

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF  
THE TAX COURT COMMITTEE ON OPINIONS**

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| MELVIN MILLIGAN and             | : | TAX COURT OF NEW JERSEY |
| KIM LAWTON-MILLIGAN,            | : | DOCKET NO. 001337-2012  |
|                                 | : |                         |
| Plaintiffs,                     | : |                         |
|                                 | : |                         |
| v.                              | : | OPINION                 |
|                                 | : |                         |
| DIRECTOR, DIVISION OF TAXATION, | : |                         |
| and STATE OF NEW JERSEY,        | : |                         |
| DEPARTMENT OF THE TREASURY,     | : |                         |
| DIVISION OF STATE LOTTERY,      | : |                         |
|                                 | : |                         |
| Defendants.                     | : |                         |
| -----x                          |   |                         |

Decided: February 23, 2015

Steven R. Klein, Esq., for plaintiffs (Cole, Schotz, P.C., attorneys,  
Lauren M. Manduke, Esq., on the briefs)

Thu N. Lam, Deputy Attorney General, for defendant Division of  
State Lottery (John J. Hoffman, Acting Attorney General of New  
Jersey, attorney)

Ramanjit K. Chawla, Deputy Attorney General, for defendant  
Director, Division of Taxation (John J. Hoffman, Acting Attorney  
General of New Jersey, attorney)

DeALMEIDA, P.J.T.C.

This is the court’s opinion with respect to the motion of defendant Division of State Lottery to dismiss the claims raised against it in the Complaint, pursuant to R. 4:6-2(e), for failure to state a claim upon which relief can be granted. For the reasons explained more fully below, defendant’s motion is denied.

### I. Allegations of Complaint and Procedural History

It is well established that when deciding a motion to dismiss pursuant to R. 4:6-2(e) for failure to state a claim upon which relief can be granted the court is to consider the allegations of the Complaint to be true, Nostrame v. Santiago, 213 N.J. 109, 113 (2013), and is “not concerned with the ability of the plaintiffs to prove the allegation[s].” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). The court, therefore, recites the facts as alleged by plaintiffs but in doing so does not adopt those facts as findings of fact.

Plaintiff Melvin Milligan is a resident of New Jersey. In June 2000, he purchased a Big Game Lottery ticket from an authorized New Jersey Division of State Lottery merchant. Mr. Milligan held a winning ticket for the June 9, 2000 drawing entitling him to a prize of \$46 million. At the time of the June 9, 2000 drawing, and when Mr. Milligan subsequently claimed his prize, N.J.S.A. 54A:6-11 provided that New Jersey lottery winnings were not subject to New Jersey gross income tax. The statute provided that gross income subject to tax “shall not include lottery winnings from the New Jersey lottery.” N.J.S.A. 54A:6-11.

Mr. Milligan alleges that at the time that he purchased his lottery ticket, the Division of State Lottery, a State agency, represented in various advertisements, on billboards, and in publications that New Jersey residents who won a prize were not required to pay New Jersey gross income tax on their winnings. The reasonable inference from these allegations, to which Mr. Milligan is entitled at this stage of the proceedings, Stubaus v. Whitman, 339 N.J. Super. 38, 52 (App. Div. 2001), certif. denied, 171 N.J. 442 (2002), is that the Division of State Lottery publicized this information as an inducement to the public to purchase a ticket for a New Jersey Lottery drawing.

As a lottery winner, Mr. Milligan could elect to receive his winnings either as a lump sum payment or as a multi-year annuity payment. After consulting with counsel, accountants and/or financial advisors, and in reliance on State law as it existed at that time, Mr. Milligan opted to receive his lottery winning in multi-year annuity payments. He decision resulted in the Division of State Lottery's agreement to send him annual payments of approximately \$1.77 million per year for 26 years. According to the representations of counsel, the annuity-payment election was effectuated by Lottery's purchase of a bond which generates annual payments to the Division sufficient to satisfy its annual-payment obligation to Mr. Milligan. After receipt of the annual payments, the Division of State Lottery withholds applicable taxes (there is no dispute that Mr. Milligan is subject to federal income tax on his New Jersey lottery winnings) and transmits the remainder to Mr. Milligan.

