21ST SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION & NATIONAL JUDGEMENT WRITING COMPETITION ON CORPORATE LAW 2022 – 2024
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

vs.

Additional Commissioner of GST and Others, Bengaluru … Respondent

MOST REVERENTLY SUBMITTED TO THE LEARNED JUDGES OF THE HON"BLE HIGH COURT OF KARNATAKA

MEMORIAL *on behalf of the* **PETITIONER**

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STATEMENTOF JURISDICTION

The petitioner, Southern Operating Systems India Pvt. Ltd Bengaluru, has approached the Hon'ble High Court of Karnataka under Article 226[1] of the Constitution of India against the demand orders of the GST department to pay taxes by relying on the definition of 'services' and Schedule I read with Section 7 to the GST Act, 2017

THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS ON BEHALF OF THE PETITIONER IN THE INSTANT CASE.

[1] Article 226 (1) clearly states that every High Court shall have the powers throughout the territories in relation to which it exercised jurisdiction to issue writ or orders to any person or authority.

STATEMENTOFFACTS

BACKDROP

Southern Operating Systems India Pvt Ltd (SOS India), established in 2010 as a subsidiary of Southern Operating Systems Inc. (SOS US), aimed to tap into the software development market in Asia. To achieve this, SOS US sent highly skilled personnel to India, with salaries initially borne by SOS US and later reimbursed by SOS India.

EVENTS LEADING TO PETITION BEFORE THE COURT

However, the reimbursement led to a dispute with the tax authorities regarding service tax liabilities for importing services (expat employees) under the reverse charge mechanism.
Despite arguments from SOS India that the reimbursement was on a cost-to-cost basis and did not involve any profit markup, the Karnataka High Court ruled that SOS India was liable to pay service tax. In 2022, the Supreme court in the similar case held the Indian company liable.This decision prompted SOS India to reconsider its secondment strategy, particularly with the introduction of the Goods and Services Tax Act in 2017.
In response to the new tax regime, SOS India devised a tax planning strategy involving the termination of expat services from SOS US and their direct hiring by SOS India. This move was intended to mitigate GST implications, as services rendered by Indian employees to an Indian company were not subject to GST. However, the GST department issued show cause notices questioning this arrangement and demanding payment of GST for the entire period.

THE PROCEEDINGS

SOS India vehemently contested the notices, arguing that the expats were effectively Indian employees, especially since they had been physically present in India for over a decade. Despite these arguments, the GST department confirmed the demands, leading SOS India to file writ petitions before the High Court of Karnataka to challenge the GST liability.

STATEMENTOF ISSUES

1. **WHETHER THE WRIT PETITION IS MAINTAINABLE.**
2. **WHETHER THE DEPARTMENT HAS JURISDICTION TO ISSUE THE SCNS IF THE SERVICES WERE NOT LIABLE TO GST PER SE?**
3. **WHETHER THE SECONDMENT ARRANGEMENT IN GENERAL LIABLE TO GST.**
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.**
5. **WHETHER BASED ON THE ARRANGEMENT FROM 01.06.2022, IT CAN BE SAID THAT THERE WILL BE NO GST IMPLICATION.**
6. **WHETHER THERE IS ANY IMPORT OF SERVICES UNDER GST AND WHETHER THE INDIAN COMPANY IS LIABLE TO PAY GST UNDER REVERSE CHARGE MECHANISM.**

SUMMARYOFARGUMENTS

1. **WHETHER THE WRIT PETITION IS MAINTAINABLE.**

   The writ petition filed under Article 226 of the Indian Constitution challenges show cause notices issued by the GST department, asserting violations of legal rights and duties. The validity of the show cause notices is questioned due to erroneous facts and misinterpretation of law and alternative remedies are inadequate, making the High Court the appropriate forum.

2. **WHETHER THE DEPARTMENT HAS JURISDICTION TO ISSUE THE SCNS IF THE SERVICES WERE NOT LIABLE TO GST PER SE?**

   The GST department lacks jurisdiction to issue show cause notices if the services are not inherently liable under GST. The secondment arrangements, involving an employer-employee relationship, do not fall under the purview of GST.

