

TEAM CODE TC-14

**21ST SURANA AND SURANA NATIONAL CORPORATE LAW MOOT COURT
COMPETITION 2024
JSS LAW COLLEGE, MYSURU**

Before
**THE HON'BLE HIGH COURT OF KARNATAKA
AT BENGALURU
WP NO. 50000 OF 2024 & WP NO. 50001 OF 2024
FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA**

IN THE MATTER BETWEEN

SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD.

BENGALURU

...PETITIONER

VS.

ADDITIONAL COMMISSIONER OF GST AND OTHERS

BENGALURU

...RESPONDENT

WRITTEN SUBMISSION ON BEHALF OF PETITIONER

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&	And
¶	Paragraph
%	Percent
AIR	All India Reporter
Anr	Another
BOM	Bombay High Court
Bang	Bangalore
Co.	Company
DEL	Delhi
DRJ	Delhi Reported Judgments
Deptt.	Department
edn.	Edition
Hon'ble	Honorable
i.e.	That is
QB	Queen Bench
INR	Indian Rupee
Ltd.	Limited

M/s	Messrs
GST	Goods and Services Tax
ONGC	Oil and Natural Gas Corporation
Ors.	Others
Para	Paragraph
Pvt.	Private
RAJ	Rajasthan
S	Section
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
v.	Verses
WLR	Weekly Law Report
S.T.R	Service Tax Review
ITR	Income Tax Report
CESTAT	Customs Excise and Service Tax Appellate Tribunal
CST	Commissioner for Service Tax

CCE	Commissioner of Central Excise
Cal	Calcutta
KER	Kerela
TTJ	Tax Tribunal Judgements
ITAT	Income Tax Appellate Tribunal
TLR	Temple Law Review
UKPC	United Kingdom Privy Council
US	United States of America
AIR	All India Reporter
All E.R	All England Law Reports
KB	King Bench

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STATEMENT OF JURISDICTION

The PETITIONER humbly submits to the jurisdiction of the Hon'ble High Court of Karnataka, in the matter of *Southern Operating Systems India Pvt. Ltd. vs. Additional Commissioner of GST*, under Article 226 of the Constitution of India.

The present memorial puts forth the facts, contentions and arguments in the present case.

STATEMENT OF FACTS

THE SECONDMENT ARRANGEMENT

Southern Operating Systems India ('Assessee'), a Bengaluru subsidiary of Southern Operating Systems Inc. ('overseas entity'), established in 2010 to leverage the expanding software market in India and Asia-Pacific, entered into a secondment agreement with the parent company where it was agreed that the Assessee would incur the salary and other expenses of the seconded employees. The expats were legally the employees of the overseas entity but the Assessee was deemed to be the employer for economic purposes.

Initially, the overseas entity covered the salaries of expats for the Assessee. After two years once the subsidiary became profitable, it started reimbursing the overseas entity for these expenses. It also repaid the overseas entity for the expenses incurred during the first two years of its inception.

THE TAX DEMAND UNDER THE SERVICE TAX REGIME

In May 2017, the Revenue raised a demand for tax under the reverse charge mechanism ('RCM') for the period from April 2012 to March 2017. The Assessee challenged the show cause notices ('SCN') before the Karnataka High Court which upheld the Revenue's demand to treat the secondment arrangement as manpower supply services and quashed the notices to the extent they exceeded the usual limitation period under the Finance Act, 1994.

THE TAX PLANNING

The introduction of the Goods and Services Tax ('GST') in July 2017, prompted the overseas entity to terminate the expats and transfer them to the Assessee's payrolls by issuing new appointment letters in June 2022 for the entire secondment period to benefit from Indian social security policies. From 01st June 2022, if the Assessee required an expat, the overseas entity would terminate their services, and then it would subsequently re-hire them.

THE TAX DEMAND UNDER THE GST REGIME

The Revenue demanded GST for the secondment arrangement until 2022 and the subsequent arrangement from 1st June 2022 to 31st December 2023, alleging tax evasion. After a reply from the Assessee refuting the demand, the department confirmed the demand in March 2024. Thereafter, the Assessee filed two writ petitions before the High Court of Karnataka challenging the demands of the department.

ISSUES RAISED

ISSUE I

WHETHER THE PRESENT WRIT PETITION IS MAINTAINABLE?

ISSUE II

WHETHER THERE IS A GST IMPLICATION ON THE SECONDMENT ARRANGEMENT FOR THE PERIOD
UNTIL 2022?

ISSUE III

WHETHER THERE IS A GST IMPLICATION FROM 01.06.2022 ONWARDS?

ISSUE IV

WHETHER THE MEASURES TAKEN BY THE ASSESSEE AMOUNT TO TAX EVASION?

SUMMARY OF ARGUMENTS

ISSUE [1] THE PRESENT WRIT PETITION IS MAINTAINABLE

It is submitted that the writ petition is maintainable as the court has the power to adjudicate on substantial questions of law. The existence of alternate remedy does not bar writ jurisdiction of the High Court when there is a violation of the fundamental rights of the Assessee, the defiance of the principles of natural justice by tax authorities, and the proceedings initiated by revenue are without jurisdiction. Furthermore, the show cause notice is partially beyond the extended period limitation and the tax demand is without the authority of law.