In 2009, a bill was introduced in the Legislature to amend N.J.S.A. 54A:6-11 to provide that New Jersey Lottery "winnings from a prize in an amount exceeding \$10,000 shall be included in gross income" subject to tax. The amendment was enacted on June 29, 2009. L. 2009, c. 69. According to L. 2009, c. 69, §5, the amendment to N.J.S.A. 54A:6-11 "shall take effect immediately and apply to taxable years beginning on or after January 1, 2009."

On April 5, 2010, Mr. Milligan and plaintiff Kim Lawton-Milligan, his spouse, filed a joint New Jersey gross income tax return for tax year 2009. They reported the annual installment of New Jersey lottery winnings Mr. Milligan received in 2009 from the Division of State Lottery as taxable gross income and paid the tax due.

On August 9, 2010, plaintiffs filed an amended New Jersey gross income tax return for tax year 2009. This return excluded from taxable gross income the New Jersey lottery winnings Mr. Milligan received in 2009. Plaintiffs stated in their amended return that they disputed the

retroactive application of the amendment to N.J.S.A. 54A:6-11 to Mr. Milligan's winnings from the June 9, 2000 drawing. Plaintiffs, therefore, sought a refund of the New Jersey gross income tax they paid on the winnings Mr. Milligan received in 2009.

By letter dated October 22, 2010, the Division of Taxation disallowed plaintiffs' amended income tax return and refund claim for tax year 2009.

On or about December 8, 2010, plaintiffs submitted a Notice of Protest and Request for Hearing with the Division of Taxation. An administrative hearing was held at the Division of Taxation on or about January 7, 2011.

By letter dated February 2, 2011, the Director, Division of Taxation rejected plaintiffs' administrative appeal and issued a Final Determination upholding the denial of plaintiffs' refund request for tax year 2009.

On June 6, 2011, plaintiffs filed a Complaint in the Superior Court, Law Division, Bergen County. They named as defendants both the Director, Division of Taxation, and the State of New Jersey, Department of the Treasury, Division of State Lottery.

Plaintiffs allege four Counts. In the First Count, plaintiffs allege that the retroactive application of the amendment to N.J.S.A. 54A:6-11 to Mr. Milligan's lottery winnings from the June 9, 2000 drawing violates the due process and equal protection clauses of both the United States and New Jersey Constitutions.

In the Second Count, plaintiffs allege that retroactive application of the amendment to N.J.S.A. 54A:6-11 to Mr. Milligan's lottery winnings from the June 9, 2000 drawing violates the common-law "manifest injustice" doctrine.

In the Third Count, plaintiffs allege that retroactive application of the amendment to N.J.S.A. 54A:6-11 to Mr. Milligan's lottery winnings from the June 9, 2000 drawing constitutes

a breach of contract. According to the Complaint, a valid and enforceable contract exists between the parties in which the State agreed to pay Mr. Milligan a sum certain in the event he purchased the winning Big Game Lottery ticket for the June 9, 2000 drawing and that sum certain was determined without the reduction of New Jersey gross income tax.

In the Fourth Count, plaintiffs seek declaratory relief with respect to the allegations set forth in the First through Third Counts for tax year 2009 and all tax years thereafter. Plaintiffs also seek a refund of the New Jersey gross income tax they paid for tax year 2009, interest, attorneys' fees, costs, and such further relief the court deems just and equitable.