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

   Secondment arrangements do not attract GST as they involve an employer-employee relationship, which is neither a supply of service nor goods under the GST provisions. The reimbursement of salary in such arrangements is based on cost-to-cost basis without markup, aligning with fair market practices.

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 employment status of expatriates as employees of SOS India from 2010 to 2022 exempts them from GST liability. Legal doctrines like the Doctrine of Control Test, along with GST regulations, firmly establish the exemption of services provided by employees to their employer within the same entity from GST.

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

   By transitioning to direct employment of expatriates, SOS India has taken a proactive step to mitigate potential GST liabilities. The absence of consideration flowing from the US

company to SOS India for services rendered underscores compliance with statutory provisions, fostering transparency and accountability in business operations.

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

In light of the absence of cross-border provision of services, there is no import of services under GST. Consequently, the reverse charge mechanism, typically triggered in cases of imported services, does not apply.

ARGUMENTSADVANCED

I. WHETHER THE WRIT PETITION IS MAINTAINABLE.

The counsel humbly submits the writ petition is maintainable in this Hon'ble High court of Karnataka based on the following grounds:

1.1 Article 226 of the Indian Constitution:

The writ petition has been filed under Article 226 of the Indian Constitution challenging show cause notices issued by the GST department on 30.01.2024. Article 226 empowers the Court to issue writs against state entities or any authority for violation of legal rights or duties, regardless of whether they are fundamental rights. In this instance, the notices exceed the GST department's jurisdiction as the arrangements in question, involves an employer-employee relationship which do not fall under the purview of GST law and the definition of 'services' under Section 7 r/w Schedule III of the Act, constituting a violation of SOS India's legal rights.

1.2 Validity of the SCN:

The SCN can be challenged by filing a writ petition before the High Court under Article 226. The SCNs issued are based on erroneous facts and misinterpretation of law. The GST department has inaccurately assessed the facts and misapplied the relevant laws applicable to this case. The reply to such notices were rejected by the department and demanded exorbitant amount of tax coupled with penalties which is arbitrary, unreasonable and violates the principles of natural justice. The court's interference with an SCN is limited, barring exceptions. The court examines whether the jurisdictional fact existed for issuing the notice. The SCN is a primary stage of adjudication and is not an order, so it cannot be challenged before the first appellate authority. In taxation matters, civil courts lack jurisdiction, making the High Court the only avenue for challenging SCNs[2]

1.3 Other remedies:

The counsel has moved this Hon'ble high court since the alternative remedy available does not seem adequate, efficacious, speedy, or convenient. The present case involves a question of law which is deemed as an exceptional situation where the Hon'ble high court may be pleased to investigate the matters to protect the interests and provide justice

1.4 117. Appeal to High Court. —

[2] Shreyaa, A Show Cause Notice [SCN] is issued when a government official is held prima facie responsible for misconduct,

(1) Any person aggrieved by any order passed by the State Bench or area Benches of the Appellate Tribunal may file an appeal to the High Court and the High Court may admit such appeal, if it is satisfied that the case involves a substantial question of law.

(2) An appeal under sub-section (1) shall be filed within a period of one hundred and eighty days from the date on which the order appealed against is received by the aggrieved person and it shall be in such form, verified in such manner as may be prescribed:

Provided that the High Court may entertain an appeal after the expiry of the said period if it is satisfied that there was sufficient cause for not filing it within such period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question and the appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(4) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(5) The High Court may determine any issue which—

(a) has not been determined by the State Bench or Area Benches; or

(b) has been wrongly determined by the State Bench or Area Benches, by reason of a decision on such question of law as herein referred to in sub-section (3).

(6) Where an appeal has been filed before the High Court, it shall be heard by a Bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(7) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only, by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(8) Where the High Court delivers a judgment in an appeal filed before it under this section, effect shall be given to such judgment by either side on the basis of a certified copy of the judgment.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil

Procedure, 1908(5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

Noting section 117 of the Central Goods and Services Tax which allows an aggrieved party to appeal before the High Court, subsection 5(a) of the same section empowers the High court to determine any issue which has not been determined by any State or area benches.

