IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.194/Coch/2019 : Asst.Year 2000-2001

Sri.Rajmohan V.V. Kumbalappalli Peringanam P.O. Via. Nileshwar Kasargod District **PAN : BFRPR3172K.**	Vs.	The Income Tax Officer Special Ward Kannur.
(Appellant)		(Respondent)

Appellant by : Sri.M.C.Jacob
Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 01.08.2019		**Date of Pronouncement : 07.08.2019**

O R D E R

Per George George K, JM

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 20.12.2018. The relevant assessment year is 2000-2001.

2. The grounds raised read as follows:-

"1. The order of the Commissioner of Income Tax (Appeals) is contrary to law, facts and evidence and is quite illegal.

2. The Assessing Authority & Commissioner of Income Tax (Appeals) erred in law when they held that the value of 1 kg. of gold is winning from "Lottery".

3. The Susha Ayyar (ITR 1936 Madras 225) relied by the CIT(Appeals) was case of a Chti Fund and the

scheme of Chits always involves a draw of lots. The participant joins the scheme with intention to participate in the scheme. The facts are totally different and the assessee in this scheme is not buying goods for the purpose of participating in a lottery.

4. For these reasons and other grounds to be advanced at the time of hearing it is prayed that the impugned order may be set aside."

3. Brief facts of the case are as follows:

The assessee had made purchases of cloth from a shop at Kanhangad. The purchases made by the assessee was above the specified monetary limit, hence, he was given certain number of price coupons. The assessee did not pay any consideration for the price coupons. The price coupon given to the assessee was under a scheme of the Kasargod Vyapari Vyavasaya Ekopana Trust (KVVES Trust) (a unit of Kasargod District Merchant Association). The assessee won first price on lot being one kg. of gold. On production of coupon, the assessee was issued 600 gms. of gold coins and balance was deducted being 40% of the price money by KVVES Trust u/s 194 B of the I.T.Act. The one kg. of gold coins was valued at Rs.4,290,200 and total tax deducted at source including surcharge was Rs.1,88,848.

4. The assessee had filed return of income for assessment year 2000-2001 on 02.05.2000 declaring total income at Rs.`Nil', claiming refund of Rs.1,88,748 being tax deducted at source by KVVES Trust from the gift value of Rs.4,29,200 given to the assessee. The assessee during the course of assessment

proceedings submitted that winning price from free coupons are not chargeable to tax. However, the assessment u/s 143(3) r.w.s. 147 was completed vide order dated 23.03.2001, wherein the Assessing Officer held that the assessee's first price of one kg. gold is nothing but winning from lottery and thus chargeable to tax as per rates provided in section 115BB of the I.T.Act. It was concluded by the Assessing Officer that the tax has been rightly deducted at source by KVVES Trust authorities and the total income was assessed at Rs.4,24,200. Additions were contested before the first appellate authority, who confirmed the assessment order made by the Assessing Officer. Aggrieved, the assessee filed further appeal to the Tribunal. The Tribunal was of the view that the assessee was not properly heard in the matter. Therefore, the Tribunal set aside the order of the CIT(A) and restored the issue to the CIT(A) for fresh consideration. Pursuant to the Tribunal's order, the CIT(A) decided the issue against the assessee. The relevant finding of the CIT(A) in this regard reads as follows:-

> *"4. I have considered the submissions and also perused the facts of the case. The appellant's submissions are based on the plea that essential elements 'Consideration and Chance or Risk' are absent in the case of prize won by him under free prize coupon scheme. The appellant has also relied upon certain decisions. In the case of ITO Vs. Malayala Manorama (277 ITR(AT) 133 (Cochin) the issue was whether tax is deductable on the prize money in the contest organised by the assessee. The Hon'ble ITAT observed that skill was an integral part of the scheme and therefore the assessee was not liable to deduct the tax. Thus the decision is not applicable in the case of appellant. Similarly, in the decision relied upon by the appellant in CIT vs. G.R.Karthikeyan (201 ITR 866 (SC), again the issue was whether the tax is liable to be deducted where skill and endurance is a part of contest. It is not the case of appellant that any skill or endurance was part of the scheme in which he participated. The other*

case relied upon by the appellant is CIT Vs. Dy. Director of Small Savings (266 ITR 2) (Mad). The facts of the case are again different from the facts here and in fact the Hon'ble Madras High Court while deciding the issue has specifically observed that the scheme in that case is not one for the promotion for sale of any goods. Therefore, all these decisions are not applicable to the appellant.