On November 4, 2011, the Hon. Brian R. Martinotti, J.S.C., transferred plaintiffs' Superior Court Complaint to this court. See N.J.S.A. 2B:13-2(b)("The Tax Court shall have jurisdiction over actions cognizable in the Superior Court which raise issues as to which expertise in matters involving taxation is desirable, and which have been transferred to the Tax Court pursuant to the Rules of the Supreme Court.").<sup>1</sup>

The Division of State Lottery subsequently moved pursuant to R. 4:6-2(e) to dismiss all claims alleged against it in the Complaint for failure to state a claim upon which relief can be granted. The Director, Division of Taxation, did not join the motion. Plaintiffs opposed the motion to dismiss and cross-moved to compel discovery and for an award of attorney's fees.<sup>2</sup>

The court thereafter heard oral argument from counsel.<sup>3</sup>

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<sup>1</sup> Judge Martinotti also granted plaintiffs leave to file a late Notice of Contract claim pursuant to N.J.S.A. 59:13-6 and held that a May 12, 2011 notice from plaintiffs was sufficient to satisfy the Contractual Liability Act.

<sup>2</sup> Plaintiffs' cross-motion will be addressed in a separate opinion.

<sup>3</sup> On April 29, 2011, plaintiffs also filed a Complaint in the Tax Court challenging the Director's February 2, 2011 Final Determination. That Complaint, which has been assigned Tax Court Docket No. 007048-2011, is not the subject of this motion.

## II. Conclusions of Law

When reviewing a motion to dismiss, the court's inquiry is limited to the "legal sufficiency of the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013)(quoting Printing Mart, supra, 116 N.J. at 746 (internal quotations omitted). The question is whether the alleged facts "suggest" a cause of action. Id. at 451. A court searches "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Id. at 452. The question is not whether plaintiffs can prove a claim; rather, plaintiffs are to be given every "reasonable inference of fact" with respect to their allegations. Ibid. (internal citations and quotations omitted). As the Supreme Court explained:

At this preliminary stage of the litigation [a] [c]ourt [should not be] concerned with the ability of plaintiffs to prove the allegation contained in the complaint . . . . [P]laintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

[Banco Popular No. Amer. v. Gandi, 184 N.J. 161, 165 (2005) (citing Printing Mart, supra, 116 N.J. at 746 (alterations in original).]

Because of this liberal and searching inquiry, dismissal under Rule 4:6-2(e) should be granted "in only the rarest of instances." NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006)(quoting Printing Mart, supra, 116 N.J. at 772).

Here, plaintiffs' claims against the Division of State Lottery are based on what they characterize as a contractual agreement to award to Mr. Milligan the full amount of his Lottery winnings from the June 9, 2000 drawing free from New Jersey gross income tax. There is limited precedent in New Jersey regarding the nature of the relationship between the purchaser of

a lottery ticket and the State and its agencies. In 1993, a trial court judge recognized precedents from other jurisdictions holding that “the relationship arising out of the lottery system is primarily contractual in nature.” Driscoll v. State, 265 N.J. Super. 503, 510 (Law Div. 1993)(citing Valante v. Rhode Island Lottery Comm’n, 544 A.2d 586, 589 (R.I. 1988); Hair v. State, 2 Cal. App. 4<sup>th</sup> (1991); Aguimatang v. California State Lottery, 234 Cal. App. 3d 769 (1991); Brown v. California State Lottery Comm’n, 232 Cal. App. 3d 1335 (1991); Thao v. Control Data Corp., 790 P.2d 1239 (Wash. App. 1990)). “A ticket holder is said to have accepted an offer upon purchasing the lottery tickets at the licensed agency.” Id. at 510. “From a contractual perspective, the terms of the contract are subject to the lottery law, and the rules and regulations promulgated pursuant to that authority.” Ibid. (citing Karafa v. New Jersey State Lottery Comm’n, 129 N.J. Super. 499, 502 (Chan. Div. 1974)(denying claim to lottery prize by person who misplaced winning ticket and could not satisfy regulation requiring presentation of ticket to claim prize)). “The rights and obligations of the contracting parties arising out of a lottery ticket purchase cannot, therefore, contravene the rules and regulations of the” Division of State Lottery. Id. at 510.<sup>4</sup>