Hence the GST department without proper examination has issued the SCN exceeding its jurisdiction. It is contended by the petitioner that the department has acted without jurisdiction in issuing such notice which is erroneous, volatile of the fundamental rights, and thus is liable to be quashed and set aside. Further, it is contended that the present writ petition before the Hon'ble Court is maintainable as the show cause notice issued by the GST department is without jurisdiction.

In the case of ***Whirlpool's Corp. v. Registrar of Trade Marks***,

In which it was held by the Apex Court that the jurisdiction of the HC in entertaining a writ petition under article 226 of the Constitution would not be affected although there exist alternative statutory remedies particularly in cases where the authority against whom the writ has been filed is shown to have had no jurisdiction or has purported to usurp jurisdiction without any legal foundation.

II. WHETHER THE DEPARTMENT HAS JURISDICTION TO ISSUE THE SCNS IF THE SERVICES WERE NOT LIABLE TO GST PER SE?

2.1 Power of GST department to issue SCN:

Section 73 & 74 of the CT Act empowers the officers to issue show cause notices while determining the tax in 2 circumstances.

i. tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts.
ii. tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.

In this present case there is neither fraud nor wilful-misstatement or suppression of facts as to the tax payable. Hence the department has no jurisdiction to issue SCNs.

The petitioner counsel asserts that if the services provided were not inherently liable to GST, then the department lacks jurisdiction to issue show cause notices. In other words,

the mere absence of GST liability should preclude the initiation of enforcement actions. In the case of ***C.C., C.E. & S.T. – Bangalore (Adjudication) v. Northern Operating Systems Pvt Ltd.,*** the Supreme Court clarified that secondment arrangements (where employees are deputed from overseas entities to Indian entities) do not fall under the purview of GST. The Court emphasized the employee-employer relationship and the nature of services provided, which were not considered taxable supplies. This decision highlights that services outside the scope of GST should not be subject to show cause notices.

2.2 'Services' liable or not as per GST:

In this present case the seconded employees cannot be subject to taxation under reverse charge mechanism as there is no longer supply of manpower services. The basis for reverse charge mechanism is predicated on the employees returning to the parent company once the secondment agreement terminates. But the seconded employees are considered as employees of the Indian entity receiving new appointment letters. The employees were included the Indian company's payroll and there was only direct payment of salary to such employees in India without any reimbursement arrangement. Now there exists an employee-employer relationship. This situation is an exception under service tax because the definition of services excludes the services provided by employee to his employer from its ambit. The petitioner counsel might argue that unnecessary show cause notices cause undue harassment to taxpayers. If the services were genuinely exempt or not taxable, issuing notices would create an unnecessary administrative burden.

Hence the GST department without proper examination has issued the SCN exceeding its jurisdiction. The petitioner could emphasize that the legislative intent behind GST was to tax specific services and supplies. If a particular service falls outside the ambit of GST, issuing notices would be unjust.

III. WHETHER THE SECONDMENT ARRANGEMENT IN GENERAL LIABLE TO GST.

The counsel humbly submits that, in the context of the general liability of secondment arrangement in GST, the understanding I s that the secondment arrangement does not fall under the purview of GST Act,2017. The rationale behind this exemption is that the services provided by seconded employees to their employer are not considered goods or supplies and are therefore exempt from GST[3]. The employer – employee relationship during secondment is neither a

[3] Gautam Khaitan and Ruchesh Sinha, The viewpoint GST on secondment Arrangement – Supreme court in Northern Operating Systems case, published by Bar and Bench on 01.12.2023. lastly accessed on 09.03.2024.

supply of service nor a supply of goods under the GST provisions[4].

3.1 OUTLINE FOR SECONDMENT ARRANGEMENT:

Secondment involves the temporary transfer of employees from one company (the Seconder) to another company (the host) for a specific period. During secondment, the employee works under the direction and control of the host company. Three key parties are involved: 1. the seconder, 2. the secondee (employee), 3. and the host.

