TC -11

21ST SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION

BEFORE

THE HON'BLE HIGH COURT OF KARNATAKA AT BENGALURU

WRIT PETITION FILED UNDER ART. 226 OF THE CONSTITUTION OF INDIA

IN THE MATTER OF

WP NO. 50000 OF 2024 & WP NO. 50001 OF 2024

SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD

BENGALURU

... PETITIONER

V.

ADDITIONAL COMMISSIONER OF GST AND OTHERS

BENGALURU

... REPONDENTS

MEMORIAL FOR PETITIONER

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
%	Percentage
¶	Paragraph
§	§
A.T.	Appellate Tribunal
AIR	All India Reporter
ANR.	Another
ART.	Article
ASST.	Assistant
B/W	Between
C.A	Civil Appeal
CCE	Collector of Central Excise
CGST	Central Goods and Services Tax Act
CIT	Commissioner of Income Tax
CL.	Clause
CO.	Company
COMM'R	Commissioner
DEL.	Delhi
DTAA	Double Tax Avoidance Agreements
EDN.	Edition
ETC.	Et Cetra
FY	Financial Year
GST	Goods and Service Tax
GUJ.	Gujrat
HC	High Court
HON'BLE	Honourable
INT'L	International
KMP	Key Managerial Persons
LTD.	Limited
MOU	Memorandum of Understanding

NO.	Number
ORS.	Others
PG.	Page
PVT.	Private
RCM	Reverse Charge Mechanism
SC	Supreme Court
SOS	Southern Operating Systems
SCC	Supreme Court Cases
SCN	Show Cause Notice
SCH.	Schedule
SUPP.	Supplementary
U.S.	United States
V.	Versus
VOL.	Volume
W.P.	Writ Petition

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13.	Divya Enterprises v. CCE, 2010 (19) STR 370.

MISCELLANEOUS

1.	Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd., (1952) SCR 696, 702.

STATEMENT OF JURISDICTION

THE COUNSELS APPEAR ON BEHALF OF THE PETITIONER IN THE MATTER OF SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD V. ADDITIONAL COMMISSIONER OF GST AND OTHERS BEFORE THE HON'BLE HIGH COURT OF KARNATAKA.

THE COUNSELS ON BEHALF OF THE PETITIONER HAVE ENDORSED THEIR PLEADINGS IN TWO WRIT PETITIONS UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

IT SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS OF THE PETITIONER.

STATEMENT OF FACTS

Southern Operating Systems India Pvt. Ltd is a company registered under the Companies Act, 1956 having its registered office in Bengaluru. The company was incorporated on 01.02.2010 which is almost a 100% subsidiary of US Company. When the Indian company was to be set up, the KMP were sent to India in 2010 to set up the Indian company so that there would be transfer of technological know-how, expertise and to maintain the quality of the products manufactured. There was a 'secondment-arrangement' to this effect between the US Co. and the Indian Co.

For all legal purposes, the US expats (seconded employees to India) were treated as employees of the US company. However, for all economic purposes, the Indian company was treated as the employer of the expats. Meaning, though the termination of the employees from service was with the US company, the termination of the secondment arrangement with a particular employee was with the Indian company.

The High Court of Karnataka in 2017 held the Indian Company liable to Service Tax under RCM for import of services since the supply of seconded employees by the US Co. to the Indian Co. was to be treated as manpower supply services.

Thereafter, in the year 2022, as a Tax planning measure the Indian Co. and the US Co. keeping the expats in confidence, 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 terms of new employment were such that the expats, for all legal and other purposes, will be treated as employees of the Indian company.

For the above circumstance, the GST department issued two show cause notices:

i) on 31.01.2024 to the Indian company to show cause as to why GST should not be imposed on the secondment arrangement between the US company and the Indian company up to 31.05.2022; and

ii) for the period from 01.06.2022 to 31.12.2023 which questioned the 'innovative arrangement' of the Indian Co. with the US Co.

STATEMENT OF ISSUES

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

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

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

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.**

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

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

SUMMARY OF ARGUMENTS

Issue 1 – The counsels humbly submit that the two writ petitions are maintainable before this Hon'ble Court because the Show Cause Notices were erroneously issued against the petitioner thereby violating the rights of Petitioner.

Issue 2 – The Counsels humbly submit that the issuance of such SCNS is without jurisdiction because *firstly*, the service provided by the Petitioner is not liable for GST, *secondly*, the SCNs are time barred, and *thirdly*, the Department has no jurisdiction issue such SCNs in the first place.

Issue 3 – The Counsels humbly submit that **t**he determination of GST liability over a secondment arrangement has no straight jacket formula, and the liability arises on a case-to-case basis. While ascertaining the GST liability over a secondment arrangement, the substance and the form of the agreement between the parties involved, should be observed.

