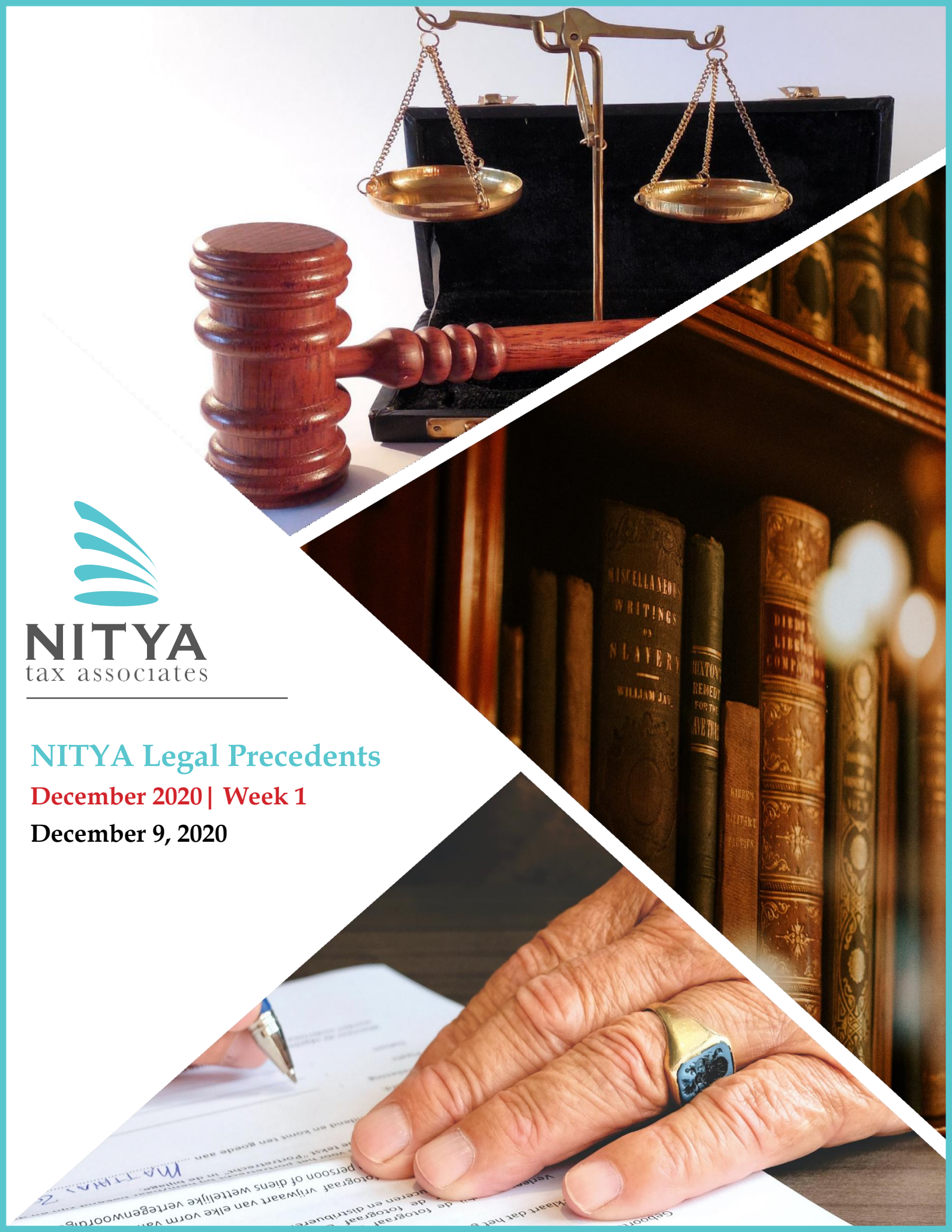

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NITYA Legal Precedents

December 2020 | Week 1

December 9, 2020

PART A: WRIT PETITIONS

1. Levy of GST on lotteries

The Petitioner was an authorized agent for sale and distribution of lotteries. The Petitioner challenged inclusion of 'actionable claim' in the definition of 'goods' under Section 2(52) of the Central Goods and Services Tax Act, 2017 ('CGST Act').

