Act. For the purpose of seizure where the authority is having a reason to believe that proceedings of the confiscation are required in the matter, to which inspection has been carried out, after recording the said reason, he may exercise such power for seizure by authorising in writing any of the officers of the Central Tax Department.

Held accordingly, *that the order of prohibition was an order issued under section 67(2) of the Act by the Deputy Assistant Commissioner. In the order of prohibition, nothing was mentioned by which written order he had been authorized by officer specified in section 67(2) to the Act. The order of prohibition without reference to the order of authorisation in writing, was illegal and without jurisdiction.*

Writ Petition No. 6146 of 2020.

Dandu Srinivas for the petitioner.

The Government Pleader for Commercial Tax for the respondents.

ORDER[1]

The order of the court was made by

J. K. Maheshwari C. J.—Being aggrieved by the order of prohibition issued in Form GST INS 03, dated December 21, 2019 by the first respondent-Deputy Assistant Commissioner (ST), Jaggaiahpet unit, Nandigama Circle, Bhavanipuram, Vijayawada, this writ petition has been preferred. 1

Learned counsel for the petitioner has advanced solitary contention emphasizing the jurisdiction of the first respondent, who passed the order of prohibition as contemplated under section 67(2) to the Central Goods and Services Tax Act, 2017 (hereinafter be called as "the CGST"). It is urged that the authority competent to pass the order should not be below the rank of Joint Commissioner while the order impugned has been passed by the Deputy Assistant Commissioner, who is not competent to pass the order of prohibition, therefore, the order of prohibition so passed confiscating the goods is unsustainable in law. 2

On the other hand, learned Government Pleader for Commercial Tax appearing on behalf of the respondents though opposed the prayer, but on reference to the provision so contemplated under section 67(2) of the Act, he consented to adjudication of the case on merits. 3

After hearing the learned counsel for both the parties, and looking to the fact that the issue involved regarding jurisdiction of the authority in the matter of search, seizure and confiscation, in the matter, has not been found from the order impugned, however, being a legal issue, it can be heard and decided on merits as rightly conceded by the learned Government Pleader for the respondents. 4

In the present case, the order of prohibition issued in Form GST INS 03 is under challenge. The said Form was issued in terms of rule 139(4) of the Central Goods and Services Tax Rules, 2017, which prescribes that, to carry out the purpose of the Act specified under section 67(2) of the Act, how it can be proceeded with. At present, the provisions of the Act, i. e., section 67(1) and (2) of the Act are relevant. However, it is reproduced as under : 5

> "67. *Power of Inspection, search and seizure*.—(1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that,—
>
> (a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input-tax credit in excess of his entitlement under this

1. Oral.

Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act ; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act,

he may authorise in writing any other officer of Central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of Central tax to search and seize or may himself search and seize such goods, documents or books or things :

Provided that where it is not practicable to seize any such goods. the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer :

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act."

6 On perusal thereto, it reveals that under sub-section (1), where the officer not below the rank of Joint Commissioner has reasons to believe that the person has suppressed the transaction relating to supply of goods or services or both or the stock of goods in hand or claimed input-tax credit in excess to his entitlement or indulged in contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade tax under this Act, (or) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods, which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax, in that contingency, he may authorise any other officer of Central tax to inspect any places of business of the taxable person or the persons engaged

in the business of transporting goods or the owner or the operator of warehouse or godown as the case may be. Meaning thereby, under sub-section (1) of section 67 of the Act, competent officer is the Joint Commissioner, but in case, he has reasons to believe of the aforesaid facts, he may authorize any person in writing or any other officer of the Central tax to inspect. As per section 67(2) of the Act, it is clear that an officer, not below the rank of Joint Commissioner, in pursuance to the inspection carried out under sub- section (1), or otherwise, has reasons to believe that any goods liable for confiscation or any documents or books or things, which shall be useful for or relevant to any proceedings under the Act, are secreted in any place, he may authorise in writing any other officer of Central tax to search and seize or may himself search and seize such goods, documents or books or things. The first proviso makes it clear that where seizure of any goods is not practicable, then, he may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer. The second proviso deals with the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

7 In the present case, Form GST INS 03, which deals with the order of prohibition, has been issued to the proprietor of MAT Parcel Service premises. However, this is an order issued under section 67(2) of the Act by an officer, i. e., first respondent-Deputy Assistant Commissioner (ST). In the said order of prohibition, nothing is mentioned, viz., by which written order he has been authorized by officer so specified in section 67(2) to the Act. It is also the contention of the petitioner that even for the purpose of section 67(1) of the Act, in respect of the search including the inspection, written authorization is required. It is conspicuously missing in the present case. Therefore, the order of prohibition passed by the first respondent is illegal and without any jurisdiction.

8 After perusal of the provisions of the Act, we find much substance in the argument of the learned counsel for the petitioner. As per the provisions of section 67(1) of the Act, power of inspection is specified to an officer not below the rank of Joint Commissioner. The said officer for the purpose of search as specified in section 67(1) (a) and (b) may authorize in writing any other officer of Central tax for inspection of any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown, as the case may be. Similar is the provision of section 67(2) of the Act. For the purpose of seizure where the authority is having a reason to believe that proceedings

of the confiscation are required in the matter, to which inspection has been carried out, after recording the said reason, he may exercise such power for seizure by authorising in writing any of the officers of the Central Tax Department. In this view of the matter and looking to the order of prohibition so passed in GST INS 03, the said order passed by respondent No. 1, without reference to the order of authorisation in writing, is illegal and without jurisdiction. Therefore, it is hereby set aside. It is made clear that this court has passed this order looking to the competency of the authority and having found that the power so exercised by respondent No. 1 is not in conformity with the provisions of the Act, but not on the merits of the case.

9 With the aforesaid, the writ petition is allowed. No costs. As a sequel all the pending miscellaneous applications shall stand closed. However, the authority is at liberty to take recourse as permissible under law.

(END OF VOLUME 77)

Rate of tax on intra-State supply of certain services—Amendments (Manipur)

Notification No. 10/2019-State Tax (Rate), dated 10th May, 2019

No. Tax/4(53)/GST-NOTN/2016.—In exercise of the powers conferred by sub-sections (1), (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15, sub-section (1) of section 16 and section 148 of the Manipur Goods and Services Tax Act, 2017 (3 of 2017), the State Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of Manipur, Secretariat : Finance Department (Expenditure Section) No. 11/2017-State Tax (Rate), dated the 28th June, 2017, published in the Manipur Gazette, Extraordinary, vide No. 120, dated the 29th June, 2017, namely :—

In the said notification,—

(i) in the Table, against serial number 3, in items (ie) and (if), in the entries in column (5), for the figures and letters "10th", wherever they occur, the figures and letters "20th" shall be *substituted* ;

(ii) in Annexure IV, for the figures and letters "10th", at both the places where they occur, the figures and letters "20th" shall be *substituted*.

Note : The principal Notification No. 11/2017-State Tax (Rate), dated the 28th June, 2017, published in the Manipur Gazette, Extraordinary, vide No. 120, dated the 29th June, 2017, and was last amended by Notification No. 3/2019-State Tax (Rate), dated the 29th March, 2019[1] vide No. 530, dated the 30th March, 2019.

Retail outlets in departure area of international airport, making tax-free supply of goods to outgoing international tourist—Eligibility to claim refund (Manipur)

Notification No. 11/2019-State Tax (Rate), dated 1st July, 2019

No. Tax/4(53)/GST-NOTN/2016.—In exercise of the powers conferred by section 55 of the Manipur Goods and Services Tax Act, 2017 (3 of 2017), the State Government, on the recommendations of the Council, hereby specifies retail outlets established in the departure area of an international airport, beyond the immigration counters, making tax free supply of goods to an outgoing international tourist, as class of persons who shall be entitled to claim refund of applicable State tax paid on inward supply of such goods, subject to the conditions specified in rule 95A of the Manipur Goods and Services Tax Rules, 2017.

1. See [2020] 77 GSTR (St.) 127.

Explanation.—For the purposes of this notification, the expression "outgoing international tourist" shall mean a person not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes.

2. This notification shall come into force with effect from the 1st day of July, 2019.

Rate of goods and services tax—Amendments (Manipur)

Notification No. 12/2019-State Tax (Rate), dated 31st July, 2019[1]

No. Tax/4(53)/GST-NOTN/2016.—In exercise of the powers conferred by sub-section (1) of section 9 and sub-section (5) of section 15 of the Manipur Goods and Services Tax Act, 2017 (3 of 2017), the State Government, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of Manipur, Secretariat : Finance Department (Expenditure Section) No. 1/2017-State Tax (Rate), dated the 28th June, 2017, published in the Manipur Gazette, Extraordinary, vide No. 110, dated the 29th June, 2017, namely :—

1. In the said notification,—

(a) in Schedule I—2.5%,—

(i) after serial number 234A and the entries relating thereto, the following serial number and entries shall be *inserted*, namely :—

"234B	8504	Charger or charging station for electrically operated vehicles" ;

(ii) after serial number 242 and the entries relating thereto, the following serial number and entries shall be *inserted*, namely :—

"242A	87	Electrically operated vehicles, including two and three wheeled electric vehicles. *Explanation*.—For the purposes of this entry, "electrically operated vehicles" means vehicles which are run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicles and shall include e-bicycles." ;

(b) in Schedule II—6%, serial number 206 and the entries relating thereto shall be *omitted* ;

(c) in Schedule III—9%, against serial number 375, in the entry in column (3), after the words "inductors", the words ", other than charger or charging station for electrically operated vehicles" shall be *inserted*.

2. This notification shall come into force on the 1st August, 2019.

1. Manipur Gaz., Extry. No. 150, dt. 1-8-2019.

Note : The principal Notification No. 1/2017-State Tax (Rate), dated the 28th June, 2017, published in the Manipur Gazette, Extraordinary, vide No. 110, dated the 29th June, 2017, and was last amended by Notification No. 24/2018-State Tax (Rate), dated the 1st January, 2019[1] vide No. 377, dated the 3rd January, 2019.

Exemption to intra-State supply of certain services—Amendments (Manipur)

Notification No. 13/2019-State Tax (Rate), dated 31st July, 2019[2]

No. Tax/4(53)/GST-NOTN/2016.—In exercise of the powers conferred by sub-section (1) of section 11 of the Manipur Goods and Services Tax Act, 2017 (3 of 2017), the State Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of Manipur, Secretariat : Finance Department (Expenditure Section) No. 12/2017-State Tax (Rate), dated the 28th June, 2017, published in the Manipur Gazette, Extraordinary, vide No. 121, dated the 29th June, 2017, namely :—

In the said notification, in the Table, against serial number 22, in the entries in column (3), after clause (a), the following clause shall be *inserted*, namely :—

(3)
'(aa) to a local authority, an electrically operated vehicle meant to carry more than twelve passengers ; or *Explanation*.—For the purposes of this entry, "Electrically operated vehicle" means vehicles falling under Chapter 87 in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), which are run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicle.'.

2. This notification shall come into force with effect from the 1st of August, 2019.

Note : The principal Notification No. 12/2017-State Tax (Rate), dated the 28th June, 2017, published in the Manipur Gazette, Extraordinary, vide No. 121, dated the 29th June, 2017, and was last amended by Notification No. 4/2019-State Tax (Rate), dated the 29th March, 2019 vide No. 531, dated the 30th March, 2019.

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1. See [2020] 77 GSTR (St.) 110.
2. Manipur Gaz., Extry. No. 150, dt. 1-8-2019, page 3.

Rate of goods and services tax—Amendments (Tamil Nadu)

Notification G. O. Ms. No. 1, CTR(B1)
[No. II(2)/CTR/12(b-1)/2020], dated 2nd January, 2020[1]

In exercise of the powers conferred by sub-section (1) of section 9 and sub-section (5) of section 15 of the Tamil Nadu Goods and Services Tax Act, 2017 (Tamil Nadu Act 19 of 2017), the Governor of Tamil Nadu, on the recommendations of the Council, hereby makes the following further amendments to the Commercial Taxes and Registration Department Notification No. II(2)/CTR/532(d-4)/2017[2], published at pages 3 to 68 in Part II, section 2 of the Tamil Nadu Government Gazette Extraordinary, dated 29th June, 2017, namely :—

AMENDMENTS

In the said notification,—

(a) in Schedule II—6%, serial numbers 80AA and 171A and the entries relating thereto shall be *omitted* ;

(b) in Schedule III—9%, after serial number 163A and the entries relating thereto, the following serial numbers and entries shall be *inserted*, namely :—

"163B	3923 or 6305	Woven and non-woven bags and sacks of polyethylene or polypropylene strips or the like, whether or not laminated, of a kind used for packing of goods ;
163C	6305 32 00	Flexible intermediate bulk containers".