Issue 4 – The Counsels humbly submit that the Petitioner had the power to issue the experience letters to the KMPs. A company can issue experience letters to its own employees confirming their tenure with the organisation. The KMPs which were seconded to the Petitioner by the SOS US were issued experience letters by the Indian entity, asserting that they were employees of the Indian entity for the specified period.

Issue 5 – The Counsels humbly submit that there can be no GST implications on the Petitioner based on the arrangement from 01.06.2022 because **(1)** No service of identifying/arranging employees is provided by SOS US to the petitioner, **(2)** Services of employees specifically excluded under CGST Act, 2017, **(3)** the Expats are employees of SOS India as per the contract, and **(4)** that whatever is done by the petitioner is done as part of its tax planning; which is not illegal.

Issue 6 – The Counsels humbly submit that there is no import of services under GST and hence, the Petitioner is not liable to pay under Reverse Charge Mechanism. **(1)** There is no 'supply' of service in order to create import of service and **(2)** Petitioner cannot be charged under RCM in absence of import of service.

ARGUMENTS ADVANCED

I. WHETHER THE WRIT PETITION IS MAINTAINABLE UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

¶ 1. It is humbly submitted that the two writ petitions filed by Southern Operating Systems India Pvt. Ltd (hereinafter referred to as "the Petitioner") are maintainable before this Hon'ble High Court under Article 226 of the Constitution of India because, the impugned Show Cause Notices (hereby SCNs) were erroneously issued against the Petitioners **[1.1]**, and that this Hon'ble High Court has the discretionary power to try the petition under its writ jurisdiction **[1.2]**.

1.1. That the impugned SCN were erroneously issued by the GST Department.

¶ 2. It is submitted that the Impugned SCNs dated 31.01.2024 are without any jurisdiction and violative of Article 265 of the Constitution of India, being without any authority of law and as such, the same are liable to be quashed by this Hon'ble High Court. It is further stated, the demands raised in the Impugned SCNs are violative of Article 19(1) (g) of the Constitution.

¶ 3. In the Impugned SCNs, the Respondent proceeds on the basis of an erroneous assumption that the services provided by the employees of the Petitioner are "manpower supply services" being provided by the overseas entity. On the basis of this erroneous assumption, the services provided under the employer-employee relationship to the Petitioner, which are specifically excluded from the ambit of GST as per Schedule III of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act")[1] are erroneously being held taxable services under the Act.

¶ 4. Therefore, in so far as the secondment arrangement constitutes between the Petitioner with its overseas entity is irrelevant for the purpose of the present case as the employment agreement by and between the Petitioner and its employees constitutes an independent contract of services in respect of employment with the Petitioner.[2] There exists a bonafide employer-employee relationship between the Petitioner and the employees/secondees, and the reimbursements were in the nature of reimbursement of 'salary expenses'.

[1] The Central Goods and Services Tax Act, 2017, Schedule III, No. 12, Acts of Parliament, 2017 (India).

[2] Flipkart Internet Private Limited v. The Deputy Commissioner of Income Tax, MANU/KA/2822/2022.

1.2. That the High Court has discretionary power to try the petition under its Writ jurisdiction.

¶ 5. It is trite in law that the bar of alternate remedy is a self-imposed restriction imposed by the Courts on the exercise of their own powers and the said bar is a matter of discretion which can be exercised in the right facts and circumstances[3]. Reliance is placed on the decision of the Apex Court in the case of *Whirlpool Corpn. v. Registrar of Trade Marks*,[4] wherein it was categorically held that the alternate remedy is not a bar and that writ petition is maintainable in the following the following circumstances, **i)** where the writ petition has been filed for the enforcement of any Fundamental Rights, **ii)** where there has been a violation of the principles of natural justice, **iii)** where the order or proceedings are wholly without jurisdiction, **iv)** where the vires of an Act is challenged.[5]

¶ 6. It is hence submitted that the Impugned SCN were violative of article 19(1)(g) of the Constitution, as an imposition of illegal tax is a hinderance to the Petitioner's trade and business.[6] Furthermore, article 265 of the Constitution states that no tax shall be levied or collected except by authority of law, hence, the demand of tax through an erroneous SCN, for the issuance of which the GST Department had no jurisdiction, is a tax levied without the authority of law, and an imposition of an illegal tax, and hence violative of Article 265.

¶ 7. Under Article 226 of the Constitution, the High Court has discretion to entertain or not entertain a writ petition; however, the High Court has imposed upon itself certain restrictions, one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the existence of an alternative remedy does not operate as a bar on the High Court to exercise its writ jurisdiction[7].

¶ 8. The Hon'ble Supreme Court has held that alternate remedy is essentially not an absolute rule.[8] It is a rule of discretion and it is not a rule of compulsion, but it should be applied with utmost rigor when it comes to matters pertaining to taxes, cess, fees, etc.[9]

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[3] Godrej Sara Lee Ltd. v. Excise & Taxation Officer, 2023 SCC OnLine SC 95.

