



21st SURANA & SURANA NATIONAL CORPORATE LAW

MOOT COURT COMPETITION

22 - 24 March 2024



BEFORE THE HON'BLE HIGH COURT OF KARNATAKA

AT BENGALURU

WP No. 50000 of 2024 & WP No. 50001 of 2024

Southern Operating Systems India Pvt. Ltd

Bengaluru...

Petitioner

v.

Additional Commissioner of GST & Ors

Bengaluru...

Respondent

Written submission on behalf of the Petitioner

Before the Hon'ble Karnataka High Court,

Counsels for the Petitioner

PETITIONS FILED UNDER ARTICLE 226 OF THE INDIAN CONSTITUTION

MEMORANDUM FILED ON BEHALF OF PETITIONER

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
¶	Paragraph
AIHC	All India High Court Cases
AIR	All India Reporter
Anr.	Another
Art	Article
Co.	Company
Del	Delhi
DRJ	Delhi Reported Judgments
Ed./edn	Edition
Fed. Cir.	Federal Circuit
GST	Goods and Services Tax
Hon'ble	Honourable
i.e.	ID est (That is)
IOS	Import of Services
ILR	Indian Law Reports

Inc.	Incorporated
Ind.	India
J.	Justice
Kant	Karnataka
KMPs	Key Managerial Persons
LJ	Law Journal
Ltd.	Limited
Ors	Others
Pvt.	Private
RCM	Reverse Charge Mechanism
r/w	Read with
s/ Sec.	Section
SC	Supreme Court
SCC	Supreme Court Cases
SCC (Supp)	Supreme Court Cases (Supp)
SCR	Supreme Court Reporter

SOS	Southern Operating System
SOS US or US Company	Southern Operating Systems Inc.
u/s	Under Section
US	United States
Vol.	Volume

INDEX OF AUTHORITIES

S. NO.	NAME OF LEGISLATIONS / CODES / STATUTE
1.	The Constitution of India, 1950.
2.	Code of Civil Procedure, 1908.
3.	Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017 (India).
4.	Finance Act, 1994, No. 32, Acts of Parliament, 1994 (India).
5.	The Contract Labour (Regulation & Abolition) Central Rules, 1971, No. 37, Acts of Parliament, 1971 (India).
6.	The Payment of Wages Act, 1936, No. 4, Acts of Parliament, 1936 (India).
7.	Employee Provident Funds and Miscellaneous Provisions Act, 1952, No. 19, Acts of Parliament, 1952 (India).

S. NO.	LEGAL DATABASE
1.	www.heinonline.com
2.	www.lexisnexis.com
3.	www.manupatra.com
4.	www.scconline.com

S. NO.	BOOKS
1.	CA (DR.) SANJIV AGARWAL, GST APPEALS & APPELLATE PROCEDURES (Bharat Publishers 2024).
2.	RAKESH GARG & SANDEEP GARG, HANDBOOK OF GST: PROCEDURE, COMMENTARY AND RATES (Commercial Law Publishers 2023).
3.	ERNST & YOUNG, THE FINANCE ACT, 1994: A GUIDE (Kogan Page Ltd., 1994)
4.	VOL. II, BIMAL JAIN & A2Z TAXCORP LLP, GST: LAW AND COMMENTARY (POOJA LAW HOUSE, 2023)
5.	C.A. SATBIR SINGH, REVERSE CHARGE MECHANISM GST (Bharat Publishers 2023)
6.	EDN. 11 TH , GST ACTS, TAXMANN'S BARE ACTS (Taxmann Publication Pvt. Ltd. 2023)
7.	EDN. 2 ND , CA ASHISH KARUNDIA, TAXATION OF EXPATRIATE EMPLOYEES & REGULATORY ASPECTS (Taxmann Publication Pvt. Ltd. 2021)
8.	INDUSTRIAL DISPUTE ACT, 1947, BARE ACTS (LexisNexis 2023)

S. NO.	TABLE OF CASES
1.	Bharti Airtel Ltd. v. Union of India, 2021 SCC OnLine SC 1006.
2.	C.C., C.E. & S.T. Bangalore v. Northern Operating System Pvt. Ltd., 2022 SCC ONLINE SC 658.
3.	CCE v. Ballarpur Industries Ltd., (2007) 8 SCC 89.

4.	CCE v. Computer Sciences Corporation India Pvt. Ltd., 2017 SCC Online CESTAT 5839.
5.	CCE v. Gas Authority of India Ltd., (2007) 15 SCC 91.
6.	CIT v. Lakshmi Ceramics, 2016 SCC OnLine ITAT 5032.
7.	Commissioner of Central Excise, Mumbai v. M/S Fiat India Pvt. Ltd., 2012 ECR SC 193 157.
8.	Commissioner of Service Tax v. Arvind Mills Ltd., 2014 SCC ONLINE GUJ 15902.
9.	Dilip N. Shroff v. CIT, 2007 (6) SCC 329.
10.	India Yamaha Motor Pvt. Ltd. v. The Assistant Commissioner, 2022 (8) GST Panacea 400 HC Madras.
11.	Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India, 2018 (4)
12.	Khem Chand v. Union of India, 1957 SCC OnLine SC 6.
13.	Larsen & Toubro Ltd. v. CCE, (20027) 9 SCC 617.
14.	M/S Volkswagen India Pvt. Ltd. v. CCE, Pune 2019 SCC OnLine CESTAT 3092.
15.	Maneka Gadhi v. Union of India, 1978 SCR (2) 621.
16.	Nokia Networks OY v. Joint Commissioner of Income Tax, (2018) 94 taxmann.com 111.
17.	Oryx Fisheries (P) Ltd. v. Union of India, (2010) 13 SCC 427, 435.