In typical secondment arrangement employees of overseas entities (employer(s)) are deployed or deputed to the Indian entity on its request to meet the requirements and specific needs of the Indian entity. Even during the term of secondment, the seconded employees remain on the payroll of the employer. The Indian entity usually exercises control and supervision over the seconded employees during the term of secondment. The Indian entity fulfils the labour laws and income tax TDS compliance with respect to the seconded employees during the tenure of secondment. The salary, other benefits of the seconded employees are paid by the employer to the employee. The employer claims the reimbursement of the said salary and benefits from the Indian entity on actuals and there is no mark-up on the said reimbursements.

3.2 WHETHER GST IS APPLICABLE IN SECONDMENT ARRANGEMENT:

Speaking generally, the thinking behind such arrangement of secondment is that the same does not attract the provisions of the GST Act (erstwhile the services Act) as such arrangement does not fall under the ambit of any 'service.' The reason is that there is an employer – employee relationship between the company and the seconded / deputed employees. In the other words, it is a commonly accepted phenomena that the services rendered by the deputed / seconded employee to its employer during the employment is not treated as supply and will not come under the purview of GST. Based on the same understanding, the secondment arrangements are considered as out of ambit of GST, as employee – employer relationship is neither a supply of service, nor a supply of goods under the provisions imposing GST.

[4] Section 7 read with schedule III of the GST Act, 2017 & Ruchesh Sinha & Prakash Mehta – [2023] 155 m 444(article), [opinion] Practical Approach to Handle the Notice Issued by GST Department pertaining to Secondment of Employees, published by taxmann, GST & Customs on October 25,2023. Lastly accessed on 07.03.2024.

Whereas the contagious issue and the thrust of the department is that where the foreign entity has seconded its employee in Indian entity will be treated as 'supply of services' and accordingly, GST will be applicable on consideration paid by the entity to the expatriates. The said arrangement seems to be simple and hassle free, however, taxation of such secondment arrangement under the GST provisions has once again become a controversial issue in view of the judgement of the supreme court in the case of ***CC, CE & ST V. NORTHERN OPERATING SYSTEMS (P.) LTD.***[5] ***[2022]138,359/2022(61) GSTL 129/92 GST 792***, which albeit pertains to the erstwhile Service Tax regime as the former has subsumed in the later.

Under the GST regime, services of the employee to the employer are considered as neither supply of goods nor the supply of services as per the schedule – III to the central goods and Services Act, 2017 ("CGST Act").[6] Further, Entry 1 of schedule – III to the CGST Act states that services by an employee to the employer in the course of or in relation to his employment are outside the scope of GST.[7]

Under the erstwhile service tax law, the abovementioned arrangements were considered liable to service tax by the tax authorities. The tax authorities were of the view that such deployment of employees by employer to Indian entity is nothing but 'supply of manpower service' and reimbursement made by the Indian entity was the consideration for the service. However, in most of the cases the demand was disputed by the assessee and the disputes were usually settled by the decisions of the tribunal (CESTAT). The tribunal considered the facts of each case, in most cases held that the relationship between the employee and Indian entity was that of employee-employer, as among other things, the control and supervision over the employee was exercised by the Indian entity and employer has no such control over the employee. Therefore, tribunal in most cases concluded that there was no 'manpower supply service' provided by the employee to the Indian entity and the mode of disbursement of salary and benefits could not determine the nature of transaction.

Most of the appeals by the tax authorities, against the decisions of the tribunal, had been rejected by the Supreme Court.

[5] [2022]138,359/2022(61) GSTL 129/92 GST 792

[6] Section 7 read with schedule III of the GST Act, 2017

[7] Adv. Ashish Tahalyani, goods and service tax – articles, GST on employee secondment: Recent Developments & Judicial Insights, published by Tax Guru on 18th December, 2023.

3.3 WHETHER THERE IS A CONTRACT OF SERVICE OR NOT.

The counsel humbly states that Supply is the main deciding factor on which taxation of a transaction under GST system is based. If a transaction is treated as a 'supply', then only the question of taxing the transaction arises. So 'supply' is the most crucial factor under GST system and it is the taxable event on happening of which the charge of GST is determined. Supply holds the greatest significance and shall be an important event in determining the taxability of all transaction whether commercial or otherwise. Therefore, determining whether or not a transaction falls under the scope of supply, is most important to decide the GST applicability of the transaction. Schedule III gives a comprehensive list of activities not treated as supply. List of such activities is given below:

ENTRY 1: Services by an employee to the employer in the course of or in relation to his employment.

3.4 WHETHER THERE EXISTS AN EMPLOYER – EMPLOYEE RELATIONSHIP:

The existence of an employer – employee relationship between an Indian company and secondees depends on factors like contractual agreements, control over work, and financial arrangements. By considering these factors, there exists a employer – employee relationship as

i. There exists a contractual agreement between the seconder (real employer) and the host company (economic employer) to employ the secondees anymore until they set up the company.
ii. The Indian company is having a full control over the work done by the expats and the expats in return rendered their service were not as expats but as the employees of the Indian company a s said in para 13 and due to their complete devotion towards the Indian company it can be considered that Indian company are the employer of the secondees.

Recently, there has been another ruling in this context pronounced by High Court of Karnataka in the case of ***Flipkart Internet Private Limited***[8], wherein certain important factors were considered in relation to employer – employee relationship in secondment arrangements. Flipkart India filed a Writ Petition before High Court of Karnataka.

Key Highlights of the High Court of Karnataka Ruling:

High Court held that the proceedings for NIL withholding tax certificate were tentative in

[8] [TS-503-HC-2022(KAR.)]

nature and tax authorities could have decided taxability of recipient (Flipkart) at a later stage. High Court also observed that the relevant DTAA in the facts before it had a restrictive definition of the term fees for technical services.

Though the above factors formed basis for the judgment of High Court that NIL withholding tax order should be issued, analysis provided by High Court on employer – employee relationship would be of relevance. It has given significance to the relationship between Flipkart India and the seconded employees and listed below factors to consider Flipkart India as the employer of seconded employees would be relevant:[9]

i. Flipkart issues the appointment letter,
ii. Flipkart India has the power to terminate the services of employees and
iii. Flipkart India had established an online market place for consumer goods and is not merely acting as back support for providing support services to Walmart Inc.

Further, High Court also observed that following factors should not affect the employer – employee relationship between Flipkart India and the seconded employees:

i. Authority with Walmart Inc. to decide on the employee's continuance with Walmart Inc. post the period of secondment, being service condition post the period of secondment;
ii. Payment of salary by Walmart Inc. to seconded employees;
iii. Walmart Inc. raised the invoice on Flipkart India after incurring secondment costs; Equity eligibility of the seconded employees continues to be tied with Walmart Inc., being a pre-existing benefit

3.5 <u>REIMBURSEMENT OF SALARY BY THE HOST COMPANY:</u>

The counsel humbly states that the SOS India staunchly denied its tax liability as it primarily arguing that the reimbursement of the salary expenses was only on cost – to – cost basis without any markup to the US company and hence this was not a separate commercial activity of the US company but more of its core business activity which was 'in relation to' software development. It may be stated that in a classic secondment arrangement, employees of overseas entities are deputed to the host entity (Indian associate) on the its request to meet its specific needs and requirements of the Indian associate. During the arrangement such

[9] Chetan Kakariya, Priyanka Limaye & Niraj Shah, Secondment of employees to India – Recent jurisprudence on controversies, published on 8 September 2022 by Rodl & Partner. Lastly accessed on 04.03.2024

expatriate viz., the 'secondees' work under the control and supervision of the Indian company and in relation to the work responsibilities of the Indian affiliate. Social security laws of the home country (of the secondees) and business considerations result in payroll retention and salary payment by the foreign entity, which is claimed as reimbursement from the host entity i.e., the Indian company.