[4] Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1.

[5] Assistant Commissioner of State Tax & Ors. v. Commercial Steel Ltd. CA No. 5121 of 2021(SC).

[6] Smt Ujjam Bai v. State of Madras, AIR 1962 SC 1621.

[7] K.S. Rashid & Son v. Income Tax Investigation Commission [AIR 1954 SC 207: (1954) 25 ITR 167].

[8] United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110.

[9] Authorized Officer, State Bank of Travancore v. Mathew K.C., (2018) 3 SCC 85.

¶ 9. Thereby, the Petitioner humbly concludes that it is a well-established principle that the availability of an alternate remedy does not completely prevent the filing of a writ petition[10] under Article 226 of the Indian Constitution. The requirement for exhausting statutory remedies before granting writ is a rule of policy, convenience, discretion or self-imposed restraint.[11] Hence, the writ petition is maintainable under Art. 226 of the Constitution of India.

II. WHETHER THE DEPARTMENT HAD JURISDICTION TO ISSUE THE SCNS IF THE SERVICES WERE NOT LIABLE

¶ 10. It is humbly submitted that the GST Department has the jurisdiction to issue the SCNs in circumstances where there has been a non-payment of taxes, or wilful evasion of tax liability, the power for the same is provided under §73 and §74 of the Act, respectively. However, in the present case the issuance of such SCNS is without jurisdiction because *firstly*, the service provided by the Petitioner is not liable for GST **[2.1]**, *secondly*, the SCNs are time barred **[2.2]**, and *thirdly*, the Department has no jurisdiction issue such SCNs in the first place **[2.3]**.

2.1. That the Service is not *per se* liable for GST under manpower supply category

¶ 11. It is humbly submitted that the services provided by SOS US to the Petitioner, do not fall under the category of manpower supply services. Being a creature of the statue, the Respondents have only been given the power to exercise jurisdiction over the transactions which are taxable as per the Act. Thus, in the present case, when the services are not per se liable to GST, the department does not have any jurisdiction to initiate proceedings against the Petitioner by issuing show cause notices and as such, the Impugned SCNs deserve to be quashed.[12]

¶ 12. It is submitted that there is no "supply" of service as under §7, there must be a flow of consideration from the service recipient to the supplier which, in the present case, is absent from the transaction. No "consideration" has been paid to the petitioner. The transaction between the parties pertains to reimbursement of salary expenses of its employees on a cost-to-cost basis without any markup.

[10] L. Hriday Narain v. ITO, (1970) 2 SCC 355.

[11] State of West Bengal v. North Adjai Coal Co. Ltd, 1971 (1) SCC 309.

[12] LINDE Engineering India Pvt. Ltd.v. Union of India, SCA No. 12626 of 2018- Guj HC.

¶ 13. Since the services provided by an employee to an employer are specifically excluded from the purview of the GST, reimbursement of the salary cost of the employee is not subject to this tax[13].

2.2. The SCN issued for the period from FY 2017-2022 is time barred

¶ 14. It is humbly submitted that §73(10) of the Act specifically provides a time limit of three years from the due date for furnishing of annual return for the financial year to which the tax due relates to. It is submitted that by virtue of CBIC Notification No.09/2023 - Central Tax issued under the provisions of Section 168A of the CGST Act, the time limit for issuance of an order for the financial year 2017-18 has been extended upto 31/12/2023, which makes the last date for issuing SCN as 30.09.2023.

¶ 15. It is humbly submitted that under §74 of the Act, the tax authorities have power to issue a SCN till five years from the last date of filing annual returns of that financial year. In the present case, the time limit for issuing the SCN was only up till June 2023 as per §74(2), and no extension has been granted for SCN under §74 vide any notification.

¶ 16. It is further humbly submitted that a single SCN spanning multiple financial years cannot be issued by GST authorities.[14] Issuing multiple SCNs is against the spirit of the provision of §73 and has held that where an assessment encompasses different assessment years, each assessment year could be easily split up and dissected and the items can be separated and taxed for different periods.[15]

2.3. The Department has no jurisdiction to issue SCN under §74(1)/73(1) of the Act

¶ 17. It is humbly submitted that in order to issue notice under §74, there must be fraud or wilful misstatement or suppression of facts to evade tax. Only in cases where the investigation indicates that there is material evidence of fraud or wilful misstatement or suppression of facts to evade tax, the Tax Authorities can invoke §74(1) of the CGST Act. Further, such evidence should also be made a part of the show cause notice and must be substantiated and not merely alleged.[16]

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[13] *Supra* note 2.

