IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

THURSDAY, THE 30TH DAY OF APRIL 2020 / 10TH VAISAKHA, 1942

WA.No.648 OF 2008(E)

AGAINST THE JUDGMENT IN WPC 12189/2007 DATED 29-06-2007
OF HIGH COURT OF KERALA

APPELLANTS/PETITIONERS:

1 STATE OF SIKKIM,
REPRESENTED BY DIRECTOR OF LOTTERIES,
SIKKIM STATE LOTTERIES, GOVERNMENT OF SIKKIM.

2 A. JOHN KENNEDY,
(PROPRIETOR) MEGHA DISTRIBUTOR,
OFFICE AT 15/650, KUNNATHUR MEDU,
COIMBATORE MAIN ROAD, PALAKKAD.

BY ADVS.
SRI.A. KUMAR
SMT. G. MINI,
SRI. S.K. BAGARIA SR. ADV.

RESPONDENTS/RESPONDENTS:

1 STATE OF KERALA,
REPRESENTED BY ITS CHIEF SECRETARY,
GOVT.OF KERALA, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695001.

2 SECRETARY,
TAXES (H) DEPARTMENT, GOVT.OF KERALA,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001.

3 COMMISSIONER OF COMMERCIAL TAXES,
COMMERCIAL TAXES DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001.

4 THE DIRECTOR,
KERALA STATE LOTTERIES,
GOVT. OF KERALA, THIRUVANANTHAPURAM-695001.

5 THE DEPUTY COMMISSIONER,
COMMERCIAL TAXES DEPARTMENT, PALAKKAD-678001.

6 THE ASSISTANT COMMISSIONER (ASSESSMENT),
COMMERCIAL TAXES, SPECIAL CIRCLE, PALAKKAD-678001.

R1 TO R6 BY SRI. C.E. UNNIKRISHNAN, SPL.G.P.(TAXES)
R1 TO R6 BY ADV. SRI. PALLAV SHISHODIA, SR. ADV.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 04-03-2020, THE COURT ON 30-04-2020 DELIVERED THE FOLLOWING:

'C.R.'

C.K. ABDUL REHIM, J.
&
T.V. ANILKUMAR, J.

W.A. No. 648 OF 2008

DATED THIS THE 30th DAY OF APRIL, 2020

J U D G M E N T

Abdul Rehim, J:

The petitioners in the writ petition, W.P (C) No.12189/2007, are the appellants herein, challenging judgment of the Single Judge dismissing the writ petition. The 1st appellant is the State of Sikkim and the 2nd appellant is the Distributor of the paper lotteries organized by the 1st 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.

2. Brief history of the impugned legislation may be worthfull to mention. By virtue of the Finance Act, 2001, introduced with effect from 23-07-2001, 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 and others (2007 (2) KLT 397) = (2007 (2) KHC 427)** this court held that Section 5BA of the KGST Act is ultra vires and unconstitutional. Eventhough the State of Kerala filed appeal before the Division Bench, it was dismissed by relying on the dictum laid by the Hon'ble Supreme Court in **Sunrise Associates V. Govt. of NCT of New Delhi and others (AIR 2006 SC 1908)**, in which earlier ruling of the Hon'ble Supreme Court in **H. Anraj V. Govt. of Tamil Nadu (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 hon'ble Supreme Court in the ruling reported in **State of Kerala V. Prabhavathy Thankamma and others ((2009) 3 SCC 511)**.

3. In the year 2005, the impugned legislation was enacted, with effect from 08-04-2005, 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'. Section 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 willful 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 1 st 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 above said 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 7th Schedule in 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 7th Schedule, and therefore the imposition of tax on paper lotteries is within the realm of the state legislature. Eventhough 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 repelled all the above said contentions. Relying on a decision of the Hon'ble Supreme Court in **M/s. B.R. Enterprises V. State of Uttar Pradesh (AIR 1999 SC 1867)** it was found that, even in case of state organized lotteries there exists an element 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 7th Schedule was found valid. Referring to ruling of the Hon'ble apex court in **State of West Bengal V. Kesoram Industries Ltd. ((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, 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 2nd 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 on the sale turnover of the Promoter. Referring to **Sunrise Associates** (supra) 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 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 7th Schedule of 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 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) & (3) of the Constitution of India, no legislature of a state can make law touching upon the subject of state oranised lotteries, is the contention.

9. In support of the above said contention, learned Senior Counsel for the appellants placed reliance on a decision of the Hon'ble Supreme Court in **H. Anraj and others V. State of Maharashtra ((1984) 2 SCC 292)**, in which it is held as follows;

> *“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 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 Act. 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 Sec. 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 and others ((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 from Entry 34 of List II of Schedule VII by Entry 40 of List 1, therefore 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** (supra), the Hon'ble 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 1st 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 and others ((1994) 4 SCC 217),** a Constitution Bench of the Hon'ble 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 7th 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 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 **M/s. B .R. Enterprises** (supra) that, lottery is 'gambling' and therefore obeviously tax on lottery is a subject covered by Entry 62 of List-II of the 7th 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.** (supra), 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, eventhough 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**. (supra). Referring to an earlier decision of the apex court in **Hoechst Pharamaceuticals Ltd. V. State of Bihar ((1983) 4 SCC 45)**, it is held as follows;

> *(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 Article 246. There is no overlapping 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 with in List II though it may incidentally affect any item in List I."*

In **Kesoram Industries Ltd.** (supra) 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 & II classified into two groups : *"(a) those that are it will 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.

15. 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' 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 7th Schedule of the Constitution, which is summed up by the Hon'ble Supreme Court in para 74 of the judgment in **Kesoram Industries Ltd.**(*supra*) is in support of the above view. The principle evolved therein are as follows:

> *"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 of 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 7th 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 Hon'ble Supreme Court in **State of Bombay v. RMD Chamarbaugwalla (AIR 1957 SC 699),** in support of the above.

16. Emphasizing the above contentions, learned Senior Counsel for the 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 **M/s B.R. Enterprises Ltd.**(*supra*). In para 70 of the said judgment it is held as under;

> *"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 Article 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 Hon'ble Supreme Court in **Jindal Stainless Ltd. & Anr v State of Haryana [(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 demand otherwise. In para 976.3 of the said judgment it is held as under;

> *"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 Kesavananda Bharati Versus 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 of those words. This rule of interpretation is applicable in construing a Constitution as well..."*

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

18. In summing up the arguments based on the ground of legislative competence, 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 anywhere 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 appellants also placed reliance on a decision of the Hon'ble Supreme Court in **Union of India v. Shri Harbhajan Singh Dhillon [(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 legislative 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;

> *"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 one included in List II or in List III or is the tax sought to be levied mentioned in List-II or in List III No question has to be asked about List I. If the answer is in the negative, then it follows that Parliament has power to make laws with respect to that matter or tax.

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 this 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 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** (*supra*), 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 with in 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.**(*supra*), **RMD Chamarbaugwalla**(*supra*), **Jindal Stainless Ltd.**(*supra*) and **Harbhajan Singh Dhillon**(*supra*). 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 **M/s B.R. Enterprises** (*supra)*, referring to **RMD Chamarbaugwalla**

(*supra*), it is held by the Hon'ble 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 Hon'ble 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**(*supra*) 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.

21. During course of the argument it was pointed out that, validity of a 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 14th August 2009 (**N.V. Marketing Pvt. Ltd V. State of Maharashtra and others – writ petition No.432/2007 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 7th 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**. (supra). 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 paragraph 100 to 107 in the judgment

in **Kesoram Industries Ltd**. (supra), 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 7th 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 organiseed 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.** (supra), 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 7th 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 on 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** (supra) 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 7th 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.** (supra). 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** (supra) 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 7th 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 27-12-2010)** 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 Hon'ble Supreme Court in the decision in **B.R. Enterprises** (supra) held that, eventhough 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.

