TC 04 - PETITIONER

21ST SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION, 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

VERSUS

ADDITIONAL COMMISSIONER OF GST AND OTHERS BENGALURU

……RESPONDENT

MEMORIAL ON BEHALF OF THE PETITIONER

DRAFTED AND FILED BY THE COUNSELS FOR THE PETITIONER

TABLE OF CONTENTS

INDEX OF AUTHORITIES

I. LIST OF ABBREVIATION

Sr. No.	Abbreviation	Key
1.	%	Percentage
2.	&	And
3.	A.P,	Andhra Pradesh
4.	AIR	All India Report
5.	Anr.	Another
6.	Art.	Article
7.	CC. CE. ST	Commissioner of Central Excise and Service Tax
8.	CESTAT	Customs, Excise and Service Tax Appellate Tribunal
9.	CGST	Central Goods and Service Tax
10.	COI	Constitution of India
11.	Commr.	Commissioner
12.	Dy.	Deputy
13.	Ed.	Edition
14.	ELR	England Law Reports
15.	EPF	Employment Provident Fund
16.	Etc.	Et Cetera
17.	Govt.	Government
18.	GST	Goods and Service Tax
19.	Hon'ble	Honourable
20.	Idib	In the Same Place
21.	IGST	Integrated Goods and Services Tax
22.	IOS	Import of Service
23.	ITAT	Income Tax Appellate Tribunal
24.	ITC	Input Tax Credit
25.	KAR	Karnataka
26.	LLJ	Labour Law Journal
27.	Ltd.	Limited
28.	M/S	Messrs

29.	Misc.	Miscellaneous
30.	No.	Number
31.	Ors.	Others
32.	PF	Provident Fund
33.	Pvt.	Private
34.	QB	Queen's Bench
35.	RCM	Reverse Charge Mechanism
36.	S.	Section
37.	S.C. J	Supreme Court Journal
38.	S.C.R.	Supreme Court Reporter
39.	SC	Supreme Court
40.	SCC	Supreme Court Cases
41.	Sch	Schedule
42.	SCN	Show Cause Notice
43.	Sec.	Section
44.	SOS India	Southern Operating Systems India Pvt. Ltd
45.	SOS US	Southern Operating Systems Inc.
46.	Sr.	Serial Number
47.	Supp	Supplementary
48.	Supra	Above
49.	Tri.	Turbinal
50.	U.K.	United Kingdom
51.	UOI	Union Of India
52.	V.	Verus
53.	WLR	Weekly Law Reports
54.	WP	Writ Petition

II. LIST OF CASE LAWS

Sr. No.	Case Laws
1.	A. P. Public Service Commission v. Baloji Badhavath; (2009) 5 SCC 1
2.	Balwant Rai Saluja v. Air India Ltd 2014 9 SCC 407.

3.	C.C., C.E. & S.T. – Bangalore (Adjudication) Etc. v. M/s Northern Operating System Pvt. Ltd.; 2022 SCC OnLine SC 658.
4.	CCE v. Brindavan Beverages (P) Ltd.; (2007) 5 SCC 388.
5.	Commissioner of Central Excise, Mumbai v. M/s Fiat India (P) Ltd.; (2012) 9 SCC 332.
6.	Darshan Lal Nagpal v. Union of India; AIR 2012 SC 412.
7.	Dharangadhara Chemical Works Ltd. v. State of Saurashtra, (1957) 1 LLJ 477.
8.	Director of Income Tax (International Taxation) v.Abbey Business Services India (P.) Ltd.; 2020 SCC OnLine Kar 5356.
9.	Election Commission v. Saka Venkata Rao, AIR 1953 SC 210
10.	Flipkart Internet Pvt Ltd vs. DY. CIT (IT) 2022 SCC OnLine Kar 1738.
11.	Harakchand V/s UOI (1969) 2 SCC 166.
12.	Hussainbhai v. Alath Factory Thezhilali Union; (1978) 4 SCC 257.
13.	ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476.
14.	Kedar Shashikant Deshpandey & Ors. v. Bhor Municipal Council & Ors.; (2011) 2 SCC 654.
15.	Kishan Chand Arora v. Commr. of Police; AIR 1961 SC 705.
16.	M/s Volkswagen India (Pvt.). Ltd. v. CCE, Pune-I; 2014 (34) S.T.R. 135 (Tri.-Mumbai).
17.	Maneka Gandhi v. Union of India; 1978 AIR 597.
18.	Market Investigations Ltd v. Minister of Social Security (1969) 2 WLR 1 (Queen's Bench Division).
19.	McDowell and Co Ltd v. CTO, (1985) 3 SCC 230.
20.	Mohammed Hanif v. State of Assam, (1969) 2 SCC 782.
21.	N.V. Nirmala v. Karnataka State Financial Corporation and Others; (2008) 7 SCC 639.
22.	Ram Singh v UT of Chandigarh (2004) 1 SCC 126.
23.	Rashid Ahmed v. Municipal Board, Kairana; AIR 1950 SC 163.
24.	Ready Mixed Concrete (South East) Ltd. V/s Minister of Pensions & National Insurance (1968) 2 QB 497.
25.	Shivanandan Sharma v. Punjab National Bank Ltd; AIR 1955 SC 404.