2. This notification shall be deemed to have come into force on the 1st day of January, 2020.

Exemption to intra-State supply of certain services—Amendments (Tamil Nadu)

Notification G. O. Ms. No. 2, CTR (B1)
[No. II(2)/CTR/12(b-2)/2020], dated 2nd January, 2020[3]

In exercise of the powers conferred by sub-section (3) and sub-section (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and section 148 of the Tamil Nadu Goods and Services Tax Act, 2017 (Tamil Nadu Act 19 of 2017), the Governor of Tamil Nadu, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby makes the following further amendments to

1. Tamil Nadu Govt. Gaz., Extry. No. 2, Part II, sec. 2, dt. 2-1-2020.
2. See [2017] 106 VST (St.) 96.
3. Tamil Nadu Govt. Gaz., Extry. No. 2, Part II, sec. 2, dt. 2-1-2020, page 2..

the Commercial Taxes and Registration Department Notification No. II(2)/CTR/532(d-15)/2017[1], published at pages 119 to 143 in Part II, section 2 of the Tamil Nadu Government Gazette, Extraordinary, dated 29th June, 2017, namely :—

AMENDMENTS

In the said notification, in the Table, against serial number 41,—

(a) in column (3), for the figure "50", at both the places where they occur, the figure "20" shall be *substituted* ;

(b) for the entry in column (5), the following entries shall be *substituted*, namely,—

(5)
"Provided that the leased plots shall be used for the purpose for which they are allotted, that is, for industrial or financial activity in an industrial or financial business area : Provided further that the State Government concerned shall monitor and enforce the above condition as per the order issued by the State Government in this regard : Provided also that in case of any violation or subsequent change of land use, due to any reason whatsoever, the original lessor, original lessee as well as any subsequent lessee or buyer or owner shall be jointly and severally liable to pay such amount of State tax, as would have been payable on the upfront amount charged for the long term lease of the plots but for the exemption contained herein, along with the applicable interest and penalty : Provided also that the lease agreement entered into by the original lessor with the original lessee or subsequent lessee, or sub-lessee, as well as any subsequent lease or sale agreements, for lease or sale of such plots to subsequent lessees or buyers or owners shall incorporate in the terms and conditions, the fact that the State tax was exempted on the long term lease of the plots by the original lessor to the original lessee subject to above condition and that the parties to the said agreements undertake to comply with the same.".

2. This notification shall be deemed to have come into force with effect from 1st day of January, 2020.

Supply of certain services in respect of which State tax shall be paid on reverse charge basis by recipient— Amendments (Tamil Nadu)

Notification G. O. Ms. No. 3, CTR (B1)
[No. II(2)/CTR/12(b-3)/2020], dated 2nd January, 2020[2]

In exercise of the powers conferred by sub-section (3) of section 9 of the Tamil Nadu Goods and Services Tax Act, 2017 (Tamil Nadu Act 19 of

1. See [2017] 106 VST (St.) 248.
2. Tamil Nadu Govt. Gaz., Extry. No. 2, Part II, sec. 2, dt. 2-1-2020, page 2.

2017), the Governor of Tamil Nadu, on the recommendations of the Council, hereby makes the following further amendments to the Commercial Taxes and Registration Department Notification No. II(2)/CTR/532(d-16)/2017[1], published at pages 143 to 146 in Part II, section 2 of the Tamil Nadu Government Gazette, Extraordinary, dated 29th June, 2017, namely :—

AMENDMENTS

In the said notification, in the Table, for serial number 15 and the entries relating thereto, the following shall be *substituted*, namely :—

(1)	*(2)*	*(3)*	*(4)*
"15	Services provided by way of renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient, provided to a body corporate.	Any person, other than a body corporate who supplies the service to a body corporate and does not issue an invoice charging State tax at the rate of six per cent. to the service recipient.	Any body corporate located in the taxable territory.".

Rate of tax on intra-State supply of certain services—Amendments (Jharkhand)

Notification No. [26/2019-State Tax (Rate)], dated 11th March, 2020[2].

S. O. No. 12.—In exercise of the powers conferred by sub-section (3) of section 11 of the Jharkhand Goods and Services Tax Act, 2017 (12 of 2017), the Government of Jharkhand, on the recommendations of the Council, and on being satisfied that it is necessary so to do, hereby makes the following further amendment in the notification of the Government of Jharkhand, in the Commercial Taxes Department, No. 11/2017-State Tax (Rate), dated the 29th June, 2017[3], published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 41, dated the 29th June, 2017. In the said notification, in the Table, against serial number 26, in column (3), in item (ic), the following *Explanation* shall be *inserted*, namely :—

"*Explanation*.—For the purposes of this entry, the term "bus body building" shall include building of body on chassis of any vehicle falling under Chapter 87 in the First Schedule to the Customs Tariff Act, 1975."

2. This notification shall be deemed to be effective from 22nd November, 2019.

[File.No Va Kar/GST/03/2019]

1. See [2017] 106 VST (St.) 273.
2. Jharkhand Gaz., Extry. No. 144, dt. 11-3-2020.
3. See [2018] 58 GSTR (St.) 38.

Note : The principal Notification No. 11/2017-State Tax (Rate), dated the 29th June, 2017[1] was published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 41, dated the 29th June, 2017 and was last amended by Notification No. 20/2019-State Tax (Rate), dated the 1st November, 2019[2] vide S. O. No. 88, dated the 1st November, 2019.

Rate of goods and services tax—Amendments (Jharkhand)

Notification No. [27/2019-State Tax (Rate)], dated 11th March, 2020[3].

S. O. No. 13.—In exercise of the powers conferred by sub-section (1) of section 9 and sub-section (5) of section 15 of the Jharkhand Goods and Services Tax Act, 2017 (12 of 2017), the Government of Jharkhand, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of Jharkhand in the Commercial Taxes Department, No. 1/2017-State Tax (Rate), dated the 29th June, 2017[4], published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 31, dated the 29th June, 2017, namely :—

In the said notification,—

(a) in Schedule II—6%, serial numbers 80AA and 171A and the entries relating thereto shall be *omitted* ;

(b) in Schedule III—9%, after serial number 163A and the entries relating thereto, the following serial numbers and entries shall be *inserted*, namely :—

"163B	3923 or 6305	Woven and non-woven bags and sacks of polyethylene or polypropylene strips or the like, whether or not laminated, of a kind used for packing of goods ;
163C	6305 32 00	Flexible intermediate bulk containers".

2. This notification shall be deemed to be effective from the 1st day of January, 2020.

[File No. Va Kar/GST/03/2019]

Note : The principal Notification No. 1/2017-State Tax (Rate), dated the 29th June, 2017 was published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 31, dated the 29th June, 2017 and was last amended by Notification No. 14/2019-State Tax (Rate), dated the 1st November, 2019[5], published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 82, dated the 1st November, 2019.

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1. See [2018] 58 GSTR (St.) 38.
2. See [2020] 72 GSTR (St.) 122.
3. Jharkhand Gaz., Extry. No. 145, dt. 11-3-2020.
4. See [2017] 103 VST (St.) 149.
5. See [2020] 72 GSTR (St.) 115.

Exemption to intra-State supply of certain services—Amendments (Jharkhand)

Notification No. [28/2019-State Tax (Rate)], dated 11th March, 2020[1].

S. O. No. 14.—In exercise of the powers conferred by sub-section (3) and sub-section (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and section 148 of the Jharkhand Goods and Services Tax Act, 2017 (12 of 2017), the Government of Jharkhand, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of Jharkhand, in the Commercial Taxes Department, No. 12/2017-State Tax (Rate), dated the 29th June, 2017[2], published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 42, dated the 29th June, 2017, namely :—

In the said notification, in the Table, against serial number 41,—

(a) in column (3), for the figure "50", at both the places where they occur, the figure "20" shall be *substituted* ;

(b) for the entry in column (5), the following entries shall be *substituted*, namely,—

(5)
"Provided that the leased plots shall be used for the purpose for which they are allotted, that is, for industrial or financial activity in an industrial or financial business area : Provided further that the State Government concerned shall monitor and enforce the above condition as per the order issued by the State Government in this regard : Provided also that in case of any violation or subsequent change of land use, due to any reason whatsoever, the original lessor, original lessee as well as any subsequent lessee or buyer or owner shall be jointly and severally liable to pay such amount of State tax, as would have been payable on the upfront amount charged for the long term lease of the plots but for the exemption contained herein, along with the applicable interest and penalty : Provided also that the lease agreement entered into by the original lessor with the original lessee or subsequent lessee, or sub-lessee, as well as any subsequent lease or sale agreements, for lease or sale of such plots to subsequent lessees or buyers or owners shall incorporate in the terms and conditions, the fact that the State tax was exempted on the long term lease of the plots by the original lessor to the original lessee subject to above condition and that the parties to the said agreements undertake to comply with the same.".

2. This notification shall be deemed to be effective from the 1st day of January, 2020.

[File No. VaKar/GST/03/2019]

1. Jharkhand Gaz., Extry. No. 146, dt. 11-3-2020.
2. See [2018] 58 GSTR (St.) 84.

Note : The principal Notification No. 12/2017-State Tax (Rate), dated the 29th June, 2017[1] was published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 42, dated the 29th June, 2017 and was last amended by Notification No. 21/2019-State Tax (Rate), dated the 1st November, 2019[2] vide S. O. No. 89, dated the 1st November, 2019.

Supply of certain services in respect of which State tax shall be paid on reverse charge basis by recipient—Amendments (Jharkhand)

Notification No. [29/2019-State Tax (Rate)], dated 11th March, 2020[3].

S. O. No. 15.—In exercise of the powers conferred by sub-section (3) of section 9 of the Jharkhand Goods and Services Tax Act, 2017 (12 of 2017), the Government of Jharkhand, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of Jharkhand, in the Commercial Taxes Department, No. 13/2017-State Tax (Rate), dated the 29th June, 2017[4], published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 43, dated the 29th June, 2017, namely :—

In the said notification, in the Table, for serial number 15 and the entries relating thereto, the following shall be *substituted*, namely :—

(1)	*(2)*	*(3)*	*(4)*
"15	Services provided by way of renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient, provided to a body corporate.	Any person, other than a body corporate who supplies the service to a body corporate and does not issue an invoice charging State tax at the rate of six per cent. to the service recipient.	Any body corporate located in the taxable territory.".

2. This notification shall be deemed to be effective from the 1st day of January, 2020.

[File No. Va Kar/GST/03/2019]

Note : The principal Notification No. 13/2017-State Tax (Rate), dated the 29th June, 2017 was published in the Gazette of Jharkhand, Extraordinary, vide S. O. No. 43, dated the 29th June, 2017 and was last amended by Notification No. 22/2019-State Tax (Rate), dated the 1st November, 2019[5] vide S. O. No. 90, dated the 1st November, 2019.

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1. See [2018] 58 GSTR (St.) 84.
2. See [2020] 72 GSTR (St.) 126.
3. Jharkhand Gaz., Extry. No. 147, dt. 11-3-2020.
4. See [2018] 58 GSTR (St.) 115.
5. See [2020] 72 GSTR (St.) 128.

CIRCULAR (Delhi)

Circular No. 1/2019-GST, dated 11th March, 2019

Subject: **Denial of composition option by tax authorities and effective date thereof—Reg.**

Ref : **Central Circular No. 77/51/2018-GST**[1]

Rule 6 of the Delhi Goods and Services Tax Rules, 2017 (hereinafter referred to as the "DGST Rules") deals with the validity of the composition levy. As per the said rule, the option exercised by a registered person to pay tax under the composition scheme shall remain valid so long as he satisfies the conditions mentioned in section 10 of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as the "DGST Act") and the DGST Rules. The Rule lays down the procedure for withdrawal from the composition scheme by a taxpayer who intends to withdraw from the said scheme and also the procedure for denial of option to the taxpayer to pay tax under the said scheme where he has contravened the provisions of the DGST Act or the DGST Rules.

2. In this connection, doubts have been raised as to the date from which withdrawal from the composition scheme shall take effect in a case where the composition taxpayer has exercised such option to withdraw. Doubts have also been raised regarding the effective date of denial of the option to pay tax under the composition scheme where action has been initiated by the tax authorities to deny such option to the composition taxpayer. Further, clarification has been sought regarding the follow up action to be taken by the tax authorities when the composition option is denied to the taxpayer retrospectively. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of the law across field formations, the Commissioner, in exercise of the powers conferred by section 168(1) of the DGST Act, hereby clarifies the issues raised as below.

3. Sub-rule (2) of rule 6 of the DGST Rules provides that the composition taxpayer shall pay tax under sub-section (1) of section 9 of the DGST Act as a normal taxpayer from the day he ceases to satisfy any of the conditions of the composition scheme and shall issue tax invoice for every taxable supply made thereafter. Sub-rule (3) of rule 6 of the DGST Rules provides that the registered person who intends to withdraw from the composition scheme shall, before the date of such withdrawal, file an application in *FORM GST CMP-04* on the common portal. He shall file

1. See [2019] 61 GSTR (St.)149.

intimation for withdrawal from the scheme in *FORM GST CMP-04* within seven days of the occurrence of such event.

4. As per sub-rule (4) of rule 6 of the DGST Rules, where the proper officer has reasons to believe that the registered person was not eligible to pay tax under section 10 of the DGST Act or has contravened the provisions of the DGST Act or the DGST Rules, he may issue a notice to such person in *FORM GST CMP-05* to show cause as to why the option to pay tax under section 10 of the DGST Act shall not be denied. Upon receipt of the reply to the show-cause notice from the registered person in *FORM GST CMP-06*, the proper officer shall, in accordance with the provisions of sub-rule (5) of rule 6 of the DGST Rules, issue an order in *FORM GST CMP-07* within a period of thirty days of the receipt of such reply, either accepting the reply, or denying the option to pay tax under section 10 of the DGST Act from the date of the option or from the date of the event concerning such contravention, as the case may be.

5. It is clarified that in a case where the taxpayer has sought withdrawal from the Composition Scheme, the effective date shall be the date indicated by him in his intimation/application filed in *FORM GST CMP-04* but such date may not be prior to the commencement of the financial year in which such intimation/application for withdrawal is being filed. If at any stage it is found that he has contravened any of the provisions of the DGST Act or the DGST Rules, action may be initiated for recovery of tax, interest and penalty. In case of denial of option by the tax authorities, the effective date of such denial shall be from a date, including any retrospective date as may be determined by tax authorities, but shall not be prior to the date of contravention of the provisions of the DGST Act or the DGST Rules. In such cases, as provided under sub-section (5) of section 10 of the DGST Act, the proceedings would have to be initiated under the provisions of section 73 or section 74 of the DGST Act for determination of tax, interest and penalty for the period starting from the date of contravention of provisions till the date of issue of order in *FORM GST CMP-07*. It is also clarified that the registered person shall be liable to pay tax under section 9 of the DGST Act from the date of issue of the order in *FORM GST CMP-07*. Provisions of section 18(1)(c) of the DGST Act shall apply for claiming credit on inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the date immediately preceding the date of issue of the order.

6. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

7. Difficulties, if any, faced in implementation of the above instructions may be brought to the notice of the policy branch.

COMMISSIONER (GST)

[F. No. 3(250)/Policy-GST/2019/1161-67]

Circular No. 2/2019-GST, dated 11th March, 2019.

Subject: **Clarification on export of services under GST—Regarding**

Ref : **Central Circular No. 78/52/2018-GST**[1]

Representations have been received seeking clarification on certain issues relating to export of services under the GST laws. The same have been examined and the clarifications on the same are as below :

Sl. No.	*Issue*	*Clarification*
1.	In case an exporter of services out sources a portion of the services contract to another person located outside India, what would be the tax treatment of the said portion of the contract at the hands of the exporter ? There may be instances where the full consideration for the out sourced services is not received by the exporter in India.	1. Where an exporter of services located in India is supplying certain services to a recipient located outside India, either wholly or partly through any other supplier of services located outside India, the following two supplies are taking place : (i) Supply of services from the exporter of services located in India to the recipient of services located outside India for the full contract value ; (ii) Import of services by the exporter of services located in India from the supplier of services located outside India with respect to the out sourced portion of the contract. Thus, the total value of services as agreed to in the contract between the exporter of services located in India and the recipient of services located outside India will be considered as export of services if all the conditions laid down in section 2(6) of the Integrated Goods and Services Tax Act, 2017 ("IGST Act", for short) read with section 13(2) of the IGST Act are satisfied.

1. See [2019] 61 GSTR (St.)151.

Sl. No.	*Issue*	*Clarification*
		2. It is clarified that the supplier of services located in India would be liable to pay integrated tax on reverse charge basis on the import of services on that portion of services which has been provided by the supplier located outside India to the recipient of services located outside India. Furthermore, the said supplier of services located in India would be eligible for taking input tax credit of the integrated tax so paid. 3. Thus, even if the full consideration for the services as per the contract value is not received in convertible foreign exchange in India due to the fact that the recipient of services located outside India has directly paid to the supplier of services located outside India (for the out sourced part of the services), that portion of the consideration shall also be treated as receipt of consideration for export of services in terms of section 2(6)(iv) of the IGST Act, provided the : (i) integrated tax has been paid by the supplier located in India for import of services on that portion of the services which has been directly provided by the supplier located outside India to the recipient of services located outside India ; and (ii) RBI by general instruction or by specific approval has allowed that a part of the consideration for such exports can be retained outside India. *Illustration* : ABC Ltd. India has received an order for supply of services amounting to $ 5,00,000 to a US based client. ABC Ltd. India is unable to supply the entire services from India and asks XYZ Ltd. Mexico (who is not merely an establishment of a distinct person, viz., ABC Ltd. India, in accordance with the *Explanation* 1 in section 8 of the IGST Act) to supply a part of the services (say 40 per cent. of the total contract value).

Sl. No.	*Issue*	*Clarification*
		ABC Ltd. India shall be the exporter of services for the entire value if the invoice for the entire amount is raised by ABC Ltd. India. The services provided by XYZ Ltd. Mexico to the US based client shall be import of services by ABC Ltd. India and it would be liable to pay integrated tax on the same under reverse charge and also be eligible to take input tax credit of the integrated tax so paid. Further, if the provisions contained in section 2(6) of the IGST Act are not fulfilled with respect to the realization of convertible foreign exchange, say only 60% of the consideration is received in India and the remaining amount is directly paid by the US based client to XYZ Ltd. Mexico, even in such a scenario, 100 per cent. of the total contract value shall be taken as consideration for the export of services by ABC Ltd. India provided integrated tax on import of services has been paid on the part of the services provided by XYZ Ltd. Mexico directly to the US based client and RBI (by general instruction or by specific approval) has allowed that a part of the consideration for such exports can be retained outside India. In other words, in such cases, the export benefit will be available for the total realization of convertible foreign exchange by ABC Ltd. India and XYZ Ltd. Mexico.

2. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

3. Difficulty if any, in the implementation of this circular may be brought to the notice of the Policy Branch.

COMMISSIONER (GST)

[F. No. 3(250)/Policy-GST/2019/1168-74]

Circular No. 4/2019-GST, dated 13th March, 2019.

Subject: **Mentioning details of inter-State supplies made to unregistered persons in Table 3.2 of FORM GSTR-3B and Table 7B of FORM GSTR-1—Reg.**

Ref : **Central Circular No. No. 89/08/2019-GST**[1]

A registered supplier is required to mention the details of inter-State supplies made to unregistered persons, composition taxable persons and UIN holders in Table 3.2 of *FORM GSTR-3B*. Further, the details of all inter-State supplies made to unregistered persons where the invoice value is up to Rs. 2.5 lakhs (rate-wise) are required to be reported in Table 7B of *FORM GSTR-1*.

2. It has been brought to the notice of the undersigned that a number of registered persons have not reported the details of inter-State supplies made to unregistered persons in Table 3.2 of *FORM GSTR-3B*. However, the said details have been mentioned in Table 7B of *FORM GSTR-1*. In order to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168(1) of the Delhi Goods and Services Tax Act, 2017 ("DGST Act" for short), hereby issues the following instructions.

3. It is pertinent to mention that apportionment of IGST collected on inter–State supplies made to unregistered persons in the State where such supply takes place is based on the information reported in Table 3.2 of *FORM GSTR-3B* by the registered person. As such, non-mentioning of the said information results in—

(i) non-apportionment of the due amount of IGST to the State where such supply takes place ; and

(ii) a mis-match in the quantum of goods or services or both actually supplied in a State and the amount of integrated tax apportioned between the Centre and that State, and consequent non-compliance of sub-section (2) of section 17 of the Integrated Goods and Services Tax Act, 2017.

4. Accordingly, it is instructed that the registered persons making inter-State supplies to unregistered persons shall report the details of such supplies along with the place of supply in Table 3.2 of *FORM GSTR-3B* and Table 7B of *FORM GSTR-1* as mandated by the law. Contravention of any of the provisions of the Act or the rules made thereunder attracts penal action under the provisions of section 125 of the DGST Act.

5. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

1. See [2019] 62 GSTR (St.) 142.

6. Difficulty, if any, in the implementation of this circular may be brought to the notice of the Policy Branch.

COMMISSIONER (GST)

[F. No. 3(250)/Policy-GST/2019/1182-88]

Circular No. 5/2019-GST, dated 13th March, 2019.

Subject: **Compliance of rule 46(n) of the DGST Rules, 2017 while issuing invoices in case of inter-State supply—Reg.**

Ref : **Central Circular No. 90/9/2019-GST**[1]

A registered person supplying taxable goods or services or both is required to issue a tax invoice as per the provisions contained in section 31 of the Delhi Goods and Services Tax Act, 2017 ("DGST Act", for short). Rule 46 of the Delhi Goods and Services Tax Rules, 2017 ("DGST Rules", for short) specifies the particulars which are required to be mentioned in a tax invoice.

2. It has been brought to the notice of the undersigned that a number of registered persons (especially in the banking, insurance and telecom sectors, etc.) are not mentioning the place of supply along with the name of the State in case of a supply made in the course of inter-State trade or commerce in contravention of rule 46(n) of the DGST Rules which mandates that the said details must be mentioned in a tax invoice. In order to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168(1) of the Delhi Goods and Services Tax Act, 2017, hereby issues the following instructions.

3. After introduction of GST, which is a destination-based consumption tax, it is essential to ensure that the tax paid by a registered person accrues to the State in which the consumption of goods or services or both takes place. In case of inter-State supply of goods or services or both, this is ensured by capturing the details of the place of supply along with the name of the State in the tax invoice.

4. It is therefore, instructed that all registered persons making supply of goods or services or both in the course of inter-State trade or commerce shall specify the place of supply along with the name of the State in the tax invoice. The provisions of sections 10 and 12 of the Integrated Goods and Services Tax Act, 2017 may be referred to in order to determine the place of supply in case of supply of goods and services respectively. Contravention

1. See [2019] 62 GSTR (St.) 143.

of any of the provisions of the Act or the rules made there under attracts penal action under the provisions of sections 122 or 125 of the DGST Act.

5. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

6. Difficulty, if any, in the implementation of this circular may be brought to the notice of the policy branch.

COMMISSIONER (GST)

[F. No. 3(250)/Policy-GST/2019/1189-95]

Circular No. 6/2019-GST, dated 13th March, 2019.

Subject: **Clarification regarding tax payment made for supply of warehoused goods while being deposited in a customs bonded warehouse for the period July, 2017 to March, 2018—Reg.**

Ref : **Central Circular No. 91/10/2019-GST**[1]

Attention is invited to Circular No. 3/1/2018-IGST, dated May 25, 2018[2] of Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, Government of India whereby applicability of integrated tax on goods transferred/sold while being deposited in a warehouse (hereinafter referred to as the "warehoused goods") was clarified. In the said circular, it was enunciated that from 1st of April, 2018 the supply of warehoused goods before their clearance from the warehouse would not be subject to the levy of integrated tax.

2. It has been brought to notice of the undersigned that during the period from 1st of July, 2017 to 31st of March, 2018 (hereinafter referred to as the "said period"), the common portal did not have the facility to enable the taxpayer to report payment of integrated tax, in the details required to be submitted in *FORM GSTR-1*, for such supplies especially where the supplier and the recipient were located in the same State or Union territory. Hence taxpayers making such supplies have reported such supplies as intra-State supplies and discharged Central tax and State tax instead of integrated tax accordingly. Now, representations have been received from trade to clarify the same.

3. In order to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168(1) of the Delhi Goods and Services Tax Act, 2017, hereby issues the following instructions.

1. See [2019] 62 GSTR (St.) 145.
2. See [2018] 55 GSTR (St.) 200.

4. Supply of warehoused goods while deposited in custom bonded warehouses had the character of inter-State supply as per the provisions of Integrated Goods and Services Tax Act, 2017. But, due to non-availability of the facility on the common portal, suppliers have reported such supplies as intra-State supplies and discharged Central tax and State tax on such supplies instead of integrated tax. In view of revenue neutral position of such tax payment and that facility to correctly report the nature of transaction in *FORM GSTR-1* furnished on the common portal was not available during the period July, 2017 to March, 2018, it has been decided that, as a one-time exception, suppliers who have paid Central tax and State tax on such supplies, during the said period, would be deemed to have complied with the provisions of law as far as payment of tax on such supplies is concerned as long as the amount of tax paid as Central tax and State tax is equal to the due amount of integrated tax on such supplies.

5. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

6. Difficulty, if any, in the implementation of this circular may be brought to the notice of the Policy Branch.

COMMISSIONER (GST)

[F. No. 3(250)/Policy-GST/2019/1196-1202]

Circular No. 7/2019-GST, dated 16th May, 2019.

Subject: **Clarifications on refund related issues—Regarding**

Ref : **Central Circular No. 94/13/2019-GST of Central tax**[1]

Various representations have been received seeking clarifications on certain issues relating to refund. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168(1) of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as "DGST Act"), hereby clarifies the issues as detailed hereunder :

Sl. No.	*Issue*	*Clarification*
1.	Certain registered persons have reversed, through return in *Form GSTR-3B* filed for the month of August, 2018 or for a subsequent month, the accumulated input tax credit (ITC) required to be lapsed in terms of Notification No. 20/2018-State Tax (Rate), dated September 2, 2019[1] read with	(a) As a one-time measure to resolve this issue, refund of accumulated ITC on account of inverted tax structure, for the period(s) in which there is reversal of the ITC required to be lapsed in terms of the said

1. See [2019] 64 GSTR (St.) 54.

Sl. No.	*Issue*	*Clarification*
	Circular No. 56/30/2018-GST, dated August 24, 2018[2] (hereinafter referred to as the "said notification"). Some of these registered persons, who have attempted to claim refund of accumulated ITC on account of inverted tax structure for the same period in which the ITC required to be lapsed in terms of the said notification has been reversed, are not able to claim refund of accumulated ITC to the extent to which they are so eligible. This is because of a validation check on the common portal which prevents the value of input tax credit in Statement 1A of *Form GST RFD-01*A from being higher than the amount of ITC availed in *Form GSTR-3B* of the relevant period minus the value of ITC reversed in the same period. This results in registered persons being unable to claim the full amount of refund of accumulated ITC on account of inverted tax structure to which they might be otherwise eligible. What is the solution to this problem ?	notification, is to be claimed under the category "any other" instead of under the category "refund of unutilized ITC on account of accumulation due to inverted tax structure" in *Form GST RFD-01A*. It is emphasized that this application for refund should relate to the same tax period in which such reversal has been made. (b) The application shall be accompanied by all statements, declarations, undertakings and other documents which are statutorily required to be submitted with a "refund claim of unutilized ITC on account of accumulation due to inverted tax structure". On receiving the said application, the proper officer shall himself calculate the refund amount admissible as per rule 89(5) of the Delhi Goods and Services Tax Rules, 2017 (hereinafter referred to as "DGST Rules"), in the manner detailed in para 3 of Circular No. 59/33/2018-GST, dated September 4, 2018[3]. After calculating the admissible refund amount, as described above, and scrutinizing the application for completeness and eligibility, if the proper officer is satisfied that the whole or any part of the amount claimed is payable as refund, he shall request the taxpayer, in writing, to debit the said amount