4.1. Coming to the first element whether there was a element of chance or not in the case of appellant, the guidelines of scheme prescribe that the free price coupon was given to every purchaser purchasing goods over a stipulated amount and prices were to decided by draw of lot from those coupon. Therefore, it is seen that the element of chance is present in howsoever limited way amongst the purchasers who purchased over a stipulated amount and were awarded the coupons. As regards the other essential element of whether any consideration was paid or not, it is relevant to draw observations from an old decision of Madras High Court in the case of Sesha Awar Vs. Krishan Awar (AIR 1936 Madras 225) in which the majority had held that the chit scheme under which Rs. 3 per ticket was to be paid for 50 months by 625 persons and to the holder of one lucky ticket to be drawn each month Rs. 150/- was to be paid, amounted to scheme of lottery. The Hon'ble Court observed that scheme may fairly be regarded as lottery if it is clear that whatever other benefit the competitor may get in return for his money the chance of getting the prize was also part of the bargain and must have entered into his calculation. In the case before me, though no direct consideration has been paid by the appellant for purchase of the coupon, but purchasing goods over the stipulated limit will mean that the chance of getting prize was also part of the bargain and this must have entered into the appellant's calculation. In other way, the consideration is indirectly present in the bargain of purchasing goods over a stipulated amount. Therefore, I hold that both the essential elements i.e. consideration and risk or chance are present in the case of appellant. The transaction is by no stretch of means a gift, as the transaction is purely with a stranger and the essential elements of gifts are not present in this case. The other arguments that it is an income of merchant who gave the price coupon is totally unacceptable as the merchant has in no way benefitted from the price given to the appellant. Definition of Section 2(24)(ix) is comprehensive enough to cover such transaction / arrangements. Thus, the appellant gets no relief and the assessment order is upheld.

5. In result, the appeal is dismissed."

5. The assessee being aggrieved has filed the present appeal before the Tribunal. The learned AR reiterated the submissions made before the authorities below. The learned AR further submitted that the essential ingredients of the term “lottery” as it stood prior to the insertion of *Explanation* to section 2(24)(xi) is not satisfied in this case and the assessment in this case being assessment year 2000-2001, the price received by the assessee being 1 kg. gold cannot be brought to tax since there was no consideration paid / contribution made for participation. Moreover, it was submitted that there is no risk of loss of any amount in participating in this chance / lot among the participants. In other words, it was submitted that there was no contribution by the assessee in making purchase of this gift coupon. The gift coupon admittedly is “free gift coupon”.

6. The learned Departmental Representative strongly supported the orders of the Income-tax authorities.

7. We have heard the rival submissions and perused the material on record. Section 2(24) of the Act defines 'Income'. The Finance Act, 1972 introduced a new sub-clause (ix) in the definition of "income" in section 2(24) of the Act, which reads as follows :

> *"2(24) ..... .*
> *(ix) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever. "*

7.1 Winnings from lotteries on and after April 1, 1972 came

within the scope of the definition of "income". Prior to April 1, 2002, the Act did not contain a definition of "lottery". In the Finance Act, 2001, an explanation was added below section 2(24) (ix), which Explanation reads thus:

> *"Explanation, -- For the purposes of this sub-clause, --*
>
> *(i) 'lottery' includes winnings, from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;*
>
> *(ii) 'card game and other game of any sort' includes any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game. "*

7.2 The term `lottery' is required to be construed without the aid of Explanation. The explanation was added w.e.f. April 1, 2002. The Explanation is not retrospective nor can Explanation be regarded as merely clarificatory in this case. The term `lottery' is widened to bring within the ambit also price won without any contribution for participation. In other words the Explanation, added w.e.f from 01.0.2002, is not applicable to this appeal which relates to A Y 2000-2001.