26.	Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments (1974) 3 SCC 498.
27.	State of Rajasthan v. Nath Mal, AIR 1954 SC 307.
28.	Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited; (2021) 7 SCC 151.
29.	Uniworth Textiles Limited v. Commissioner of Central Excise, Raipur; (2013) 9 SCC 753.
30.	UOI v. W.N. Chadha 1993 Supp (4) SCC 260.
31.	Vodafone International Holdings BV v. UOI; 2012 6 SCC 613.

III. LIST OF Statutes Referred

1. Central Goods and Service Tax Act, 2017
2. Central Goods and Service Tax Rules, 2017
3. Companies Act, 1956
4. Companies Act, 2013
5. Constitution of India, 1949
6. Employees PF & Misc. Provisions Act, 1952
7. Finance Act, 1994
8. Income Tax Act, 1961
9. Integrated Goods and Service Tax Act, 2017
10. Payment of Gratuity Act 1936
11. The Employees' State Insurance Act 1948

IV. LIST OF BOOKS And Commentaries Referred

1. Avtar Singh, Company Law, EBC, 17th Edition
2. C.A. (Dr.) Arpit Haldia, Taxman's GST Law & Practice (2nd Ed.)
3. CA Mohd. Salim, GST Law & Practice, CA Arpit Haldia, Taxman, 4th Edition 2023
4. D.D Basu, Introduction to the Constitution of India 448 (21st Ed. 2013).
5. GK Kapoor & Sanjay Dhamija, Company Law & Practice, 27th Edition, 2024
6. M.P.Jain Indian Constitutional Law 670 (6th Ed. 2010).
7. Rakesh Garg & Sandeep Garg, GST Law Manual Acts, Rules and Form (7th Ed.)
8. SS Gupta, Taxmann's GST on Services, Taxmann, Edition 2023
9. Tarun Jain, Goods and Services Tax, EBC, Edition 1 2018

STATEMENT OF JURISDICTION

The Petitioner has approached the Hon'ble High Court of Karnataka under Article 226 (1) of the Indian Constitution, 1949 read with Section 74(1) of the CGST Act, 2017, challenging the orders of the GST Department issued gainst the Petitioner.

Article 226 (1) of the Constitution of India, 1950 - Power of High Courts to issue certain writs

> *Notwithstanding anything in article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrantor and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*

Section 74. of the CGST Act, 2017 - Determination of 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. —

> *(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 and a penalty equivalent to the tax specified in the notice.*

STATEMENT OF FACTS

1. Southern Operating Systems India Pvt Ltd (**"SOS India"**) is a registered company under Companies Act, 1956, established in 2010 as an almost 100% subsidiary of Southern Operating Systems Inc., a US company (SOS US). Both entities specialise in niche software development globally. The Indian company aimed to tap into the Indian and Asia Pacific software market.
2. In 2010, key managerial persons (**"KMPs"**) from the US were sent to India to set up SOS India. Their salaries were borne by the US company, with a reimbursement arrangement once the Indian company became profitable. There was also a **'secondment agreement'** to this effect between the home country company and the host country company in each situation. Within two years, SOS India achieved significant revenue, reimbursing from cost-to-cost bases to the US company for KMP salaries starting from April 2012, and even paid previous due of 2010-2012 amount.
3. In May 2017, the Indian company faced service tax show cause notices for importing services under 'Manpower Supply Services', thereby taxable under finance Act, 1994. The Karnataka High Court held SOS India liable to pay service tax under reverse charge mechanism, but extended period of limitation was not imposed
4. With the introduction of the Goods and Services Tax Act in 2017, the company faced potential GST implications. To mitigate this, in June 2022, SOS India terminated expats' services from the US company, making them employees of the Indian company retroactively from 2010. SOS India went ahead in tax planning and from 01.06.2022, whenever it wanted secondment of employees from the US or other group companies, it made an arrangement that any expat who had to be seconded to India will be terminated from the services of the seconding company (home company) and will be freshly appointed in the Indian secondee company (host company).
5. On 31.03.2024, the GST department issued show cause notices, challenging both the arrangements, pre-June 2022 arrangement and the innovative post-June 2022 restructuring. SOS India vehemently countered the notices, despite SOS India's responses, the GST department issued demand notice in March 2024, imposing penalties, alleging intentional tax evasion, and invoked the extended period of limitation. SOS India filed two writ petitions before the High Court of Karnataka challenging the demand orders, and seeking relief from GST liabilities and penalties imposed by the department.

STATEMENT OF ISSUES

Following issues are been raised before the Hon'ble Court of Karnataka, as under: -

Issue I: Whether the writ petition is maintainable?

Issue II: Whether the department had jurisdiction to issue the SCNs if the services were not liable to GST per se?

Issue III: Whether secondment arrangement in general liable to GST?

Issue 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?

Issue V: Whether based on the arrangement from 01.06.2022, it can be said that there will be no GST implication?

Issue VI: Whether there is any import of services under GST and whether the Indian company is liable to pay GST under reverse charge mechanism?

Issue VII: Whether extended period of limitation is applicable to the case?

SUMMARY OF ARGUMENTS

Issue I: The writ petition's is maintainable, hinging on the interpretation of writ jurisdiction under Article 226, emphasizing principles of natural justice, the public law nature of Article 226 remedy, and establishing the petitioner's locus standi.

Issue II: Department does not have any jurisdiction to issue show cause notices (SCNs) in the absence of GST liability, absence of malafide intention, the inapplicability of a mechanical application of a single judgment, inherent lack of jurisdiction, and the relevance of employer-employee relations.

Issue III: In-general secondment arrangements are not liable under GST Regime, same is scrutinized by delving into the definition of secondment arrangements, the implications of involving three parties, the disconnection between disbursement of salary and transaction nature, and the analysis of vicarious liability concepts.

Issue IV: It is observed that there exist no GST implications for the period 2010 to 2022, same is established under the defined employee-employer relationship under Indian statutes and applying a set test for this relationship.

Issue V: It is observed that there exist no GST implications for the period from June 1, 2022, onwards and same is pragmatic after applying the employer-employee test, scrutinizing the payment of salaries and reimbursement scheme, and confirming the complete localization of employees.

Issue VI: Their exist no import of services under GST and the no liability of the Indian company to pay GST under the reverse charge mechanism is addressed through analyzing the scope of supply, import of services under the law, the doctrine of internal co-relation, and settled principles for the application of the reverse charge mechanism.

Issue VII: Extended period of limitation is not applicable and same is asserted by interpreting the involved statute, considering the absence of wilful default and suppression of facts, and referencing central government instructions on the extended period of limitation.

ARGUMENTS ADVANCED

I. WHETHER THE WRIT PETITION IS MAINTAINABLE

1. The Respondents issued two SCNs on 31.01.2024 demanding tax on the secondment arrangement between SOS India and SOS US. Even upon vehement opposition by the Petitioner, the Respondents confirmed the demand. This Writ Petition is filed to challenge the SCNs because, *firstly*, **[1.1] Scope of writ jurisdiction under Article 226 of the Constitution of India ("COI") and principles of natural justice**, *secondly*, **[1.2] Remedy under Article 226 is of Public Law**, *lastly*, **[1.3] Petitioner holds the locus standi in the matter at hand.**

[1.1] Scope of writ jurisdiction under Article 226 and principles of natural justice

2. Article 226 confers on all High Courts within their veer to issue appropriate writs to any person or authority within their territorial jurisdiction. In other words, writs words, the power to issue writs under Article 226 can be exercised by a High Court throughout its territorial jurisdiction[1].
3. It is a matter of fact that the registered office of the Petitioner is in Bengaluru, Karnataka. Additionally, the Respondents have, also, operated in the direction of the issuance of the SCNs from their office in Bengaluru.[2]
4. The ideal of Audi Alterum Partum[3] i.e., let the other side speak is the fundamental principle of law all around the globe. Every party has the right to hear in a free and fair manner. It is also one of the founding principles of the legal system in India. Its principle applies[4] to judicial, quasi-judicial, statutory and administrative body. This carries the embedded principle of appeal and the existence of personal liberty[5] within it as well. The SCNs were issued and even after vehement opposition on points of merit, the Petitioner were left unheard. It is saddening that there appears no judicial or quasi-judicial body to hear the plight of the Petitioner. The Petitioner are circumstanced in a sad state to sit quiet and concede to the injustice that occurred to them.

---

[1] Article 226(1) & (2); Election Commission v. Saka Venkata Rao, AIR 1953 SC 210, Rashid Ahmed v. ITI Commissioner, AIR 1954 SC 207.
[2] Paragraph 1 of the Fact Sheet.
[3] Darshan Lal Nagpal v. Union of India; AIR 2012 SC 412.
[4] ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476.
[5] UOI v. W.N. Chadha 1993 Supp (4) SCC 260.

5. The jurisdiction of High Courts under Article 226 is a supervisory jurisdiction, a jurisdiction meant to supervise the work of the tribunals and public authorities and to see that they act within the limits of their respective jurisdiction[6]. Article 226 empowers every High Court to issue writs, directions or orders for the enforcement of (a) fundamental rights; and (b) for any other purpose. Thus, the jurisdiction of the High Court under Article 226 is wider than the jurisdiction.[7]
6. However, this injustice has invited the infringement of their Right to Personal Liberty[8]. Time and again, it has been established and re-established by the Courts of Law that the deprivation of the Right to Appeal constitutes and is read under the infringement of the Right of Personal Liberty to the person or organisation alike.[9] This principle derives its authority from the notion that mere animal existence does not count, rather, the Right to Live with human dignity is something that graces the person.[10]
7. Further, it is been contended that there is an unrestrictive restriction on the part of the respondents towards SOS India. Drawing parallels from the precedents set by apex court Harakchand V/s UOI[11], it is expressed that imposing an unreasonable restriction on the freedom of trade and occupation infringes Article 19(1)(g) of the COI.
8. Accordingly, where power is conferred on the executive to regulate and control the exercise of the freedom conferred by Article 19(1)(g), it is necessary that the law which does so should either lay down the circumstances or grounds on which the power may be exercised or indicate the policy to be achieved for which the discretion is to be exercised[12]. Such acts should not question of legality, arbitrariness, unfairness or unreasonableness of the action, as the same is done in the present matter, and thereby, to sustain the reasonableness of the restriction, the Act must furnish sufficient guidance to the executive in the matter of the exercise of discretionary power, and such needs to be fair reading of the Act and the other relevant circumstances,[13] which is not practiced in the present case.
9. It is even pertinent to note that Respondents sustain bad intent and are malafidely posting the SCNs after a couple of years of continuance of the practice as alleged by them.

---

[6] Mohammed Hanif v. State of Assam, (1969) 2 SCC 782.
[7] Art. 226(1) of the Constitution of India, 1950.
[8] Art. 21 of the Constitution of India, 1950.
[9] Maneka Gandhi v. Union of India; 1978 AIR 597.
[10] Ibid n(9), Maneka Gandhi.
[11] (1969) 2 SCC 166.
[12] State of Rajasthan v. Nath Mal, AIR 1954 SC 307.
[13] Kishan Chand Arora v. Commr. of Police; AIR 1961 SC 705.

10. Assuming but not admitting that there exists an alternate remedy does not absolutely bar the remedy of Writ bestowed upon the Petitioners by the COI. It is a matter of practice and a self-imposed limitation that an alternate remedy is sought before moving a plea before the Hon'ble High Court under Writ Jurisdiction.[14]
11. In exceptional circumstances, the High Court having wider jurisdiction, could grant relief under Article 226 even when there exists an alternate remedy. But, the case of the Petitioner stands only on with the hope of remedy before this Hon'ble Court under Writ Jurisdiction. Therefore, this Writ Petition shall be maintainable.
12. It should not, however, be forgotten that the existence of an alternative remedy is not an absolute bar to the granting of a writ under Article 226 but *"is a thing to be taken into consideration in the matter of granting writs"*[15] In other words, the existence of an alternative remedy is a rule of policy, practice and discretion rather than a rule of law. It is a self-imposed limitation and cannot oust the jurisdiction of the court. In exceptional circumstances, the High Court may grant relief under Article 226, even if an alternative remedy is available to the aggrieved person.

