TEAM CODE: 03

21st SURANA AND SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION, 2023-24

BEFORE THE HON'BLE HIGH COURT OF KARNATAKA

UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

WRIT PETITION NO. __ OF 2024

In The Matter Of

SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD…….PETITIONER

V.

ADDITIONAL COMMISSIONER OF GST AND OTHERS……..…RESPONDENT

MEMORIAL ON THE BEHALF OF PETITIONER

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TABLE OF ABBREVIATIONS

Sr. No.	Abbreviations	Expansion
1.	**&**	And
2.	**AIR**	All India Reporter
3.	**Anr.**	Another
4.	**ILR**	Indian Law Reporter
5.	**¶**	Paragraph
6.	**§**	Section
7.	**SC**	Supreme Court
8.	**SCC**	Supreme Court Cases
9.	**v.**	Versus
10.	**Ors.**	Others
11.	**SCR**	Supreme Court Reporter
12.	**GST**	Goods and Service Tax
13.	**CGST**	Central Goods and Services Tax
14.	**IGST**	Integrated Goods and Service Tax
15.	**Ed.**	Edition
16.	**SCN**	Show Cause Notice
17.	**HC**	High Court
18.	**Hon'ble**	Honorable
19.	**S.**	Section
20.	**WP**	Writ Petition

21.	**SOS India**	Southern Operating System India Pvt Ltd
22.	**SOS US**	Southern Operating Systems Inc.
23.	**NOS**	*C.C., C.E. & S.T. Bangalore v. Northern Operating Systems (P.) Ltd.*
24.	**OECD**	Organisation for Economic Co-operation and Development

INDEX OF AUTHORITIES

S. No.	STATUTES REFERRED
1.	The Constitution of India, 1949
2.	The Central Goods and Services Act, 2017
3.	The Integrated Goods and Services Tax Act, 2017
4.	Finance Act, 1994
5.	The CGST & SGST Rules, 2017.
6.	Circular No. 172/04/2022-GST, dt. 6th July 2020

S. NO.	CASES	CITATION
1.	*Whirlpool Corporation v. Registrar of Trademarks, Mumbai & Ors.*	(1998) 8 SCC 1
2.	*Harbanslal Sahnia v. Indian Oil Corpn. Ltd,*	(2003) 2 SCC 107
3.	*CIT v. Chhabil Dass Agarwal*	(2014) 1 SCC 603
4.	*Collector of Customs v. Soorajmull Nagarmul*	(1969) 1 SCC 858
5.	*M/S. Godrej Sara Lee Ltd. v. The Excise and Taxation Officer-cum-Assessing Authority & Ors*	(2023) 109 GSTR 403
6.	*Oryx Fisheries Pvt. Ltd v. Union of India & Ors,*	(2010) 13 SCC 427
7.	*Dharampal Satyapal Ltd v. Deputy Commissioner of Central Excise, Gauhati & Ors*	(2015) 8 SCC 519
8.	*S.L. Kapoor v. Jagmohan*	(1980) 4 SCC 379
9.	*Kumaon Mandal Vikas Nigam Ltd v. Girja Shankar Pant & others*	(2001) 1 SCC 182.
10.	*State Bank of India and others v. Rajesh Agarwal and*	(2023) 6 SCC 1

	others	
11.	*Siemens Ltd. v. State of Maharashtra*	(2006) 12 SCC 33
12.	*M/S. Bharat Marine Co. v. The Commissioner of Customs*	2014 SCC OnLine Mad 7700**.**
13.	*Rabindra Nath Bose and others v. Union of India and others*	AIR 1970 SC 470
14.	*R. v. Diary Produce Quota Tribunal*	(1990) 2 AII ER 434
15.	*S.A. Kini v. Union of India*	AIR 1985 SC 893
16.	*Indian legal and Economic forum v. U.O.I*	(1997) 10 SCC 728.
17.	*Satish Chandra v. Union of India*	AIR 1953 SC 250.
18.	*Mathuram Agrawal v. State of Madhya Pradesh*	AIR 2000 SC 109
19.	*M/S 3I Infotech Ltd v. Commissioner of Service Tax, Mumbai*	2023 INSC 711.
20.	*Metal Forgings and Ors. v. Union of India (UOI) and Ors.*	AIR 2003 SC 291.
21.	*Vodafone International Holdings BV v. Union of India*	(2009) 179 Taxman 129 (SC).
22.	*IRC v. Fisher's Executors*	1926 AC 395 (HL), p. 412.
23.	*C.C., C.E. & S.T. Bangalore v. Northern Operating Systems (P.) Ltd.*	[2022] 138 taxmann.com 359 (SC)
24.	*Commissioner of Central Excise, Mumbai Versus M/s Fiat India(P) Ltd*	Civil Appeal 1648-49 of 2004
25.	*Inland Revenue Commissioners v. His Grace Duke of Westminster*	[1936] A.C. 1 (U.K. H.L.)
26.	*Bradford (City) v. Pickles*	[1895] A.C. 587 (U.K. H.L.)
27.	*Silver Jubilee Tailoring House v. Chief Inspector of*	1974 (1) SCR 747