Plaintiffs allege that they have a contractual right to receive from the State the winnings from the June 9, 2000 drawing in 26 installments in the sum certain agreed upon by the parties. That sum certain was calculated without deduction of New Jersey gross income tax. This claim is based, in part, on plaintiffs’ allegations that in 2000, at the time Mr. Milligan purchased his winning ticket, the Division of State Lottery advertised publically through various media that

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<sup>4</sup> Article IV, Section VII, paragraph 2 of the 1947 Constitution prohibited gambling of any kind without approval from the voters. In 1969, that clause was amended to permit the Legislature to authorize a State lottery. The Legislature implemented this provision by enactment of L. 1970, c. 13, § 1, et seq., effective February 16, 1970. Karafa, supra, 129 N.J. Super. at 502.

New Jersey lottery winnings are not subject to New Jersey gross income tax. An inference can be drawn from plaintiffs' allegations that those advertisements were an inducement to play the lottery and a material component of the Division of State Lottery's offer to purchase a ticket for a chance to win the June 9, 2000 drawing. Plaintiffs allege, in effect, that Mr. Milligan accepted that offer when he purchased the winning ticket for the June 9, 2000 drawing and that the Division of State Lottery breach the resulting contract when in 2009 it paid him less than the contractually agreed upon sum certain.<sup>5</sup>

The Division of State Lottery argues that, even if taken as true, plaintiffs' allegations establish that the Division of State Lottery satisfied any contractual obligation that it has to Mr. Milligan. According to the Division of State Lottery, it is contractually obligated only to pay Mr. Milligan his annual installment of winnings from the June 9, 2000 drawing, which the Division argues it has done. The taxation of those winnings in tax year 2009 and beyond is, according to the Division of State Lottery, carried out by the Division of Taxation, a separate government entity that does not have a contractual obligation to Mr. Milligan. Thus, the Division of State Lottery argues, any claims that Mr. Milligan may have with respect to the taxation of his Lottery winnings must be asserted against the Director, Division of Taxation, who is a defendant in this action, and do not sound in contract against the Division of State Lottery. See Kawa v. Wakefern Food Corp., 24 N.J. Tax 444 (App. Div. 2009), certif. denied, 200 N.J. 369 (2009).

In addition, the Division of State Lottery argues that it is not possible for the parties to have entered into an agreement precluding the Legislature from amending the Gross Income Tax

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<sup>5</sup> It is not clear from the allegations of the Complaint whether the Division of Lottery withheld New Jersey gross income tax from its 2009 payment to Mr. Milligan. It can be inferred from the allegations of the Complaint, however, that the Division of Lottery will withhold New Jersey gross income tax from its annual payments to Mr. Milligan beginning in 2010.

Act to include lottery winnings over a certain amount in taxable income. According to the Division of State Lottery, such a contractual provision would be unenforceable. Finally, the Division of State Lottery argues that any advertisements indicating that lottery winnings are not subject to gross income tax were not a contractual promise, but a statement of fact accurately stating the tax status of lottery winning at the time of the June 9, 2000 drawing. See Schlichtman v. New Jersey Highway Auth., 243 N.J. Super. 464, 469 (Law. Div. 1990)(advertisements are mere notices and solicitations for offers which create no power of acceptance in the recipient).

In light of the liberal standard which this court must employ on a motion to dismiss pursuant to R. 4:6-2(e), the court rejects the Division of State Lottery's argument. The Complaint without question suggests a contract claim against the Division of State Lottery. This suggestion is based on legal precedents recognizing a contractual relationship between the bearer of a winning lottery ticket for the June 9, 2000 drawing and the Division of State Lottery. The Complaint also alleges that the contract included the Division of State Lottery's agreement to pay a sum certain to Mr. Milligan each year for 26 years. That sum certain, according to the allegations, was calculated based on the advertised prize amount without a reduction for New Jersey gross income tax. According to the Complaint, Mr. Milligan received less than that amount with respect tax year 2009, and, by inference, will continue to do so in future years. These allegations are sufficient to withstand a motion to dismiss for failure to state a claim.