25. Next issue agitated is regarding the ambiguities, uncertainties and vagueness 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-clause (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 chargability. 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 chargability of the taxing event. Further, if it is assumed that the chargability 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 chargability 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 chargability or on the incidence of taxation. Therefore Sub-Section (2) or Sub-Section (3) does not create any chargability or payability, apart from Sub-Section (1). There is complete ambiguity, uncertainity 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 certainity 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 need 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 Hon'ble Supreme Court in **Govind Saran Ganga Saran V. Commissioner of Sales Tax and others (1995 (Suppl.) SCC 205)**, in which it is held as follows;

> *"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 ill 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 Hon'ble Supreme Court in **Madhuram Agarwal V. State of Madhyapradesh ((1999) 8 SCC 667).** A Constitution Bench of the Hon'ble apex court while dealing with vires of the provisions in Madhyapradesh 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 and others ((2018) 9 SCC 1)** the Hon'ble Supreme Court observed that;

"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 intendment; 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 Hon'ble Supreme Court in **Kesoram Industries Ltd.** (supra), which are as follows;

"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 is 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 Hon'ble Supreme Court in **Commissioner, Central Excise and Customs, Kerala V. Larsen and Toubro Ltd. ((2016) 1 SCC 170)**. In paragraph 14 of the said judgment it is held as under;

> *"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 Philips India Ltd. and another V. State of Uttarpradesh and others ((2005) 2 SCC 515)**. In paragraph 57 of the judgment it is held;

> *"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 chargability 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 Hon'ble Supreme Court in the above cited decisions, are not satisfied in Section 6 of the impugned Act and there is complete uncertainity, 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 Hon'ble Supreme Court in **Sunrise Associates** (*supra*). 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** (*supra*) 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** (*supra*) 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.

29. *Per contra*, Sri. Bagaria pointed out that, history of the legislation would 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 08.04.2005, at a point of time prior to settlement of the law on the point, by the

Hon'ble Supreme Court in **Sunrise Associates**(*supra*), which was decided only on 28.04.2006. 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 above said 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 Hon'ble Supreme Court in **Sunrise Associates** (*supra*). 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 sale 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 Hon'ble Supreme Court, including the Constitutional Bench decision in **Sunrise Associates** (*supra*), 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. Inspite 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.** (*supra*). 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 1st 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 analyzed 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. No where 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 1st 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 Hon'ble apex court. Sri. Pallav Shishodiya submitted that, even assuming that such a contention can be considered, it only relates to assessibility 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.

32. Learned Senior Counsel for the respondent/state submitted that, contention 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**(*supra*), wherein it is held as follows;

> *"The next point urged by the petitioners is that under Arts. 245 and 246 the Legislature of a State can only make a law for the State or any part thereof and, consequently, the Legislature overstepped 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 4 annas per entry.

These advertisements reach a large number of people resident within the Stat. 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 undertake 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 it is 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 Hon'ble Supreme Court. Going by provisions of the Act impugned herein, merely because the

Promoter, who includes the distributor appointed by the 1st 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**(*supra*). 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 'estoppal' '*contemporanea exposito*' and 'constructive res judicata'. It is pointed out that the 2nd 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 Hon'ble Supreme Court in **Devilal Modi V. The Sales Tax Officer (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 2nd appellant. The State of Sikkim (1st 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** (supra) 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 declinied the challenges and an appeal against the said order was also dismissed by the Hon'ble 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 2nd 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 1st appellant - State of Sikkim had given necessary authentification with respect to appointment of the 2nd 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 exposito*' 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 estoppal 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 estoppal. 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 estoppal is arises. In taxation laws there is no estoppal. Learned Senior counsel for the respondents placed reliance on certain rulings in resisting the arguments on the ground of estoppal, such as **CIT V. OVR SR Arunachalam Chettiar (AIR 1965 SC 1216), Municipal Corporation of City of Pune V. Vidyut Metalitcs Ltd. & others ((2007) 8 SCC 688)** and **Dunlop India Ltd. V. Union of India ((1976) 2 SCC 241)**.