[14] Titan Company Ltd. v. Joint Commissioner of GST & Central Excise, W.P. No. 33164 of 2023 Madras HC.

[15] State of Jammu and Kashmir and Others v. Caltex (India) Ltd., AIR 1966 SC 1350.

[16] Commissioner of Customs, Central Excise and Service Tax, Bangalore (Adjudication) and Others v. Northern Operating Systems Pvt. Ltd., AIR 2022 SC 2450.

¶ 18. The Impugned SCNs which suffer from vagueness and arbitrariness in so far as it invokes the powers under §74 without establishing the necessary ingredients of the same, are bad in law and deserve to be quashed for this sole reason.[17]

¶ 19. The only ground alleged by the Respondents is that the Petitioner failed to discharge the alleged tax liability for the GST regime, despite accepting the Order of the Hon'ble High Court for the services tax regime. On the basis of this, the Respondents have assumed the presence of the necessary ingredients of §74 of the Act. In this regard, the Petitioner relies on the decision of Hon'ble Supreme Court in the case of *M/s. Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur,*[18] wherein it was held that mere non-payment of duties does not necessarily indicate collusion, wilful misstatement, or suppression of facts.

¶ 20. It is humbly submitted that the SCNs have been issued without following the mandatory procedure as per the CGST Act and the CGST Rules, as per which, a pre-show cause notice communication/consultation is necessary.[19] In the present case, since the procedure under the law has not been followed, the Impugned SCNs are not valid in law. Pre-notice communication before issuing SCN was made compulsory, vide Circular No. 1053/02/2017-CX dated 10/03/2017. Also, in the case of *Amadeus India Pvt. Ltd. v. Principal Commissioner, Central Excise, Service Tax and Central Tax,*[20] the SCN was quashed for not holding pre-notice consultation/communication.

¶ 21. Based on the above arguments, it is humbly submitted, that in the present case, the SCNs issued were without any jurisdiction and, their issuance in themselves is erroneous, thus they deserve to be quashed.

III. WHETHER SECONDMENT ARRANGEMENT IN GENERAL LIABLE TO GST

¶ 22. In general, a secondment agreement, foreign workers, also referred to as "secondees," are sent by the parent entity to an Indian entity under the terms of the secondment agreement. The Indian entity is essentially in charge of and has control over the seconded workers. In this arrangement, the secondee continues to be paid by a foreign company while

[17] M/S Virani Metal Industries v. State of Gujarat, SCA No. 13233 of 2022.

[18] 2013 (1) TMI 616.

[19] Back-office IT Solutions Pvt. Ltd v. Union of India & Ors, 2021 SCC Online Del 2742.

[20] Amadeus India Pvt. Ltd. v. Principal Commissioner, Central Excise, Service Tax and Central Tax, 2019. (5) TMI 669- DELHI HIGH COURT.

receiving their wages in their home country. The Indian company reimburses the salary of the secondee to the foreign company.

¶ 23. The determination of GST liability over a secondment arrangement has no straight jacket formula, and the liability arises on a case-to-case basis.

3.1. The substance and the form of the agreement are relevant to GST being levied on secondment arrangements

¶ 24. It is humbly submitted that while ascertaining the GST liability over a secondment arrangement, the substance and the form of the agreement between the parties involved, should be observed.

¶ *25.* Following the aftermath of the NOS judgment, in the case of *Commissioner of Central Excise, Mumbai v. M/s Fiat India(P) Ltd,*[21] it has been observed that each case depends on its own facts and close similarities between cases is not a significant detail to alter the entire aspect of one case.

¶ 26. Depending on the details of the contract and other terms and conditions included, the tax consequences of each arrangement may vary. As a result, it is not appropriate to apply the Hon'ble Supreme Court's ruling in the NOS verdict uniformly to all situation.[22]

¶ 27. To ascertain whether an investigation is taxable or to what extent under GST, as well as whether the guidelines established by the Hon'ble Supreme Court's ruling in the NOS case are applicable, each case must be carefully examined for its unique factual matrix, which includes the terms of the contract between the foreign company and the Indian entity.[23]

¶ 28. It has been observed to determine whether the arrangement between the Assessee and the seconded employees is a contract of service or contract for service, the Court applied the 'substance over form' test which requires a close examination of the terms of a contract.[24]

3.2. GST is not levied on employer-employee relationship

¶ 29. It is further humbly submitted that CGST Act, Schedule III Entry 1 read with §7 states that services by an employee to the employer in the course of or in relation to his employment are activities or transactions which shall be treated neither as supply of goods nor as supply of services.

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[21] (2012) 9 SCC 332.

[22] Instruction No. 05/2023-GST.

[23] *Supra* note 2.

[24] *Supra* note 16.