The Division of State Lottery draws too fine a line at this stage in the proceedings with its argument that the contract created by Mr. Milligan's purchase of the winning ticket was between Mr. Milligan and the Division of State Lottery only and that the Division cannot be contractually liable for the actions of a separate state agency, the Division of Taxation, which collected the tax from plaintiffs for 2009. N.J.A.C. 17:20-7.5, a regulation adopted by the Division of State

Lottery, suggests that the contract created by the purchase of a winning ticket is between the ticket holder and the State, including all of its subdivisions. The regulation provides:

- (a) The State of New Jersey, its subdivisions, agents, officers, and employees, the State Lottery Commission, the Director, Division of the State Lottery, its agents, officers, and employees shall be discharged of all liability upon award of a prize.

[N.J.A.C. 17:20-7.5.]

The Division of State Lottery acknowledges that this regulation is incorporated in the contract that exists between Mr. Milligan and the Division of State Lottery. If, as the Division of State Lottery suggests, the relevant contract is between Mr. Milligan and the Division of State Lottery only, N.J.A.C. 17:20-7.5 would not need to contain a sweeping protection from liability encompassing all State subdivisions, agents, officers, and employees. To view the contract in the manner suggested by the Division of State Lottery would render most of N.J.A.C. 17:20-7.5 superfluous, an outcome which should be avoided. The concept is well recognized in the arena of statutory construction. See Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969) (“It is a cardinal rule of statutory construction that full effect should be given, if possible, to every word of a statute. We cannot assume that the Legislature used meaningless language.”). Regulations are subject to the same rules of construction as are applicable to statutes. Krupp v. Board of Educ., 278 N.J. Super. 31, 38 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995); Department of Health v. Tegnazian, 205 N.J. Super. 160, 175 (App. Div. 1985); Beljakovic v. Director, Div. of Taxation, 26 N.J. Tax 455 (Tax 2012).

Nor is the court convinced that dismissal of the Complaint against the Division of State Lottery is mandated by the holding in Kawa, supra, because plaintiffs’ exclusive remedy to secure a refund of gross income tax is through a challenge in Tax Court to a final determination of the Director, Division of Taxation. Kawa arose as a class action suit in which the plaintiff

alleged that she made several purchases at various supermarkets and was overcharged sales tax on items which had reduced prices or were free through use of the store coupons and customer loyalty cards. Id. at 446. According to the plaintiffs, the supermarkets used the wrong base price of the items to calculate the sales tax. It was undisputed that the supermarkets had remitted all sales tax collected from plaintiff and the class to the Director, Division of Taxation, as required by law. Id. at 446-447.

Plaintiffs did not seek a refund of the overpaid sales tax from the Director, Division of Taxation. They instead filed claims in the Superior Court against the supermarkets under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20, and under common law fraud, negligent taxation and an alleged breach of fiduciary duty. Id. at 447. The matter was transferred to the Tax Court, see N.J.S.A. 2B:13-2(b), and defendants moved to dismiss the Complaint, alleging that the allegations in the Complaint amounted to a claim for a refund of overpaid sales tax that could exclusively be heard by the Director, Division of Taxation. Id. at 447. Defendants also argued that “there was a direct and unavoidable conflict between the design of the tax statutes . . . for a refund of overpaid sales tax . . . and the purpose and remedies under the” Consumer Fraud Act. Id. at 447-448.