7.3 The term 'Lottery" is not defined in the Income Tax Act 1961. Lottery is defined in The New Oxford Dictionary of English as *"a means of raising money by selling numbered tickets and giving prizes to the holders of numbers drawn at random."* Halsbury's Laws of England, Fourth Edition Reissue, Volume 4(1), at paragraph 7, which deals with "lotteries", reads thus:

> *"There is no statutory definition of a lottery. However, it has been said that:*
>
> *A lottery is the distribution of Prizes by chance where the persons taking part in the operation, or a substantial number of them make a payment or consideration in return for obtaining their chance to a prize. There are really three points one must look for in deciding whether a lottery has been established: first of all, the distribution of prizes: secondly, the tact that this was to be done by means of a chance and thirdly, that there must be some actual contribution made by the participants in return for their obtaining a chance to take part in the lottery. "*

7.4 Before a scheme can be regarded as a lottery, there must be the element of distribution of prizes which should be by chance or lot and such distribution should be among those who had paid a price for participating in the scheme. Mere gratuitous distribution without any price having been paid by the participants for acquiring the chance and receiving a prize that is ultimately distributed, would not amount to a lottery. That appears to be the reason why the *Explanation* was added under section 2(24)(ix), w.e.f. 1.4.2002, to bring within the purview of section 194B, winnings from prizes awarded to any person by a draw of lots under any scheme or arrangement, whether or not the persons taking part in that arrangement, had paid a price for acquiring the chance of winning the prize. The *Explanation* lays emphasis on the winnings awarded by a draw of lots of chance. The Hon'ble Madras High Court in the case of *CIT v. Dy.Director of Small Savings [(2004) 266 ITR 27 (Mad.)]* had considered an identical case where free price coupons were given to the participants. In the case considered

by the Hon'ble Madras High Court, free Prize coupons were distributed in the 'District Level Gift Linked Savings Mobilization Scheme' when the investor in the scheme invested in excess of Rs.1000. Investor did not pay any price for the coupon. Coupons were distributed free of cost. A free chance was given to the investor Prizes were awarded to the holder of the Lucky- Coupon. The Hon'ble Court was of the view that before a scheme can be regarded as a lottery, there must be the element of distribution of prizes which should be by chance or lot and such distribution should be among those who had paid a price for participating in the scheme. Mere gratuitous distribution without any price having been paid by the participants for acquiring the chance and receiving a prize that is ultimately distributed would not amount to a lottery. The Hon'ble High Court of Madras held as follows: *"The chance given to the investor to win a prize is a free chance, and is not a chance given in return for a price or contribution paid. The Scheme is not a lottery"*

7.5 The Hon'ble Kerala High Court in the case of *Canaan Kuries & Loans (P.) Ltd. v. ITO [(2005) 272 ITR 534 at 543 (Ker.)]* had held that the essential elements that go to constitute a lottery are : (a) a prize or some advantage in the nature of a prize; (b) distribution thereof by chance, and (c) consideration paid or promised for purchasing the chance. The chance of a person getting the prize cannot be treated as part of the bargain unless independent consideration is there with respect to the prize awarded. In the instant case, it is not in dispute

that the assessee received a 'FREE COUPON'. It is even printed on the face of the coupon itself that it is free. Hence the assessee has no risk of loss '. Being a 'free coupon', the assessee obviously has' not paid any consideration' for his participation in the scheme. Moreover, the assessee had not made any contribution to the organizers, KVVE Trust.

7.6 The Hon'ble Karnataka High Court in the case of *Visveswaraiah Lucky Centre v. CIT [(1990) 189 ITR 698 (Kar.)]* had held that to constitute a lottery winner must be not only a contributor to the prize amount but must also be a participant in the lottery. In this case, the Hon'ble High Court was considering a case of an assessee who was a sub-agent selling lottery tickets. The assessee received commission at 15% of the face value of lottery tickets. Further, the assessee had also received an amount of Rs.1,00,000 as bonus commission on account of the fact that one of the tickets sold by him in a particular draw won the first prize of Rs.10,00,000. The assessee claimed the benefit of section 80TT of the I.T.Act. The question was whether it was a `lottery' within the meaning of section 80TT of the I.T.Act as it stood then (since omitted). The Hon'ble Karnataka High Court, after analyzing the issue, held as follows:-

> *"In dealing with the facts of that case, the learned judges went into the question of "lottery ", which was not a term defined under the Act or other enactment where it is required to be defined. In that circumstance, they referred to the meaning of the word "lottery" in Webster's New International Dictionary and Legal and Commercial Dictionary by*