¶ 30. Hence, a secondment agreement in which the nature of employment is deemed to produce an employer-employee relationship cannot be liable to GST. In a case where the Assessee has control over the work of the secondees and has economic control over the workers' subsistence, skill and continued employment and they would be virtually laid-off if the employer ceased to use their goods or services for any reason,[25] would constitute a contract of service.

¶ 31. Thus, secondment arrangements are not liable to GST when a contract of service or employer-employee relationship exists between the parties, hence a parallel can be drawn with the instant case where the Petitioner and the their "seconded" employees have a contract of service, and thereof, the secondment arrangement between them is not liable to GST.

3.3.Tax liability does not arise under DTAA agreements

¶ 32. It is further humbly submitted that entities which enter in secondment agreement, belonging to India and USA are also governed by Double Taxation Avoidance Agreement, which through a 'Memorandum of Understanding' (MoU) dated 12.09.1989 entered into between the Government of India and U.S.A. which is stated to be forming part of the 'DTAA' provides that Fee for Included Services, which 'make available to the person acquiring the services', only would be amenable to tax. Article 243 of the Constitution of India gives power to the parliament to make law of any treaty, convention, etc, thereof, it is not unlikely that the DTAA can be enforced to curb unnecessary tax liabilities.

¶ 33. Accordingly, any service that does not make technology available to the person acquiring the service would not fall in the category of 'make available' and accordingly, would stand excluded from the provision of Article -12 of DTAA.[26]

¶ 34. It was noted that payments in the nature of reimbursement cannot be charged as income under the Act.[27] In the present case, the taxpayer has paid only the actual cost of salaries of the seconded employees and there is no 'mark-up' which is retained by 'SOS US' on such costs.

[25] Hussainbhai v. Alath Factory Thezhilali Union, 1978 SCC (4) 257.

[26] Biesse Manufacturing Company Pvt. Ltd. v. The Assistant Commissioner of Income Tax, Circle 1(1)(2),

[27] Director of Income Tax (IT)-I v. A.P. Moller Maersk A.S., (2017) 5 SCC 651 (2018).

¶ 35. Therefore, the GST liability over secondment agreements should be determined on a case-to-case basis, keeping in mind, the substance and form of the agreement, and whether or not it is hindered by any other arrangements or agreements.

¶ 36. However, in the present case, no GST liability arises over the Petitioner for the secondment arrangement with SOS US.

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.

¶ 37. It is humbly submitted that there will be no GST implications based on the experience letters issued for the period from 2010 to 2022, the assertion is put forth by stating that (i) the KMP's were deemed employees of the petitioner for the period of 2010 to 2022 as their salaries and expenses were being paid by the Indian entity and (ii) based on these experience letters, no GST implications arise.

4.1. THE PETITIONER HAD THE POWER TO ISSUE THE EXPERIENCE LETTERS FOR THE PERIOD FROM 2010 TO 2022.

¶ 38. It is humbly submitted that the Petitioner had the power to issue the experience letters to the KMPs. A company can issue experience letters to its own employees confirming their tenure with the organisation. The KMPs which were seconded to the Petitioner by the SOS US were issued experience letters by the Indian entity, asserting that they were employees of the Indian entity for the specified period.

¶ 39. The secondees, though sent to India by the SOS US, were under the supervision and economic control of the Petitioner ever since 2010. While it is true that as a temporary arrangement for the initial years after the Petitioner Company was incorporated in India, the cost of salary for the KMPs was borne by the US Company, however, from 2012 onwards, the salary expenses were reimbursed by the Petitioner to the US company (including the cost for the period from 2010-31.03.2012) at no 'mark-up'.

¶ 40. This further proves that the KMPs remained under the control of the Petitioner since 2010 and their respective salary expenses were also discharged by the Petitioner to the US Company on a cost-to-cost basis and thereof, it cannot be said that the work rendered by the KMPs for the Petitioner in India was a 'supply of service' by the US company to the Petitioner herein.

a) AN EMPLOYER-EMPLOYEE RELATIONSHIP EXISTED B/W PETITIONER & SECONDEES

¶ 41. The contract between the Petitioner and the secondee is a contract of service and not a contract for service, hence, in a contract of service, no GST implications arise.