Judge Menyuk agreed with defendants’ argument and dismissed the Complaint. She first examined the statutory provisions creating the right of a consumer to seek a refund of overpaid sales tax from the Director, Division of Taxation and the establishing the procedures for doing so. Kawa v. Wakefern Food Corp., 24 N.J. Tax 39, 46-48 (Tax 2008). She then examined the Consumer Fraud Act, with “its remedial purpose, namely, to root out consumer fraud,” id. at 49 (quoting Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 264 (1997)), and its provisions

allowing for treble damages and the award of reasonable attorney's fees. Id. at 48. Finding these statutory schemes to be in conflict, Judge Menyuk explained

I conclude that the Division of Taxation has exclusive jurisdiction in the first instance to determine whether a transaction is taxable or not taxable, to determine the price on which the tax is calculated, to determine the correct amount of the tax, and if tax has been overpaid and remitted to the Director, to refund the tax pursuant to N.J.S.A. 54:32B-20(a). Under the facts of this case, there is therefore a direct and unavoidable conflict between the provisions of the Sales and Use Tax Act and application of the Consumer Fraud Act.

[Id. at 51.]

She detailed the unavoidable conflict by observing that the Sales and Use Tax Act, together with Division of Taxation regulations, provided a detailed mechanism for vendors to seek a refund of sales taxes collected from customers in excess of those actually due. The regulations do not include a penalty provision for vendors who collect excess sales taxes and, in fact, require the vendor to remit to the Director all sales tax collected, even if in excess of the amount due. On the other hand, the Consumer Fraud Act, as the Kawa plaintiffs intended to use it, authorizes damages, including treble damages and attorney's fees, against vendors who collect and remit to the Director excess sales taxes. This contravenes "a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross purposes." Id. at 52 (quoting Lemelledo, supra, 150 N.J. at 270). Notably, Judge Menyuk also held that

there is nothing in the Sales and Use Tax Act that creates a fiduciary duty on the party of the vendor for the benefit of the customer. The vendor is a trustee, but only for and on account of the State. N.J.S.A. 54:32B-12(a).

[Id. at 59.]

The Kawa plaintiffs, however, alleged breach of fiduciary duty against the vendors. The Appellate Division affirmed Judge Menyuk substantially for the reasons set forth in her written opinion. 24 N.J. Tax at 446.

Here, plaintiffs' contract claims against the Division of State Lottery are not in direct conflict with the statutes that authorize the Director, Division of Taxation to adjudicate gross income tax refund claims. As a threshold matter, Mr. and Mrs. Milligan, unlike the plaintiffs in Kawa, filed a refund claim with the Director, Division of Taxation. After the Taxation Director rejected the claim, plaintiffs, contemporaneous with the filing of their Superior Court Complaint, filed a Complaint in the Tax Court challenging the Taxation Director's decision. The two actions, therefore, are proceeding in tandem. Plaintiffs are not circumventing the authority of the Director of Taxation to determine whether retroactive application the 2009 amendment to N.J.S.A. 54A:6-11 to Mr. Milligan's winnings from the June 9, 2000 drawing is valid. At oral argument on the motion to dismiss, plaintiffs' counsel acknowledged that the entire measure of contractual damages sought from the Division of State Lottery in the Superior Court action is equal to the amount claimed as a gross income tax refund from the Director of Taxation. Thus, if the plaintiffs prevail in securing a refund of gross income tax from the Director in their direct appeal in the Tax Court, their contract claims against the Division of State Lottery in the Superior Court action will be extinguished. If, and only if, plaintiffs do not prevail in their challenge to the Taxation Director's denial of their refund claim will they proceed with their contract claim against the Division of State Lottery. There is, therefore, no danger of plaintiffs securing more in damages than the amount of overpaid gross income tax they allege to be due to them, a significant difference from the facts in Kawa where the plaintiffs had available to them a

Consumer Fraud Act provision allowing for treble damages and attorney's fees in addition to the amount of sales tax they alleged to have overpaid.