S.D Mitra as well as the judicial definition of lottery as found in Corpus Juris Secundum. We are of the view that the definition found in Corpus Juris Secundum is the most appropriate and we extract it :

"Pooling the proceeds derived from chances or tickets taken or purchased and then allotting such proceeds or a part of them or their equivalent by chance to one or more such takers or purchasers are indicia of a lottery. "

7. From the above, it is clear that if lottery is a scheme for the distribution of prizes by lot or chance, it is necessary that the winner must be not only a contributor to the prize amount I but must also be a participant in the lottery. All the ingredients which are set out in the definition in Corpus Juris Secundum must be present to identify the winner and the winnings of the lottery. (emphasis supplied)

The Hon'ble H.C held that the income of Rs.1,00,000/- from 'bonus commission' is not income from lottery in the hands of the assessee as the assessee had not made any contribution nor is he the winner of the prize money. There the essential element of a lottery namely participators, contribution and winning of prize was absent."

7.7 The Hon'ble Guwahati High Court in the case of *Director of State Lotteries Assam v. ACIT [(1999) 238 ITR 1 (Gau)]* had held that the assessee in the said case was not liable for non-deduction of tax u/s 194B of the I.T.Act in respect of unclaimed / undisbursed prize money. The assessee in the case considered by the Hon'ble Guwahati High Court had contended that unclaimed/ undisbursed prize money was not winning from lottery and as such the provisions of section 194B of the I.T.Act for deduction of income tax at source was not applicable in respect thereof. The Court held that there are no "wining from lotteries" as the petitioner had not participated

in the draw intending for a prize. Any income which is incidental to the business activities carried on by the assessee is a business income and cannot be treated as income from other sources as one of the necessary ingredients of lottery is that the winner should be a participant in the lottery, and that the organizing agent does not participate in lottery draw with an intention to win prize, but derives income from selling lottery tickets.

7.8 The Cochin Bench of the Tribunal in the case of *ITO v. Malayala Manorama Co. Ltd. [2005) 277 ITR (AT) 133 (ITAT-Coch)]* was considering a case of an assessee who had conducted a world cup football forecast contest. The assessee received 10,25,859 forecasts, out of which 22 entries was correct forecast. Out of the correct 22 forecast, the first three prizes were selected by draw of slot. The Assessing Officer took the view that it is a case of lottery. The CIT(A) allowed the appeal of the assessee. On further appeal by the Revenue, the ITAT held that it is not a lottery within the meaning of income as defined u/s 2(24)(ix) of the I.T.Act as it stood then. The relevant observation of the ITAT reads as follow:-

> *"In the case of New Orleans v. Collins (27 So 532, 536, 52 La Ann 973) at page 468, it has been held that "lottery is a scheme for the distribution of property by chance or lot among persons who have paid or agreed to pay a valuable consideration for the privilege of participating in such scheme". To bring a scheme into the field of lottery, two ingredients are required.*
>
> *(a) Distribution of property by chance or lot among the participants;*
> *(b) Participants have either paid or agreed to pay a*

> *valuable consideration for the privilege of participation in the scheme.*
>
> *In the instant case of the assessee, the second ingredient is clearly absent; no consideration is required to be paid to participate in the context. Even the first ingredient i.e. distribution of property by chance or lot is also absent because the participant has to have some skill or knowledge to make the correct prediction."*

7.9 We are of the view that the essential ingredients of 'Lottery' as it stood prior to insertion of the Explanation to Section 2(24)(xi) of the I.T.Act mandates the following:

> (1) Distribution of prize by chance or lot among the participants.
>
> (2) The participants have either paid or agreed to pay a valuable consideration / contribution for the participation.
>
> (3) Risk of loss.
>
> (4) Intention to participate

7.10 It is customary in Kerala to buy new clothes during onam festival. The intention of the assessee was to purchase new clothes for himself and his family. The assessee approached the cloth merchant with this predominant intention. This particular scheme of distributing free coupons at the time of festival seasons like Onam is offered by almost all the merchants in the town, be it Textiles, Footwear, Groccery, Jewellry etc. In the case of this assessee, the choice of a particular cloth merchant was the availability of the desired dress material at his affordable price and not the offer of a free

coupon. Hence it cannot, by any stretch of imagination, be presumed that the assessee visited a particular merchant and purchased the dress material from him with intention to participate in the lot. Hence there is 'no intention to participate'.