Furthermore, relying upon the *Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd.,*[28] the Court observed that one single test may not be adequate to discern the nature of the contract. A *"conglomerate of all applicable tests taken on the totality of the fact situation"* has to be applied in order to arrive at an answer. Hence, the following are a few tests for determining of an employer-employee relationship:

i) Economic reality of control test - In *Hussainbhai v. Alath Factory Thezhilali Union,* the Apex Court held that where a worker labours to produce goods or services which are for the business of another person, then he is the employer of such worker/ group of workers. In the present case, the workers are only working for the benefit of the business of the Petitioner, and hence the Petitioner can be said to be the employer of the KMPs.

ii) Nomenclature test - The nomenclature of a contract is not determinative of the real nature of the document. These have to be determined from all the terms and clauses of the document and all the rights and results flowing therefrom and not by picking and choosing certain clauses and the ultimate effect or result.[29] Although the contract was of secondment, the rights of employer were accrued to the Petitioner herein as a result of the terms of the contract.

iii) Master/servant relationship - The prima facie test for 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[30] not only in the matter of directingwhat work the servant is to do,[31] but also the manner in which he shall do his work.[32]

iv) Control test and Integration test - The control test postulates that when the hirer has control over the work assigned and the manner in which it is to be done and the employee is integrated within the company, an employer-employee relationship is established.[33] If the employer exercises the same level of control over the employee in question as he does over his other employee, then he will be considered a deemed

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

[29] State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280.

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

[31] Chintaman Rao v. State of M.P., 1958 SCR 1340.

[32] Dharangadhara Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 158.

[33] Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments, (1974) 3 SCC 498.

employee of the company.[34] In the present case, the Petitioner is exercising the same level of control over the KMPs as its other employees and hence applying the control test, the KMPs are deemed employees of the petitioner.

¶ 42. Contrary to the facts of *C.C., C.E. & S.T., Bangalore (Adjudication) and Ors. v. Northern Operating Systems Pvt. Ltd.,*[35] the secondees were on the payroll of the foreign entity, whereas in the instant case, all economic control lies with the Petitioner.

b) THE SECONDEES WERE DUALLY EMPLOYED BY THE PETITIONER AND THE SOS US

¶ 43. In *arguendo,* it is humbly submitted that the secondees were dually employed by the two entities, hence, the Petitioner had the power to issue the experience letters and because of the employer-employee relationship between the Petitioner and the secondees, no GST implications arise. Referring to the case of ***Flipkart Internet Private Ltd. v. DCIT International Taxation)***,[36] it was observed that any employment with the foreign entity before or after the secondment period should not be considered essential to assess the secondees' relationship with the Indian entity during the secondment period. Instead, the relationship between the secondees and the Indian entity must be evaluated during the secondment period.

¶ 44. Hence, if an employer-employee relationship exists between the Petitioner and the secondees, then the Petitioner has the power to issue the experience letters and based on the same, no GST implications arise.

4.2. ISSUANCE OF EXPERIENCE LETTERS DOES NOT INVOKE GST LIABILITY.

¶ 45. It is further submitted that GST is not applicable on an employer employee relationship, as it is neither a good, nor a service. Furthermore, secondment of the employees by the companies under agreement cannot be termed as "manpower recruitment or supply agency" where employer-employee relationship exists.[37]

¶ 46. Further, When the agreement between the service provider and recipient is for a particular job and not for supply of manpower, the activity cannot be classified under 'Manpower Recruitment or Supply Agency Service'.[38] In the present case, the agreement

[34] Shivanandan Sharma v. Punjab National Bank Ltd., AIR 1955 SC 404.

[35] *Supra* note 16.

[36] *Supra* note 2.

[37] M/s Target Corporation India Pvt Ltd v. C.C.E., Bangalore, Service Tax Appeal No. 20459 of 2016.

[38] Divya Enterprises v. CCE, 2010 (19) STR 370.

was majorly for exchange of technical know-how and even such transfer of technical know-how is not taxable under GST and no liability of the petitioner arises.

¶ 47. Merely because there is a taxable supply categorised as 'manpower supply services' under the GST law, considering that in the instant case, the Petitioner always had an employer-employee relationship with secondees, the Respondents have erred in ignoring the said relationship and proceeding on by assuming it to be a 'manpower supply service' to somehow impose the GST liability upon the Petitioner.

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

¶ 48. It is humbly submitted that there can be no GST implications on the Petitioner based on the arrangement from 01.06.2022 because **(i)** No service of identifying/arranging employees is provided by SOS US to the petitioner, (ii) Services of employees specifically excluded under CGST Act, 2017.

5.1. NO SERVICE OF IDENTIFYING/ARRANGING EMPLOYEES IS PROVIDED BY SOS US TO THE PETITIONER

¶ 49. It is humbly submitted that there is no service of 'identifying/arranging employees' is being provided by the SOS US to the petitioner as **(i)** there exists no contract between the parties for identifying/arranging employees and **(ii)** no consideration is given for the alleged services.

a) THERE IS NO CONTRACT BETWEEN THE PARTIES FOR IDENTIFYING/ARRANGING EMPLOYEES.

¶ 50. It is submitted that no contract has been entered between the Petitioner and SOS US so as to create any contractual obligation for providing the alleged services of 'identifying/arranging employees. The Respondent is wrongly assuming the existence of any such agreement between the companies.