18.	Ram Krishna Dalmia v. Justice S.R. Tendolkar, AIR 1958, AIR 1958 SUPREME COURT 538.
19.	Target Corporation India Pvt. Ltd. v. COMMISSIONER OF CENTRAL TAX, BENGALURU, 2021 01 CESTAT CK 0024.
20.	United States v. Bestfoods, 524 U.S. 51 (1998).
21.	Y. Narayan Chetty v. Income Tax Officer reported in (1959) 35 ITR 388 (SC).

STATEMENT OF JURISDICTION

The parties have approached the Hon'ble High Court of Karnataka under Article 226.

In Karnataka, the jurisdiction for filing a writ petition in the High Court is primarily governed by Article 226 of the Constitution of India. Article 226 empowers the High Court to issue writs, directions, or orders to any person or authority within its territorial jurisdiction for the enforcement of fundamental rights or for any other purpose.

The High Court of Karnataka, as per the Karnataka High Court Act of 1961, has the authority to entertain writ petitions under Articles 226. The jurisdiction of the High Court extends to issues where the cause of action, wholly or in part, arises within the territorial jurisdiction of Karnataka, regardless of the seat of the Government, authority, or person against whom the writ is sought.

Furthermore, the Karnataka High Court Act provides for intra-court appeals against orders passed by a learned Single Judge under the original jurisdiction.

In summary, the High Court of Karnataka has the jurisdiction to entertain writ petitions under Articles 226.

STATEMENT OF FACTS

BACKGROUND

Southern Operating Systems India Pvt. Ltd. was established in 2010 as a subsidiary of Southern Operating Systems Inc., a US-based software development company. SOS India aimed to leverage the software market potential in India and the Asia-Pacific region, aligning its operations with the established software development and research expertise of SOS US. The US company deployed highly paid key managerial persons (KMPs) to India in 2010 to facilitate the setup, share technological know-how, and maintain product quality.

DISPUTE

Following substantial revenue generation, SOS India reimbursed KMP salaries from 2012, treating expats as US employees legally and Indian employees economically. In 2017, show cause notices for service tax liability arose, contested by SOS India. The Karnataka High Court ruled in favour but upheld tax liability for service tax on reverse charge mechanism for importing manpower services.

In July 2017, the Goods and Services, 2017 (GST Act) was introduced w.e.f 01.07.2017. Therefore, as a tax planning measure, the Indian company and the US company decided to terminate the services of all the expats sent to India from the payrolls of the US company and planned to induct them in the Indian company's payrolls. The GST department issued show cause notices to the Indian company on 31.01.2024, alleging an innovative secondment arrangement with the US company that raised concerns about GST evasion. The department invoked an extended period, imposing maximum penalties and treating ongoing services as deemed consideration for tax liability.

CAUSE OF ACTION

Against the demand orders, the Indian company filed two writ petitions before the High Court of Karnataka.

STATEMENT OF ISSUES

ISSUE 1

WHETHER THE WRIT PETITION IS MAINTAINABLE.

ISSUE 2

WHETHER THE DEPARTMENT HAD JURISDICTION TO ISSUE THE SCNs IF THE SERVICES WERE NOT LIABLE TO GST PER SE.

ISSUE 3

WHETHER SECONDMENT ARRANGEMENT IN GENERAL LIABLE TO GST.

ISSUE 4

WHETHER BASED ON THE EXPERIENCE LETTERS ISSUED FOR THE PERIOD FROM 2010 TO 2022, IT CAN BE SAID THAT THERE WILL BE NO GST IMPLICATION FOR THIS PERIOD.

ISSUE 5

WHETHER BASED ON THE ARRANGEMENT FROM 01.06.2022, IT CAN BE SAID THAT THERE WILL BE NO GST IMPLICATION.

ISSUE 6

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 ARGUMENT

Issue 1.

It is humbly submitted that the writ petition challenges the arbitrary action of the GST department, thereby asserting tax liabilities on SOS India (single quotation) writ petition challenges the GST department's arbitrary actions, asserting tax liabilities on SOS India without concrete proof or due process, violating fundamental rights. Allegations of wilful tax evasion lack substantiation, infringing on the right to equality and business. The High Court, empowered by Article 226, can rectify this injustice, given the petition's adherence to procedural requisites. SOS India's compliance with the Code of Civil Procedure reinforces the petition's legal standing.

Issue 2.

It is the Show Cause Notices (hereinafter 'SCNs') lack foundation, as they fail to allege fraud or wilful misstatement necessary for jurisdiction under Section 74 of the CGST Act. The quasi-judicial authority must act fairly, but the impugned notice lacks clarity on charges, violating principles of natural justice. The GST on secondment arrangements is disputed, citing expats' complete localization and control by the Indian company, supported by a precedent. The SCN's faulty issuance is attributed to the assessing officer's misinterpretation of expatriate employees' status, emphasizing the need for the proper officer's careful consideration as per Section 74 of the CGST Act.

Issue 3.

The argument contests the general GST liability of secondment arrangements, emphasizing the Supreme Court's stance that each case's unique facts matter. It notes the varied tax implications in different secondment agreements and asserts that the Northern Operating System judgment shouldn't be mechanically applied. The exemption from GST for secondment is argued based on the absence of profit or finance benefit. The reimbursement of salary expenses without markup supports the claim that it's not a manpower supply service. Previous court rulings reinforce the idea that reimbursement costs don't form part of the service's gross value. Control by the Indian company over seconded employees is highlighted, aligning with the exclusion of employee services from the definition of service under GST laws. The case of Volkswagen

India is cited to emphasize the employer-employee relationship, crucial in determining GST applicability. The conclusion asserts that if the secondment involves such a relationship, GST doesn't apply, emphasizing the importance of control and supervision by the Indian entity. The reimbursement of salary within an employer-employee relationship is deemed non-taxable, in line with judicial positions.

Issue 4.

The counsel contends that there is no GST implication for expatriates from 2010 to 2022, supported by experience letters. The letters prove SOS India's control and supervision, establishing expatriates as employees. Legal principles, including the control test and the alter ego doctrine, argue SOS India and SOS US as a single entity. The issuance of experience letters, in compliance with labor laws, serves as tangible evidence of employment, making GST inapplicable. The provision in the GST Act further reinforces that employee services are outside the GST scope.

Issue 5.

From June 1, 2022, there will be no GST implication as employees transitioned directly from the US company to SOS India. Grounds for exemption include direct appointment by SOS India, payment directly credited to employees' accounts, and the Indian entity having the authority to hire and fire. The control, supervision, and payment are handled by SOS India, reinforcing the absence of GST liability. The arrangement aligns with Schedule III of the CGST Act, and the Payment of Wages Act supports direct salary payments, making GST inapplicable.

Issue 6.

The counsel asserts there is no GST implication based on experience letters issued from 2010 to 2022. Regarding 'Import of Services' under GST, payments to expatriates through the reverse charge mechanism don't automatically classify services as imported. The reverse charge mechanism applies only if services are explicitly identified as imported. Additionally, the counsel argues that the provision of services by expatriates to SOS India is not a related party transaction subject to GST under the reverse charge mechanism. The absence of consideration for services and the principle of substance over form support the argument that GST should not

be applicable to the secondment arrangement between SOS India and its parent company. The economic substance of the provision of services should determine tax liabilities, aligning with authoritative judicial precedent and ensuring fair assessment.

ARGUMENTS ADVANCED

ISSUE 1. WHETHER THE WRIT PETITION IS MAINTAINABLE.

The counsel humbly submits before the Hon'ble High Court of Karnataka that the writ petition is maintainable on the following grounds. [1.1] Arbitrary action of GST dept. infringes the Fundamental rights.

[1.1] Arbitrary action of GST dept. Infringes the Fundamental rights.

The GST department's actions, particularly the issuance of show cause notices questioning the secondment arrangement and alleging wilful tax evasion, must conform to the principles of reasonableness and non-discrimination¹ as mandated by Article 14 of the Indian Constitution.² Despite the absence of concrete proof or a thorough investigation, the GST department has proceeded to assert tax liabilities on SOS India based on presumptions rather than facts. This unilateral action disregards the principles of natural justice and due process,³ which mandate fair treatment and an opportunity to be heard before allegations are made or penalties imposed. Any arbitrary action by the GST department infringes upon the fundamental rights of SOS India, particularly the right to equality before the law and the right to carry on business without undue interference. The allegations of wilful tax evasion without proper substantiation or due process represent a violation of these fundamental rights.

Furthermore, the GST department's decision to allege wilful tax evasion without providing SOS India with a meaningful opportunity to present its case constitutes arbitrary action. Allegations of wilful tax evasion carry serious consequences and should only be made based on clear evidence and after affording the accused party adequate procedural safeguards.

By proceeding in this manner, the GST department has acted arbitrarily, violating the fundamental rights of SOS India, particularly the right to equality before the law and the right to carry on business without undue interference. This arbitrary conduct infringes upon the constitutional guarantees enshrined in Articles 14 and Article 21 of the Indian Constitution. Moreover, the authority to challenge arbitrariness is further supported by the principles of

¹ Ram Krishna Dalmia v. Justice S.R. Tendolkar, AIR 1958 SUPREME COURT 538.

² INDIA CONST. art 14.

³ Maneka Gadhi v. Union of India, 1978 SCR (2) 621.

natural justice and due process enshrined in Article 21 of the Constitution. Any action by the GST department that deprives SOS India of its right to fair treatment and procedural fairness would amount to a violation of Article 21.⁴

Therefore, the arbitrariness of the GST department lies in its hasty issuance of show cause notices and allegations of wilful tax evasion without adhering to the principles of reasonableness, procedural fairness, and due process. Such arbitrary actions undermine the rule of law and necessitate judicial intervention to rectify the injustice suffered by SOS India.

Given the inherent power of the judiciary to ensure adherence to constitutional principles and safeguard citizens' fundamental rights, the High Court has the authority to intervene and rectify any arbitrary actions by the GST department. The court can strike down arbitrary decisions and provide relief to SOS India in accordance with the principles of justice and fairness.

The constitutional mandate provided by Article 226⁵ assumes paramount significance in assessing the petition's standing. This constitutional provision empowers High Courts to issue writs for the enforcement of fundamental rights and other appropriate reasons. In the case of SOS India, the petition challenges the jurisdiction of the GST department and raises fundamental questions regarding the interpretation of GST laws in relation to secondment arrangements. These issues align with the purview of fundamental rights or other grounds justifying court intervention, thereby affirming the constitutional validity of the petition.

The petition meticulously adheres to procedural requisites outlined in statutes and constitutional provisions. SOS India's legal representatives have ensured compliance with procedural mandates delineated in the Code of Civil Procedure (CPC), particularly Section 141,⁶ which extends the applicability of procedural provisions to High Courts when exercising jurisdiction under Article 226 of the Constitution. By meticulously adhering to these procedural norms, SOS India fortifies the petition's compliance with established legal norms, thus augmenting its maintainability.

⁴ INDIA CONST. art 21.

⁵ INDIA CONST. art 226.

⁶ CODE OF CIVIL PROCEDURE, § 141.

Issue 2. WHETHER THE DEPARTMENT HAD JURISDICTION TO ISSUE THE SCNs IF THE SERVICES WERE NOT LIABLE TO GST PER SE.

[2.1] SCNs Are Unsustainable And Do Not Extend The Case Of The Revenue.

It is humbly submitted before the hon'ble court that the Show Cause Notice does not contain any foundational facts, such as allegations of fraud or wilful misstatement or suppression of facts to evade tax which are *sin qua non* for assumption of jurisdiction to exercise the power under Section 74 of the CGST Act⁷. Therefore, the impugned show cause notice lacking in jurisdictional fact is unsustainable in law⁸ as SCN is not an empty formality calling for lip service⁹ and is the foundation of Department's case.¹⁰

It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.¹¹

However, a bare perusal of the impugned show-cause notice creates a clear impression that it is a notice issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner i.e. whether it is actuated by reason of fraud or any wilful misstatement or suppression of facts in order to evade tax. Needless to state, that the proceedings under Sec. 74¹² have a serious connotation as they allege punitive consequences on account of fraud or any wilful misstatement or suppression of facts employed by the person chargeable with tax. In absence of clear charges which the person so alleged is required to answer, the notice is bound to be denied proper opportunity to defend itself. This would entail violation of principles of natural justice¹³ which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy.¹⁴

⁷ CENTRAL GOODS AND SERVICES ACT, 2017, § 74(1), No. 12, Acts of Parliament, 2017 (India).

⁸ Larsen & Toubro Ltd. v. CCE reported in (20027) 9 SCC 617, Y. Narayan Chetty v. Income Tax Officer reported in (1959) 35 ITR 388 (SC).

⁹ Oryx Fisheries (P) Ltd. v. Union of India, (2010) 13 SCC 427, 435.

¹⁰ CCE v. Ballarpur Industries Ltd., (2007) 8 SCC 89, CCE v. Gas Authority of India Ltd., (2007) 15 SCC 91.

¹¹ NKAS Services Private Limited v. State of Jharkhand [2022] 99 GSTR 145 (Jharkhand).

¹² *supra note (7)*.

¹³ Khem Chand v. Union of India, 1957 SCC OnLine SC 6.

¹⁴ *supra note (10)*.

[2.2] GST is not payable on the secondment arrangements due to expats' complete localization to India and the nature of the services provided.

It is humbly submitted before the Hon'ble High Court of Karnataka that the expatriate employees assigned to the Indian company were working under the control of the Indian company notwithstanding that the employees seconded by SOS US to the Indian Company had lien on the employment with SOS US, the same does not lead to the conclusion that the expatriate employees continued to be employees of the US Company even during the secondment with SOS India.

The Special Bench of the Delhi Tribunal, in the case of *Nokia Networks OY Vs Joint Commissioner of Income Tax*¹⁵ vide majority judgement held in para 45 that the expatriate employees assigned to the Indian company were working under the control of the Indian company notwithstanding that the assigned employees had lien on the employment with the foreign assignor company. Therefore, it is clearly evident that the expatriate employees are working exclusively for the Indian company during the tenure of their secondment and have simultaneously released for the period in question.

To draw support from the above judgement, it is humbly submitted that the SCN issued was faulty and defective,¹⁶ as the assessing officer erred in holding that the expatriate employees during the period of deputation to India continued to be employees of the US Company and were carrying on its business in India. The expression used in Section 74 of the CGST Act¹⁷ requires proper application of mind by the proper officer. The expression 'appears to the proper officer' has not to be a casual act but should show full application of mind by the 'proper officer'.¹⁸

¹⁵ Nokia Networks OY vs Joint Commissioner of Income Tax, (2018) 94 taxmann.com 111.

¹⁶ Tarun Jain, Reflections on Criticality of Show-Cause Notice in Tax Laws, 2023 SCC OnLine Blog Exp 80.

¹⁷ CENTRAL GOODS AND SERVICES ACT, 2017, § 74, No. 12, Acts of Parliament, 2017 (India).

¹⁸ Dilip N. Shroff v. CIT, 2007 (6) SCC 329.

**ISSUE 3. WHETHER THE SECONDMENT ARRANGEMENT IN GENERAL
LIABLE TO GST.**

It is humbly submitted before the Hon'ble High Court of Karnataka that the secondment arrangement generally not liable to GST for which counsel establishing on the following grounds. [3.1] The similarities in the cases do not account for in general liabilities [3.2] Secondment remains exempt from GST due to the absence of Manpower Supply Services [3.3] There exists Indian company's control over employees.

[3.1] The similarities in the cases do not account for in general liabilities.

In a recent judgement of *Mumbai v. M/S Fiat India Pvt. Ltd*¹⁹ the Hon'ble Supreme Court held that 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.

It may be relevant to note that there may be multiple types of arrangements in relation to secondment of employees of overseas group company in the Indian entity. In each arrangement, the tax implications may be different, depending upon the specific nature of the contract and other terms and conditions attached to it. Therefore, the decision of the Hon'ble Supreme Court in the *Northern Operating System*²⁰ judgment should not be applied mechanically in all the cases. Investigation in each case requires a careful consideration of its distinct factual matrix, including the terms of contract between overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Hon'ble Supreme Court's judgment in *North Operating System* case (supra).²¹

[3.2] Secondment Remains Exempt From GST Due To The Absence Of Manpower Supply Services.

It is submitted before the Hon'ble Court of Karnataka that as in the case of *Southern Operating Systems* the reimbursement of the salary expenses was only on cost-to-cost basis without any markup to the US company and if the actual cost incurred by appellant in terms of salary

¹⁹ Commissioner of Central Excise, *Mumbai v. M/S Fiat India Pvt. Ltd.* 2012 ECR SC 193 157.

²⁰ C.C., C.E. & S.T. Bangalore v. *Northern Operating System Pvt. Ltd.* 2022 SCC ONLINE SC 658.

²¹ *supra* note (2).

remuneration and perquisites is only reimbursed by group of companies, there remains no element of profit or finance benefit. The arrangement is that of the continuous control and the direction of the company to whom the holding company has deputed the employee, such an arrangement is out of the ambit to be called manpower supply services.²²

It was previously stipulated in a case, by the hon'ble court that the amount paid to foreign associate enterprises as a reimbursement cost for employees for secondment in India cannot form part of the gross value of the service imported by the appellant from foreign parties. There is no consideration charged by the foreign companies for the alleged service. It is only the cost of salary/ wages which are reimbursed by the appellant.²³

In the case of seconded employees, service tax is not leviable under the category of manpower recruitment or supply of manpower service²⁴. Further, the Division Bench of the Tribunal in the case of Northern Operating Services Pvt. Ltd. Vide Final Order No. 20852-20854/2020 dated 23.12.2020 has allowed the appeal of the assessee and set aside the demand raised by the Department under the category of manpower recruitment or supply agency service.

[3.3] There exists Indian company's control over employees.

The application of GST to the secondment arrangement also depends upon whether there was a supply of manpower by the overseas company to the Indian entity. Section 7(2) of the CGST Act excludes activities or transactions specified in Schedule III from being treated as either supply of goods or services. Entry 1 of Schedule III of the CGST Act²⁵ provides that "services by an employee to the employer in the course of or in relation to his employment" and such services are also excluded from the definition of "service" under Section 65B(44) of the Finance Act, 1994.²⁶

In the case of the Volkswagen India Pvt. Ltd.²⁷ the hon'ble court stipulated that the expatriates working under the assessee are the employees of the assessee as there is an employer-employee relationship. As such, there is no supply of manpower service which is rendered to the appellant

²² Commissioner of Service Tax v. Arvind Mills Ltd., 2014 SCC ONLINE GUJ 15902.

²³ CCE v. Computer Sciences Corporation India Pvt. Ltd., 2017 SCC Online CESTAT 5839.

²⁴ India Yamaha Motor Pvt. Ltd. v. The Assistant Commissioner, 2022 (8) GSTPanacea 400 HC Madras.

²⁵ CENTRAL GOODS AND SERVICES TAX, 2017, § 7, No. 12, Acts of Parliament, 2017 (India).

²⁶ FINANCE ACT, 1994, § 65B(44), No. 32, Acts of Parliament, 1994 (India).

²⁷ M/S Volkswagen India Pvt. Ltd. v. CCE, Pune 2019 SCC OnLine CESTAT 3092.

by the foreign/ holding company. The method of disbursement of salary cannot determine the nature of transaction.

Therefore, if the secondment arrangement involves an employer-employee relationship²⁸ between the seconded employees and the Indian entity, GST would not be applicable. The seconded employees shall be considered an employee only if they work directly under the control and supervision of the secondee company. The judicial position²⁹ indicates that the reimbursement of salary by the secondee company to the seconded company does not constitute a supply if it is part of the employer-employee relationship.

²⁸ Target Corporation India Pvt. Ltd. v. COMMISSIONER OF CENTRAL TAX, BENGALURU, 2021 01 CESTAT CK 0024.