In the context of reimbursement in secondment arrangements, the arm's length doctrine ensures that the reimbursement aligns with fair market practices. For example, when a foreign company secondees an employee to its Indian subsidiary, the reimbursement for the seconded employee's salary should be at arm's length. Recently In the Bangalore bench of the Income-tax Appellate Tribunal (ITAT) held that cost-to-cost reimbursement of seconded employees by the Indian subsidiary to the foreign company was not taxable as fees for technical services (FTS) or fees for included services (FIS) under the Income-tax Act or the India–US Double Taxation Avoidance Agreement (DTAA)

IV. 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 that there is no GST implication for the period from 2010 to 2022 based on the experience letters

4.1. DOCTRINE OF CONTROL TEST

The Doctrine of Control Test stands as a criterion in determining the nature of the employer-employee relationship under Indian employment law. It provides a clear framework to ascertain whether an individual should be classified as an employee or not, based on the level of control exercised by the employer over the worker's activities. In the case at hand, the expatriates' status as employees of the Indian company for the entire duration since 2010, can be strongly supported by the fact that they were under the direct control and supervision of SOS India while physically present and actively engaged in rendering services within India.

The significance of the Control Test has been underscored by various judgments of the Supreme Court of India, which have elucidated its importance in discerning the employer-employee relationship. For instance, in the case of ***Balwant Rai Saluja & ANR. Vs. Air India Ltd. & Ors[10],*** the Supreme Court emphasized the test of effective and absolute control as pivotal

[10] *Balwant Rai Saluja & ANR. Vs. Air India Ltd. & Ors,* 2014 9 SCC 407

in determining this relationship. Additionally, the principles of vicarious liability and the Doctrine of Respondeat Superior, both rooted in the Control Test, further accentuate its relevance in assessing the employment status of individuals.

Referring to specific judicial pronouncements[11], such as the landmark judgment in ***Dhrangadhra Chemical Works Ltd. v. the State of Saurashtra***[12], the SC reinforces the primacy of the supervision and control test in employment matters. This test serves as a vital criterion in distinguishing employer and employee relationship.

In light of these legal principles and precedents, the expatriates' working conditions align with the criteria established by the Control Test and other relevant provisions undoubtedly qualify as employees of SOS India.

4.2. GST EXEMPTION:

The argument presented aligns with the provisions[13] of the GST framework in India, which exempt services rendered by employees to their employer within the same legal entity from GST[14]. This exemption is grounded in the principle that such services are part of the employment contract and do not constitute a supply for GST purposes.

By establishing that the expatriates are now considered employees of the Indian company, the argument solidifies their eligibility for this exemption. Therefore, based on the principles outlined in the GST framework, it can be concluded that there should be no GST liability arising from the services rendered by the expatriates to SOS India. This interpretation ensures compliance with GST regulations while recognizing the employment relationship established between the expatriates and the Indian company.

4.3. DOCTRINE OF MUTUALITY

In the case at hand, the doctrine of mutuality stands as a cornerstone principle, offering a profound perspective on the intricate relationship between Southern Operating Systems (SOS) entities, particularly the US parent company and its Indian subsidiary. Given the integral role of the US company as the parent and holding entity of the Indian company, it is evident that both entities essentially operate as a cohesive unit. In this context, any actions undertaken by the US company, such as the secondment of employees to the Indian subsidiary, cannot be construed as a separate supply of service. Taxation cannot be levied on the provision of one's

[11] *Punjab National Bank v. Ghulam Dastagir* (1978) 2 SCC 358; Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments, (1974) 3 SCC 498

[12] *Dhrangadhra Chemical Works Ltd. v. the State of Saurashtra,* (1957) 1 LLJ 477

[13] Section 7 of GST Act, 2017; Section 2(102) of GST Act, 2017.

[14] Schedule – III of Section 7 of GST Act, 2017 (Activities or transactions which shall be treated neither as a supply of goods nor a supply of services)

own services, as it fundamentally lacks the characteristic of an external commercial transaction. Furthermore, established legal precedents underscore those activities conducted for collective interests, devoid of any profit motive, do not fall within the purview of taxable supply under GST[15].

Against this backdrop, the present scenario compelling an argument against the imposition of GST on secondment arrangements with its US counterpart. The symbiotic relationship between the entities, characterized by the seamless transfer of personnel for mutual benefit, underscores a shared purpose rather than a commercial exchange. Thus, any attempt to levy GST on such arrangements would not only run counter to the principles of mutuality but also disregard the inherent unity and interdependence between the US parent company and its Indian subsidiary.