¶ 51. The employment contract entered in 2022 is a proof of the employer-employee relationship between the Petitioner and its employees and the terms of contract have to be read as a whole and the department cannot assume what is not there in those terms.[39]

¶ 52. The levy of GST is governed by §9 of the Act which stipulates that GST shall be levied on all supplies of goods or services or both. Further, §7 defines 'supply' to include all forms of supply of goods or services which are made for a consideration.

[39] Provash Chandra Dalui & Anr v. Biswanath Banerjee & Anr, AIR 1989 SC 1834.

¶ 53. Further, definition of 'service' as embedded under the Act is coined in a phraseology which includes 'anything other than goods'. Notably, such phrases cannot be interpreted in a manner to include everything within its ambit. It is a settled law that general words are required to be interpreted in the context in which these are being used.[40] Therefore, the word 'any' used in the definition of service cannot be interpreted to include everything even if no activity is involved therein. In the present case, no supply of any service can be drawn from the arrangement of 2022.

¶ 54. Unless the contract is for supply of manpower, the charge of provision of service under manpower recruitment and supply service cannot be made.[41] Courts cannot rewrite contracts and they have to rely on terms and conditions agreed by the parties while adjudicating disputes.[42] Further, the contractual terms cannot be interpreted in isolation, they must be understood as intended by parties[43] and not on the wrongful assumptions of the Department.[44]

b) NO CONSIDERATION IS GIVEN FOR THE ALLEGED SERVICES

¶ 55. In GST, in order to qualify as 'supply', there must be an element of *quid-pro-quo* in form of consideration in the said supply. In other words, the person providing such consideration is expected to receive something in return. In the present case however, the alleged provider of the service of "arranging/identifying employees" i.e. SOS US is not receiving anything in return for providing the said service to the Petitioner as alleged by the department and therefore it cannot be treated as a 'supply' under §7 of the CGST Act. Hence, in absence of consideration, there cannot be said to be any supply of service from SOS US to the Petitioner.

¶ 56. In the case of *Commissioner of CGST and Central Excise v. M/S Edelweiss Financial Services Ltd.,*[45]the Apex Court has held that in the absence of consideration, no service tax liability emerges. In the present case, no consideration is provided to SOS US in any manner.

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[40] The Chief Inspector of Mines and another v. Lala Karam Chand Thapar etc., (1962) 1 SCR 9.

[41] Mahendrapal & Co. v. C.C. E. & S.T. (CESTAT Ahmedabad) Service Tax Appeal No. 11417 of 2013-DB.

[42]Venkataraman Krishnamurthy and another v. Lodha Crown Buildmart Pvt. Ltd., Civil Appeal No. 971 of 2023.

[43] Food Corporation of India v. Abhijit Paul, 2022 SCC OnLine SC 1605.

[44] Oudh Sugar Mills v. Union of India, 1978 (2) ELT (J172) (S.C).

[45] Central Excise v. M/S Edelweiss Financial Services Ltd, 2023 SCC OnLine CESTAT 962.

5.2. SERVICES OF EMPLOYEES SPECIFICALLY EXCLUDED UNDER CGST ACT, 2017

¶ 57. 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. The Entry 1 of Schedule III specifically excludes the services of the employees given to the employer.

¶ 58. It is humbly submitted that the Petitioner had entered into a specific employment agreement which was entered into by the employees and the Petitioner in June 2022. The employment agreements are treated as a 'contract of service' and such services are excluded from the ambit of GST.

¶ 59. Further, it is humbly submitted that there is no "innovative arrangement" as the secondees were employees of the petitioner all along by the reason of deemed employment and post 2022, all that is being done is to give the secondees the contractual recognition, as a decision made in the commercial prudence of the Petitioner and nothing more.

¶ 60. The services which the employees are providing to the petitioner are done in the course of or relation to employment. It is not under dispute that the employees in the present case are knowledgeable and experts of their field i.e. software products. The Petitioner is also involved in the business of producing software and such services of employees are essentially for the business of the Petitioner and the same clearly fall within the ambit of "services provided by an employee to an employer in the course of or furtherance of the business"

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

¶ 61. It is humbly submitted that there is no import of services under GST and hence, the Petitioner is not liable to pay under Reverse Charge Mechanism (hereinafter referred to as RCM) as **(1)** there is no 'supply' of service in order to create import of service and **(2)** the Petitioner cannot be charged under RCM in absence of import of service.

6.1. THERE IS NO IMPORT OF SERVICES UNDER GST AS EMPLOYER-EMPLOYEE RELATIONSHIP EXISTS

¶ 62. Import of services has specifically been defined under IGST Act, 2017 and refers to supply of any service where the supplier is located outside India, the recipient is located in India and the place of supply of service is in India. But in the present case, there is no supply as per §7 of the Act.

¶ 63. The seconded employees are working in the capacity of employees, as explained in detail in [4.1], there cannot be any 'supply' of service which rules out the possibility of import of any services.