The Petitioner contended that 'lottery' is not goods and inclusion of the same in definition of 'goods' under the CGST Act is unconstitutional. It relied on the decision of Supreme Court in the case of ***Sunrise Associates v. Govt. of NCT of Delhi, 2006-VIL-11-SC*** wherein it was held that lottery is not 'goods'. It also contended that exclusion of lottery, betting and gambling from Para 6 of the Schedule III of the CGST Act is hostile discrimination and violative of Article 14 of the Constitution of India.

The Supreme Court observed that the definition of 'goods' under Article 366(12) of the Constitution of India is an inclusive one and does not specifically exclude actionable claim from its purview. GST was introduced vide Article 246A which begins with 'non-obstante clause'. Hence, Article 246A confers wide powers to make laws with respect to Goods and Services Tax. Further, expanding scope of 'goods' in GST regime vis-à-vis the Sale of Goods Act, 1930 does not violate constitutional provisions nor conflicts with definition of goods under Article 366(12). The Court also held that exclusion of lottery, betting and gambling from Schedule III of the CGST Act is rational and not violative of Article 14.

Skill Lotto Solutions v. UOI, 2020-VIL-37- SC

NITYA Comments: *This ruling is correct and inclusion of 'actionable claim' in the definition of 'goods' under CGST Act is constitutionally valid. Further, the Supreme Court in the case of* ***Sunrise Associates*** *(supra) correctly held that 'lottery' being actionable claim, is not goods under VAT laws wherein the definition of goods did not include 'actionable claim'. This decision will not apply under GST law considering distinctive provisions.*

PART B: ADVANCE RULINGS

1. Classification of Malabar Parota and Whole Wheat Parota

The Applicant sought advance ruling on classification and rate of tax on supply of 'Malabar Classic Parota' and 'Whole Wheat Malabar Parota' ('food products'). The Applicant contended that food products merit classification under Heading 1905 as 'Bread' and eligible for exemption from GST under ***Notification No. 2/2017-Central Tax*** dated ***June 28, 2017***. The Authority for Advance Ruling ('AAR') did not agree with Applicant's view and held that food products are classified under Heading 2106 and attract 18 percent GST.

The Appellate Authority for Advance Ruling ('AAAR') upheld AAR's decision. The AAAR held that food products are distinct from 'Bread' and are not fit for immediate consumption and Heading 1905 covers only such food products which can be readily consumed. Therefore, food products merit classification under Heading 2106 and attract 18 percent GST.

Modern Food Enterprises, 2020-VIL-72-AAAR (KER)

NITYA Comments: *The ruling in incorrect on merits. The AAAR failed to understand food products from technical and common parlance perspective. The food products qualify as 'Bread' and are also commonly referred as 'Indian Breads'.*

2. GST on transportation facility provided by employer to employees (free or at nominal cost)

The Applicant was providing transportation facility (pick and drop) to its employees either free or at nominal cost. The question before the AAR was whether transportation services provided by employer to employees qualify as supply and exigible to GST.

The AAR observed that expression 'furtherance of business' is wide enough to cover any supply made in connection with the business. The AAR also observed that service provided to related party even without consideration, qualify as supply under Section 7 of the CGST Act read with para 2 of Schedule I. Schedule III of the CGST Act only covers services provided by employees to employer and not vice-versa. Accordingly, AAR held that provision of transport facility to employees by employer qualifies to be supply whether provided free or on recovery of nominal cost.

Beumer India, 2020-VIL-316-AAR (HAR)

NITYA Comments: *This ruling is incorrect to the extent it levies GST on transportation facility provided to employees on FOC basis. The Ministry of Finance, through Press Release dated July 10, 2017, clarified that supply by employer to its employees under contractual agreement will not be liable to GST. Hence, any facility provided by employer to employees without consideration does not qualify as supply being provided under employment agreement.*

The AAR has also incorrectly held that valuation of such supply will be its open market value. The AAR failed to consider that where employer provides goods or services to its employees at concessional cost under condition of contract, such cost should be considered as open market value.

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