Sl. No.	*Issue*	*Clarification*
		from his electronic credit ledger through *Form GST DRC-03*. Once the proof of such debit is received by the proper officer, he shall proceed to issue the refund order in *Form GST RFD-06* and the payment advice in *Form GST RFD-05*. (c) All refund applications for unutilized ITC on account of accumulation due to inverted tax structure for subsequent tax period(s) shall be filed in *Form GST RFD-01A* under the category "refund of unutilized ITC on account of accumulation due to inverted tax structure".
2.	The clarification at Sl. No. 1 above applies to registered persons who have already reversed the ITC required to be lapsed in terms of the said notification through return in *Form GSTR-3B*. What about those registered persons who are yet to perform this reversal ?	It is hereby clarified that all those registered persons required to make the reversal in terms of the said notification and who have not yet done so, may reverse the said amount through *Form GST DRC-03* instead of through *Form GSTR-3B*
3.	What shall be the consequence if any registered person reverses the amount of credit to be lapsed, in terms the said notification, through the return in *Form GSTR-3B* for any month subsequent to August, 2018 or through *Form GST DRC-03* subsequent to the due date of filing of the return in *Form GSTR-3B* for the month of August, 2018 ?	(a) As the registered person has reversed the amount of credit to be lapsed in the return in *Form GSTR-3B* for a month subsequent to the month of August, 2018 or through *Form GST DRC-03* subsequent to the due date of filing of the return in *Form GSTR-3B* for the month of August, 2018, he shall be liable to pay interest under sub-section (1) of section 50 of the DGST Act on the amount which has been reversed belatedly. Such interest shall be calculated starting from the due date of

Sl. No.	*Issue*	*Clarification*
		filing of return in *Form GSTR-3B* for the month of August, 2018 till the date of reversal of said amount through *Form GSTR-3B* or through *Form GST DRC-03*, as the case may be. (b) The registered person who has reversed the amount of credit to be lapsed in the return in *Form GSTR-3B* for any month subsequent to August, 2018 or through *Form GST DRC-03* subsequent to the due date of filing of the return in *Form GSTR-3B* for the month of August, 2018 would remain eligible to claim refund of unutilized ITC on account of accumulation due to inverted tax structure with effect from August 1, 2018. However, such refund shall be granted only after the reversal of the amount of credit to be lapsed, either through *Form GSTR-3B* or *Form GST DRC-03*, along with payment of interest, as applicable.
4.	How should a merchant exporter claim refund of input tax credit availed on supplies received on which the supplier has availed the benefit of the Government of National Capital Territory of Delhi, Department of Finance (Revenue-I) Notification No. 40/2017-State Tax (Rate), dated the 27th November, 2017[4], published in the Gazette of Delhi, Extraordinary, Part IV, vide number F.3(57/Fin(Rev-I)/2017-2018/DS-VI/763, dated the 27th November, 2017 or Notification No. 41/2017-State Tax (Rate), dated the 28th November, 2017[5], published in the Gazette of Delhi, Extraordinary, Part IV, vide number F.3(59/Fin	(a) Rule 89(4B) of the DGST Rules provides that where the person claiming refund of unutilized input tax credit on account of zero-rated supplies without payment of tax has received supplies on which the supplier has availed the benefit of the said notifications, the refund of input tax credit, availed in respect of such inputs received under the said notifications, for export of goods, shall be granted.

Sl. No.	*Issue*	*Clarification*
	(Rev-I)/2017-2018/DS-VI/765, dated the 28th November, 2017 (hereinafter referred to as the "said notifications") ?	(b) This refund of accumulated ITC under rule 89(4B) of the DGST Rules shall be applied under the category "any other" instead of under the category "refund of unutilized ITC on account of exports without payment of tax" in *Form GST RFD-01A* and shall be accompanied by all supporting documents required for substantiating the refund claim under the category "refund of unutilized ITC on account of exports without payment of tax". After scrutinizing the application for completeness and eligibility, if the proper officer is satisfied that the whole or any part of the amount claimed is payable as refund, he shall request the taxpayer, in writing, to debit the said amount from his electronic credit ledger through *Form GST DRC-03*. Once the proof of such debit is received by the proper officer, he shall proceed to issue the refund order in *Form GST RFD-06* and the payment advice in *Form GST RFD-05*.
5.	Vide Circular No. 59/33/2018-GST, dated September 4, 2018, it was clarified that after issuance of a deficiency memo, the input tax credit is required to be re-credited through Form GST RFD-01B and the taxpayer is expected to file a fresh application for refund. Accordingly, in several cases, the ITC amounts were re-credited after issuance of deficiency memo. However, it was later represented that the common portal	In such cases, the claimant may resubmit the refund application manually in *Form GST RFD-01A* after correction of deficiencies pointed out in the deficiency memo, using the same ARN. The proper officer shall then proceed to process the refund application as per the existing guidelines. After scrutinizing the application

Sl. No.	*Issue*	*Clarification*
	does not allow a taxpayer to file a fresh application for the same period after issuance of a deficiency memo. Therefore, the matter was re-examined and it was subsequently clarified, vide Circular No. 70/44/2018-GST, dated October 26, 2018[6] that no re-credit should be carried out in such cases and taxpayers should file the rectified application, after issuance of the deficiency memo, under the earlier ARN only. It was also further clarified that a suitable clarification would be issued separately for cases in which such re-credit has already been carried out. However, no such clarification has yet been issued and several refund claims are pending on this account.	for completeness and eligibility, if the proper officer is satisfied that the whole or any part of the amount claimed is payable as refund, he shall request the taxpayer, in writing, to debit the said amount from his electronic credit ledger through *Form GST DRC-03*. Once the proof of such debit is received by the officer, he shall proceed to issue the refund order in *Form GST RFD-06* and the payment advice in *Form GST RFD-05*.

1. See [2019] 71 GSTR (St.) 263.
2. See [2018] 56 GSTR (St.) 236.
3. See [2018] 57 GSTR (St.) 110.
4. See [2018] 49 GSTR (St.) 384.
5. See [2018] 49 GSTR (St.) 385.
6. See [2018] 58 GSTR (St.) 147.

2. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

3. Difficulty, if any, in implementation of this circular may please be brought to the notice of the Policy Branch, Trade and Taxes Department, Govt. of NCT of Delhi.

COMMISSIONER (GST)

[F. No. F.3 (250)/Policy-GST/2019/84-90]

Circular No. 8/2019-GST, dated 16th May, 2019.

Subject: **Verification of applications for grant of new registration—Reg.**

Ref : **Central Circular No. 95/14/2019-GST of Central tax**[1]

Recently, a large number of registrations have been cancelled by the proper officer under the provisions of sub-section (2) of section 29 of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as "DGST Act") read with rule 21 of the Delhi Goods and Services Tax Rules, 2017

1. See [2019] 64 GSTR (St.) 60.

(hereinafter referred to as "DGST Rules") on account of non-compliance of the said statutory provisions. In this regard, instances have come to notice that such persons, who continue to carry on business and therefore are required to have registration under GST, are not applying for revocation of cancellation of registration as specified in section 30 of the DGST Act read with rule 23 of the DGST Rules. Instead, such persons are applying for fresh registration. Such new applications might have been made as such person may not have furnished requisite returns and not paid tax for the tax periods covered under the old/cancelled registration. Further, such persons would be required to pay all liabilities due from them for the relevant period in case they apply for revocation of cancellation of registration. Hence, to avoid payment of the tax liabilities, such persons may be using the route of applying for fresh registration. It is pertinent to mention that as per the provisions contained in proviso to sub-section (2) of section 25 of the DGST Act, a person may take separate registration on same PAN in the same State.

2. In order to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168(1) of the DGST Act, hereby issues the following instructions.

3. Sub-section (10) of section 25 of the DGST Act read with rule 9 of the DGST Rules provide for rejection of application for registration if the information or documents submitted by the applicant are found to be deficient. It is possible that the applicant may suppress some material information in relation to earlier registration. Some of the information that may be concealed in the application for registration in *Form GST REG-01* are Sl. No. 7 "Date of commencement of business", Sl. No. 8 "Date on which liability to register arises", Sl. No. 14 "Reason to obtain registration", etc. Such persons may also not furnish the details of earlier registrations, if any, obtained under GST on the same PAN.

4. It is hereby instructed that the proper officer may exercise due caution while processing the application for registration submitted by the taxpayers, where the tax payer is seeking another registration within the State although he has an existing registration within the said State or his earlier registration has been cancelled. It is clarified that not applying for revocation of cancellation of registration along with the continuance of the conditions specified in clauses (b) and (c) of sub-section (2) of section 29 of the DGST Act shall be deemed to be a "deficiency" within the meaning of sub-rule (2) of rule 9 of the DGST Rules. The proper officer may compare the information pertaining to earlier registrations with the information

contained in the present application, the grounds on which the earlier registration(s) were cancelled and the current status of the statutory violations for which the earlier registration(s) were cancelled. The data may be verified on common portal by fetching the details of registration taken on the PAN mentioned in the new application vis-a-vis cancellation of registration obtained on same PAN. The information regarding the status of other registrations granted on the same PAN is displayed on the common portal to both the applicant and the proper officer. Further, if required, information submitted by applicant in Sl. No. 21 of *Form GST REG-01* regarding details of proprietor, all partner/karta/managing directors and whole time Director/Members of Managing Committee of Associations/ Board of Trustees, etc., may be analysed, vis-a-vis, any cancelled registration having same details.

5. While considering the application for registration, the proper officer shall ascertain if the earlier registration was cancelled on account of violation of the provisions of clauses (b) and (c) of sub-section (2) of section 29 of the DGST Act and whether the applicant has applied for revocation of cancellation of registration. If proper officer finds that application for revocation of cancellation of registration has not been filed and the conditions specified in clauses (b) and (c) of sub-section (2) of section 29 of the DGST Act are still continuing, then, the same may be considered as a ground for rejection of application for registration in terms of sub-rule (2) read with sub-rule (4) of rule 9 of the DGST Rules. Therefore, it is advised that where the applicant fails to furnish sufficient convincing justification or the proper officer is not satisfied with the clarification, information or documents furnished, then, his application for fresh registration may be considered for rejection.

6. It is requested that suitable trade notices may be issued to publicise the contents of these instructions.

7. Difficulty, if any, in the implementation of these instructions may be brought to the notice of the Policy Branch, Trade and Taxes Department, Govt. of NCT of Delhi.

COMMISSIONER, VAT

[F. No. F.3 (250)/Policy-GST/2019/91-97]

Circular No. 9/2019-GST, dated 16th May, 2019.

Subject: **Clarification in respect of transfer of input tax credit in case of death of sole proprietor—Reg.**

Ref : **Central Circular No. 96/15/2019-GST of Central tax**[1]

Doubts have been raised whether sub-section (3) of section 18 of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as "DGST Act"), provides for transfer of input tax credit which remains unutilized to the transferee in case of death of the sole proprietor. As per sub-rule (1) of rule 41 of the Delhi Goods and Services Tax Rules, 2017 (hereinafter referred to as "DGST Rules"), the registered person (transferor of business) can file *Form GST ITC-02* electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee. Further, clarification has also been sought regarding procedure of filing of *Form GST ITC-02* in case of death of the sole proprietor. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168(1) of the DGST Act, hereby clarifies the issues raised as below.

2. Clause (a) of sub-section (1) of section 29 of the DGST Act provides that reason of transfer of business includes "death of the proprietor". Similarly, for uniformity and for the purpose of sub-section (3) of section 18, sub-section (3) of section 22, sub-section (1) of section 85 of the DGST Act and sub-rule (1) of rule 41 of the DGST Rules, it is clarified that transfer or change in the ownership of business will include transfer or change in the ownership of business due to death of the sole proprietor.

3. In case of death of sole proprietor if the business is continued by any person being transferee or successor, the input tax credit which remains unutilized in the electronic credit ledger is allowed to be transferred to the transferee as per provisions and in the manner stated below :

(a) *Registration liability of the transferee/successor* : As per provisions of sub-section (3) of section 22 of the DGST Act, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession, where a business is transferred to another person for any reasons including death of the proprietor. While filing application in *Form GST REG-01* electronically in the common portal the applicant is required to mention the reason to obtain registration as "death of the proprietor".

1. See [2019] 64 GSTR (St.) 62.

(b) *Cancellation of registration on account of death of the proprietor* : Clause (a) of sub-section (1) of section 29 of the DGST Act, allows the legal heirs in case of death of sole proprietor of a business, to file application for cancellation of registration in *Form GST REG-16* electronically on common portal on account of transfer of business for any reason including death of the proprietor. In *Form GST REG-16*, reason for cancellation is required to be mentioned as "death of sole proprietor". The GSTIN of transferee to whom the business has been transferred is also required to be mentioned to link the GSTIN of the transferor with the GSTIN of transferee.

(c) *Transfer of input tax credit and liability* : In case of death of sole proprietor, if the business is continued by any person being transferee or successor of business, it shall be construed as transfer of business. Sub-section (3) of section 18 of the DGST Act, allows the registered person to transfer the unutilized input tax credit lying in his electronic credit ledger to the transferee in the manner prescribed in rule 41 of the DGST Rules, where there is specific provision for transfer of liabilities. As per sub-section (1) of section 85 of the DGST Act, the transferor and the transferee/successor shall jointly and severally be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business "in whole or in part, by sale, gift, lease, leave and license, hire *or in any other manner whatsoever*". Furthermore, sub-section (1) of section 93 of the DGST Act provides that where a person, liable to pay tax, interest or penalty under the DGST Act, dies, then the person who continues business after his death, shall be liable to pay tax, interest or penalty due from such person under this Act. It is therefore clarified that the transferee/successor shall be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business due to death of sole proprietor.

(d) *Manner of transfer of credit* : As per sub-rule (1) of rule 41 of the DGST Rules, a registered person shall file *Form GST ITC-02* electronically on the common portal with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee, in the event of sale, merger, de-merger, amalgamation, lease *or transfer or change in the ownership of business for any reason*. In case of transfer of business on account of death of sole proprietor, the transferee/successor shall file *Form GST ITC-02* in respect of the registration which is required to be cancelled on account of death of the sole proprietor. *Form GST ITC-02* is required to be filed by the transferee/successor before filing the application for cancellation of such registration. Upon acceptance by the transferee/successor,

the unutilized input tax credit specified in *Form GST ITC-02* shall be credited to his electronic credit ledger.

4. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

5. Difficulty if any, in the implementation of this circular may be brought to the notice of the Policy Branch, Trade and Taxes Department, Govt. of NCT of Delhi.

COMMISSIONER, VAT

[F. No. F.3(250)/Policy-GST/2019/98-104]

Circular No. 3/2019-20, dated 4th November, 2019.

Subject: **Clarification on refund related issues—Reg.**

Ref : **Central Circular No. 79/53/2018 of Central Tax**[1]

Various representations have been received seeking clarification on various issues relating to refund. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of law across field formations, the Board, in exercise of its powers conferred by section 168(1) of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as "DGST Act"), hereby clarifies the issues detailed hereunder :

Physical submission of refund claims with jurisdictional proper officer :

2. Due to the non-availability of the complete electronic refund module, a work around was prescribed vide Circular No. 2/2018-GST, dated January 11, 2018[2] (Ref Central Circular No. 17/17/2017-GST, dated November 15, 2017[3]) and Circular No. 5/2018-GST, dated January 11, 2018[4] (Ref Central Circular No. 24/24/2017-GST, dated December 21, 2017[5]), wherein a taxpayer was required to file *FORM GST RFD-01A* on the common portal, generate the application reference number (ARN), take print-outs of the same, and submit it physically in the office of the jurisdictional proper officer, along with all the supporting documents. It has been learnt that this requirement of physical submission of documents in the jurisdictional tax office is causing undue hardship to the taxpayers. Therefore, in order to further simplify the refund process, the following instructions, in partial modification of the aforesaid circulars, are issued :

1. See [2019] 61 GSTR (St.) 153.
2. See [2018] 52 GSTR (St.) 286.
3. See [2018] 48 GSTR (St.) 319.
4. See [2018] 53 GSTR (St.) 2.
5. See [2018] 48 GSTR (St.) 335.

(a) All documents/undertaking/statements to be submitted along with the claim for refund in *FORM GST RFD-01A* shall be uploaded on the common portal at the time of filing of the refund application. Circular No. 59/33/2018-GST, dated September 4, 2018[1] specified that instead of providing copies of all invoices, a statement of invoices needs to be submitted in a prescribed format and copies of only those invoices need to be submitted the details of which are not found in *FORM GSTR-2A* for the relevant period. It is now clarified that the said statement and these invoices, instead of being submitted physically, shall be electronically uploaded on the common portal at the time of filing the claim of refund in *FORM GST RFD-01A*. Neither the application in *FORM GST RFD-01A*, nor any of the supporting documents, shall be required to be submitted physically in the office of the jurisdictional proper officer.

(b) However, the taxpayer will still have the option to physically submit the refund application to the jurisdictional proper officer in *FORM GST RFD-01A*, along with supporting documents, if he so chooses. A taxpayer who still remains unallocated to the Central or State tax authority will necessarily have to submit the refund application physically. They can choose to do so before the jurisdictional proper officer of either the State or the Central tax authority, as was earlier clarified vide Circular No. 2/2018-GST, dated January 11, 2018[2].

(c) The ARN will be generated only after the claimant has completed the process of filing the refund application in *FORM GST RFD-01A*, and has completed uploading of all the supporting documents/undertaking/statements/invoices and, where required, the amount has been debited from the electronic credit/cash ledger.

(d) As soon as the ARN is generated, the refund application along with all the supporting documents shall be transferred electronically to the jurisdictional proper officer who shall be able to view it on the system. The application shall be deemed to have been filed under rule 90(2) of the Delhi Goods and Services Tax Rules, 2017 (hereinafter referred to as "DGST Rules") on the date of generation of the said ARN and the time limit of 15 days to issue an acknowledgement shall be counted from that date. This will obviate the need for a claimant to visit the jurisdictional tax office for the submission of the refund application. Accordingly, the acknowledgement for the complete application or deficiency memo, as the case may be, would be issued by the jurisdictional tax officer based on the documents so received electronically from the common portal. However,

1. See [2018] 57 GSTR (St.) 110.
2. See [2018] 52 GSTR (St.) 286.

the said acknowledgement or deficiency memo shall continue to be issued manually for the time being.

(e) If a refund application is electronically transferred to the wrong jurisdictional officer, he/she shall reassign it to the correct jurisdictional officer electronically within a period of three days. In such cases, the application shall be deemed to have been filed under rule 90(2) of the DGST Rules only after it has been so reassigned. Deficiency memos shall not be issued in such cases merely on the ground that the applications were received electronically in the wrong jurisdiction. Where the facility of electronic re-assignment is not available, the present arrangement shall continue.

(f) It has already been clarified vide Circular No. 70/44/2018-GST, dated October 26, 2018[1] that after the issuance of a deficiency memo, taxpayers would be required to submit the rectified refund application under the earlier application reference number (ARN) only. It is further clarified that the rectified application, which is to be treated as a fresh refund application, will be submitted manually in the office of the jurisdictional proper officer.

3. It may be noted that the documents/statements/undertakings/invoices to be submitted along with the refund application in *FORM GST RFD-01A* are the same as have been prescribed under the DGST Rules and various Circulars issued on the subject from time to time. Only the method of submission of these documents/statements/undertakings/invoices is being changed from the physical mode to the electronic mode. It may also be noted that the other stages of processing of a refund claim submitted in *FORM GST RFD-01A* by the jurisdictional tax officer shall continue to be carried out manually for the time being, as is being presently done.

Calculation of refund amount for claims of refund of accumulated input tax credit (ITC) on account of inverted duty structure :

4. Representations have been received stating that while processing the refund of unutilized ITC on account of inverted tax structure, the departmental officers are denying the refund of ITC of GST paid on those inputs which are procured at equal or lower rate of GST than the rate of GST on outward supply, by not including the amount of such ITC while calculating the maximum refund amount as specified in rule 89(5) of the DGST Rules. The matter has been examined and the following issues are clarified :

(a) Refund of unutilized ITC in case of inverted tax structure, as provided in section 54(3) of the DGST Act, is available where ITC remains un-

1. See [2018] 58 GSTR (St.) 147.

utilized even after setting off of available ITC for the payment of output tax liability. Where there are multiple inputs attracting different rates of tax, in the formula provided in rule 89(5) of the DGST Rules, the term "Net ITC" covers the ITC availed on all inputs in the relevant period, irrespective of their rate of tax.

(b) The calculation of refund of accumulated ITC on account of inverted tax structure, in cases where several inputs are used in supplying the final product/output, can be clearly understood with help of the following example :

(i) Suppose a manufacturing process involves the use of an input A (attracting five per cent. GST) and input B (attracting 18 per cent. GST) to manufacture output Y (attracting 12 per cent. GST).

(ii) The refund of accumulated ITC in the situation at (i) above, will be available under section 54(3) of the DGST Act read with rule 89(5) of the DGST Rules, which prescribes the formula for the maximum refund amount permissible in such situations.

(iii) Further assume that the claimant supplies the output Y having value of Rs. 3,000 during the relevant period for which the refund is being claimed. Therefore, the turnover of inverted rated supply of goods and services will be Rs. 3,000. Since the claimant has no other outward supplies, his adjusted total turnover will also be Rs. 3,000.

(iv) If we assume that Input A, having value of Rs. 500 and Input B, having value of Rs. 2,000, have been purchased in the relevant period for the manufacture of Y, then Net ITC shall be equal to Rs. 385 (Rs. 25 and Rs. 360 on Input A and Input B respectively).

(v) Therefore, multiplying net ITC by the ratio of turnover of inverted rated supply of goods and services to the adjusted total turnover will give the figure of Rs. 385.

(vi) From this, if we deduct the tax payable on such inverted rated supply of goods or services, which is Rs. 360, we get the maximum refund amount, as per rule 89(5) of the DGST Rules which is Rs. 25.

Disbursal of refund amounts after sanction :

5. Section 56 of the DGST Act clearly states that if any tax ordered to be refunded is not refunded within 60 days of the date of receipt of application, interest at the rate of six per cent. (notified vide Notification No. 13/2017-State Tax, dated June 30, 2017[1]) on the refund amount starting from the date immediately after the expiry of sixty days from the date of receipt of application (ARN) till the date of refund of such tax shall have to be paid

1. See [2018] 48 GSTR (St.) 435.

to the claimant. It may be noted that any tax shall be considered to have been refunded only when the amount has been credited to the bank account of the claimant. Therefore, interest will be calculated starting from the date immediately after the expiry of sixty days from the date of receipt of the application till the date on which the amount is credited to the bank account of the claimant. Accordingly, all tax authorities are advised to issue the final sanction orders in FORM GST RFD-06 within 45 days of the date of generation of ARN, so that the disbursement is completed within 60 days by both Central and State Tax Authorities for CGST/IGST/UTGST/ Compensation cess and SGST respectively.

Refund applications that have been generated on the portal but not physically received in the jurisdictional tax offices :

6. There are a large number of applications for refund in *FORM GST RFD-01A* which have been generated on the common portal but have not yet been physically received in the jurisdictional tax offices. With the implementation of electronic submission of refund application, as detailed in para 2 above, this problem is expected to reduce. However, for the applications (except those relating to refund of excess balance in the electronic cash ledger) which have been generated on the common portal before the issuance of this circular and which have not yet been physically received in the jurisdictional offices (list of all applications pertaining to a particular jurisdictional office which have been generated on the common portal, if not already available, may be obtained from DG-Systems), the following guidelines are laid down :

(a) All refund applications in which the amount claimed is less than the statutory limit of Rs. 1,000 should be rejected and the amount re-credited to the electronic credit ledger of the applicant through the issuance of *FORM GST RFD-01B*.

(b) For all applications wherein an amount greater than Rs. 1,000 has been claimed, a list of applications which have not been received in the jurisdictional tax office within a period of 60 days starting from the date of generation of ARN may be compiled. A communication may be sent to all such claimants on their registered email ids, informing that the application needs to be physical submitted to the jurisdictional tax office within 15 days of the date of the email. The contact details and the address of the jurisdictional officer may also be provided in the said communication. The claimant may be further informed that if he/she fails to physically submit the application within 15 days of the date of the email, the application shall be summarily rejected and the debited amount, if any, shall be re-credited to the electronic credit ledger.

7. For the applications generated on the common portal before the issuance of this circular in relation to refund of excess balance from the electronic cash ledger which have not yet been received in the jurisdictional office, the amount debited in the electronic cash ledger in such applications may be re-credited through *FORM GST RFD-01B* provided that there are no liabilities in the electronic liability register. The said amount shall be re-credited even though the return in *FORM GSTR-3B*, as the case may be for the relevant period has not been filed.

8. For the refund applications generated on the common portal after the issuance of this circular, and for the refund applications generated on the common portal before the issuance of this circular and which have been physically received in the jurisdictional tax offices before the issuance of this circular, the existing guidelines, as modified by this circular may be followed.

Issues related to refund of accumulated input tax credit of compensation cess :

9. Several representations have been received requesting clarifications on certain issues related to refund of accumulated input tax credit of compensation cess on account of zero-rated supplies made under bond/letter of undertaking. These issues have been examined and are clarified as below :

(a) *Issue* : A registered person uses inputs on which compensation cess is leviable (e.g., coal) to export goods on which there is no levy of compensation cess (e.g., aluminium). For the period July, 2017 to May, 2018, no ITC is availed of the compensation cess paid on the inputs received during this period. ITC is only availed of the CGST, SGST/UTGST or IGST charged on the invoices for these inputs. This ITC is utilized for payment of IGST on export of goods. Vide Circular No. 45/19/2018-GST, dated May 30, 2018[1], it was clarified that refund of accumulated ITC of compensation cess on account of zero-rated supplies made under bond/letter of undertaking is available even if the exported product is not subject to levy of cess. After the issuance of this circular, the registered person decides to start exporting under bond/LUT without payment of tax. He also decides to avail (through the return in *FORM GSTR-3B*) the ITC of compensation cess, paid on the inputs used in the months of July, 2017 to May, 2018, in the month of July, 2018. The registered person then goes on to file a refund claim for ITC accumulated on account of exports for the month of July, 2018 and includes the said accumulated ITC for the month of July,

1. See [2018] 54 GSTR (St.) 99.

2018. How should the amount of compensation cess to be refunded be calculated ?

Clarification : In the instant case, refund on account of compensation cess is to be recomputed as if the same was available in the respective months in which the refund of unutilized credit of CGST/SGST/UTGST/ IGST was claimed on account of exports made under LUT/Bond. If the aggregate of these recomputed amounts of refund of compensation cess is less than or equal to the eligible refund of compensation cess calculated in respect of the month in which the same has actually been claimed, then the aggregate of the recomputed refund of compensation cess of the respective months would be admissible. Further, the recomputed amount of eligible refund (of compensation cess) in respect of past periods, as aforesaid, would not be admissible in respect of consignments exported on payment of IGST. This process would be applicable for application for refund of compensation cess (not claimed earlier) in respect of the past period.

(b) *Issue* : A registered person uses coal for the captive generation of electricity which is further used for the manufacture of goods (say aluminium) which are exported under bond/letter of undertaking without payment of duty. Refund claim is filed for accumulated input tax credit of compensation cess paid on coal. Can the said refund claim be rejected on the ground that coal is used for the generation of electricity which is an intermediate product and not the final product which is exported and since electricity is exempt from GST, the ITC of the tax paid on coal for generation of electricity is not available ?

Clarification : There is no distinction between intermediate goods or services and final goods or services under GST. Inputs have been clearly defined to include any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. Since coal is an input used in the production of aluminium, albeit indirectly through the captive generation of electricity, which is directly connected with the business of the registered person, input tax credit in relation to the same cannot be denied.