ISSUE [2] THERE IS NO GST IMPLICATION ON THE SECONDMENT ARRANGEMENT

It is submitted that there is no GST implication on the secondment arrangement for 2010-17 as there is an employee-employer relationship between the Assessee and expats which is exempted from taxation under the negative list. Further, the employment relationship is confirmed by establishing a contract of service between the Assessee and expats, application of OECD Model Tax Convention principles, economic dependence of expats on the Assessee, and social security benefits bore by the Assessee. It is further argued that reimbursement on cost-to-cost basis is not consideration.

ISSUE [3] NO GST IMPLICATION FOR THE PERIOD FROM 1.06.2022 ONWARDS

It is submitted that there will be no GST implication from 1.06.2022 as there exists an employee-employer relationship as there is a contract of service between the Assessee and expats and the requirements of the control test are met. It is further submitted that the employee-employer relationship is covered under the negative list which provides for activities that are treated neither as the supply of goods nor as the supply of services.

ISSUE [4] TAX PLANNING MEASURES UNDERTAKEN BY THE ASSESSEE DO NOT AMOUNT TO TAX EVASION

It is submitted that tax planning measures undertaken by the Assessee between the periods 2010-22 and 2022-23 do not amount to tax evasion as tax advantage to the Assessee does not amount to tax evasion. Notably, the tax planning measures employed by the Assessee are within the four corners of the law, thus it is not liable to pay the maximum penalty under the GST Regime

ARGUMENTS ADVANCED

ISSUE 1: THE PRESENT WRIT PETITION IS MAINTAINABLE

¶ 1 It is submitted before the Hon'ble High Court that the present writ petition is maintainable as, the court has the power to adjudicate on substantial questions of law [I]; the existence of alternate remedy is not a bar to the writ jurisdiction [II].

I. THE COURT HAS THE POWER TO ADJUDICATE ON SUBSTANTIAL QUESTIONS OF LAW

¶ 2 The test for the substantial question of law is whether the issue involved is of public importance or it substantially affects the rights of the parties involved given that such issue has not been finally settled before the court in question or by a higher court.¹ While administering law, the High Court must consider equity along with the legal formulations to exercise its extraordinary jurisdiction.

¶ 3 It is humbly submitted that the judgement of the Hon'ble Apex Court *Northern Operating Systems*² case is distinguishable from the facts of the present case as there is no consideration involved and the demand has been raised under the CGST Act, 2017, and not the Service Tax Act, 1994.³ Further, the CBIC has issued a circular stating that the judgment in *Northern Operating Systems* cannot be applied mechanically to all cases. The investigation in each case requires a distinct factual matrix including the terms of the contract between the overseas entity and the Indian entity.⁴ Another substantial question of law is that of the validity of tax planning measures under the CGST Act, 2017.

¶ 4 **Therefore**, it is submitted that there are substantial questions of law involved in the present matter and the Hon'ble High Court is obliged to consider such questions in light of equity along with the legal framework.

II. THE EXISTENCE OF AN ALTERNATIVE REMEDY IS NOT A BAR TO THE WRIT JURISDICTION

¶ 5 The 'adjudicating authority' is defined as any authority that is authorized to adjudicate under the GST law except the ones stipulated in the provision.⁵ Further, section 107 of the Act

¹ *Sir Chunilal Mehta & Sons Ltd v Century Spg & Mfg Co Ltd* AIR 1962 SC 1314; *Hero Vinoth v Seshammal*, (2006) 5 SCC 545.

² *CCE & ST v Northern Operating Systems (P) Ltd* 2022 SCC OnLine SC 658.

³ The Finance Act 1994, sch v.

⁴ Central Board of Indirect Taxes and Customs, *Judgement of the Hon'ble Supreme Court in the case of Northern Operating Systems Private Limited* (Instruction No. 05/2023-GST).

⁵ The Central Goods and Services Tax Act 2017, s 2(4).

provides that any appeal against the orders passed by an adjudicating authority lies before the appellate authority.⁶ Furthermore, any appeal against the order of appellate authority lies before the High Court under section 117 of the Act.⁷

¶ 6 It is a well-settled principle of law that the mere availability of an alternative remedy would not prohibit the High Court from entertaining a writ petition under Article 226 of the Constitution.⁸ The doctrine of exhaustion of alternative remedy is not a rule of law but rather a rule of policy, convenience, and discretion.⁹ Despite non-exhaustion of alternative remedy, the High Court may exercise its writ jurisdiction in at least three extraordinary circumstances, namely, where a writ petition has been filed to enforce Fundamental Rights, where there has been a breach of the principle of natural justice, or proceedings lack jurisdiction entirely or the vires of an Act is challenged.¹⁰

¶ 7 It is humbly submitted before the Hon'ble High Court that the present matter can be entertained by the court on the following grounds: there has been a violation of the fundamental rights of the Assessee [A]; the Revenue has defied the principles of natural justice [B]; the proceedings initiated by Revenue are without jurisdiction [C].

A. There has been a violation of the fundamental rights of the Assessee

¶ 8 Arbitrary exercise of power by a statutory authority is violative of Article 14 of the Constitution.¹¹ In cases where dissimilar objects, persons, or transactions are subjected to a uniform tax which may lead to discrimination owing to the failure to establish a rational classification would, in certain instances, operate as a denial of equality.¹² Further, to establish arbitrariness, a comparative/relative evaluation between two persons for recording a finding of discriminatory treatment is not essential.¹³

¶ 9 Where discretion is conferred on the executive authorities, such discretion must be exercised within the four corners of the law.¹⁴ The statutory authorities are obligated to follow the due procedure while interfering with the legal and constitutional rights of a person as per

⁶ The Central Goods and Services Tax Act 2017, s 107.

⁷ The Central Goods and Services Tax Act 2017, s 117.

⁸ UP Power Transmission Corpn Ltd v CG Power & Industrial Solutions Ltd (2021) 6 SCC 15.

⁹ *State of Himachal Pradesh v Gujarat Ambuja Cement Ltd* AIR 2005 SC 3856; *Godrej Sara Lee Ltd v Excise & Taxation Officer* 2023 SCC OnLine SC 95.

¹⁰ *Whirlpool Corporation v Registrar of Trademarks Mumbai* (1998) 8 SCC 1; *Harbanslal Sahnia v Indian Oil Corpn Ltd* (2003) 2 SCC 107.

¹¹ The Constitution of India 1950, a 14.

¹² *State of Kerala v Haji K Kutty Naha* (1969) 1 SCR 645.

¹³ *AL Kalra v Project & Equipment Corpn* (1984) 3 SCC 316; *DS Nakara v Union of India* (1983) 1 SCC 305.

¹⁴ *SG Jaisinghani v Union of India* (1967) 65 ITR 34.

Article 21 of the Constitution.¹⁵ Further, the principle of reasonableness read in Article 19 of the Constitution¹⁶ ensures fairness and non-arbitrariness.¹⁷

¶ 10 In the present case, the Revenue has raised, in violation of Article 14, on the ground that the Assessee has paid liability for the same transaction under the service tax regime as uniform tax under GST cannot be imposed based on past liability under a different law.¹⁸ Further, the department is demanding retrospective tax which is beyond the scope of CGST Act, 2017,¹⁹ thus infringing upon Article 19(1)(g) and Article 21 of the Constitution.²⁰ Furthermore, the High Court must take up a writ where there is an infringement of a fundamental right is alleged given that such allegations are well founded.²¹

¶ 11 **Therefore**, it is submitted that the present petition is maintainable and must be entertained due to the infringement of the fundamental rights of the Assessee.

B. The Revenue has defied the principles of natural justice

¶ 12 Section 75(4) of the CGST Act mandatorily requires an opportunity of hearing be given to a person against whom any adverse action is contemplated.²² This requirement is in consonance with the principle of natural justice, namely, *audi alteram partem*.²³ The High Court must exercise its writ jurisdiction where a court or tribunal has breached the fundamental principles of natural justice even if all the available remedies have not been exhausted.^{24,25}

¶ 13 In the present case, the Revenue has confirmed the demand in March 2024 and imposed penalties against the Assessee without providing a personal hearing in violation of section 75(4) of the Act and the principles of natural justice.^{26,27} **Therefore**, the Hon'ble High Court must entertain the writ petition to ensure the legislative intent of the Act is realized in accordance with the principles of natural justice.

¹⁵ The Constitution of India 1950, a 21.

¹⁶ The Constitution of India 1950, a 19.

¹⁷ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

¹⁸ The Moot Proposition, ¶ 14.

¹⁹ The Moot Proposition, ¶ 12.

²⁰ The Constitution of India 1950, a 19, 21.

²¹ *State of Bombay v The United Motors India Ltd* 1953 AIR 252.

²² The Central Goods and Services Tax Act 2017, s 75(4); *KJ Enterprises v State of UP* [2024] 159 taxmann.com 56 (Allahabad).

²³ *Radha Krishna Industries v State of Himachal Pradesh* 2021 SCC OnLine SC 334.

²⁴ *Assistant Collector of Customs for Appraisalment v Soorajmull Nagarmull* AIR 1952 Cal 656.

²⁵ *Khurshed Modi v Rent Controller Bombay* AIR 1947 BOMBAY 46; *Harbanslal Sahnia v Indian Oil Corpn Ltd* (2003) 2 SCC 107.

²⁶ The Moot Proposition, ¶ 14.

²⁷ Taxmann, *GST Case Laws Digest* (2nd edn, Taxmann 2020).

C. The proceedings initiated by the Revenue are without jurisdiction

¶ 14 It is submitted that the proceedings initiated by the Revenue are without jurisdiction as, the show cause notice for tax demand until 2022 is beyond the extended period of limitation [i]; the tax demand is without the authority of law [ii].

i. The Show Cause Notice is beyond the extended period of limitation

¶ 15 Under section 73 of the CGST Act, the notice can be issued three months prior to the end of the period of limitation i.e. three years from the due date for filing of annual return for the year to which the amount relates, in case there is no fraud.²⁸ Whereas in cases of fraud, willful misstatement, or suppression of facts, the notice must be sent six months prior to the maximum extendable period of limitation i.e. five years from the due date for filing of annual return for the year to which the amount relates.²⁹

¶ 16 It is submitted that the statute must be construed strictly in a fair and reasonable manner and the taxing enactments must be construed according to the ordinary and natural meaning of the facts of the language used.³⁰ The delay in issuance of SCN cannot be condoned under the provisions of the Limitation Act since the Act cannot be extended to a special statute such as the CGST Act unless specified.³¹

¶ 17 It is further submitted that the Revenue has invoked the extended period of limitation in the absence of fraudulent intention for legitimate tax planning. The due date for filing of annual returns for 2017-18, 2018-19, and 2019-20, is 07.02.2020³², 31.12.2020³³, and 31.03.2021³⁴, respectively.³⁵ Thus, the issuance of show-cause notice is beyond the period of limitation of three years for the period from 01.07.2017 to 31.05.2022 and 01.06.2022 to 31.12.2023.³⁶ Moreover, the department has demanded GST for a period from 2010 to 2022 where the Assessee has previously paid its tax liability under the service tax regime.³⁷

¶ 18 **Therefore**, the proceedings initiated for the period beyond the extended period of limitation by the department are in excess of their jurisdiction conferred by the Act.

²⁸ The Central Goods and Services Tax Act 2017, s 73 (10).

²⁹ The Central Goods and Services Tax Act 2017, s 74 (10).

³⁰ *Vikrant Tyres Ltd. v First ITO* (2001) 247 ITR 821 (SC).

³¹ *Penuel Nexus Pvt Ltd v Adtl Commissioner* 2023 SCC OnLine Ker 4243.

³² Department of Revenue, Ministry of Finance, *Notification No. 6/2020-Central Tax* (F. No. 20/06/07/2019-GST, 03.02.2020).

³³ Department of Revenue, Ministry of Finance, *Notification No. 80 /2020 - Central Tax* (F. No. CBEC-20/06/09/2019-GST, 28.10.2020).

³⁴ Department of Revenue, Ministry of Finance, *Notification No. 6/2020-Central Tax* (F. No. CBEC-20/06/13/2020-GST, 28.02.2021).

³⁵ Arpit Haldia and Mohd Salim, *GST Law & Practice* (5th edn, Taxmann 2023).

³⁶ The Moot Proposition, ¶ 14.

³⁷ The Moot Proposition, ¶ 12.

ii. The tax demand is without the authority of law

¶ 19 The CGST Act explicitly restricts the powers of the Government to extend the prescribed time limit in special circumstances to give retrospective effect to a notification from a date prior to the commencement of this Act. Further, tax under the Act cannot be levied on services covered under Chapter V of the Finance Act, 1994 regardless of provisions laid in Section 13 concerning the time supply of services.³⁸ Further, Article 265 of the Constitution provides that tax cannot be levied except by authority of law.³⁹

¶ 20 It is submitted that the GST cannot be levied on the secondment arrangement for the period of 2010 till the date of the commencement as the period has been excluded under sections 168A and 142 of the CGST Act. **Therefore**, the tax liability on secondment arrangement prior to the enactment of the Act is not sustainable and is beyond the scope of the powers conferred on the department.

³⁸ The Central Goods and Services Tax 2017, s 142 (11)(b).

³⁹ The Constitution of India, a 265.

ISSUE 2: THERE IS NO GST IMPLICATION ON THE SECONDMENT ARRANGEMENT

¶ 21 It is submitted that there is no GST implication for the secondment arrangement between the Assessee and overseas entity as, the employee-employer relationship between the Assessee and expats is covered under the negative list [I]; the reimbursement on cost-to-cost basis is not consideration [II].

I. THE EMPLOYEE-EMPLOYER RELATIONSHIP BETWEEN THE ASSESSEE AND EXPATS IS COVERED UNDER THE NEGATIVE LIST

¶ 22 Schedule III provides for the activities or transactions which shall neither be treated as a supply of goods nor as a supply of services.⁴⁰ It is submitted that the employee-employer relationship between the Assessee and expats is covered under the negative list as, there is a contract of service between Assessee and expats [A]; the OECD principles will apply [B]; expats are economically dependent on the Assessee [C]; social security benefits are taken care of by the Assessee [D].

A. There is a contract of service between Assessee and Expats

¶ 23 The fair test to determine the relationship between a master and a servant is the existence of the master's right to supervise and control the work by directing the work but also the manner in which the servant shall do the work. The extent of control varies from business to business and cannot be given a precise definition.⁴¹

¶ 24 The employer has the right to terminate sub-standard work.⁴² The true test that has been laid to determine the employer-employee relationship is whether the worker or group of workers labour to produce goods or services which are for the business of another person.⁴³ The test involves majorly- (i) control; (ii) ownership of the tools; (iii) chance of profit and; (iv) Risk of loss.⁴⁴ It is submitted that the secondment arrangement is not taxable as an employer-employee relationship under the negative list.⁴⁵

¶ 25 A contract of service exists if the servant agrees that in exchange for a wage or remuneration, he will provide his work and skill for his master, agrees that in the performance

⁴⁰ The Central Goods and Services Tax Act 2017, sch iii.

⁴¹ *Dharangadhara Chemical Works Ltd v State of Saurashtra* [1956] SCC OnLine SC 11.

⁴² *Silver Jubilee Tailoring House v Chief Inspector of Shops & Establishments* [1974] 3 SCC 498.

⁴³ *Hussainbhai v Alath Factory Thezhilali Union* [1978] 4 SCC 257.

⁴⁴ *Montreal v Montreal Locomotive Works Ltd* [1944] UKPC 44.

⁴⁵ *Target Corporation India Pvt Ltd v CCE Bangalore III* MANU/CB/0003/2021.

of that service, he will be subject to a sufficient degree of control, and that other provisions of the contract are consistent with its being a contract of service.⁴⁶

¶ 26 In the present case, the Assessee had the right to supervision over the expats and the right to terminate the arrangement as well.⁴⁷ It also paid for the salary and other expenses of the expats. Moreover, the profit and loss out of the business were borne by the Assessee alone. **Therefore**, there is a contract of service between the Assessee and the expats.

B. The OECD principles are applicable in the present case

¶ 27 OECD in its commentary on the model convention on Article 15, while dealing with who is to be treated as an employer stated that the term 'employer' was not defined in the convention but it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks.

¶ 28 It is further submitted that apart from the above test, contracting states must consider various factors to identify the true employer. These factors encompass the authority to instruct individuals on work procedures, control over the workplace, and direct charging of remuneration by the formal employer. Providing tools and materials, determining the number and qualifications of secondees, and exercising the right to select and terminate contracts are also indicative. Furthermore, the ability to enforce disciplinary actions and dictate holidays and work schedules are pivotal in establishing a genuine employer in such scenarios.⁴⁸

¶ 29 In the present case, the expats showcased complete devotion to the Assessee throughout the secondment arrangement,⁴⁹ salaries and other expenses were paid,⁵⁰ and the right to terminate the secondment agreement of individual employees was with the Assessee.⁵¹ Moreover, the overseas entity sent the expats as per the requirements of the subsidiary. **Therefore**, the OECD principles are applicable to establish the employee-employer relationship.

C. The expats are economically dependent on the Assessee

¶ 30 If an employee of an overseas parent company has been seconded to India and the remuneration paid to the individual by the parent company is being reimbursed by the Indian company, it can be considered as the economic employer as the services are being provided to

⁴⁶ Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497.

⁴⁷ The Moot Proposition, ¶ 5.

⁴⁸ Model Tax Convention, *Commentaries on the Articles of the Model Tax Convention* (OECD, 2004).

⁴⁹ The Moot Proposition, ¶ 13.

⁵⁰ The Moot Proposition, ¶ 4.

⁵¹ The Moot Proposition, ¶ 5.

the Assessee company. It is determined as the whole of time, attention and skills are being rendered to the Indian company.⁵²

¶ 31 Under the economic dependence test, in determining the existence of an employee-employer relationship, realities involving activities or the relationship must be examined. This “reality” is the economic dependence of the worker on his employer.⁵³ It is whether the worker is dependent on the employer for his continued employment.⁵⁴ All statutory obligations as an employer are met when the amount of wages and cost of salaries is reimbursed to the foreign company.⁵⁵ Where legal employment remains with one employer while supervision and control remain with the other employer, the latter is considered the real or economic employer.^{56,57}

¶ 32 In the present case, the Assessee was the economic employer and had the right to terminate the secondment arrangement of a particular employee, if it so desired.⁵⁸ In a broader sense, the Assessee fulfilled all the requirements of an employer and exercised supervision and control over the expats. **Therefore**, the Assessee is the real and economic employer of the expats.

D. Social security benefits are taken care of by the Assessee

¶ 33 The expenses of social security benefits are an important test of determining employer-employee relationship. Where social security contributions in respect of the expatriate employees are paid by the holding company and later reimbursed by the Indian company, such employees cannot be treated as the employees of the holding company provided to the appellant company on a manpower supply basis.⁵⁹

¶ 34 In the present case, the overseas entity looked after the expenses and other emoluments of the seconded employees which were later reimbursed by the Assessee on an actual basis.⁶⁰ Later, to extend the benefits of Indian social security laws such as gratuity and employees’ insurance, the expats were included in the payroll of the Assessee from inception.⁶¹ Thus, the expats cannot be treated as employees of the overseas entity on the basis of manpower supply.

⁵² *IDS Software Solutions (India) (P) Ltd v ITO* [2009] 122 TTJ 410 (Bang).

⁵³ *Wilhelmina Orozco v Court of Appeals* [2008] G.R. No. 155207.

⁵⁴ *Antonio Valeroso v Sky Cable Corporation* [2016] G.R. No. 202015.

⁵⁵ *Airbus Group India (P) Ltd v. CST* [2017] SCC OnLine CESTAT 5737.

⁵⁶ *IDS Software solution v ITO* [2009] 122 TTJ 410 (ITAT-Bang).

⁵⁷ *Abbey Business Services (India) (P) Ltd v Deputy Commissioner of Income- Tax* [IT Appeal Nos. 1141 (BANG.) OF 2010 and 41 & 42 (BANG.) OF 2011].

⁵⁸ The Moot Proposition, ¶ 5.

⁵⁹ *Bain & Co India Pvt. Ltd. v Commissioner of Service Tax* [2014] MANU CESTAT 0257.

⁶⁰ The Moot Proposition, ¶ 4.

⁶¹ The Moot Proposition, ¶ 10.

¶ 35 **Therefore**, there is an employer-employee relationship as the social security benefits are provided by the Assessee to the seconded employees.

I. REIMBURSEMENT ON COST-TO-COST BASIS IS NOT A CONSIDERATION

¶ 36 The expenses have been reimbursed to the holding company, on an actual basis, by the Assessee. It has been established that the deputation of employees from one company to another does not involve profit or financial benefit, with remuneration and expenses being reimbursed, then there is no relationship of agency and client involved in such deputation.⁶² In a secondment arrangement, reimbursement is not consideration for services of manpower recruitment supply services.⁶³⁶⁴

¶ 37 It is submitted that where there is an employee-employer relationship reimbursements made by Indian Company to its parent company for employee Secondment are not taxable.⁶⁵ Reimbursement of actual salary by the real and economic employer to the holding company is not a consideration for rendering any services, and thus cannot be considered as manpower supply (SAC 998519).⁶⁶⁶⁷

¶ 38 In the present case, there is no consideration charged by the holding company from the overseas entity for any services,⁶⁸ unlike in the *Northern Operating System* case where a 15 percent markup was charged.⁶⁹ Further, the reimbursement of salary and other expenses of expats is not consideration, thus not taxable as manpower supply.

¶ 39 **Therefore**, there exists no tax liability on the secondment arrangement between the Assessee and the overseas entity from the period of 2010 to 2022.

⁶² *Commissioner of Service Tax v Arvind Mills Ltd* MANU/GJ/0484/2014.

⁶³ *Ivanhoe Cambridge Investment Advisory India (P) Ltd v CST Delhi* [2018] MANU/CE/0491.

⁶⁴ *Nissin Brake India Pvt. Ltd. v CCE, 2018 SCC OnLine CESTAT 1690; Metal One Corporation India Pvt Ltd v Union of India & Ors W.P.(C) 14945/2023.*

⁶⁵ *Imasen Manufacturing India (P) Ltd v Assistant Commissioner CGST* [2021] 128 taxmann.com 255.

⁶⁶ *Vidarbha Iron & Steel Co Ltd v Commissioner of Central Excise Nagpur* [2015] 63 taxmann.com 358 (Mumbai - CESTAT); *Punj Lloyd Ltd v Commissioner of Service Tax Delhi* [2018] 92 taxmann.com 35 (New Delhi - CESTAT).

⁶⁷ Department of Revenue, Ministry of Finance, Notification No. 11/2017-Central Tax (Rate).

⁶⁸ The Moot Proposition, ¶ 4.

⁶⁹ *CC CE & ST v Northern Operating Systems (P) Ltd* 2022 SCC OnLine SC 658.

ISSUE 3: NO GST IMPLICATION FOR THE PERIOD FROM 1.06.2022 ONWARDS

¶ 40 It is submitted that there will be no GST implication from 1.06.2022 as, there exists an employee-employer relationship [I]; the employee-employer relationship is covered under the negative list [II].

I. THERE EXISTS AN EMPLOYEE-EMPLOYER RELATIONSHIP

¶ 41 It is submitted that there exists an employer-employee relationship between the Assessee and expats as, there is a contract of service between the Assessee and expats [A]; the requirements of the control test are met [B].

A. *There is a contract of service between the Assessee and expats*

¶ 42 The supplies made by the employer to the employees based on their contractual agreements would not be subjected to GST as services by the employee to the employer in the course or in relation to his employment is outside the scope of GST.⁷⁰ The test to determine would be whether the work done is an integral part of the business of the employer, in which case it would be a contract of service, or whether it was done as an accessory to such business, in which case it would be a contract for service.

¶ 43 The three-tier test laid down, *namely*, whether wage or other remuneration is paid by the employer; whether there is a sufficient degree of control by the employer and other factors would be a test elastic enough to apply to a large variety of cases. The test of who owns the assets with which the work is to be done and/or who ultimately makes a profit or a loss so that one may determine whether a business is being run for the employer or on one's account is another important test.⁷¹

¶ 44 In the present case, the expats were entrusted with maintenance of the quality of the manufactured products and executing their technological know-how which is an integral part of the business of the Assessee, who ultimately benefits from the employment of the expats.⁷² **Therefore**, there is a contract of service between the Assessee and the expats.

B. *The requirements of control test are met*

¶ 45 The determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of deciding what work the servant is to do but also the manner in which he shall do his

⁷⁰ The Central Board of Indirect Tax and Customs, *Notification No. 10/2017*.

⁷¹ *Indian Banks Association v Workmen of Syndicate Bank and Ors* [2001] AIR SC 946.

⁷² The Moot Proposition, ¶ 1.

work. The correct approach would be to consider whether the work done was under due control and supervision of the employer.⁷³ The authority that pays salary is also determinative of the employee-employer relationship.⁷⁴

¶ 46 The 'real employer' is the company for whose benefit the seconded employees work and who issues the appointment letters to such secondees.⁷⁵ The presence of factors like the right to select for the appointment, right to take disciplinary action, right to prescribe conditions for service, determining the source of salary,⁷⁶ etc. are considered to determine the existence of a master-servant relationship and the deputed person shall be said to be the employee only if he works under direct control and supervision of the seconded company.⁷⁷

¶ 47 The proper test in this regard is the right to control the manner of execution of the work.⁷⁸⁷⁹ The test of control was not of universal application and there were many contracts in which the master could not control the manner in which the work was done.⁸⁰

¶ 48 In the present case, the expats are employees of the Assessee as they had complete devotion towards it and were exclusively employees of the company. It also paid the salaries and other expenses of expats.⁸¹ For tax planning purposes, the expats were terminated from the overseas entity's payroll and freshly recruited by the Assessee.⁸²

¶ 49 **Therefore**, the requirements of control test are met as the expats were under direct supervision and control of the Assessee.⁸³

II. EMPLOYER-EMPLOYEE RELATIONSHIP IS COVERED UNDER THE NEGATIVE LIST

¶ 50 It is also necessary to compare the provision of Para 2 of Schedule I and Para 4 of Schedule III. Schedule III provides for the activities or transactions which shall neither be treated as a supply of goods nor as a supply of services. Para 1 of Schedule III provides for services by an employee to the employer in the course or in relation to employment on the other hand Para 2 of Schedule 1 *inter alia* provides that services between related persons shall

⁷³ *DC Works Limited v State of Saurashtra* [1957] AIR SC 264.

⁷⁴ *Shivanandan Sharma v Punjab National Bank Ltd.* [1955] AIR 404.

⁷⁵ *M/s Flipkart Internet Private Limited v DCIT* [2022] 139 taxmann.com 595 (Karnataka).

⁷⁶ *Tapas Paul v ACIT Circle-51 Kolkata* ITAT KOLKATA MANU/IK/0104/2017.

⁷⁷ *Ibid.*

⁷⁸ *Silver Jubilee Tailoring House and Others v Chief Inspector of Shops and Establishments and Another* [1974] AIR 37.

⁷⁹ *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1952] SCR 696, 702.

⁸⁰ *Cassidy v Ministry of Health* [1951] 2 KB 343; *Jordan Harrison Ltd. v Macdonald and Evans* [1952] 1 TLR 101.

⁸¹ The Moot Proposition, ¶ 13.

⁸² The Moot Proposition, ¶ 9.

⁸³ The Moot Proposition, ¶ 11.

deemed to be supply even if made without consideration and the term related person includes relation of employee and employer.

¶ 51 On the combined reading of Schedule I and Schedule III, it can be observed that Schedule III overrides the provisions of Schedule I by virtue of the non-obstantate clause contained in sub-section (2) of Section 7 and thereby the transactions which are excluded from the levy of tax for transactions between employee and employer.⁸⁴

¶ 52 In the present case, there is an employer-employee relationship between the expats and the Assessee as there has been a complete localization of expats to India from June 2022 through legitimate tax planning measures.⁸⁵ **Therefore**, the employer-employee relationship of the Assessee and the expats is exempt from taxability under Schedule III of the Act.

⁸⁴ Arpit Haldia and Mohd Salim, *GST Law & Practice* (5th edn, Taxmann 2023).

⁸⁵ The Moot Proposition, ¶ 11.

ISSUE 4: TAX PLANNING MEASURES UNDERTAKEN BY ASSESSEE DO NOT AMOUNT TO TAX EVASION

¶ 53 The tax planning measures undertaken by the Assessee do not amount to tax evasion as, tax advantage does not amount to tax planning [II]; the tax planning measures are within the four corners of law [III]; the Assessee is not liable to pay maximum penalty [III].

I. TAX ADVANTAGE DOES NOT AMOUNT TO TAX EVASION

¶ 54 Every man is entitled to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them to secure this result, then he cannot be compelled to pay an increased tax, however unappreciative the fellow taxpayers may be of his ingenuity.⁸⁶ It is submitted that the assessing officer cannot disregard a transaction just because it results in a tax advantage to the Assessee. Genuine tax planning should not be disapproved if it is within permissible tax planning and though the line of demarcation between tax evasion and planning is thin, it cannot be used as an excuse by the Revenue to err on excessive caution.⁸⁷

¶ 55 In the present case, the measure has been taken after the implementation of GST to save tax from 2017-2022 and to provide benefits of Indian social security laws to the expats without any *mala fide* intention but just as a measure of tax planning.⁸⁸ From June 2022, whenever there was a need for an expat, the overseas holding entity terminated an employee who was later re-hired by the Assessee.⁸⁹ **Therefore**, does not amount to evasion of tax as tax advantage cannot be disregarded as tax evasion.