In conclusion, the doctrine of mutuality serves as a guiding principle in navigating the complexities of taxation, particularly in cases involving closely affiliated entities like SOS India and its US counterpart. It is imperative for the judiciary to recognize and uphold this principle, ensuring that taxation remains aligned with the fundamental principles of fairness and equity, especially in cases where transactions occur within a unified organizational framework.

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

The counsel humbly submits that there will be no GST implication based on the arrangement from 01.06.2022 thorough following submissions,

5.1. DIRECT EMPLOYMENT RELATIONSHIP:

The Latin maxim "Qui facit per alium facit per se" encapsulates a fundamental legal principle that holds employers accountable for the actions of their employees, establishing a direct relationship between the two parties[16]. Applying this principle within the realm of GST in India, the termination of a secondment arrangement and the subsequent direct employment of expatriate employees under the Indian company's payroll as of June 1, 2022, signifies a pivotal shift in the dynamics of employer-employee relations.

By virtue of this transition, the Indian entity assumes sole responsibility as the employer of

[15] *Banglore Club v Commissioner of Income Tax And Anr* (2013) 5 SCC 509; *State Of West Bengal v. Calcutta Club Association* 2019 SCC OnLine SC 1291

[16] *H E Nasser Abdulla Hussain vs Dy. City,* (2002) 77 TTJ Mumbai 878; *Deo Narain a Rai and Anr. vs Kukur bind and Ors,* ,1902, ILR 24 All 319

these expatriates. Consequently, the services rendered by these employees are rightly construed as services provided by an employee to their employer in the course of employment. Importantly, Schedule III of the CGST Act explicitly exempts such services from the purview of GST, recognizing them as outside the scope of taxable supplies.[17]

Therefore, the direct employment of expatriate employees by the Indian company effectively severs any supply of manpower services from the US company to the Indian entity. This critical alteration fundamentally alters the landscape of GST liability, particularly under the reverse charge mechanism (RCM), which typically comes into play when services are provided by one entity to another in a manner that constitutes a supply of services.

To substantiate this argument further, specific provisions within the CGST Act and IGST Act, such as Section 9(3) and Section 5(3) respectively, enumerate goods or services notified by the Government under RCM[18]. Additionally, referencing pertinent judicial precedents, such as the Supreme Court of India's ruling in the case of *Northern Operating Systems Pvt. Ltd*, can offer valuable insights into the treatment of secondment arrangements under GST.

In light of these compelling arguments and legal provisions, it becomes abundantly clear that the direct employment arrangement implemented by the Indian company from June 1, 2022, absolves it of any GST liability arising from the erstwhile secondment arrangement. This strategic shift not only aligns with legal mandates but also exemplifies prudent tax planning, ensuring compliance while fostering operational efficiency.

5.2. NO MANPOWER SUPPLY:

Indeed, the termination and subsequent reengagement of expatriates by the Indian company decisively nullify any notion of manpower provision from the US company. By directly employing these expatriates, the Indian company has severed any contractual association with the US company regarding their services, thereby eliminating any basis for GST liability under the reverse charge mechanism.

The expatriates, now under the direct employment of the Indian company, operate solely within the framework of their employment relationship with the Indian entity. This direct employment arrangement ensures that all aspects of their employment, including their roles, responsibilities, and remuneration, are governed exclusively by the Indian company, independent of any involvement or influence from the US company.

Consequently, the expatriates' services are no longer deemed to be provided through a

[17] Schedule – III of Section 7 of GST Act, 2017 (Activities or transactions which shall be treated neither as a supply of goods nor a supply of services)
[18] Section 9(3) of CGST Act, 2017, Section 5(3) of IGST Act, 2017.

contractual arrangement with the US company, effectively disentangling them from any supply of manpower services. This clear delineation of employer-employee relationships underpins the assertion that GST liability associated with manpower provision from the US company has been definitively nullified.