(c) *Issue* : A registered person avails ITC of compensation cess (say, of Rs. 100) paid on purchases of coal every month. At the same time, he reverses a certain proportion (say, half, i.e., Rs. 50) of the ITC of compensation cess so availed on purchases of coal which are used in making zero rated outward supplies. Both these details are entered in the *FORM GSTR-3B* filed for the month as a result of which an amount of Rs. 50 only is credited in the electronic credit ledger. The reversed amount (Rs. 50) is then shown as a "cost" in the books of account of the registered person.

However, the registered person declares Rs. 100 as "Net ITC" and uses the same in calculating the maximum refund amount which works out to be Rs. 50 (assuming that export turnover is half of total turnover). Since both the balance in the electronic credit ledger at the end of the tax period for which the claim of refund is being filed and the balance in the electronic credit ledger at the time of filing the refund claim is Rs. 50 (assuming that no other debits/credits have happened), the system will proceed to debit Rs. 50 from the ledger as the claimed refund amount. The question is whether the proper officer should sanction Rs. 50 as the refund amount or Rs. 25 (i. e., half of the ITC availed after adjusting for reversals) ?

Clarification : ITC which is reversed cannot be held to have been "availed" in the relevant period. Therefore, the same cannot be part of refund of unutilized ITC on account of zero-rated supplies. Moreover, the reversed ITC has been accounted as a cost which would have reduced the income-tax liability of the claimant. Therefore, the same amount cannot, at the same time, be refunded to him/her in the ratio of export turnover to total turnover. However, if the said reversed amount is again availed in a later tax period, subject to the restriction under section 16(4) of the DGST Act, it can be refunded in the ratio of export turnover to total turnover in that tax period in the same manner as detailed in para 9(a) above. This is subject to the restriction that the accounting entry showing the said ITC as cost is also reversed.

Non-consideration of ITC of GST paid on invoices of earlier tax period availed in subsequent tax period :

10. Presently, ITC is reflected in the electronic credit ledger on the basis of the amount of the ITC availed on self declaration basis in *FORM GSTR-3B* for a particular tax period. It may happen that the goods purchased against a particular tax invoice issued in a particular month, say August 2017, may be declared in the *FORM GSTR-3B* filed for a subsequent month, say September, 2017. This is inevitable in cases where the supplier raises an invoice, say in August, 2017, and the goods reach the recipient's premises in September, 2017. Since GST law mandates that ITC can be availed only after the goods are received, the recipient can only avail the ITC on such goods in the *FORM GSTR-3B* filed for the month of September, 2017. However, it has been observed that field officers are excluding such invoices from the calculation of refund of unutilized ITC filed for the month of September, 2017.

11. In this regard, it is clarified that "Net ITC" as defined in rule 89(4) of the DGST Rules means input tax credit availed on inputs and input services during the relevant period. Relevant period means the period for which the

refund claim has been filed. Input tax credit can be said to have been "availed" when it is entered into the electronic credit ledger of the registered person. Under the current dispensation, this happens when the said taxable person files his/her monthly return in *FORM GSTR-3B*. Further, section 16(4) of the DGST Act stipulates that ITC may be claimed on or before the due date of filing of the return for the month of September following the financial year to which the invoice pertains or the date of filing of annual return, whichever is earlier. Therefore, the input tax credit of invoices issued in August, 2017, "availed" in September, 2017 cannot be excluded from the calculation of the refund amount for the month of September, 2017.

Misinterpretation of the meaning of the term "inputs" :

12. It has been represented that on certain occasions, Departmental Officers do not consider ITC on stores and spares, packing materials, materials purchased for machinery repairs, printing and stationery items, as part of Net ITC on the grounds that these are not directly consumed in the manufacturing process and therefore, do not qualify as input. There are also instances where stores and spares charged to revenue are considered as capital goods and therefore the ITC availed on them is not included in Net ITC, even though the value of these goods has not been capitalized in his books of account by the claimant.

13. In relation to the above, it is clarified that the input tax credit of the GST paid on inputs shall be available to a registered person as long as he/she uses or intends to use such inputs for the purposes of his/her business and there is no specific restriction on the availment of such ITC anywhere else in the GST Act. The GST paid on inward supplies of stores and spares, packing materials, etc., shall be available as ITC as long as these inputs are used for the purpose of the business and/or for effecting taxable supplies, including zero-rated supplies, and the ITC for such inputs is not restricted under section 17(5) of the DGST Act. Further, capital goods have been clearly defined in section 2(19) of the DGST Act as goods whose value has been capitalized in the books of account and which are used or intended to be used in the course or furtherance of business. Stores and spares, the expenditure on which has been charged as a revenue expense in the books of account, cannot be held to be capital goods.

Refund of accumulated ITC of input services and capital goods arising on account of inverted duty structure :

14. Section 54(3) of the DGST Act provides that refund of any unutilized ITC may be claimed where the credit has accumulated on account of rate of

tax on *inputs* being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies). Further, section 2(59) of the DGST Act defines *inputs* as any *goods other than capital goods* used or intended to be used by a supplier in the course or furtherance of business. Thus, inputs do not include services or capital goods. Therefore, clearly, the intent of the law is not to allow refund of tax paid on input services or capital goods as part of refund of unutilized input tax credit. Accordingly, in order to align the DGST Rules with the DGST Act, Notification No. 26/2018-State Tax, dated September 2, 2019 was issued wherein it was stated that the term Net ITC, as used in the formula for calculating the maximum refund amount under rule 89(5) of the DGST Rules, shall mean input tax credit availed on *inputs* during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both. In view of the above, it is clarified that both the law and the related rules clearly prevent the refund of tax paid on input services and capital goods as part of refund of input tax credit accumulated on account of inverted duty structure.

15. All previous circulars/instructions issued on the subject stand modified accordingly. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

16. Difficulty, if any, in the implementation of this circular may be brought to the notice of the Policy Branch. Trade and Taxes Department, Government of NCT of Delhi.

COMMISSIONER (GST)

[F. No. F.3 284/Policy-GST/2019/480-86]

Circular No. 4/2019-20, dated 4th November, 2019.

Subject: **Clarification in respect of goods sent/taken out of India for exhibition or on consignment basis for export promotion—Reg.**

Ref : **Central Circular No. 108/27/2019 of Central tax**[1]

Various representations have been received from the trade and industry regarding procedure to be followed in respect of goods sent/taken out of India for exhibition or on consignment basis for export promotion. Such goods sent/taken out of India crystallise into exports, wholly or partly, only after a gap of certain period from the date they were physically sent/taken out of India.

1. See [2019] 67 GSTR (St.) 33.

2. The matter has been examined and in view of the difficulties being faced by the trade and industry and to ensure uniformity in the implementation of the provisions of the law across the field formations, the Board, in exercise of its powers conferred under section 168(1) of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as the "DGST Act") hereby clarifies various issues in succeeding paragraphs.

3. As per section 7 of the DGST Act, for any activity or transaction to be considered a supply, it must satisfy twin tests, namely :—

(i) it should be for a consideration by a person ; and

(ii) it should be in the course or furtherance of business.

4. The exceptions to the above are the activities enumerated in Schedule I of the DGST Act which are treated as supply even if made without consideration. Further, sub-section (21) of section 2 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the "IGST Act") defines "supply", wherein it is clearly stated that it shall have the same meaning as assigned to it in section 7 of the DGST Act.

5. Section 16 of the IGST Act deals with "Zero rated supply". The provisions contained in the said section read as under :

16.(1) *"zero rated supply" means any of the following supplies of goods or services or both, namely* :—

(a) export of goods or services or both ; or

(b) supply of goods or services or both to a special economic zone developer or a special economic zone unit.

Therefore, it can be concluded that only such "*supplies*" which are either "export" or are "supply to SEZ unit/developer" would qualify as zero-rated supply.

6. It is, accordingly, clarified that the activity of sending/taking the goods out of India for exhibition or on consignment basis for export promotion, except when such activity satisfy the tests laid down in Schedule I of the DGST Act (hereinafter referred to as the "specified goods"), do not constitute supply as the said activity does not fall within the scope of section 7 of the DGST Act as there is no consideration at that point in time. Since such activity is not a supply, the same cannot be considered as "Zero rated supply" as per the provisions contained in section 16 of the IGST Act.

7. Since the activity of sending/taking specified goods out of India is not a supply, doubts have been raised by the trade and industry on issues relating to maintenance of records, issuance of delivery challan/tax invoice, etc. These issues have been examined and the clarification on each of these points is as under :

Sl. No.	*Issue*	*Clarification*
1.	Whether any records are required to be maintained by registered person for sending/taking specified goods out of India ?	The registered person dealing in specified goods shall maintain a record of such goods as per the format at annexure to this circular.
2.	What is the documentation required for sending/taking the specified goods out of India ?	(a) As clarified above, the activity of sending/taking specified goods out of India is not a supply. (b) The said activity is in the nature of "sale on approval basis" wherein the goods are sent/taken outside India for the approval of the person located abroad and it is only when the said goods are approved that the actual supply from the exporter located in India to the importer located abroad takes place. The activity of sending/taking specified goods is covered under the provisions of sub-section (7) of section 31 of the DGST Act read with rule 55 of the Delhi Goods and Services Tax Rules, 2017 (hereinafter referred to as the "DGST Rules"). (c) The specified goods shall be accompanied with a delivery challan issued in accordance with the provisions contained in rule 55 of the DGST Rules. (d) As clarified in paragraph 6 above, the activity of sending/taking specified goods out of India is not a zero-rated supply. That being the case, execution of a bond or LUT, as required under section 16 of the IGST Act, is not required.
3.	When is the supply of specified goods sent/taken out of India said to take place ?	(a) The specified goods sent/taken out of India are required to be either sold or brought back within the stipulated period of six months from the date of removal as per the provisions contained in sub-section (7) of section 31 of the DGST Act.

Sl. No.	*Issue*	*Clarification*
		(b) The supply would be deemed to have taken place, on the expiry of six months from the date of removal, if the specified goods are neither sold abroad nor brought back within the said period. (c) If the specified goods are sold abroad, fully or partially, within the specified period of six months, the supply is effected, in respect of quantity so sold, on the date of such sale.
4.	Whether invoice is required to be issued when the specified goods sent/taken out of India are not brought back, either fully or partially, within the stipulated period ?	(a) When the specified goods sent/taken out of India have been sold fully or partially, within the stipulated period of six months, as laid down in sub-section (7) of section 31 of the DGST Act, the sender shall issue a tax invoice in respect of such quantity of specified goods which has been sold abroad, in accordance with the provisions contained in section 12 and section 31 of the DGST Act read with rule 46 of the DGST Rules. (b) When the specified goods sent/taken out of India have neither been sold nor brought back, either fully or partially, within the stipulated period of six months, as laid down in sub-section (7) of section 31 of the DGST Act, the sender shall issue a tax invoice on the date of expiry of six months from the date of removal, in respect of such quantity of specified goods which have neither been sold nor brought back, in accordance with the provisions contained in section 12 and section 31 of the DGST Act read with rule 46 of the DGST Rules.

Sl. No.	*Issue*	*Clarification*
5.	Whether the refund claims can be preferred in respect of specified goods sent/taken out of India but not brought back ?	(a) As clarified in para 5 above, the activity of sending/taking specified goods out of India is not a zero-rated supply. That being the case, the sender of goods cannot prefer any refund claim when the specified goods are sent/taken out of India. (b) It has further been clarified in answer to question No. 3 above that the supply would be deemed to have taken place : (i) on the date of expiry of six months from the date of removal, if the specified goods are neither sold nor brought back within the said period ; or (ii) on the date of sale, in respect of such quantity of specified goods which have been sold abroad within the specified period of six months. (c) It is clarified accordingly that the sender can prefer refund claim even when the specified goods were sent/taken out of India without execution of a bond or LUT, if he is otherwise eligible for refund as per the provisions contained in sub-section (3) of section 54 of the DGST Act read with sub-rule (4) of rule 89 of the DGST Rules, in respect of zero rated supply of goods after he has issued the tax invoice on the dates as has been clarified in answer to the question No. 4 above. It is further clarified that refund claim cannot be preferred under rule 96 of the DGST Rules as supply is taking place at a time after the goods have already been sent/taken out of India earlier.

8. The above position is explained by way of illustrations below :

Illustrations :

(i) M/s. ABC sends 100 units of specified goods out of India. The activity of merely sending/taking such specified goods out of India is not a supply. No tax invoice is required to be issued in this case but the specified goods shall be accompanied with a delivery challan issued in accordance with the provisions contained in rule 55 of the DGST Rules. In case the entire quantity of specified goods is brought back within the stipulated period of six months from the date of removal, no tax invoice is required to be issued as no supply has taken place in such a case. In case, however, the entire quantity of specified goods is neither sold nor brought back within six months from the date of removal, a tax invoice would be required to be issued for entire 100 units of specified goods in accordance with the provisions contained in section 12 and section 31 of the DGST Act read with rule 46 of the DGST Rules within the time period stipulated under sub-section (7) of section 31 of the DGST Act.

(ii) M/s. ABC sends 100 units of specified goods out of India. The activity of sending/taking such specified goods out of India is not a supply. No tax invoice is required to be issued in this case but the specified goods shall be accompanied with a delivery challan issued in accordance with the provisions contained in rule 55 of the DGST Rules. If 10 units of specified goods are sold abroad say after one month of sending/taking out and another 50 units are sold say after two months of sending/taking out, a tax invoice would be required to be issued for 10 units and 50 units, as the case may be, at the time of each of such sale in accordance with the provisions contained in section 12 and section 31 of the DGST Act read with rule 46 of the DGST Rules. If the remaining 40 units are not brought back within the stipulated period of six months from the date of removal, a tax invoice would be required to be issued for 40 units in accordance with the provisions contained in section 12 and section 31 of the DGST Act read with rule 46 of the DGST Rules. Further, M/s. ABC may claim refund of accumulated input tax credit in accordance with the provisions contained in sub-section (3) of section 54 of the DGST Act read with sub-rule (4) of rule 89 of the DGST Rules in respect of zero-rated supply of 60 units.

9. Difficulty, if any, in the implementation of the above instructions may please be brought to the notice of Policy Branch.

COMMISSIONER, GST

[F. No. F.3(279)/Policy-GST/2019/487-92]

ANNEXURE

RECORD OF SPECIFIED GOODS SENT/TAKEN OUT OF INDIA AND BROUGHT BACK/SOLD ABROAD

Folio No./ Reference No.	*Description of specified goods*	*Quantity unit (Nos./ grams/ piece, etc.)*	*Value per unit*	*Total value of the specified goods*	*Date of removal from place of business*	*Delivery Challan No. & date*		*Shipping Bill No. & date*		*Details of specified goods supplied (i.e. specified goods not brought back)*		*Invoice No. & date*		*Details of specified goods brought back*		*Bill of entry No. & date*	
						No.	*Date*	*No.*	*Date*	*Quantity*	*Value*	*No.*	*Date*	*Quantity*	*Value*	*No.*	*Date*
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)

Circular No. 5/2019-GST, dated 8th November, 2019.

Subject: **Clarification regarding determination of place of supply in certain cases—Regarding**

Ref : **Central Circular No. 103/22/2019-GST of Central tax**[1]

Various representations have been received from trade and industry seeking clarification in respect of determination of place of supply in following cases :—

(I) *Services provided by ports.*—Place of supply in respect of various cargo handling services provided by ports to clients ;

(II) *Services rendered on goods temporarily imported in India.*—Place of supply in case of services rendered on unpolished diamonds received from abroad, which are exported after cutting, polishing, etc.

2. The provisions relating to determination of place of supply as contained in the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "the IGST Act") have been examined. In order to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by sub-section (1) of section 168 of the

1. See [2019] 67 GSTR (St.) 18.

Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as "the DGST Act") clarifies the same as below :

Sl. No.	*Issue*	*Clarification*
1.	Various services are being provided by the port authorities to its clients in relation to cargo handling. Some of such services are in respect of arrival of wagons at port, haulage of wagons inside port area up-to place of unloading, siding of wagons inside the port, unloading of wagons, movement of unloaded cargo to plot and staking hereof, movement of unloaded cargo to berth, shipment/loading on vessel, etc. Doubts have been raised about determination of place of supply for such services, i. e., whether the same would be determined in terms of the provisions contained in sub-section (2) of section 12 or sub-section (2) of section 13 of the IGST Act, as the case may be or the same shall be determined in terms of the provisions contained in sub-section (3) of section 12 of the IGST Act.	It is hereby clarified that such services are ancillary to or related to cargo handling services and are not related to immovable property. Accordingly, the place of supply of such services will be determined as per the provisions contained in sub-section (2) of section 12 or sub-section (2) of section 13 of the IGST Act, as the case may be, depending upon the terms of the contract between the supplier and recipient of such services.
2.	Doubts have been raised about the place of supply in case of supply of various services on unpolished diamonds such as cutting and polishing activity which have been temporarily imported into India and are not put to any use in India ?	Place of supply in case of performance based services is to be determined as per the provisions contained in clause (a) of sub-section (3) of section 13 of the IGST Act and generally the place of services is where the services are actually performed. But an exception has been carved out in case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process.

Sl. No.	*Issue*	*Clarification*
		In case of cutting and polishing activity on unpolished diamonds which are temporarily imported into India are not put to any use in India, the place of supply would be determined as per the provisions contained in sub-section (2) of section 13 of the IGST Act.

3. Difficulty, if any, in the implementation of this circular may be brought to the notice of the Policy Branch, Trade and Taxes Department, Government of NCT of Delhi.

COMMISSIONER, GST

[F. No. F3 (283)/Policy-GST/2019/509-14]

Circular No. 6/2019-GST, dated 19th November, 2019.

Subject: **Clarification on various doubts related to treatment of secondary or post-sales discounts under GST—Regarding**

Ref : **Central Circular No. 105/24/2019-GST of Central tax**[1]

Circular No. 92/11/2019-GST, dated 7th March, 2019[2] was issued providing clarification on various doubts related to treatment of sales promotion schemes under GST. Post issuance of the said circular various representations have been received from the trade and industry seeking clarifications in respect of tax treatment in cases of secondary discounts or post sales discount. The matter has been examined in order to ensure uniformity in the implementation of the law across the field formations, the Board, in exercise of its powers conferred under section 168(1) of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as "the DGST Act") clarifies the issues in succeeding paragraphs.

2. For the purpose of value of supply, post sales discounts are governed by the provisions of clause (b) of sub-section (3) of section 15 of the DGST Act. It is crucial to examine the true nature of discount given by the manufacturer or wholesaler, etc. (hereinafter referred to as "the supplier of goods") to the dealer. It would be important to examine whether the additional discount is given by the supplier of goods in lieu of consideration for

1. See [2019] 67 GSTR (St.) 22.
2. See [2019] 62 GSTR (St.) 203.

any additional activity/promotional campaign to be undertaken by the dealer.

3. It is clarified that if the post-sale discount is given by the supplier of goods to the dealer without any further obligation or action required at the dealer's end, then the post sales discount given by the said supplier will be related to the original supply of goods and it would not be included in the value of supply, in the hands of supplier of goods, subject to the fulfilment of provisions of sub-section (3) of section 15 of the DGST Act. However, if the additional discount given by the supplier of goods to the dealer is the post-sale incentive requiring the dealer to do some act like undertaking special sales drive, advertisement campaign, exhibition, etc., then such transaction would be a separate transaction and the additional discount will be the consideration for undertaking such activity and therefore would be in relation to supply of service by dealer to the supplier of goods. The dealer, being supplier of services, would be required to charge applicable GST on the value of such additional discount and the supplier of goods, being recipient of services, will be eligible to claim input tax credit (hereinafter referred to as the "ITC") of the GST so charged by the dealer.

4. It is further clarified that if the additional discount is given by the supplier of goods to the dealer to offer a special reduced price by the dealer to the customer to augment the sales volume, then such additional discount would represent the consideration flowing from the supplier of goods to the dealer for the supply made by dealer to the customer. This additional discount as consideration, payable by any person (supplier of goods in this case) would be liable to be added to the consideration payable by the customer, for the purpose of arriving value of supply, in the hands of the dealer, under section 15 of the DGST Act. The customer, if registered, would be eligible to claim ITC of the tax charged by the dealer only to the extent of the tax paid by the said customer to the dealer in view of second proviso to sub-section (2) of section 16 of the DGST Act.

5. There may be cases where post-sales discount granted by the supplier of goods is not permitted to be excluded from the value of supply in the hands of the said supplier not being in accordance with the provisions contained in sub-section (3) of section 15 of the DGST Act. It has already been clarified vide Circular No. 92/11/2019-GST, dated 7th March, 2019[1] that the supplier of goods can issue financial/commercial credit notes in such cases but he will not be eligible to reduce his original tax liability. Doubts have been raised as to whether the dealer will be eligible to take ITC of the original amount of tax paid by the supplier of goods or only to the extent of

1. See [2019] 62 GSTR (St.) 203.

tax payable on value net of amount for which such financial/commercial credit notes have been received by him. It is clarified that the dealer will not be required to reverse ITC attributable to the tax already paid on such post-sale discount received by him through issuance of financial/commercial credit notes by the supplier of goods in view of the provisions contained in second proviso to sub-rule (1) of rule 37 of the DGST Rules read with second proviso to sub-section (2) of section 16 of the DGST Act as long as the dealer pays the value of the supply as reduced after adjusting the amount of post-sale discount in terms of financial/commercial credit notes received by him from the supplier of goods plus the amount of original tax charged by the supplier.

6. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

7. Difficulty if any, in the implementation of this circular may be brought to the notice of the policy branch, Trade and Taxes Department, Government of NCT of Delhi.

COMMISSIONER (GST)

[F. No. F.3(250)/Policy-GST/2019/518-24]

Circular No. 7/2019-GST, dated 20th November, 2019

Subject: **Clarification on issue of GST on Airport levies—Regarding**

Ref : **Central Circular No. 115/34/2019-GST of Central tax**[1]

Various representations have been received seeking clarification on issues relating to GST on airport levies and to clarify that airport levies do not form part of the value of services provided by the airlines and consequently no GST should be charged by airlines on airport levies. In order to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168 of the Delhi Goods and Services Tax Act, 2017 (hereinafter referred to as "DGST Act"), hereby clarifies the issues in the succeeding paras.

2. Passenger Service Fee (PSF) is charged under rule 88 of the Aircraft Rules, 1937 according to which the airport licensee may collect PSF from embarking passengers at such rates as specified by the Central Government. According to the rule the airport license shall utilize the said fee for infrastructure and facilitation of the passengers. User Development Fee (UDF) is levied under rule 89 of the Aircraft Rules, 1937, which provides

1. See [2019] 71 GSTR (St.) 13.

that the licensee may levy and collect, at a major airport, the user development fee at such rate as may be determined under clause (b) of sub-section (1) of section 13 of the Airports Economic Regulatory Authority of India Act, 2008.

2.1 Though the rule does not prescribe the specific purpose of levy and whether it is to be charged from the airlines or the passengers. However, it is seen from section 2(n) of the Airports Economic Regulatory Authority of India Act, 2008, that the authority which manages the airport is eligible to levy and charge UDF from the embarking passengers at any airport.

2.2 Further, Director General of Civil Aviation has clarified vide order No. AIC Sl. No. 5/2010, dated September 13, 2010 that in order to avoid inconvenience to passengers and for smooth and orderly air transport/ airport operations, the user development fees (UDF) shall be collected from the passengers by the airlines at the time of issue of air ticket and the same shall be remitted to Airports Authority of India in the line system/procedure in vogue. For this, collection charges of Rs. 5 shall be receivable by the airlines from AAI, which shall not to be passed on to the passengers in any manner.

2.3 The above facts clearly indicate that PSF and UDF are charged by airport operators for providing the services to passengers.

2.4 Section 2(31) of the DGST Act states that "consideration" in relation to the supply of goods or services or both includes any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person. Thus, PSF and UDF charged by airport operators are consideration for providing services to passengers.

2.5 Thus, services provided by an airport operator to passengers against consideration in the form of UDF and PSF are liable to GST. UDF was also liable to service tax. It is also clear from notification of Director General of Civil Aviation AIC Sl. No. 5/2010, dated September 13, 2010, which states that UDF approved by MoCA, GoI is inclusive of service tax. It is also seen from the Air India website that the *UDF is inclusive of service tax*. Further in order No. AIC Sl. Nos. 3/2018 and 4/2018, both dated February 27, 2018, it has been laid down that *GST is applicable on the charges of UDF and PSF*.

2.6 PSF and UDF being charges levied by airport operator for services provided to passengers, are collected by the airlines as an agent and is not a consideration for any service provided by the airlines. Thus, airline is not

responsible for payment of ST/GST on UDF or PSF provided the airline satisfies the conditions prescribed for a pure agent under rule 33 of the DGST Rules. It is the licensee, that is the airport operator (AAI, DIAL, MIAL, etc.) which is liable to pay ST/GST on UDF and PSF.

2.7 Airlines may act as a pure agent for the supply of airport services in accordance with rule 33 of the DGST Rules. Rule 33 of the DGST Rules provides that the expenditure or costs incurred by a supplier as a pure agent of the recipient of supply shall be excluded from the value of supply, if all the following conditions are satisfied, namely :—

(i) the supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorisation by such recipient ;

(ii) the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service ; and

(iii) the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

"Pure agent" has been defined to mean a person who,—

*(a) enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both ; (b) neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply ; (c) does not use for his own interest such goods or services so procured ; and (d) receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own accoun*t.

2.8 Accordingly, the airline acting as pure agent of the passenger should separately indicate actual amount of PSF and UDF and GST payable on such PSF and UDF by the airport licensee, in the invoice issued by airlines to its passengers. The airline shall not take ITC of GST payable or paid on PSF and UDF. The airline would only recover the actual PSF and UDF and GST payable on such PSF and UDF by the airline operator. The amount so recovered will be excluded from the value of supplies made by the airline to its passengers. In other words, the airline shall not be liable to pay GST on the PSF and UDF (for airport services provided by airport licensee), provided the airline satisfies the conditions prescribed for a pure agent under rule 33 of the DGST Rules. The registered passengers, who are the ultimate recipient of the airport services, may take ITC of GST paid on

PSF and UDF on the basis of pure agent's invoice issued by the airline to them.

2.9 The airport operators shall pay GST on the PSF and UDF collected by them from the passengers through the airlines. Since, the airport operators are collecting PSF and UDF inclusive of ST/GST, there is no question of their not paying ST/GST collected by them to the Government.

2.10 The collection charges paid by airport operator to airlines are a consideration for the services provided by the airlines to the airport operator (AAI, DAIL, MAIL, etc.) and airlines shall be liable to pay GST on the same under forward charge. ITC of the same will be available with the airport operator.

3. Difficulty if any, in the implementation of this circular may be brought to the notice of the Policy Branch, Trade and Taxes Department, Government of NCT of Delhi.

COMMISSIONER, GST

[F. No. F.3 (288)/Policy-GST/2019/530-36]

Circular No. 8/2019-GST, dated 20th November, 2019

Subject: **Levy of GST on the service of display of name or placing of name plates of the donor in the premises of charitable organisations receiving donation or gifts from individual donors—Regarding**

Ref : **Central Circular No. 116/35/2019-GST of Central tax**[1]

Representations have been received seeking clarification whether GST is applicable on donations or gifts received from individual donors by charitable organisations involved in advancement of religion, spirituality or yoga which is acknowledged by them by placing name plates in the name of the individual donor.

