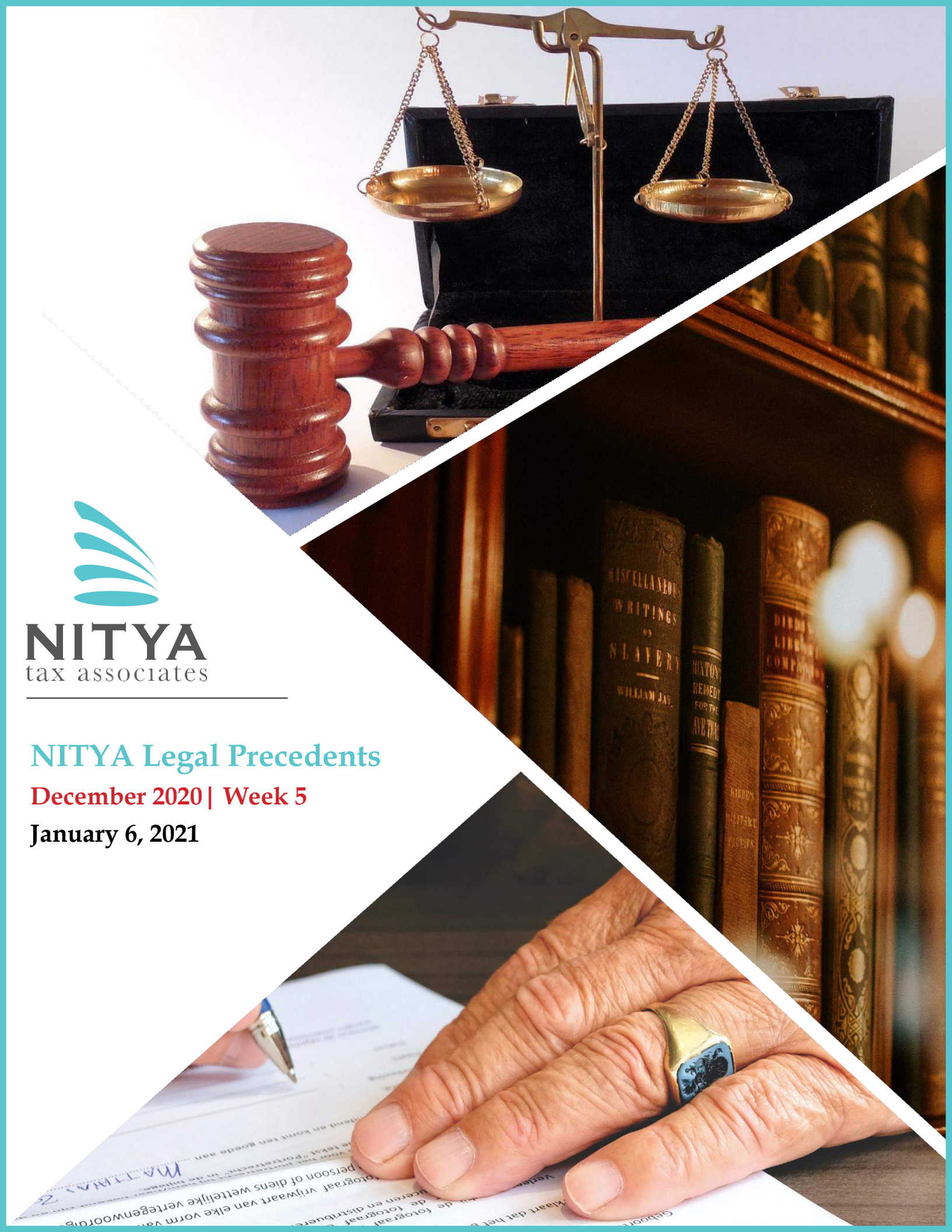

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NITYA Legal Precedents

December 2020 | Week 5

January 6, 2021

PART A: WRIT PETITIONS

1. Provisional attachment of bank account

The department doubted the Petitioner's classification of carbonated fruit drinks under Tariff Item 2202 99 20 of the Customs Tariff Act, 1975. The department initiated investigations under Section 67 of the Central Goods and Services Tax Act, 2017 ('CGST Act') and invoked Section 83 to provisionally attach the Petitioner's bank accounts. The Petitioner challenged provisional attachment of bank accounts.

The High Court observed that under Section 67 read with Section 83, proper officer should have reasons to believe that taxpayer has suppressed transactions to evade tax and will default in payment of tax. Unless such situation arises, provisional attachment should not be undertaken. In this case, the Petitioner neither defaulted in payment of tax nor suppressed any transaction to evade payment of tax. Thus, department's action was not justified. Basis this, the Court directed withdrawal of provisional attachment of the Petitioner's bank accounts.

AJE India v. UOI, 2020-VIL-654-BOM

NITYA Comments: *In our update* ***NITYA Insight | Issue 201 | Short Video :: Classification of Fruit Juice-based Drinks*** *dated* ***December 21, 2020****, we highlighted dispute regarding classification of fruit-juice based drinks. It is shocking to see that department is resorting to extreme steps like attachment of bank account for such interpretative issues involving classification of goods.*

2. Refund of IGST to Advance Authorization holders

Basis Gujarat High Court ruling in the case of ***Cosmo Films v. UOI, 2020-VIL-514-GUJ,*** the department has started issuing indiscriminate notices to exporters who had claimed benefit of both Advance Authorization and output refund of GST. The Petitioner challenged retrospective applicability of ***Notification No. 54/2018-Central Tax*** dated ***October 9, 2018.***

The High Court has admitted writ petition and stayed departmental proceedings till next hearing.

Zaveri and Co. v. UOI, 2020-VIL-653-GUJ

NITYA Comments: *This writ petition correctly challenges incorrect conclusion of High Court in Cosmos ruling. We have discussed same in detail in our update* ***NITYA Insight | Issue 206 | Writ Petition challenging Gujarat High Court decision in case of Cosmo Films*** *dated* ***December 29, 2020****.*

PART B: ADVANCE RULINGS

1. ITC on promotional material given to franchisees and distributors

The Applicant was supplying promotional materials to its franchisees and distributors under cover of delivery challans. The Applicant sought advance ruling on availability of Input Tax Credit ('ITC') on such promotional materials.

The Authority for Advance Ruling ('AAR') categorized promotional materials as under:

i. **Non-Distributable** goods like display boards, posters, outdoor hoardings etc. whose ownership remained with the Applicant.

ii. **Distributable** goods like uniform to sales personnel, carry bags, pens etc. bearing Applicant's brand which were further distributed to employees and customers of franchisees and distributors.

The AAR classified non-distributable goods as capital goods as their value was capitalized in books of account of Applicant. Basis this, the AAR held that ITC shall be available on non-distributable goods. The AAR further observed that whenever such items are scrapped or written off, this will attract ITC reversal under Rule 43 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules').

For distributable goods, the AAR relied on ***Circular No. 92/11/2019-GST*** dated ***March 7, 2019*** and held that distribution of goods to exclusive franchisees (being related party) will qualify as supply under Para 2 of Schedule I of the CGST Act. Accordingly, ITC will be available on the same. It further held that distribution of goods to distributors will qualify as gift whose ITC will be restricted under Section 17(5) of the CGST Act.

Page Industries, 2020-VIL-332-AAR (KAR)

2. Classification of digital goods and applicability of GST

The Applicant procured digital goods such as online gaming from foreign suppliers. It supplied such goods to its customers in India as well as outside India through email or internet link.

The Applicant posed following questions before the AAR relating to classification and applicability of GST:

S. No.	Issues	AAR's observation
1.	Classification as goods or services	Section 2(17) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') defines online information and database access or retrieval services' (OIDAR) as 'services'. Digital goods qualify as 'services' under GST law.
2.	Applicability of IGST under reverse charge mechanism when software is procured from outside India	Since service provider is located outside India and place of supply of service is in India (as service recipient is located in India), IGST will be payable under reverse charge mechanism.
3.	Export status of services provided to Indian customer paying consideration in convertible foreign exchange	Since service recipient is in India, GST will be payable.
4.	Export status of services provided to foreign customer paying consideration in convertible foreign exchange	The AAR did not address this question due to lack of information for determining place of supply for OIDAR services.

Amogh Ramesh Bhatawadekar, 2020-VIL-325-AAR (MAH)

3. Financial assistance received from holding company, qualifies as consideration

The Applicant was engaged in supply of electric transformers, static converters, electric wires / cable and installation and commissioning services. The Applicant's holding company located in Germany, had to invest some amount in India for social projects and accordingly, asked the Applicant to undertake the same. The holding company proposed to provide financial assistance to Applicant for this project. The project will involve construction of training center, catering training to trainers, apprentices, unskilled workers and students or college graduates and other necessary activities.

The Applicant sought advance ruling as to whether financial assistance provided by holding company to Applicant to undertake the said project qualifies as consideration under GST law and exigible to tax.

The AAR observed that the Applicant executed 'Service Agreement' with its holding company to perform activities as per the agreement. The activity qualifies as 'agreeing to do an act' classified under SAC 999792. Further, financial assistance is consideration for performance of services. Thus, said activity qualifies to be supply and exigible to GST. The AAR also observed that most of the activities will be

undertaken in India, thus, place of supply of service will be India. Accordingly, supply of instant service will not qualify as export of service.

Prettl Automotive India, 2020-VIL-326-AAR (MAH)

NITYA Comments: *AAR is incorrect on both points. The Applicant was undertaking charitable activities in India which was fully / partly funded by its holding company. The activity should not qualify as supply since financial assistance was conditional donation meant for specified activities rather than consideration for supply. Only terminology 'service agreement' should not lead to activity becoming taxable.*

Further, even if activity qualifies as supply, place of supply of toleration of an act service will be location of recipient and not activity where charitable activities took place. Thus, activity should have qualified as export of service.

PART C: CESTAT ORDERS

1. Compensation for breach of contract is not toleration of an act

The Appellant was engaged in business of mining and selling of coal. It collected compensation / penalty and forfeited earnest money on short lifting or non-lifting of agreed quantity or for breach of contract. The department demanded service tax on compensation / penalty and forfeited earnest money treating activity as 'declared service' under Section 66E(e) of the Finance Act, 1994 as 'tolerating an act'.

CESTAT observed that consideration for service must flow from recipient and should result in some benefit to service provider. Penal clauses in contract, are meant for safeguarding commercial interest of parties to contract and to ensure that such act is not undertaken. An agreement must be read as whole to gather intention of parties. Basis this, CESTAT held that compensation / penalty and forfeited earnest money cannot be termed as consideration for 'tolerating an act'. Hence, no service tax will be payable on such amount.

South Eastern Coalfields v. CCE and ST Raipur, 2020-VIL-559-CESTAT-DEL-ST

NITYA Comments: *The ruling rightly lays down that compensation and penalty for breach of contract (liquidated damages) does not qualify as consideration for any service. The decision will be equally applicable under GST regime as well. In the case of* ***K.N. Food Industries, 2019-VIL-731-CESTAT-ALH-ST,*** *CESTAT took similar view. We have discussed K.N. Foods's case in detail in our update* ***NITYA Insight | Issue 77 | Compensation not to be considered as 'Toleration of an Act' for levy of Service Tax*** *dated* ***December 18, 2019****.*

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