36. Placing reliance on the doctrine of '*contemporanea exposito',* learned Senior Counsel for the respondents / State cited the rulings in **National & Grindlays Bank Ltd. V. Municipal Corporation ((1969) 1 SCC 541), Deshbandhu Gupta & Co. V. Delhi Stock Exchange Association**

((1979) 44 SCC 565) and **Indian Metals & Ferro Alloys Ltd. V. CEE ((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 exposito* or constructive res judicata, The appellants cannot also be non-suited on the doctrine of estoppal.

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 and others ((1999) 9 SCC 599**. 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 1st April, 1991 and 30th September, 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 over-ruling 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 supplied)*

The aforesaid proposition was reiterated by the Hon'ble Supreme Court in the ruling in **Somaiya Organics India Ltd. V. State of U.P. ((2001) 5 SCC519)**. Referring to a passage from the judgment in **Galak Nath V. State of Punjab (AIR 1967 SCC 1643)** it was reiterated as follows;

> *".....we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective over-ruling 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 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 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 Hon'ble 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 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.

38. The issue lastly considered is with respect to claim for refund of the tax 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 2nd appellant, who is the Distributor appointed by the 1st 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 decision of the Hon'ble Supreme Court in **Mafatlal Industries Ltd. and others V. Union of India and others ((1997) 5 SCC 536)**. The Hon'ble 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) & (iii) it is held as follows;

> *(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 Tilokchand Motichand 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 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.

39. Factual contention on behalf of the respondents seems to be that, the refund, if made, will amount to unjust enrichment

to the Distributor (2nd 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 2nd 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 above said 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 1st 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.** (supra), 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.

40. From the factual scenario evaluated and found as above, it is clear that 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 1st appellant State. Nor it is proved through any convincing materials that such liability has been paid by the 2nd 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.

41. Based on the findings rendered hereinabove, we are persuaded to allow 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 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 1st 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.

Sd/-

C.K.ABDUL REHIM

JUDGE

Sd/-

T.V.ANILKUMAR

JUDGE

Ul/AMG

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE A	TRUE COPY OF THE ORDINANCE NO.53/2010 DATED 13.09.2010.
ANNEXURE B	TRUE COPY OF THE AMENDED RULES DATED 11.10.2010.
ANNEXURE C	TRUE COPY OF THE AMENDMENT ACT.
ANNEXURE D	A TRUE COPY OF THE JUDGMENT IN WP(C)NO.30355 AND 30176 OF 2006 DATED 10.01.2007.
ANNEXURE E	TRUE COPY OF THE JUDGMENT IN W.A.NO.88 OF 2007 DATED 30.03.2007.
ANNEXURE F	TRUE COPY OF THE ORDER IN I.A.NO.17018/2007 IN WP(C)NO.36645 OF 2007K DATED 28.12.2007.
ANNEXURE G	TRUE COPY OF THE JUDGMENT IN WP(C)NO.36645/07 DATED 25.02.2008.
ANNEXURE H	TRUE COPY OF THE JUDGMENT IN WRIT PETITION NO.28081 OF 2010 DATED 26.10.2010.
ANNEXURE I	TRUE COPY OF THE LOTTERY REGULATION RULES, 2010.

RESPONDENT'S ANNEXURES:

ANNEXURE R1	N
ANNEXURE R2	N
ANNEXURE R3	N
ANNEXURE R4	N
ANNEXURE R5(A)	A TRUE COPY OF THE AGREEMENT DATED 06.10.2004.
ANNEXURE R5(B)	A TRUE COPY OF THE AGREEMENT DATED 18.10.2004.