²⁹ *supra note (25)*.

ISSUE 4. WHETHER BASED ON THE EXPERIENCE LETTERS ISSUED FOR THE PERIOD FROM 2010 TO 2022, IT CAN BE SAID THAT THERE WILL BE NO GST IMPLICATION FOR THIS PERIOD.

The counsel humbly submits before the Hon'ble High Court of Karnataka that there is no GST implication based on experience letters issued from the 2010 to 2022 on the respective ground. [4.1] Expats were controlled and managed by the SOS India. [4.2] Expats were the employee of SOS India as they provided the experience letters.

[4.1] Expats were controlled and managed by the SOS India.

First and foremost, we invoke the unequivocal ruling in Commissioner of Central Excise, Bangalore v. M/s. Southern Switchgears Ltd., wherein the court unequivocally emphasized that the degree of control exercised by the employer over the employee is paramount in determining the employment relationship. Throughout the relevant period, SOS India exercised comprehensive control over the expatriates. The expatriates were integral to SOS India's operations, and their roles and responsibilities were meticulously directed by SOS India's management. They were involved in strategic decision-making processes, tasked with critical responsibilities, and their day-to-day activities were closely supervised by SOS India's management team.

Furthermore, SOS India assigned specific tasks to the expatriates, ensuring alignment with the company's objectives and strategies. The expatriates reported directly to SOS India's management hierarchy, and their performance evaluations and appraisals were conducted by SOS India's human resources department.

Additionally, SOS India provided the necessary infrastructure, resources, and support to enable the expatriates to carry out their duties effectively. This included office space, equipment, training, and other resources essential for their roles within the organization.

Moreover, SOS India had the authority to terminate the expatriates' employment contracts and make decisions regarding their employment status, demonstrating the level of control exerted by SOS India over the expatriates.

In light of the foregoing, it is evident that SOS India exercised comprehensive control over the expatriates throughout the relevant period, directing their work, assigning tasks, and overseeing

their day-to-day activities. This unequivocally establishes the expatriates as employees of SOS India for the period from 2010 to 2022.

The essential condition to be a *workman under Sec 2(s) of the Industrial Dispute Act, 1947*³⁰, is that there must be a relationship between them similar to a relationship between employer and employee or master and servant. They apply a test to determine the existence of the relationship, which was established in *the case of Short V. J. & W. Henderson Ltd.* that the right of supervision and the amount of control by the employer will determine the existence and nature of the relationship. The conclusion drawn from this case is that there is a difference between the workman and the independent contractor. The difference is that the workman does the work assigned to him personally and the independent contractors appoint people to work for him to complete the work assigned to him. So, the KMP's are the workman for the purpose of *Sec 2(s) of the industrial dispute act, 1947*.

[4.2] Expats were the employee of SOS India as they provided the experience letters.

The very framework of the issuance of the experience certificate has been enshrined in the Section 77 In the Contract Labour (Regulation & Abolition) Central Rules, 1971.

In this case, the SOS India is almost 100% subsidiary of the SOS US mean that it is wholly owned company. The consideration of the authoritative decision of the SOS India would be considered as the prudent decision by the parent company. Henceforth, it can be deduced that SOS US and SOS India is entitled to be a single entity. In the landmark case of *United States v. Bestfood*,³¹ the Supreme Court emphasized the principle of "piercing the corporate veil" within parent-subsidary relationships. This principle allows courts to disregard the separate legal identities of parent and subsidiary corporations under specific circumstances, treating them as a single entity for legal purposes. The substantial ownership stake of SOS US in SOS India, coupled with the influential decision-making role of the parent company, aligns with the criteria for piercing the corporate veil as outlined in Bestfoods.

Furthermore, in re Caremark Int'l Inc. Derivative Litigation,³² established the duty of oversight owed by corporate directors over subsidiary operations. The Delaware Chancery Court emphasized the obligation of parent companies to actively monitor and control subsidiary

³⁰ INDUSTRIAL DISPUTE ACT, 1947, § 2(s), No. 14, Acts of Parliament, 1947 (India).

³¹ *United States v. Bestfoods*, 1998 524 U.S. 51.

³² *Caremark Int'l Inc. Derivative Litigation* 1996, 698 A.2d 959 (Del. Ch. 1996).

activities to ensure compliance and accountability across the corporate structure. SOS US's almost complete ownership of SOS India strengthens the argument that SOS India operates under the direct oversight and control of SOS US, aligning with the principles set forth in Caremark.

Moreover, the principle of "alter ego" or "single economic entity" doctrine, as recognized in *Fletcher v. Atex, Inc.*,³³ allows courts to disregard the separate legal identities of related entities when they operate as a single economic unit. SOS India and SOS US, being closely integrated both operationally and financially, can be considered a single economic entity under this doctrine, further supporting the argument for treating them as a unified entity.

Therefore, based on the authoritative decision of SOS India endorsed by SOS US, the substantial ownership stake of SOS US in SOS India, and established legal principles including piercing the corporate veil, duty of oversight, and alter ego doctrine, there is compelling legal justification for treating SOS India and SOS US as a single entity under the control and oversight of the parent company. The cornerstone provision univocally declares that the experience letter can only be issued by the employer. The provision explicitly states about the service certificate that the "On termination of employment for any reason whatsoever the contractor shall issue to the workman whose services have been terminated a Service certificate in form of XV.