II. THE TAX PLANNING MEASURES ARE WITHIN THE FOUR CORNERS OF THE LAW

¶ 56 The McDowell principle states that tax planning is legitimate provided it is within the four corners of the law and that the intention to avoid tax does not, by itself, invalidate the transaction unless a statute prohibits the same. The Department must employ the ‘look at’ test by looking at the transaction holistically rather than the ‘look through’ test by splitting or dissecting the transaction.⁹⁰ Solely the use of colorable devices and resort to dubious methods can be said to be illegitimate or impermissible and all tax planning cannot be categorized as such.⁹¹ The Revenue must look at a document or transaction as a whole. It cannot start with the

⁸⁶ *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1.

⁸⁷ *Michael E Desa v ITO* [2021] 130 taxmann.com 314.

⁸⁸ The Moot Proposition, ¶ 9, 10.

⁸⁹ The Moot Proposition, ¶ 11.

⁹⁰ *Vodafone International Holdings Ltd v Union of India & Ors* [2008] SCC OnLine Bom 1152.

⁹¹ *M/s McDowell and Company Limited v Commercial Tax officer* [1986] AIR 649.

question as to whether the impugned transaction is a tax deferral/ saving device but should apply the “look at” test to ascertain its true legal nature.⁹²

¶ 57 The liberal interpretation of statutes must be given primacy to adopt a construction that is favourable to the Assessee. The tax statute must not be unnecessarily widened to implicate the Assessee.⁹³ The burden is on the Revenue to establish abuse by tax evasion and it can invoke the “substance over form” principle or “piercing the corporate veil” test only after it can establish on the facts and circumstances surrounding the transaction that the impugned transaction is a sham.⁹⁴

¶ 58 In the present case, the tax planning measures employed to minimize tax obligation under GST for the period 2017-22 were lawful in a broader sense as the expats had been working for the Assessee from the inception.⁹⁵ The previous arrangement for employing had undergone change through tax planning measures from 1.06.2022 wherein the secondment of employees was through termination of services from the overseas entity and fresh employment in the Indian company.⁹⁶ When the tax planning measures are analyzed through the “look at” test to ascertain its nature, the Assessee cannot be made liable for evasion of tax.

¶ 59 **Therefore**, the tax planning measures adopted by the Assessee are lawful and do not amount to tax evasion.

III. ASSESSEE IS NOT LIABLE TO PAY MAXIMUM PENALTY

¶ 60 The *Black's Law Dictionary* defines a penalty as a “Punishment imposed on a wrongdoer, in the form of imprisonment or fine; especially a sum of money exacted as punishment for either a wrong to the state or a civil wrong.”⁹⁷ It is provided that if any person has paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilized to evade tax, will be liable to pay a penalty of ten thousand rupees or the tax due from such person, whichever is higher.⁹⁸ It is submitted that a penalty cannot be imposed where there is no fraudulent intent to evade tax.⁹⁹ Moreover, tax planning measures do not amount to evasion of tax.¹⁰⁰

⁹² *Ramsay Ltd. v Inland Revenue Commissioners* [1981] 1 All E.R. 865.

⁹³ *Ardex Investments Mauritius Ltd, In re* [2010] A.A.R No. 866.

⁹⁴ *Vodafone International Holdings Ltd v Union of India & Ors* [2012] 6 SCC 613.

⁹⁵ The Moot Proposition, ¶ 9.

⁹⁶ The Moot Proposition, ¶ 11.

⁹⁷ *Black's Law Dictionary*, 1247 (8th ed., 2004).

⁹⁸ The Central Goods and Services Tax 2017, s 122(2)(b).

⁹⁹ *Citykart Retail Pvt Ltd v Commissioner of Commercial Tax 2018* 144 taxmann.com 155 (Allahabad).

¹⁰⁰ *Vodafone International Holdings Ltd* (n=85).

¶ 61 In the present case, the Assessee took various tax planning measures in the year 2022 to minimize the liability of GST while employing expats from the overseas entity and to provide benefits of social security laws to the seconded employees. Such measures taken by the Assessee do not amount to tax evasion.¹⁰¹¹⁰²

¶ 62 **Therefore**, the maximum penalty imposed by the Revenue is in excess of its jurisdiction conferred under the CGST Act, 2017.

¹⁰¹ *ibid.*

¹⁰² The Moot Proposition, ¶ 10.

PRAYER FOR RELIEF

In light of facts presented, questions raised, arguments advanced and authorities cited, Counsel for the Claimant most humbly prays before this Hon'ble High Court, to adjudge and declare that:

- (1.) The present writ petition is maintainable.
- (2.) The proceedings initiated by the respondents are without jurisdiction.
- (3.) The Petitioner is not liable to pay the demand raised by the Respondent for GST and maximum penalty.

The Court being satisfied may in like manner make any such demand as it may regard fit in the light of Justice, Equity and Good Conscience.

*And for this demonstration of kindness the **Petitioner** might as compelled bound ever humble pray.*

Date: __.03.2024

Place: BENGALURU

S/d-
(Counsel Appearing for Petitioner)