¶ 64. Moreover, it is humbly submitted that the US Company has contracted with the Petitioner for expansion of its business objective i.e., **"manufacturing Software products" and not in "supply of manpower**". Hence, it cannot be assumed that the Petitioner is a recipient of such an alleged service.[46] There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive.[47]

¶ 65. It is further humbly submitted that applying the various tests provided for determining whether the contract is 'for service' or 'contract of service' and as discussed in [4.1 (a)] including control test,[48] integration test,[49] and nomenclature test, it can be said that there exists a 'contract of service' between the Petitioner and its employees.

¶ 66. It is humbly submitted that as per §7 read with Schedule III to the Act, '*services by an employee to the employer in the course of or in relation to his employment*' is treated neither as a supply of goods nor a supply of services. The seconded employees working under the appellant are working as their employees and are having employee-employer relationship. There is no supply of manpower service rendered to the Petitioner by the US company.

¶ 67. Additionally, apart from the Indian company having control over the nature of work of the seconded employees, no consideration was charged by the US company for supplying manpower as alleged by the GST Department. The amount paid by the Petitioner to the US company was merely reimbursement of the salary expenses of its employees. There was no *quid pro quo* within this transaction. The US company did not gain anything out of the whole transaction and hence, it cannot be said to be a "supply" of service and hence, no tax liability arises.[50]

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[46] Venkataraman Krishnamurthy and Anr v. Lodha Crown Buildmart Pvt. Ltd. Civil Appeal no. 971 of 2023.

[47] Bhopal Sugar Ind. Ltd. v. STO, (1977) 3 SCC 147.

[48] DIT (IT) v. Abbey Business Services India Pvt. Ltd., (2021) 17 ITR-OL 150.

[49] *Supra* note 32.

[50] Volkswagen India Pvt. Ltd. v. Commissioner of Central Excise, MANU/CM/0053/2013.

6.2. THE PETITIONER IS NOT LIABLE TO PAY GST UNDER REVERSE CHARGE MECHANISM

¶ 68. It is humbly submitted that Reverse Charge Mechanism means the liability to pay tax by the recipient of the supply of goods or services or both instead of the supplier of such goods or services or both. It means the liability to pay tax is on the recipient of supply of goods or services instead of the supplier of such goods or services in respect of notified categories of supply.

¶ 69. It is humbly submitted that vide its notification,[51] CBIC listed out the services for which RCM will be applied. Entry 1 of the said notification covers import of services. But in the present case, no import of service is taking place and hence the company is not liable to pay tax under RCM.

¶ 70. It is humbly submitted that since the secondees are considered employees of the Indian entity for the duration of their secondment, adverse tax consequences should not occur as a result of their services not generating any revenue for the foreign entity. Furthermore, the Indian entity would not be liable under Indian GST laws for services performed by its employees, as services provided by employees in the course of their employment are expressly excluded from the GST's scope.

¶ 71. It is humbly submitted that in an arrangement as that of the facts in question, it is the liability of the overseas entity to bear the salary of its employees, hence the Petitioner is bearing the salary costs of its employees. SOS US is not supplying manpower to the Indian company. Therefore, no service tax is payable under RCM by the Indian company for services provided by the seconded employees.[52] The same discernment should be applied to GST.

¶ 72. The conditions laid out above are specifically exempted under §7 and there can be no RCM applied in case of exempted supplies.

[51] Notification No- 10/2017 Integrated Tax (Rate) dated 28-06-2017.

[52] Yutaka Auto Parts India Pvt. Ltd. v. Commissioner, MANU/CE/0023/2021.

PRAYER

Wherefore, in the light of facts stated, issues raised, arguments advanced and authorities cited, the counsels on behalf of the Petitioner humbly pray before this Hon'ble Court that it may be pleased to adjudge and declare that:

1. THE WRIT PETITIONS FILED BY THE PETITIONER ARE MAINTAINABLE BEFORE THIS HON'BLE COURT; AND
2. THE RESPONDENT DID NOT HAVE JURISDICTION TO ISSUE THE IMPUGNED SCNS; AND
3. BY MEANS OF WRIT OF MANDAMUS OR ANY OTHER APPROPRIATE WRIT, ORDER OR DIRECT THE QUASHING OF THE TWO SHOW CAUSE NOTICES ISSUED BY THE RESPONDENT; AND
4. STAY FURTHER PROCEEDINGS AGAINST THE PETITIONER PURSUANT TO THE IMPUGNED SCNS ISSUED BY THE RESPONDENT.

And pass any order that the Hon'ble Court May Deem Fit in the light of Justice, Equity and Good Conscience.

And for this act of kindness of Your Lordships the Petitioner shall duty bound ever pray.

Sd/-

Counsels for the Petitioner