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28.	*Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd.*	(2021) 7 SCC 151
29.	*M/s Dell International Services India Pvt. Ltd. v. The Commissioner of Central Excise & Customs, Bangalore Commissionerate*	Appeal No. 3195 of 2011
30.	*Shivnandan Sharma v. Punjab National Bank Ltd*	AIR 404/1955 SCR (1)1427
31.	*Ram Singh v. U.T. of Chandigarh*	(2004) 1 SCC 126
32.	*M.O.H. Uduman and Ors. v. M.O.H. Aslum*	AIR [1991] SC 1020
33.	*Glynn v. Margetson*	[1893] AC 884
34.	*M/s Target Corporation India Pvt Ltd v. C.C.E., Bangalore*	[Service Tax Appeal No. 20459 of 2016, dated January 19, 2021]
35.	*In re Tata Motors Limited (GST AAR Maharashtra)*	*GST-ARA- 23/2019-20/B-46*
36.	*Venkataraman Krishnamurthy v. Lodha Crown Buildmart (P) Ltd.*	2024 SCC OnLine SC 182
37.	*In re Tata Motors Limited (GST AAR Maharashtra)*	GST-ARA- 23/2019-20/B-46

S. No.	**LIST OF BOOKS, DIGESTS, COMMENTARIES**
1.	M.P. Jain, Indian Constitutional Law (7th Ed. 2014, Lexis Nexis Butterworth Wadhwa, Nagpur)
2.	Durga Das Basu, Commentary on The Constitution Of India (9th Ed., Lexis Nexis Vol. 1, 2015)
3.	M.P. Singh, V.N. Shukla's Constitution of India (13th Ed. Reprint 2017, Eastern Book Company, Lucknow)
4.	Rakesh Garg & Sandeep Garg, GST Law Manual Acts, Rules and Form (7th Ed.)
5.	C.A. (Dr.) Arpit Haldia, Taxman's GST Law & Practice (2nd Ed.)

6.	Dr. Vinod k Singhania & Dr. Monica Singhania Student's Guide to Income Tax Including GST (Taxmann's Flagship Publication, New Delhi, 26th edition, 2023)

S. No.	WEBSITES
1.	www.scconline.com
2.	www.manupatrafast.com
3.	www.taxmann.com
4.	www.aironline.in

STATEMENT OF JURISDICTION

The Petitioner has approached the Hon'ble High Court of Karnataka under Art. 226 of the Indian Constitution, 1950, challenging the orders of the GST Department and proceedings initiated against the Petitioner.

ARTICLE 226: **Power of High Courts to issue certain writs**

(1) "Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favor such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case be, the expiry of the said next day, stand vacation.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

STATEMENT OF FACTS

1. Southern Operating Systems India, an Indian subsidiary of US-based Southern Operating Systems Inc., was established in 2010 to capitalize on the Indian and Asia Pacific software market, with senior personnel initially seconded to India.
2. Initially, SOS India reimbursed SOS US for these salaries once it became profitable. US expats in India were treated as employees by the US company for legal purposes, while the Indian company was considered the employer for economic purposes.
3. However, the Indian Service Tax Department issued show cause notices in 2017, alleging SOS India's liability to pay service tax under the reverse charge mechanism (RCM) for importing services from SOS US.
4. The Karnataka HC ruled in favour of the service tax department, holding SOS India liable for service tax. The High Court quashed notices regarding the extended period of limitation under the Finance Act, 1994, stating that the Indian company's non-payment of service tax was not due to any exceptions.
5. Indian and US companies terminated expat services from US company payrolls and planned to induct them into Indian company payrolls for tax planning purposes. Subsequently, SOS India terminated expatriate employees' services from SOS US and hired them directly. This was intended to avoid GST implications post-2017, given a Supreme Court ruling holding companies liable for service tax on similar arrangements. However, the GST department issued show cause notices in 2024, alleging GST liability on the secondment arrangement.
6. SOS India contested these notices, arguing that under the GST Act, services by an employee to the employer are not considered supply of goods or services. For the period up to May 2022, SOS India asserted that expatriates were treated as employees solely of SOS India, thus not subject to GST.For period after June 2022, SOS India contended that direct hiring eliminated any reimbursement arrangement, further exempting it from GST.
7. The GST department rejected these arguments, maintaining that secondment arrangements constituted import of services, liable to GST. It upheld the demands and penalties, citing previous service tax payments by SOS India as evidence of willful tax evasion.
8. The writ petitions are now up for hearing in the Karnataka High Court.

STATEMENT OF ISSUES

THE PETITIONER HAS PLACED BEFORE THIS HON'BLE HIGH COURT, THE FOLLOWING ISSUES FOR ITS CONSIDERATION:

ISSUE 1

WHETHER THE WRIT PETITION IS MAINTAINABLE?

ISSUE 2

WHETHER THE DEPARTMENT HAD JURISDICTION TO ISSUE SHOW CAUSE, IF THE SERVICES WERE NOT LIABLE TO GST PER SE?

ISSUE 3

WHETHER THERE IS ANY IMPORT OF SERVICES UNDER GST AND WHETHER THE INDIAN COMPANY IS LIABLE TO PAY GST UNDER REVERSE CHARGE MECHANISM?

SUMMARY OF ARGUMENTS

I. THE WRIT PETITION IS MAINTAINABLE

The petitioner challenges GST Department's show cause notices alleging tax evasion. The contentions involve violation of natural justice and excess jurisdiction. The notices lack essential elements, exhibit bias, and render responding futile. The petition asserts the notices' illegality, arguing their maintainability under Article 226.

II. THE GST DEPARTMENT DOES NOT HAVE JURISDICTION TO ISSUE SHOW CAUSE NOTICES

The petitioner argues that the GST Department lacked jurisdiction to issue show cause notices as the subject matter was not taxable under GST. They highlight contradictions with statutory provisions, argue against charges of tax evasion, and assert the right to tax planning strategies. These grounds render the subsequent order unlawful.

III. THERE IS NO IMPORT OF SERVICES UNDER GST AND THE INDIAN COMPANY IS NOT LIABLE TO PAY GST.

The petitioner challenges GST Department's contention on multiple grounds. Firstly, secondment arrangements, in general, do not attract GST due to the exemption for employer-employee relationships. The petitioner emphasizes that GST does not apply to the employer-employee relationship under Schedule III of the CGST Act.

The petitioner then asserts that there is no GST implication for the periods 2010-2022 and 01.06.2022 to 31.12.2023. It relies on experience letters and a revised arrangement, contending that the secondment was a strategic tax planning measure. Moreover, the petitioner insists that the revised arrangement establishes a contract of service between the Indian company and the employees, further excluding it from the purview of GST.

Lastly, the petitioner challenges the invocation of an extended period of limitation and penalty, arguing that Section 74(1) necessitates wilful intent for its application. The petitioner contends that the revised arrangement, maintaining an employer-employee relationship, falls within Schedule III of the CGST Act, exempting it from GST liability. Overall, the petitioner seeks the Court's acknowledgement that the revised arrangement is not an 'import of service,' thereby nullifying the GST Department's claims.

ARGUMENTS ADVANCED

1) THE WRIT PETITION IS MAINTAINABLE

(¶ 1.) It is humbly submitted before the Hon'ble Court that the Counsel on behalf of the SOS India (hereinafter referred to as the Petitioner) has filed two writ petitions challenging the two Show Cause Notices served by the GST Department in order to levy taxes and penalties on the petitioner. The Supreme Court has reiterated that a writ petition can be entertained in exceptional circumstances where there is[1]:

i.A breach of fundamental rights;

ii.A violation of principles of natural justice;

iii.An excess of jurisdiction;

iv.A challenge to the vires of the statute orders.

The present case attracts two-fold contentions, the issue of Natural Justice and excess Jurisdiction.

i. Petitioner has a locus standi in this case

(¶ 2.) It is a well settled fact that the availability of alternative remedies does not bar hearing of a writ petition. Justice Harries, emphasized in a decision that the writ of Certiorari should be issued even when alternatives exist, if natural justice is violated or decisions are arbitrary[2]. In ***M/S. Godrej Sara Lee Ltd. v. The Excise and Taxation Officer-cum-Assessing Authority & Ors***[3], the court reaffirmed that Article 226 jurisdiction isn't negated by alternative remedies, if not pursued. Thus, the court cannot reject the present petition solely due to available of statutory remedies; the choice rests with the petitioner.

(¶ 3.) The Supreme Court, in the case of ***Oryx Fisheries Pvt. Ltd v. Union of India & Ors***[4], it emphasizes the importance of fairness and transparency in legal proceedings, especially during the issuance of show cause notices. Individuals must be informed of specific charges to mount a proper defense and uphold the integrity of the process. The case, criticizes the

[1] Whirlpool Corporation v. Registrar of Trademarks, Mumbai & Ors. (1998) 8 SCC 1; Also, Harbanslal Sahnia v. Indian Oil Corpn. Ltd, (2003) 2 SCC 107; CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603.

[2] Collector of Customs v. Soorajmull Nagarmull, (1969) 1 SCC 858

[3] /S. Godrej Sara Lee Ltd. v. The Excise and Taxation Officer-cum-Assessing Authority & Ors (2023) 109 GSTR 403

[4] Oryx Fisheries Pvt. Ltd v. Union of India & Ors (2010) 13 SCC 427

practice of implying guilt without detailing charges, stressing the need for reasonable interpretation of show cause notices to prevent abuses of power and enhance accountability. In the present instance, there is absence of essential elements in the Show Cause Notice; consequently, the GST Department invoked extension of time limit arbitrarily.

ii. Breach of Principle of Natural Justice

(¶ 4.) The preamble of the Indian Constitution ensures justice, liberty, and equality, ensuring fairness in social and economic activities of the people; and also serving as a shield against arbitrary actions, which is fundamental to jurisprudence of administrative law. However, in the present case, the GST Department's Show Cause Notice exceeded its jurisdiction, and displays a prejudiced stance of petitioner being at fault. This violates the principle of "*Audi alteram partem*" – the right to a fair hearing. ***Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati & Ors***[5]*.,* Supreme Court underscored the necessity of providing a fair hearing before any decision. Non-compliance with natural justice principles can invalidate exercises of power.

(¶ 5.) The current case involves a show cause notice accusing willful tax evasion, citing a previous agreement and deeming wages as consideration for tax calculation. The Department extends the limitation period and imposes maximum penalty. The notice alleges willful nonpayment despite familiarity with the tax system. However, the reasons provided are deemed baseless and beyond the scope of the relevant Act, upon which the Department bases its judgment.

(¶ 6.) The principle that "*Justice must not only be done but also appear to be done*" is vital for maintaining trust even in quasi-judicial proceedings. Upholding fairness and ensuring clarity in such proceedings is essential for individuals to have confidence in the system. The disregard of natural justice itself constitutes prejudice, rendering proof of prejudice unnecessary.[6] In ***Kumaon Mandal Vikas Nigam Limited v. Girja Shankar Pant & others***[7], the Supreme Court established a test to determine bias, stressing that if there's a genuine apprehension or real danger of bias, administrative actions cannot stand. Applying this test, it's evident that the GST Department erred in sending a premeditated notice to the Petitioner, indicating a breach of natural justice and a potential bias.

[5] Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati & Ors (2015) 8 SCC 519

[6] S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379

[7] Kumaon Mandal Vikas Nigam Limited v. Girja Shankar Pant & others (2001) 1 SCC 182.

(¶ 7.) It is hereby humbly submitted before the court that, recently, Chief Justice of India, Dr. D.Y. Chandrachud has further elaborated on the principles of natural justice in ***State Bank of India and others v. Rajesh Agarwal and others***[8] held that Natural justice principles ensure fair decision-making by preventing arbitrariness and upholding procedural and substantive requirements in legal proceedings against judicial, quasi-judicial, and administrative authorities.

(¶ 8.) After reading the said show cause notice, a reasonable man can sense that responding to such notice will be of no use, as the quasi-judicial body, the GST Department, has already made up their mind by referring to the wrong analogy, that if the company had paid the tax in the previous law it is bound to pay under the present law, if not, amounting to wilful tax evasion. Mention of invoking maximum limitation and deeming employee salaries as consideration further indicate bias. The use of "should" suggests pre-mediation. Consequently, replying appears pointless as conclusive charges are already apparent, violating the principles of "*Audi alteram partem*" and natural justice. Therefore, the petitioner hereby asserts the notice's illegality before the court.

(¶ 9.) It is hereby submitted that, the Apex Court has already settled the fact that, "*If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show cause notice*".[9] A show cause notice lacks fairness if on a reasonable reading; it gives the impression that responding it is futile, especially in quasi-judicial proceedings where a reasonable opportunity for defense is promised. If it seems like a person would merely face a prejudged opinion, the notice fails to initiate a fair procedure[10].

(¶ 10.) It is humbly submitted before the Hon'ble Court that the current petition is maintainable and cannot be questioned only on the grounds of laches,[11] delays and acquiescence,[12] drafting of petition in an undignified manner,[13] malicious in nature,[14]

[8] State Bank of India and others v. Rajesh Agarwal and others (2023) 6 SCC 1

[9] Siemens Ltd. V. State of Maharashtra, (2006) 12 SCC 33

1) [10]Supra n. 4; M/S. Bharat Marine Co. v. The Commissioner of Customs 2014 SCC OnLine Mad 7700.

[11] Rabindra Nath Bose and others v. Union of India and others, AIR 1970 SC 470

[12] R. v. Dairy Produce Quota Tribunal (1990) 2 AII ER 434: (1990) 2 WLR 1302.

[13] M.K Mallick, Law and Practice, 47 (12th ed., 2012).

[14] S.A. Kini v. Union of India, AIR 1985 SC 893.

where disputed question of facts are involved or question of law has been raised in the abstract[15] or enforcement of private or contractual rights are sought to be enforced.[16] In the instant case, none of the aforementioned exceptions exists. It is further submitted that the petitioner has a locus standi in this case by virtue of Article 226.

2) THE GST DEPARTMENT DOES NOT HAVE JURISDICTION TO ISSUE SHOW CAUSE NOTICES

(¶ 11.) It is hereby humbly submitted that the Show Cause Notice issued by the GST Department suffered the very fundamental question of Jurisdiction. According to Art. 256[17], no tax can be levied except by the authority of law. While in the current instance, SCN were issued on the subject matter, which is not liable to any kind of taxes under the GST Act. Also, Taxing Acts must be interpreted strictly based on their plain language; intentions beyond stated text are irrelevant. Economic outcomes and reinterpretations contradicting plain language are impermissible[18].

(¶ 12.) The CBIC has clarified vide Circular 172[19] that GST is not applicable on perks provided to employees, which form part of the contractual agreement. Subsequently, it is submitted that, from 01.07.2017 to 31.05.2022, the employees were terminated from the services of the US company and were freshly provided with the employment under the Indian Company, thereby establishing the relationship of employer employee, such relations are exempted from the taxes by virtue of Section 7 when read with Schedule III of the said Act, It states that 'services by the employee to the employer in the course of or in relation to his employment was treated neither as supply of goods nor supply of services.' Contrarily, in the SCN the employee employer relationship was subjected to taxes.

(¶ 13.) The demand order in the present case was solely based on the Show Cause Notice. The department erred in classifying the charges of "willful tax evasion" which has no statutory mentioning. In the case of ***M/S 3I Infotech Ltd v. Commissioner of Service Tax,***

[15] Indian legal and Economic forum v. U.O.I (1997) 10 SCC 728.

[16] Satish Chandra v. Union of India, AIR 1953 SC 250.

[17] Art. 256 of the Constitution of India.

[18] Mathuram Agrawal v. State of Madhya Pradesh, AIR 2000 SC 109.

[19] Circular No. 172/04/2022-GST, dt. 6th July 2020.

Mumbai [20] the Hon'ble Supreme Court mentioned that basic natural justice principles mandated that the show cause notice's classification be the only factor taken into consideration while rendering a judgement. A show cause notice with an entirely false category of services cannot be the basis for penalizing the assessee. Consequently, it was held unlawful to make a demand based on the initial show cause notice. Further, in the case of, ***Metal Forgings and Ors. v. Union of India (UOI) and Ors.***[21] The division bench of Supreme Court reinstated that the law requires a notice to be issued under a specific provision of law and not as a correspondence or part of an order.

(¶ 14.) The grounds under section 74 of the CGST Act states about willful misstatement or suppression of facts to evade tax liabilities which cannot be invoked as the Indian Company neither misstated any information nor did it suppress any kind of facts pertinent to tax liabilities. The Company had just incorporated a new tax planning set-up, which is to be differentiated from tax evasion strategies.

(¶ 15.) In the landmark case of, ***Vodafone International Holdings BV v. Union of India***[22] Taxpayers have the right to minimize taxes legally; they aren't obligated to maximize revenue for the government. Therefore, the authorities were wrong in considering this tax planning set-up as import of services. Lord Summer in ***IRC vs. Fisher's Executors***[23], referring to the **Westminster case** established the right to minimize tax obligations within legal bounds, without incurring liability or blame..

(¶ 16.) Therefore relying on the Judicial Precedents and applying the analogy to the present case it is hereby humbly submitted before this Hon'ble Court, that the Show Cause Notice was issued on erroneous grounds and outside the jurisdiction of the GST Department, so the subsequent order passed by the authorities is also unlawful.

3) WHETHER THERE IS ANY IMPORT OF SERVICES UNDER GST AND WHETHER THE INDIAN COMPANY IS LIABLE TO PAY GST UNDER REVERSE CHARGE MECHANISM?

[20] M/S 3I Infotech Ltd v. Commissioner of Service Tax, Mumbai 2023 INSC 711.

[21] Metal Forgings and Ors. v. Union of India (UOI) and Ors AIR 2003 SC 291.

[22] Vodafone International Holdings BV v. Union of India (2009) 179 Taxman 129 (SC).

[23] IRC vs. Fisher's Executors 1926 AC 395 (HL), p. 412.

(¶ 17.) It is most humbly submitted before the Hon'ble HC that there is no import of services under GST and the Indian company is not liable to pay GST under reverse charge mechanism ***firstly***, secondment arrangement in general is not liable to GST **[3.1]**; ***secondly***, there is no GST implication for the period from 2010 to 2022 **[3.2]**; ***thirdly***, there is no GST implication for the period from 01.06.2022 to to 31.12.2023 **[3.3]**; and ***fourthly,*** the invocation of extended period of limitation & penalty is erroneous **[3.4]**.

3.1 SECONDMENT ARRANGEMENT IN GENERAL IS NOT LIABLE TO GST

(¶ 18.) It is most humbly submitted before the Hon'ble HC that secondment arrangements are in general not liable to GST because ***firstly***, GST is not applicable on the employer-employee relationship **[i]**; and ***secondly***, the NOS judgement is not universally applicable **[ii].**

i. GST is not applicable to employer-employee relationship

(¶ 19.) is submitted that in the GST regime, a taxable event is the supply of goods or services or both. Anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged is termed as "Services".[24]

(¶ 20.) As per **S. 7(1)(b),** "Supply" includes import of services for a consideration whether or not in the course or furtherance of business.

(¶ 21.) It is pertinent to note that S. 7(2)(a) specifically provides certain activities or transactions that are specified in Schedule III of the CGST Act, 2017 which are not to be termed as either supply of goods or services.

(¶ 22.) Clause (1) to the said Schedule mentions that:

"Services by an employee to the employer in the course of or in relation to his employment."

(¶ 23.) In this regard, on a conjoint reading of **S. 7 with Schedule III entry (1)**, it is to be noted that under the GST regime, services of the employee to the employer are considered as neither supply of goods nor supply of services.

(¶ 24.) Therefore, it is most humbly submitted that reimbursement of salary by a host company to the deputing company in a typical secondment agreement does not qualify as a

[24] S. 2(102) of CGST ACT, 2017

supply since there is no service that is being provided by such deputed employees to the host company. Hence, if the underlying transaction encapsulates within itself an employer-employee relationship between the parties, then the service provided by the employee to the employer would be considered outside the scope of GST as the same are excluded vide Schedule III, Entry(1) to the CGST Act and hence, not be liable to GST.

(¶ 25.) In GST, in order to qualify as 'supply', there must be reciprocity and the person providing the consideration is expected to receive something in return.

ii. The NOS judgement is not universally applicable

(¶ 26.) It is most differentially submitted before the Hon'ble Court that the contention of the GST Department regarding GST implications on secondment agreements, in general, is devoid of merits. The decision of the Hon'ble SC in NOS[25], is not mechanically applicable on a universal basis as no two cases are identical in every aspect. The said judgement was decided on the basis of its own peculiar facts and cannot be *ipso facto* applicable in all cases.

(¶ 27.) In ***Commissioner of Central Excise, Mumbai v. M/s Fiat India[26]***, the Hon'ble SC has held that:

(¶ 28.) *" 66. .....Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*

(¶ 29.) This is further substantiated by the fact that vide its ***instruction***[27], the Central Board of Indirect Taxes and Customs, has clarified that the decision of the Hon'ble Supreme Court in the NOS judgment should not be applied mechanically in all the cases.

(¶ 30.) It is most reverently submitted that the tax implications of different secondment arrangements are distinct based on the nature of the contract and other terms and conditions

[25] C.C., C.E. & S.T. Bangalore v. Northern Operating Systems (P.) Ltd. [2022] 138 taxmann.com 359 (SC)

[26] Commissioner of Central Excise, Mumbai Versus M/s Fiat India(P) Ltd in Civil Appeal 1648-49 of 2004.

[27] Circular No. 172/04/2022-GST, dt. 6th July 2020

attached to it.[28] Thereby, the scenarios of different secondment arrangements need to be observed independently of any other arrangement.

(¶ 31.) Further, the decision of NOS was pertaining to the erstwhile Service Tax regime, wherein S. 65(44)(b) excludes the provision of service by an employee to the employer in the course of or in relation to his employment. This very provision is identical to Entry (1) of Schedule III of CGST Act.

(¶ 32.) The Court in the said judgment with extreme precision determined the Indian entity as the service recipient and held it liable to GST. However, if it is reckoned that the Indian company is treated as an employer, the payment would in effect be reimbursement and not chargeable to tax in the hands of the overseas entity.[29]

(¶ 33.) Therefore, it is submitted that the decision of NOS is not universally applicable on each and every case.

(¶ 34.) Hence, it is most reverently submitted that secondment arrangements in general are not liable to GST, because GST is not applicable to the employer-employee relationship and the NOS ruling is not mechanically applicable to all cases on a universal basis. In GST, in order to qualify as 'supply', there must be reciprocity and the person providing the consideration is expected to receive something in return.

3.2 THERE SHALL BE NO GST IMPLICATIONS FROM 2010-2022, BASED UPON THE EXPERIENCE LETTERS

(¶ 35.) The petitioner most reverently submits before the Hon'ble Court that based on the experience letters issued, there will be no GST implication for the period 2010 to 2022 because ***firstly***, the arrangement is sufficing tax planning **[i]**; ***secondly***, there is a contract *of* service **[ii]**.

i. The arrangement is a way of tax planning

(¶ 36.) It is brought to the kind attention of the Hon'ble Court that the Indian Co. along with the consent of SOS US and the expats had terminated the services of all the expats from the payrolls of the US Co. and inducted them in the Indian Co.'s payrolls. As per the terms of the

[28] Supra note 25, NOS.

[29] Supra note 25, NOS.

experience letters issued, for all legal and other purposes, these expats were treated as employees of SOS India from 2010 to June, 2022.

(¶ 37.) A taxpayer is entitled to arrange his/her affairs to minimise tax.[30] According to the Westminster Principle, every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.[31] In the landmark case of ***Bradford (City) v. Pickles***[32], the House of Lords held that:

(¶ 38.) *"No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious."*

(¶ 39.) Every taxpayer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury.[33]

(¶ 40.) The petitioner most reverently submits that this very act of issuing the experience letters is a way of tax planning. Through the experience letters issued, the seconded employees became the employees of SOS India.

(¶ 41.) By this arrangement, the employees benefitted from the Indian employment laws like the gratuity, employees' insurance, etc. Moreover, the arrangement is clearly a tax avoidance measure taken by the authorities in order to manage the finances since the salaries of the KMPs were already very high and the profit of the SOS India would not have been able to manage the payment of salaries while also paying the service tax.

(¶ 42.) Relying upon this reasoning, it can be concluded that the instant measure taken by the Indian Company was merely for the betterment of finances of the company as well as for the efficient environment for the employees, and would thereby amount to tax avoidance, which is perfectly legal. The contention of the GST department that the arrangement is a sham transaction is wholly untenable.

(¶ 43.) Therefore, for the period from 2010 to 2022, the services rendered by the employees were not as expats but purely as the employees of the Indian company which does not amount

[30] Inland Revenue Commissioners v. His Grace Duke of Westminster [1936] A.C. 1 (U.K. H.L.)

[31] Supra Note 1.

[32] Bradford (City) v. Pickles, [1895] A.C. 587 (U.K. H.L.)

[33] Vodafone International Holdings BV v. Union of India,

to 'import of services' under S.7 of CGST Act but gets protected under the Entry (1) to Schedule III of the same Act.

(¶ 44.) Even as an arguendo, assuming but not conceding, that this very "innovative arrangement" is not a tax avoidance scheme, it is humbly contended that, despite such an arrangement, the expats were still very much in effect, were the employees of SOS India and there was a contract *of* service between the secondees and SOS India.

ii. There is a contract of service

(¶ 45.) A contract for service is a temporary arrangement. In a contract of service, there is an employer-employee relationship.

(¶ 46.) It is submitted that there is no hard and fast rule as to which factors should in any case be treated as the determining ones to differentiate between contract of service & contract for service.[34] No one test of universal application can ever yield the correct result.

(¶ 47.) A conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service.[35] Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight.[36]

(¶ 48.) The courts have throughout followed the "substance over form"[37] approach. Further, even in NOS judgement, the court relied on the doctrine of substance over form to ascertain the true nature of the relationship between the seconded employees and the assessee.

(¶ 49.) The crux of the judgement of NOS was precisely pointed out by CESTAT Bengaluru in M/s Dell International Services India Pvt. Ltd. v. The Commissioner of Central Excise & Customs, Bangalore Commissionerate[38], wherein it identified the grounds on which the Apex

[34] Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments 1974 (1) SCR 747

[35] Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd. 7 (2021) 7 SCC 151

[36] Supra note 25.

[37] OECD (2019), "Commentary on Article 15: Concerning the Taxation of Income From Employment", in Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris,

[38] M/s Dell International Services India Pvt. Ltd. v. The Commissioner of Central Excise & Customs, Bangalore

Court in NOS held the Indian entity liable. Further, the CESTAT in the matter presented found that the circumstances are indentical with NOS, thereby, imposing service tax. The Dell ruling is reproduced below:

" 10. It would be seen from the aforesaid judgment of the Supreme Court that while the control over the performance of the employees who were seconded and the right to ask them to return was with the assessee, but it was the overseas employer who, ***in relation to its business****, deployed them to the assessee; it was the overseas employer who paid them the salaries; the terms of employment even during the secondment were in accord with the policy of overseas company; and at the end of the period of secondment the employees returned to their original place to await deployment or extension of secondment."*

(¶ 50.) The Paragraph 52 of NOS states:

"52. A vital fact which is to be considered in this case, is that the nature of the overseas group companies business appears to be to secure contracts, which can be performed by its highly trained and skilled personnel. This business is providing certain specialized services (back office, IT, bank-related services, inventories, etc.). Taking advantage of the globalized economy, and having regard to locational advantages, the overseas group company enters into agreements with its affiliates or local companies, such as the assessee. The role of the assessee is to optimize the economic edge (be it manpower or other resources availability) to perform the specific tasks given it, by the overseas company…amounts to manpower supply."

(¶ 51.) It is submitted that the ruling of NOS is not identical with the case in hand, which is substantiated by the following contentions:

a. SOS India was the legal & economic employee of the expats. Arguendo, assuming that not legal employee if the experience letter is not considered, but it indeed was the economic employee. ***According to the OECD Commentary on Article 15***[39], the expats being the economic employees means that SOS India bears the responsibility or risk for the results produced by the expats's work, it has the authority to instruct the individual regarding how work has to be performed[40]; determines the number and qualifications of the individuals

Commissionerate Appeal No. 3195 of 2011

[39] Supra note 37.

[40] Shivnandan Sharma v. Punjab National Bank Ltd AIR 404/1955 SCR (1)1427

performing the work[41]; has the right to impose disciplinary sanctions related to the work of that individual etc.

b. The most important and distinguishing factor is that the secondees in NOS were indirectly performing the task of the overseas entity despite being seconded. The Indian entity had been entrusted with that work for which it was receiving a markup of 15%. The expats were merely fulfilling the overseas entity's requirement under the guidance of the Indian entity.

c. The facts are silent on the matter of whether the terms of employment even during the secondment were in accord with the policy of overseas Co., thereby, no adverse inference can be made regarding this matter.

d. Further, through the experience letters issued, the employees got benefitted from the Indian employment laws like the gratuity, employees' insurance, etc. And they were inducted into the payrolls of Indian Co.

(¶ 52.) The intention of the parties behind an agreement is one of the major cardinal pillars of the interpretation of a contract[42], therefore, looking at the whole of the instrument and seeing what one must regard as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.[43]

(¶ 53.) Based on the arrangement between SOS India and SOS US, it may be concluded that the parties in this instance, intended the arrangement to be of an 'employer-employee' between SOS India and the expats.

3.3 THERE IS NO GST IMPLICATION FOR THE PERIOD FROM 01.06.2022 TO TO 31.12.2023

(¶ 54.) It is clear from the Factual Matrix that the SOS India from 01.06.2022 onwards, made an arrangement that wherein any expat who had to be seconded to India would be terminated from the services of the seconding company (home company) and would be freshly appointed in the Indian secondee company (host company).

[41] Ram Singh v. U.T. of Chandigarh (2004) 1 SCC 126
[42] M.O.H. Uduman and Ors. v. M.O.H. Aslum, AIR [1991] SC 1020.

[43] Glynn v. Margetson [1893] AC 884.

(¶ 55.) Therefore, the petitioner contends that, owing to the fact that according to the new arrangement, US Company cannot be treated as the supplier of manpower, as the employees are no more under the legal control of the US Company, and there exists an 'Employer-Employee Relationship' between the employees and the Indian Company, it can be concluded that such an arrangement does not amount to 'import of service' from the US company. There is no contract of service between the US Co. & the expats.

(¶ 56.) Section 15 of the GST Act specifies that the value of a supply includes all costs incurred in relation to the supply, including any consideration paid by the recipient to the supplier. It is crucial to emphasise that this arrangement does not involve any reimbursement of salary or expenses, or any flow of consideration from the Indian company to the US company, therefore, can be no 'valuation' issues to impose GST and thereby negating the applicability of GST under the reverse charge mechanism.

(¶ 57.) The expatriates, upon being appointed directly by SOS India, become fully localised employees subject to Indian employment laws and regulations. This localization further underscores the domestic nature of the employment relationship, aligning with the exclusion of services by an employee to the employer from the purview of GST under Schedule III of the GST Act.

(¶ 58.) In light of these considerations, it is evident that the arrangement implemented from June 2022 represents a paradigm shift from cross-border secondment to domestic employment, thereby obviating any GST implications.

(¶ 59.) It is submitted that as per Entry (1) to Schedule III of the CGST Act; 'service by an employee to the employer in the course of or in relation to his employment' is treated neither as supply of goods, **nor a supply of services.** Upon reference to this provision, it can be observed that the instant arrangement wherein there is an 'Employer-Employee relationship' between the employees and the Indian Company, **is not an 'import of service' or 'supply of service'** and therefore, the Indian Company would **not be liable to pay any tax in this regard.**

3.4 THE INVOCATION OF EXTENDED PERIOD OF LIMITATION & PENALTY IS ERRONEOUS

(¶ 60.) As per S.74(1) of CGST Act: "Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax,"

(¶ 61.) it is evident that section 74(1) can be invoked only in cases where there is a fraud or wilful mis- statement or suppression of facts to evade tax on the part of the said taxpayer.

(¶ 62.) It is submitted that Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis-statement or suppression of fact to evade tax on the part of the taxpayer, provisions of section 74(1) of CGST Act may be invoked for issuance of show cause notice.

(¶ 63.) In ***Cosmic Dye Chemical v. Collector of Central Excise***[44], it was held that:

"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."

(¶ 64.) In ***Uniworth Textiles v. Commissioner of Central Excise***[45], it was observed that "the conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts" is "untenable"."

(¶ 65.) It is submitted that whole of the activities were within the knowledge of the Revenue /officials of the Department and hence, there is no scope whatsoever to allege suppression of

[44] Cosmic Dye Chemical v. Collector of Central Excise (1995) 6 SCC 117

[45] Uniworth Textiles v. Commissioner of Central Excise (2013) 9 SCC 753; Escorts v. Commissioner of Central Excise (2015) 9 SCC 109; Commissioner of Customs v. Magus Metals 3 (2017) 16 SCC 491.

any facts. The entire issue involves the interpretation of the statute.[46] Hence penalty is liable to be set aside. The petitioner also seeks no penalty shall be imposed if there is reasonable cause for the failure to pay tax.

(¶ 66.) It is submitted that non-payment of service tax was on account of the belief that no service tax was payable in respect of the activities undertaken by the petitioner; that the very fact that various earlier decisions referred to herein above have also held that no service tax is payable on activities such as those undertaken by the petitioner, itself shows that the petitioners' belief was reasonable and bona fide.

(¶ 67.) It is submitted that what was paid by the petitioner to the expats was nothing but salary which is not amenable GST and the GST department only sought to interpret the same differently to fasten the tax liability. The issue, therefore, involved classification and interpretation of the taxing statute, for which reason also suppression of facts could not be alleged.[47]

(¶ 68.) Therefore, application of this reasoning to the SCN 1 issued by the GST department (31.02.2024), it is evident that because there exists **no secondment arrangement** between the US Company and the Indian Company in the first place, due to the revised arrangement and tax avoidance measure taken by the Indian Company, there exists **no GST liability as such.** Moreover, the SCN 2 (31.02.2024) issued by the GST Department is erroneous in the sense that, since the revised arrangement maintains an 'Employee-Employer Relationship' between the Indian Company and the Employees from June 2022, there exists **no GST liability as such** because such an arrangement does not entail within the parameters of 'import of service'.

(¶ 69.) Since during this period the employees did not serve as US Expats, rather there existed an employer-employee relationship between the Indian Company and the Employees and thereby such an arrangement was covered under **Section 7 r. w. SCHEDULE III of the GST Act, 2017, as not being a part of supply or services.**

[46] ECE Industries Ltd. Vs. CCE-MANU/SC/1138/2003 : 2004 (164) ELT 236
[47] Renault Nissan Automotive India Pvt. Ltd. v. The Commissioner of G.S.T. and Central Excise Service Tax Appeal No. 41736 of 2019

PRAYER FOR RELIEF

WHEREFORE IN THE LIGHT OF ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, IT IS HUMBLY PRAYED THAT THIS HON'BLE HIGH COURT MAY BE PLEASED TO DECLARE THAT:

I. That the writ petitions filed by the Company are maintainable.

II. That the department did not have jurisdiction to issue show cause if the services were not liable to GST per se.

III. That there is no import of services under GST and the Indian company is not liable to pay GST under reverse charge mechanism.

AND/ OR

Pass any such order, judgment or direction that the Hon'ble Court may deem fit in the interest of equity, justice and good conscience.

For this act of kindness, the Counsels for the Petitioner as in duty bound shall forever pray.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd/-

COUNSELS FOR THE PETITIONER