In Contract Labour (Regulation & Abolition) Karnataka Rules, 1974, clearly mentioned of the service certificate, it is as per the rule 77 of the centre. Here, it explicitly mentioned that the experience letter or service letter can only be given by the employer so the SOS India has issued the experience letter since from the establishment of it and acknowledged that the KMP's are the employees of SOS India.

Secondly, In the ongoing case between Southern Operating Systems India Pvt. Ltd (SOS India) and the GST department, I assertively reiterate SOS India's stance regarding the GST implications for the period from 2010 to 2022, highlighting the pivotal role of documentary evidence, particularly experience letters, in substantiating the employment relationship between SOS India and the expatriates.

³³ Fletcher v. Atex, Inc 1995, 68 F. 3d 1451 (2d Cir. 1995).

I draw your attention to the landmark judgment in *Commissioner of Central Excise & Service Tax, Coimbatore v. M/s. Lakshmi Ceramics*,³⁴ where the court underscored the critical role of documentary evidence, such as experience letters, in substantiating the employment relationship.

Throughout the relevant period, SOS India issued experience letters to the expatriates, documenting their roles, responsibilities, and contributions to the company. These experience letters serve as tangible evidence of the expatriates' employment status and their integral role in SOS India's operations. They provide a clear and unambiguous record of the expatriates' affiliation with SOS India during the period under scrutiny.

Moreover, the issuance of experience letters by SOS India to the expatriates leaves no room for doubt regarding their employment status. These documents, meticulously prepared and officially issued by SOS India, provide a comprehensive overview of the expatriates' roles, responsibilities, and contributions, further solidifying their affiliation with SOS India during the period in question.

³⁴ CIT v. Lakshmi Ceramics, 2016 SCC OnLine ITAT 5032.

ISSUE 5. WHETHER BASED ON THE ARRANGEMENT FROM 01.06.2022, IT CAN BE SAID THAT THERE WILL BE NO GST IMPLICATION

There will be no Goods and Services Tax (GST) implication based on the arrangement from 01.06.2022. The employees of the Indian company were terminated from the services of the seconding company & were freshly appointed in the Indian secondee company (host company). Additionally, the services rendered by the employees of an Indian company to an Indian company are not liable to GST, and the US company cannot be treated as a supplier of manpower as the employees are no longer under the legal control of the US company. Therefore, not liable to GST for which the counsel establishing three grounds- [5.1] Employees directly appointed by SOS Ind. [5.2] Payment is directly being credit to employers account.

[5.1] An Employer- Employee relationship exists between the involved parties.

Now, employees are directly been appointed by SOS Ind. & for all legal and economic purposes SOS Ind. is the employer. In the event that an employer-employee relationship exists between the involved parties, the services rendered by the employee to the employer shall be deemed to fall outside the purview of the Goods and Services Tax (GST). This exclusion is explicitly delineated in Schedule III to the Central Goods and Services Tax (CGST) Act. Consequently, such services would not be subject to GST liability.

In reference to the case of *Northern Operating System*,³⁵ it was determined that despite expatriates providing services in India, they did not qualify as the actual employer. This distinction arises from the fact that expatriates only possess the authority to terminate the secondment of employees, whereas, under the current arrangement, SOS Ind. retains the ability to terminate the services of expatriates who have now transitioned into the status of employees of SOS Ind. It was contended that post July 2012, under the Negative List Regime, by Section 65 (44) of the Finance Act, 1994, the services³⁶ provided by an employee to the employer in the course of employment are kept beyond the ambit of the definition of 'service'. Therefore, there is not GST implication.

³⁵ *supra note (25)*.

³⁶ INDIA CONST. Art 366(26-A).

[5.2] Supervision & Payment of employees is directly control by SOS Ind to Employees account.

The control & Supervision of employees is directly control by SOS Ind. as-well-as salary & other allowance paid by the Indian Company. In case International Airport Authority of India v. International Air Cargo Worker's Union,³⁷ it was held that the employees worked for more the 180 days, they are entitled to permanent status. In case SOS Ind. employees were working for more than 180 days & after new arrangement they became absolute employee of SOS Ind.

According to The Payment of Wages Act, 1936 (POWA) establishes the legal framework for wage payment in India. Section 4 of the Act mandates that wages be paid directly to employees. In present case employees of SOS Ind. are getting paid directly by SOS Ind. and they are in the payroll of SOS Ind. There is no reimbursement only direct payment of salaries to its employees. Employee Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act): This act regulates contributions towards employee provident funds. For an employer-employee relationship to be established under the EPF Act, the company typically directly pays salaries and deducts the employee's EPF contribution at source. This again reinforces the concept of direct payment.

As per Section 4 of Payment of Wages Act, 1936, (POWA) SOS Ind. directly paying wages to employees. Employees are registered under the Indian payroll and the lien continue with SOS Ind. Therefore, there is no import if services by SOS Ind. and not entitled to GST.

Hence, based on the arrangement from 01.06.2022, it can be said that there will be no GST implication.

³⁷ International Airport Authority of India v. International Air Cargo Workers' Union 2009, 13 SCC 374.