7.11 The learned CIT(A) has strongly relied on the judgment of the Hon'ble Madras High Court in the case of *Sesha Ayyar v. Krishan Ayyar (AIR 1936 Madras 225).* The facts and circumstances of the case relied on by the learned CIT(A) is different from that of the case under consideration. The Hon'ble Madras High Court was analyzing the situation contemplated in Sect.294A of the Penal code. Maintaining an office for conducting lottery business was an offense punishable with rigorous imprisonment for six months u/s 294A of the Penal Code. The facts considered by the Hon'ble Madras High Court was a period in history when lottery business was illegal and maintaining a place for conducting a lottery was illegal. Since lottery was not defined in the Penal code, the Hon. High Court had to examine facts at first to ascertain if the Prize Kuri was a `lottery'. The interpretation given in this context cannot be taken as an aid to interpret the term `lottery' under the Income Tax laws. The CIT (A) had relied on the observation in para 10 of the judgment given by his Lordship Justice Varadachariar (one among the five judges in the bench). The learned Judge was of the view that "Scheme may fairly be regarded as a lottery if it is clear that whatever other benefits the subscriber or competitor may get in return for his money, the chance of his getting the prize was also part of the bargain and must

have entered into his calculation. The Hon'ble Madras High Court in the case of *Sesha Ayyar v. Krishan Ayyar (supra)* was examining a customized scheme and finding rendered therein could not universally applied. Moreover, the Hon'ble Madras High Court in the case of *CIT v. Dy.Director of Small Savings [(2004) 266 ITR 27 (Mad.)]* had distinguished the Madras High Court judgment in the case of *Sesha Ayyar v. Krishan Ayyar (supra)*. The relevant finding of the Hon'ble Madras High Court in the case of *CIT v. Dy.Director of Small Savings (supra)* read as follows:-

> "Officer, as also the Commissioner, had placed strong reliance on an old decision of this court in the case of Sesha Ayyar v. Krishna Ayyar, AIR 1936 Mad 225, in which the majority had held that a chit scheme under which rupees three per ticket was to be paid for fifty months by 625 persons and to the holder of one lucky ticket to be drawn each month Rs. 150 was to be paid with the recipient no longer being liable to pay the monthly subscription for the remaining period, amounted to a scheme of lottery. Varadachariar J. who formed part of that majority, observed that the scheme may fairly be regarded as a lottery if it is clear that whatever other benefits the subscriber or competitor may get in return for his money, the chance of his getting the prize was also part of the bargain and must have entered into his calculation.
>
> The decision of this court with regard to kuris in Sesha Ayyar v. Krishna Ayyar, AIR 1936 Mad 225 was rendered after considering earlier English decisions, and by following the same. Subsequent decisions of the English courts by the Queen's Bench in the case of Reader's Digest Association Ltd. v. Williams [1976] 3 All ER 737 and the one by the House of Lords in the case of Imperial Tobacco Ltd. v. Attorney General [1980] 1 All ER 866 set out the current state of the law with regard to lotteries in England.
>
> In the case of the Reader's Digest [1976] 3 All ER 737, it was held that to establish that a prize constitutes a "lottery" within section 41 of the Betting, Gaming and Lotteries Act, 1963, it must be shown, in addition to the distribution of prize by chance, the participants must have made some contribution in return for obtaining the chance of a prize, and that where a significant number of participants have made no such contribution the prize draw is not a lottery."

7.12 In the light of the aforesaid reasoning and judicial pronouncements cited supra, we are of the view that essential ingredients of `lottery' as it stood prior to the insertion of

Explanation to section 2(24)(ix) of the I.T.Act is absent in the facts and circumstances of the case and the same cannot be taxed as a `lottery'. Hence, we reverse the order of the CIT(A). It is ordered accordingly.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this 07th day of August, 2019.

Sd/-	Sd/-
(Chandra Poojari)	**(George George K.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 07th August, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellants
2. The Respondent.
3. The CIT(A)-Kozhikode.
4. The CIT Kozhikode.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin