



Dimensions – 94th Edition

Judgment under GST era

***Skill Lotto Solutions Pvt Ltd v. Union of India & Ors.*¹**

Issue for Consideration

Whether levy of GST on sale of lottery tickets is constitutional? If yes, whether prize money is to be excluded while determining face value of lottery tickets while computing GST liability?

Discussion

- The Petitioner is an authorised agent selling and distributing lotteries organised by the State of Punjab.
- The present Writ Petition has been filed raising the following questions:
 - Whether the present Writ Petition is maintainable under Article 32 of the Constitution of India (“Constitution”)?
 - Whether inclusion of actionable claim in the definition of ‘goods’ under section 2(52)² of CGST Act, 2017 is contrary to the legal meaning of ‘goods’ and unconstitutional?

¹ 2020-VIL-37-SC

² “goods” means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

³ 2006-VIL-11-SC

⁴ “Actionable claims, other than lottery, betting and gambling”

- Whether the proposition of law laid down by the Hon’ble Supreme Court in the case of *Sunrise Associates v. Govt. of NCT of Delhi and Ors.*³ that lottery is an actionable claim only an *obiter dicta* and not a declaration of law?
- Whether exclusion of lottery, betting and gambling from sl. no. 6 of Schedule III⁴ to the CGST Act, 2017 is hostile discrimination and is violative of Article 14 to the Constitution?
- Whether prize money is to be excluded while determining the face value of the lottery tickets while computing GST liability?
- After considering the relevant provisions of law and contentions of the Petitioner and the Respondents, the Hon’ble Supreme Court made the following observations:
 - Since the Writ Petition is alleging violation of the Article 14 of the Constitution with respect to a Parliamentary Act, it can very well be entertained under Article 32 of the Constitution.



- The definition of 'goods'⁵ under the Sales of Goods Act, 1930 ("SOGA") specifically exclude actionable claim.
- The definition of 'goods' under Article 366(12) of the Constitution is an inclusive definition and does not specifically exclude actionable claim. Inclusive definitions are always intended to enlarge the meaning of words or phrases used in the definition. The Constitution framers were well aware of the definition of goods under the SOGA and never intended to give any restrictive meaning of goods in the Constitution.
- The Constitution Bench of the Hon'ble Supreme Court in the case of *Sunrise Associates (supra)* had concluded that lottery is an actionable claim while considering the definition of 'goods' under section 2(j) of the Tamil Nadu General Sales Act, 1959 ("TNGSTA"). If actionable claim was includible in the definition of 'goods', then there was no need for excluding them. It was further added that actionable claims are 'goods' but not for the purposes of Sales Tax Acts.
- When the Constitution Bench came to the conclusion that the lottery is an actionable claim, it was considering the aforesaid definition of 'goods' under TNGSTA and what has been held by the Constitution Bench cannot be held to be *obiter dicta*.
- The definition of 'goods' under section 2(52) of the CGST Act, 2017 does not violate any constitutional provision nor does it conflict with the definition of 'goods' given under Article 366(12) of the Constitution.
- Article 246A begins with a non obstante clause that is "*Notwithstanding anything contained in Articles 246 and 254*" which confers very wide power to make laws with respect to goods and services tax. Hence, the expansive definition of 'goods' in section 2(52) of the CGST Act, 2017 cannot be said to be beyond the constitutional provisions.
- Lottery, betting and gambling are well known concepts and have been in practice in the country since before independence and were regulated and taxed by different legislations. When the Parliament has included above three for purpose of imposing GST and not taxed other actionable claims, it cannot be said that there is no rationale or reason for taxing the above three and leaving others.
- It is a duty of the State to strive to promote the welfare of the people by securing and protecting a social order in which justice, social, economic, and political, shall form the institutions of the national life. Hence, there is no hostile discrimination in taxing lottery, betting and gambling and not taxing other actionable claims. Accordingly, there is no violation of Article 14 in sl. no. 6 of Schedule III to the CGST Act, 2017.
- With regard to the question of abating the prize money from the value of lottery, the Court observed that the Petitioner's reliance on the circular dated February 14, 2007 is not relevant under the GST law as the same was issued under the Service Tax regime.
- When there are specific statutory provisions enumerating what should be included and what should be excluded from the value of the supply as per section 15 of the CGST Act, 2017 read with rule 31A of the CGST Rules, 2017, the Petitioner's contention that prize money is to be abated for determining the value of taxable supply cannot be accepted.
- Prize paid by the distributor / agent is not contemplated to be excluded from the value of taxable supply. Hence, while determining the taxable value of the supply of lottery, the prize money is not to be excluded for the purpose of the levy of GST.
- Reliance placed by the Petitioner on taxing statutes in other countries is not relevant as the taxing policies and the taxing statutes of various countries are different which are in accordance

⁵ "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; - section 2(7) of the SOGA.



with taxing regime suitable and applicable in different countries and that the issue in present Writ needs be answered by looking into the statutory provisions of the CGST Act, 2017.

Judgment

The Hon'ble Supreme Court held that the levy of GST on sale of lottery tickets is constitutional and the definition of 'goods' under GST law is not beyond the constitutional provision. The Court also held that prize money is not to be excluded from the value of supply for GST purposes.

Dhruva Comments:

The Larger Bench decision affirms the levy of GST on lotteries after detailed examination of the Constitutional framework, the definition of 'goods' under the Constitution, SOGA and CGST Act and judicial rulings of the Apex Court.

Ruling under GST era

Beumer India Pvt. Ltd. – Authority for Advance Ruling, Haryana⁶

Issue for Consideration

Is GST payable on the transportation facility provided by the employer to the employee, in either case, where the same is provided free of cost or on recovery of a nominal amount?

Discussion

- The Applicant is engaged in the business of manufacturing / trading of intralogistics systems and has entered into a contract with a transport agency to provide pick up and drop facilities to its employees.
- The Applicant recovers a nominal amount where air conditioning transportation facility is provided to the

employees and in other cases no amount is recovered.

- The Applicant approached the Authority for Advance Ruling (“the Authority”) to contend that no GST was payable in either of the cases on the following basis:

Transportation facility provided free of cost

- One of the conditions to qualify as a 'supply' under section 7(1)(a) of the CGST Act, 2017 is that there should be a consideration. Since no consideration is being charged for the said facility, it cannot be construed as a supply under section 7(1)(a).
- As per section 7(1)(c) of the CGST Act, 2017, read with sl. no. 2⁷ of Schedule I to the CGST Act, 2017, the supply of services between related persons (employer and employee are regarded as related persons as per explanation to section 15 of the CGST Act, 2017) even without consideration should be deemed to be regarded as a supply, only if, made in the course or furtherance of business.
- Based on the definition of the term 'business' under section 2(17) of the CGST Act, 2017 and based on its definition under various dictionaries, the Applicant is engaged in manufacturing / trading of intralogistics systems and not in providing transportation facility.
- The provision of the transportation facility is not mandated by any law and hence cannot be considered as an additional facility provided to an employee and thus does not fall within the definition of business activity as there is no intention to earn any income from the same.
- Thus, the provision of said facility cannot be regarded as a 'business'. Accordingly, even if there is a related party transaction, it is not a 'supply' in terms of sl. no. 2 of Schedule I to the CGST Act, 2017.
- The transportation facility is a part of the HR policy of the Applicant and provided in the

⁶ 2020-VIL-316-AAR

⁷ Sl. no. 2 reads as supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business



course of employment in return for the services supplied by the employees. Thus, it is a consideration for the supply by the employee to the employer and thereby not a supply in terms of sl. no. 1 of Schedule III to the CGST Act, 2017.

Recovery of nominal amount for the transportation facility

- In order to qualify as ‘supply’, the activity should be in the course or furtherance of business which is not so in the present case (discussed above).
- The vendor raises the invoice on the Applicant, who then recovers only a nominal amount which is deducted from the salary of the employee. The said recovery cannot be regarded as a ‘consideration’.
- Transportation facility is a benefit provided in the course of employment and thereby covered under sl. no. 1 of Schedule III to the CGST Act, 2017.
- In addition, the employee cannot enforce any legal action if the Applicant decides to stop the said facility. The Applicant has not abstained from doing anything in return for the said service. Thereby, the provision of the said service free of cost or by way of recovery does not fall under the definition of ‘consideration’ as defined under section 2(31) of the CGST Act, 2017.
- Furthermore, reliance was placed upon the advance ruling in the case of *Tata Motors Ltd.*⁸ wherein also it was held that no GST was leviable on the nominal amount recovered from the employees for the bus facility.
- After considering the facts of the case, the Authority observed as follows:
 - The transportation facility is available to all employees except those who have opted for Flexible Benefit Plan (“FBP”) allowance in their salary structure. Basis the sample salary slips submitted, it emerged as follows:

- Employee who has not opted for the facility gets ₹21,000 under FBP;
- Employee who avails ordinary bus transportation facility do not get FBP allowance;
- Employee who avails AC bus transportation facility does not get FBP allowance and a recovery of ₹600 is made.

- The expression ‘furtherance of business’ is broad enough to cover any supplies made or anything done in connection with business while carrying out business or simply an ordinary activity of that organization to run the business. An activity done as a part of CSR by a company is also a supply in the furtherance of business. Thus, the transportation facility provided is included in the activities done for furtherance of business even if it is without consideration. In some cases, where nominal recovery is present, consideration is present.
- FBP benefits are not provided to employees who opt for the transportation facility. The facility is a supply of transportation service by the employer to the employee in furtherance of its business.
- Under Schedule III to the CGST Act, 2017, what is not taxable is the supply of service by an employee to employer and not by the employer to employee. Therefore, the said facility is not covered within Schedule III.
- The advance rulings relied upon are not applicable as the facts are different from that in the present case.
- The transportation facility is an activity for furtherance of business i.e. manufacturing / trading of intralogistics systems.

Ruling

GST is applicable on the transportation facility provided to the employees (with or without recovery) and the valuation of supply is to be done in accordance with section 15 of the CGST Act, 2017.

⁸ 2020 (41) G.S.T.L. 35 (A.A.R. - GST - Mah.)



Dhruva Comments:

The CBIC vide press release dated July 10, 2017 had clarified that supply by an employer to employee in terms of a contractual agreement, shall not be subjected to GST.

Contrast to the current ruling, the Maharashtra Authority for Advance Ruling in the case of *Tata Motors Limited* (*supra*) held that recoveries made from employees towards transportation does not constitute 'supply'.

It would be interesting to revisit the employment terms considering the divergent rulings being issued on the subject matter.





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