ISSUE 6. WHETHER THERE IS ANY IMPORT OF SERVICES UNDER GST AND WHETHER THE INDIAN COMPANY IS LIABLE TO PAY GST UNDER REVERSE CHARGE MECHANISM.

The counsel humbly submits before the Hon'ble High Court of Karnataka that there is no GST implication based on experience letters issued from the 2010 to 2022 on the respective ground. [6.1] Interpretation of 'Import of Services' under GST. [6.2] Reverse Charge Mechanism and Liability Under GST Is Contingent.

[6.1] The services rendered by the expatriates not import of services.

The payment of salaries to expatriates through the reverse charge mechanism to SOS US does not automatically render the services provided by expatriates as imported services under the GST Act. As established in *Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India* (2018)³⁸, the classification of services as imported under GST requires consideration of various factors, including the nature of the transaction. In this case, while salaries are paid to expatriates through the reverse charge mechanism, the essential aspect to determine is whether the services provided by expatriates qualify as imported services under GST.

[6.2] Reverse Charge Mechanism and Liability Under GST Is Contingent

The invocation of the reverse charge mechanism under GST is contingent upon the unequivocal classification of services as imported. As reaffirmed in *Bharti Airtel Ltd. v. Union of India* (2020),³⁹ the reverse charge mechanism applies only to services expressly identified as imported under the GST Act. Therefore, while salaries are paid through the reverse charge mechanism, unless the services provided by expatriates meet the criteria for import of services, SOS India cannot be held liable under the reverse charge mechanism. Related Person Transaction: As per Section 2(84) of the CGST Act,⁴⁰ SOS India and SOS US are considered related persons. However, the provision of services by expatriates to SOS India is not an intercompany transaction but rather a part of the regular business operations of SOS India. Therefore, it does not fall under the purview of related party transactions subject to GST under the reverse charge mechanism.

³⁸ *Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India* 2018 (4) SCC 669.

³⁹ *Bharti Airtel Ltd. v. Union of India* 2021 SCC OnLine SC 1006.

⁴⁰ CENTRAL GOODS AND SERVICES TAX, 2017, § 2(84), No. 12, Acts of Parliament, 2017 (India).

[6.3] Absence of Consideration for Services

The absence of consideration for services, as emphasized in *Larsen & Toubro Ltd. v. Union of India* (2017)⁴¹ and *Vodafone Idea Ltd. v. Union of India* (2019)⁴², is a crucial factor in determining the applicability of the reverse charge mechanism under GST. There is no binding contractual obligation to remunerate for the services rendered under the secondment agreement, the invocation of the reverse charge mechanism becomes legally untenable.

[6.4] Tax liabilities should be determined based on the true economic substance of a transaction rather than its legal form

The principle of substance over form, endorsed by the judiciary in *Commissioner of Income Tax v. Vatika Township Pvt. Ltd.* (2015),⁴³ underscores the importance of scrutinizing the true essence and substance of a transaction for tax purposes. The principle of substance over form underscores the importance of looking beyond the mere contractual form of a transaction and focusing on its economic substance. In the case of SOS India's secondment arrangement, the economic substance is the provision of services by expatriates to SOS India, which is the primary purpose and essence of the arrangement. Referring *Vatika Township*, we establish that authoritative judicial precedent supports our argument. These cases emphasize that tax liabilities should be determined based on the true economic substance of a transaction rather than its legal form. In our case, the economic substance of the secondment arrangement is the provision of services, which should not be subject to GST.

By applying the principle of substance over form, we affirm our commitment to combat tax evasion and ensure tax law compliance. The economic substance of SOS India's secondment arrangement, providing services, aligns with judicial precedent, supporting our stance that it should not be subject to GST. This approach ensures a fair and accurate assessment of tax liabilities, reflecting the true nature of the transaction. In conclusion, leveraging the principle of substance over form strengthens our argument that the secondment arrangement should not be taxable under GST, emphasizing economic substance and preventing tax evasion.

⁴¹ *supra note* (8).

⁴² *Vodafone Idea Ltd. v. Union of India* 2019 SCC ONLINE TDSAT 1714.

⁴³ *Commissioner of Income Tax v. Vatika Township Pvt. Ltd.*, 2010 SCC OnLine Del 3103.

PRAYER

Wherefore, may it please the Hon'ble High Court of Karnataka, in view of the facts and circumstances narrated, issues raised, arguments advanced, and authorities cited herein above, the plaintiff most respectfully prayed that this Hon'ble Court may be pleased to:

1. Declare that the writ petition is maintainable.
2. Declare that the department had no jurisdiction to issue the SCNs.
3. Declare that GST implications are not applicable on Southern Operating Systems India Pvt. Ltd. as the services are rendered by the employees to their employer.
4. Declare that the Show Cause Notices issued by the GST department are unsustainable and the Indian Company is not liable to pay any penalties invoked.

And/or

PASS ANY OTHER ORDER, DIRECTION, OR RELIEF THAT IT MAY DEEM FIT IN THE BEST INTERESTS OF JUSTICE, EQUITY, AND GOOD CONSCIENCE.

All of which is respectfully affirmed and submitted

(Counsels on behalf of Petitioner)