In addition, the defendants in Kawa were supermarket vendors who were required by law to collect and remit sales tax to the Director, Division of Taxation. They had no independent fiduciary duty to the plaintiffs with respect to the tax collected and were insulated from liability under the tax laws for an alleged act of collecting more sales tax than was actually due. Here, the defendant seeking dismissal of the Complaint is the Division of State Lottery, an entity which admits that it has a contractual relationship with plaintiffs. Plaintiffs allege that the contractually required prize was not paid to them. While the amount in dispute under the contract claims is equal to the amount of gross income tax plaintiffs paid for tax year 2009, plaintiffs' tax claim and plaintiffs' contract claims are distinct. Plaintiffs allege that if they are unsuccessful with their challenge to the Director, Division of Taxation's Final Determination, they will be entitled to contractual damages from the Division of State Lottery for failing to pay to Mr. Milligan in 2009 the amount of winnings to which he is entitled pursuant to contract.

There is, therefore, no basis to the argument that plaintiffs allege that Mr. Milligan's contract with the State precludes the Legislature from amending the Gross Income Tax Act so that it applies retroactively to lottery winnings. Plaintiffs do not allege that the enactment of the amendment to N.J.S.A. 54A:6-11 constituted a breach of contract. They allege that application of the amendment to Mr. Milligan's winnings from the June 9, 2000 drawing violates the federal and State Constitutions, is manifestly unjust, or is otherwise invalid. They also allege, in effect, that if they are not successful with those arguments and Mr. Milligan must pay gross income tax, the Division of State Lottery violated its contract with Mr. Milligan by not paying him the 2009 annual installment in the sum certain agreed upon by the parties.

Nor is the court convinced that plaintiffs have not alleged a claim with respect to the Division of State Lottery's advertisements. In support of its argument, the Division of State Lottery cites the Law Division holding in Schlichtman, *supra*. There, the New Jersey Highway Authority advertised through various media, including highway billboards, the sale, for a limited period, of Garden State Parkway tokens at a discount. 243 N.J. Super. at 466. Shortly after the sale period commenced it became evident that the agency had underestimated demand for the tokens, the supply of which soon dissipated. As a result, the authority was compelled to turn down prospective purchasers. The plaintiff, having on five occasions attempted to purchase the tokens without success, filed suit in the Special Civil Part of Superior Court, alleging, among other claims, a breach of contract based on the agency's advertisements. Id. at 466-467.

The court rejected the plaintiff's claims, holding that "the advertisements did not constitute offers. Rather, plaintiff made an offer in response to the authority's advertisements, but plaintiff's offers were refused by the authority." Id. at 468-469. The court held that the agency's advertisements "were not offers, but rather were solicitations for offers from potential customers that were subject to acceptance or refusal" by the agency. Id. at 469 (citing Mesaros v. United States, 845 F.2d 1576 (Fed. Cir. 1988)). The allegations made in this case, if taken as true, are substantially different from the facts in Schlichtman. Here, it is alleged that the Division of State Lottery advertised that winnings from the June 9, 2000 drawing would not be subject to gross income tax. Mr. Milligan, induced by that advertisement, purchased a ticket for the June 9, 2000 drawing. He won. Subsequent calculations of his annual annuity payment of winnings undertaken by the Division of State Lottery resulted in agreement on a sum certain to be paid to Mr. Milligan each year for 26 years. That sum certain was calculated based on the winnings from the June 9, 2000 drawing not being subject to gross income tax. Unlike in

Schlichtman, the advertisements at issue were part and parcel of a completed commercial transaction, resulting in a contractual relationship between Mr. Milligan and the State, which was reduced to a contractual obligation on the Division of State Lottery's part to pay Mr. Milligan a sum certain each year.

With respect plaintiffs' claims for declaratory relief, it is plain that plaintiffs seek a declaration that the amendment to N.J.S.A. 54A:6-11 does not apply to Mr. Milligan's 2009 annual installment, and all future annual installments, of lottery winnings from the June 9, 2000 drawing. This declaration would have an effect on the Division of State Lottery, which is required to withhold applicable taxes from the annual installment payments to Mr. Milligan. "When declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding." N.J.S.A. 2A:16-56. Here, the Division of State Lottery is such a person.

The court will enter an Order denying the defendant Division of State Lottery's motion to dismiss the allegations against it in the Complaint.