2. The issue has been examined. Individual donors provide financial help or any other support in the form of donation or gift to institutions such as religious institutions, charitable organisations, schools, hospitals, orphanages, old age homes, etc. The recipient institutions place a name plate or similar such acknowledgement in their premises to express the gratitude. When the name of the donor is displayed in recipient institution premises, in such a manner, which can be said to be an expression of gratitude and public recognition of donor's act of philanthropy and is not aimed at giving publicity to the donor in such manner that it would be an advertising or

1. See [2019] 71 GSTR (St.) 16.

promotion of his business, then it can be said that there is no supply of service for a consideration (in the form of donation). There is no obligation (quid pro quo) on part of recipient of the donation or gift to do anything (supply a service). Therefore, there is no GST liability on such consideration.

2.1 Some examples of cases where there would be no taxable supply are as follows :—

(a) "Good wishes from Mr. Rajesh" printed underneath a digital blackboard donated by Mr. Rajesh to a charitable yoga institution.

(b) "Donated by Smt. Malati Devi in the memory of her father" written on the door or floor of a room or any part of a temple complex which was constructed from such donation.

2.2. In each of these examples, it may be noticed that there is no reference or mention of any business activity of the donor which otherwise would have got advertised. Thus where all the three conditions are satisfied namely the gift or donation is made to a charitable organization, the payment has the character of gift or donation and the purpose is philanthropic (i. e., it leads to no commercial gain) and not advertisement, GST is not leviable.

3. Difficulty if any, in the implementation of this circular may be brought to the notice of the Policy Branch, Trade and Taxes Department, Government of NCT of Delhi

COMMISSIONER, GST

[F. No. F.3 (289)/Policy-GST/2019/537-43]

Circular No. 9/2019-GST, dated 20th November, 2019

Subject: **Clarification on applicability of GST exemption to the DG Shipping approved maritime courses conducted by Maritime Training Institutes of India—Regarding**

Ref : **Central Circular No. 117/36/2019-GST of Central tax**[1]

A representation has been received regarding applicability of GST exemption to the Directorate General of Shipping approved maritime courses conducted by the Maritime Training Institutes of India. The same has been examined and following is clarified.

2. Under GST Law, vide Sl. No. 66 of Notification No. 12/2017-State Tax (Rate), dated June 30, 2017[2], services provided by educational institutions

1. See [2019] 71 GSTR (St.) 17.
2. See [2018] 49 GSTR (St.) 245.

to its students, faculty and staff are exempt from levy of GST. In the above notification, "educational institution" has been defined to mean an institution providing services by way of education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force.

3. GST exemption on services supplied by an educational institution would be available, if it fulfils the criteria that the education is provided as part of a curriculum for obtaining a qualification/degree recognized by law.

4. Section 76 of the Merchant Shipping Act, 1958 (44 of 1958) provides for the certificates of competency to be held by the officers of ships. It states that every Indian ship, when going to sea from any port or place, shall be provided with officers duly certificated under this Act in accordance with such manning scales as may be prescribed. Section 78 of the Act provides for several Grades of certificates of competency. Further, section 79 provides that the Central Government or a person duly authorised by it shall appoint persons for the purpose of examining the qualifications of persons desirous of obtaining certificate of competency under section 78 of the Act.

5. In order to streamline and monitor the maritime education and trainings by maritime institutes and to administer the assessment agencies, the Merchant Shipping (Standards of Training, Certification and Watchkeeping for Seafarers) Rules, 2014 has been notified. Under rule 9 of the said Rules, the Director General of Shipping is empowered to designate assessment centres. Further the provisions of sub- rules (6), (7) and (8) of rule 4 of the said Rules, empowers the Director General of Shipping, to approve (i) the training course, (ii) training, examination and assessment programme, and (iii) approved training institute, etc.

6. From the above discussion, it is seen that the Maritime Training Institutes and their training courses are approved by the Director General of Shipping which are duly recognised under the provisions of the Merchant Shipping Act, 1958 read with the Merchant Shipping (Standards of Training, Certification and Watch-keeping for Seafarers) Rules, 2014. Therefore, the Maritime Institutes are educational institutions under GST Law and the courses conducted by them are exempt from levy of GST. The exemption is subject to meeting the conditions specified at Sl. No. 66 of Notification No. 12/2017-State Tax (Rate), dated June 30, 2017[1].

7. This clarification applies, mutatis mutandis, to corresponding entries of respective IGST, UTGST, SGST exemption notifications. Difficulty if any, in the implementation of this circular may be brought to the notice of the

1. See [2018] 49 GSTR (St.) 245.

Policy Branch, Trade and Taxes Department, Government of NCT of Delhi.

COMMISSIONER, GST

[F. No. F.3(290)/Policy-GST/2019/544-50]

Circular No. 10/2019-GST, dated 27th November, 2019

Subject: **Clarification on the effective date of *Explanation* inserted in Notification No. 11/2017-STR, dated June 30, 2017[1], Sr. No. 3(vi)—Reg.**

Ref : **Central Circular No. 120/39/2019-GST of Central tax**[2]

Representations have been received to amend the effective date of Notification No. 17/2018-STR, dated September 2, 2019[3] whereby explanation was inserted in Notification No. 11/2017-STR, dated June 30, 2017[1], Sr. No. 3(vi) to the effect that for the purpose of the said entry, the activities or transactions undertaken by Government and Local Authority are excluded from the term "business".

2. The matter has been examined. Section 11(3) of the DGST Act provides that the Government may insert an *Explanation* in any notification issued under section 11, for the purpose of clarifying its scope or applicability, at any time within one year of issue of the notification and every such *Explanation* shall have effect as if it had always been the part of the first such notification.

3. As recommended by GST Council, the *Explanation* in question was inserted vide Notification No. 17/2018-STR, dated September 2, 2019[3] in exercise of powers under section 11(3) within one year of the insertion of the original entry prescribing concessional rate, so that it would have effect from the date of inception of the entry, i. e., September 21, 2017. However, the said notification also contained a line in the last paragraph the notification shall come into effect from July 27, 2018.

4. It is hereby clarified that the explanation having been inserted under section 11(4) of the DGST Act, is effective from the inception of the entry at Sl. No. 3(vi) of Notification No. 11/2017-STR, dated June 28, 2017, that is September 21, 2017. The line in Notification No. 17/2018-STR, dated September 2, 2019, which states that the notification shall come into effect from July 27, 2018 does not alter the operation of the notification in terms of section 11(3) as explained in para 3 above.

1. See [2018] 49 GSTR (St.) 199.
2. See [2019] 71 GSTR (St.) 23.
3. See [2019] 71 GSTR (St.) 255.

5. Difficulty, if any, in implementation of this circular may be brought to the notice of the Policy Branch, Trade and Taxes Department, Government of NCT of Delhi.

COMMISSIONER, GST

[F. No. F.3(293)/Policy-GST/2019/603-09]

Circular No. 11/2019-GST, dated 27th November, 2019.

Subject: **Clarification regarding applicability of GST on additional/penal interest—Regarding**

Ref : **Central Circular No. 102/21/2019-GST of Central tax**[1]

Various representations have been received from the trade and industry regarding applicability of GST on delayed payment charges in case of late payment of equated monthly instalments (EMI). An EMI is a fixed amount paid by a borrower to a lender at a specified date every calendar month. EMIs are used to pay off both interest and principal every month, so that over a specified period, the loan is fully paid off along with interest. In cases where the EMI is not paid at the scheduled time, there is a levy of additional/penal interest on account of delay in payment of EMI.

2. Doubts have been raised regarding the applicability of GST on additional/penal interest on the overdue loan, i. e., whether it would be exempt from GST in terms of Sl. No. 27 of Notification No. 12/2017-State Tax (Rate), dated 30th June 2017[2] or such penal interest would be treated as consideration for liquidated damages (amounting to a separate taxable supply of services under GST covered under entry 5(e) of Schedule II of the State Goods and Services Tax Act, 2017 (hereinafter referred to as the DGST Act), i.e., "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"). In order to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168(1) of the DGST Act, hereby issues the following clarification.

3. Generally, following two transaction options involving EMI are prevalent in the trade :

- *Case-1* : X sells a mobile phone to Y. The cost of mobile phone is Rs. 40,000. However, X gives Y an option to pay in instalments, Rs. 11,000 every month before 10th day of the following month, over next four months (Rs 11,000 × 4 = Rs. 44,000). Further, as per the contract, if there is

1. See [2019] 67 GSTR (St.) 16.
2. See [2018] 49 GSTR (St.) 245.

any delay in payment by Y beyond the scheduled date, Y would be liable to pay additional/penal interest amounting to Rs. 500 per month for the delay. In some instances, X is charging Y Rs. 40,000 for the mobile and is separately issuing another invoice for providing the services of extending loans to Y, the consideration for which is the interest of 2.5 per cent. per month and an additional/penal interest amounting to Rs. 500 per month for each delay in payment.

• *Case-2* : X sells a mobile phone to Y. The cost of mobile phone is Rs. 40,000. Y has the option to avail a loan at interest of 2.5 per cent. per month for purchasing the mobile from M/s. ABC Ltd. The terms of the loan from M/s. ABC Ltd. allows Y a period of four months to repay the loan and an additional/penal interest at 1.25 per cent. per month for any delay in payment.

4. As per the provisions of sub-clause (d) of sub-section (2) of section 15 of the DGST Act, the value of supply shall include "*interest or late fee or penalty for delayed payment of any consideration for any supply*". Further in terms of Sl. No. 27 of Notification No. 12/2017-State Tax (Rate), dated the June 30, 2017[1] "*services by way of (a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services)*" is exempted. Further, as per clause 2(zk) of the Notification No. 12/2017-State Tax (Rate), dated the 30th June, 2017, "*interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised*" ;

5. Accordingly, based on the above provisions, the applicability of GST in both cases listed in para 3 above would be as follows :

• *Case-1* : As per the provisions of sub-clause (d) of sub-section (2) of section 15 of the DGST Act, the amount of penal interest is to be included in the value of supply. The transaction between X and Y is for supply of taxable goods, i. e., mobile phone. Accordingly, the penal interest would be taxable as it would be included in the value of the mobile, irrespective of the manner of invoicing.

• *Case-2* : The additional/penal interest is charged for a transaction between Y and M/s. ABC Ltd., and the same is getting covered under Sl. No. 27 of Notification No. 12/2017-State Tax (Rate), dated June 30, 2017. Accordingly, in this case the "penal interest" charged thereon on a transac-

1. See [2018] 49 GSTR (St.) 245.

tion between Y and M/s. ABC Ltd. would not be subject to GST, as the same would not be covered under Notification No. 12/2017-State Tax (Rate), dated June 30, 2017. The value of supply of mobile by X to Y would be Rs. 40,000 for the purpose of levy of GST.

6. It is further clarified that the transaction of levy of additional/penal interest does not fall within the ambit of entry 5(e) of Schedule II of the DGST Act, i.e., "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act", as this levy of additional/penal interest satisfies the definition of "interest" as contained in Notification No. 12/2017-State Tax (Rate), dated June 30, 2017[1]. It is further clarified that any service fee/charge or any other charges that are levied by M/s. ABC Ltd. in respect of the transaction related to extending deposits, loans or advances does not qualify to be interest as defined in Notification No. 12/2017-State Tax (Rate), dated June 30, 2017, and accordingly will not be exempt.

7. Difficulty, if any, in the implementation of this circular may be brought to the notice of Policy Branch, Trade and Taxes Department, Government of NCT of Delhi.

COMMISSIONER, GST.

[F. No. F.3 (275)/Policy-GST/2019/610-15)]

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1. See [2018] 49 GSTR (St.) 245.

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Reports : [2020] 77 GSTR

VOLUME 77

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Published by S. Ayyappan on behalf of Company Law Institute of India Pvt. Ltd.,
2 (Old No. 36), Vaithyaram Street, Thyagaraya Nagar, Chennai-600 017
and printed by him at Company Law Institute Press, 2 (Old No. 36),
Vaithyaram Street, Thyagaraya Nagar, Chennai-600 017.

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Writs under Constitution—Alternate remedy—Not appropriate for court to interfere either at the stage of show-cause notice or assessment—Constitution of India, art. 226.—NECTOR LIFE SCIENCES *v.* STATE OF UTTARAKHAND (Uttarakhand) . . . 36

——Entertainment tax—Goods and services tax—Demand of entertainment tax from theatre owners over and above goods and services tax at rate of 25 per cent. by Municipality—Writ petition—Challenge made only against proceedings arising out of powers vested on Commissioner under sections 118 and 161 of Municipalities Act and not those provisions—Not maintainable—Also on merits—Puducherry Municipalities Act (9 of 1973), ss. 118, 161—Puducherry Goods and Services Tax Act (6 of 2017)—Constitution of India, art. 226.—BALAJI THEATRE *v.* CHIEF SECRETARY (Mad) . . . 152

——Value added tax—Assessment—Assessing officer simply recording statement of enforcement wing officials and passing orders without properly applying his mind to documentary evidence filed by dealer—Orders liable to be set aside and matters remanded for passing orders afresh.—FAABER PAINTS PVT. LTD. *v.* ASSISTANT COMMISSIONER (CT) (Mad) . . . 416

——Value added tax—High Court—Appeal—Assessment—Writ petition against assessment order after expiry of period of limitation for appeal under statute—Not to be entertained—Andhra Pradesh Value Added Tax Act (5 of 2005), s. 31—Constitution of India, art. 226.—ASSISTANT COMMISSIONER (CT) LTU *v.* GLAXO SMITH KLINE CONSUMER HEALTH CARE LIMITED **(SC) . . . 342**

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