In essence, *"accessorium non ducit sed sequitur suum principale",* An accessory does not lead but follows its principal. This implies that if the primary service (secondment) is no longer present, the ancillary GST implications may also not apply.[19]

5.3. COMPLIANCE WITH GST ACT:

The company's decision to directly employ expatriate employees from June 1, 2022, onward is aligning with the provisions of the GST Act, particularly Section 7[20], which delineates taxable supply as the exchange of goods or services for consideration. Crucially, this arrangement entails no consideration flowing from the US company to the Indian entity for the provision of services, thereby precluding any taxable supply under GST.

This compliance with Section 7 underscores the adherence of the company to the statutory framework governing GST. By ensuring that no consideration is exchanged between the US company and the Indian entity in connection with the supply of services, the company has effectively pre-empted any GST liability arising from the provision of services.

In essence, the company's decision reflects a proactive approach to GST compliance, demonstrating a keen understanding of the legal requirements outlined in the GST Act. This adherence to statutory provisions not only mitigates potential tax liabilities but also fosters transparency and accountability in business operations.

5.4. VALUATION ISSUES:

Since there is no reimbursement of salaries from the Indian company to the US company, there are no valuation concerns for GST purposes. The salary in India is based on the salary that was paid to such expatriates in the US, and there is no additional consideration flowing from the Indian company to the US company.

VI. 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 that there is no import of services under GST in the present scenario and thus not liable to pay GST under reverse charge mechanism in the following

[19] Malik v. Union of India 1969 SCC Online All 276
[20] Section 7 of GST Act, 2017

submissions.

6.1. NO IMPORT OF SERVICES:

The secondment agreement entails the transfer of employees from the US company to the Indian company for the provision of services within India. As per the definition provided in Section 2(11) of the Integrated Goods and Services Tax (IGST) Act, 2017[21], import of services specifically refers to services provided from a territory outside India to a recipient in India.

Given that the services are performed within the territory of India in the present scenario, there is no import of services as defined under the IGST Act. Therefore, the Indian company cannot be held liable to pay GST under the reverse charge mechanism for imported services. This interpretation is in line with the legislative intent behind the GST framework, which seeks to tax cross-border transactions involving the supply of services from foreign territories into India, rather than transactions occurring solely within the country's borders. Thus, the absence of any importation of services absolves the Indian company from any GST liability under the reverse charge mechanism in this context.

6.2. PLACE OF SUPPLY:

According to Section 13 of the IGST Act, 2017[22], the concept of import of services under GST is intrinsically linked to the determination of the place of supply, which governs the applicability of the reverse charge mechanism. Import of services typically occurs when services are provided by a supplier located outside India to a recipient located within India. However, in the case at hand, the expatriate employees are directly employed by the Indian company, negating any involvement of a foreign supplier.

Since the expatriate employees are now under direct employment of the Indian company and render their services within the territorial jurisdiction of India, there is no cross-border provision of services. Consequently, the place of supply is deemed to be within India, and there is no import of services as defined under GST laws.

6.3. REVERSE CHARGE MECHANISM

In light of the absence of any import of services, the reverse charge mechanism, which is triggered specifically in cases of imported services, does not apply to the present scenario. Therefore, the petitioner company cannot be held liable to discharge GST under the reverse charge mechanism for the employment of expatriate employees.

This interpretation not only aligns with the statutory framework of GST but also upholds the

[21] Section 2(11) of IGST Act, 2017.
[22] Section 13 of GST Act, 2017.

principles of fairness and equity in taxation. It ensures that the petitioner company is not burdened with undue tax liabilities arising from transactions that do not fall within the ambit of import of services under GST.

In conclusion, it is respectfully submitted that the absence of import of services precludes the applicability of the reverse charge mechanism, thereby relieving the petitioner company of any GST liability in the present context. This interpretation is consistent with the principles of GST law and promotes clarity and certainty in tax compliance.

PRAYER

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

i) The Writ Petition filed by the petitioner under Article 226 of Indian Constitution is maintainable.
ii) Dismiss the order passed by the GST department

AND PASS ANY OTHER RELIEF THAT THIS HON'BLE COURT MAY DEEM FIT IN THE INTERESTS OF JUSTICE, FAIRNESS, EQUITY AND GOOD CONSCIENCE, ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd /-

COUNSEL FOR THE PETITIONER