[1.2] Remedy under Article 226 is of Public Law

13. The remedy provided by the Court under its Writ jurisdiction is a remedy to the citizens or a body corporate of its jurisdiction in general and is not limited only to the person who approached the court.[16] This brings the inference that the issues dealt with under this jurisdiction are not those of Private Law but Public Law impacting and securing the lives of people at large.
14. Therefore, adjudication upon this issue would balance the scale in favour of justice, would prevent other stakeholders, restore their fundamental rights and re-establish faith in the system.

[1.3] Petitioner holds the locus standi in the matter

15. The Respondents issued two SCNs to the Petitioner for the time periods from 01.04.2010 to 31.05.2022 and from 01.06.2022 to 31.12.2023 under the relevant sections of appropriate legislation.[17]
16. It needs to be highlighted that the relevant legislation came into force only on 01.07.2017. This puts the period of 01.04.2010 to 30.06.2017 out of the legislative jurisdiction of the

[14] Rashid Ahmed v. Municipal Board, Kairana; AIR 1950 SC 163.
[15] Idib. n(14) Rashid Ahmed, AIR 1950 SC 163, 165.
[16] Mohammad Hanif v. State of Assam; (1969) 2 SCC 782.
[17] Paragraph 12 of the Fact Sheet.

relevant legislation. It is evident that the Respondents did not take note of the same and issued the SCNs [18] depriving the Petitioner of their right to a just and fair hearing.

17. Additionally, SOS India being the directly affected party[19] has the locus standi to approach the Court in this matter. The aforementioned circumstances in itself give liberty to the Petitioner to approach this Hon'ble Court under Writ Jurisdiction and seek redressal for the injustice done.

Therefore*, it is asserted, implied and concluded that under the scope of article 226 of the COI and SOS India having locus standi, the Writ Petition be accepted.*

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

1. At the very outset, it has been established that the element of "submission to the authority" is an extremely important aspect to the notion of Jurisdiction. It is the settled principle of law that a person cannot challenge the proceedings on the ground of lack of jurisdiction if the person has submitted to the jurisdiction of the authority.[20]
2. At the instance at hand, the Petitioner has not submitted to the jurisdiction of the authority. Rather, it has challenged the jurisdiction by way of the present Writ Petition.
3. Further, the department had no jurisdiction to issue any of the two above-mentioned SCNs because, *firstly*, **[2.1] No mala fide intention for non-payment of the taxes**, *secondly*, **[2.2] No one judgment can be mechanically applied**, *thirdly*, **[2.3] Inherent lack of jurisdiction**, and, *lastly*, **[2.4] Employer-Employee Relation**.

[2.1] No malafide intention for Non-Payment of Taxes

4. It has been established before that mere non-payment of duties does not amount to collusion or wilful misstatement or suppression of facts.[21] It is an obligation upon the notice issuing authority to prove the malice in the mind of the person against whom the notice has been issued.[22]
5. In the present case, there has been no malice or mala fide intention from the side of the Petitioner. On the contrary, the Petitioner performed its business having bona fide notions

[18] Paragraphs 12, 13 & 14 of the Fact Sheet.
[19] A. P. Public Service Commission v. Baloji Badhavath; (2009) 5 SCC 1
[20] Kedar Shashikant Deshpandey & Ors. v. Bhor Municipal Council & Ors.; (2011) 2 SCC 654.
[21] Uniworth Textiles Limited v. Commissioner of Central Excise, Raipur; (2013) 9 SCC 753.
[22] Ibid n(21).

in its mind thinking the alleged Expats to be its employees. It was of the firm and clear view that there existed an Employer and Employee relationship between the Petitioner and the alleged Expats which is exempted under the relevant provisions of the pertinent legislation.[23] Moreover, it becomes the duty of the notice issuing authority to prove the mala fide intent amounting to wilful misstatement or suppression of facts.[24] In the present instance, the Issuing Authority did not find it important to give a fair and just hearing to the SCNs, let alone the obligation to prove the mala fide intent.

[2.2] No one judgment can be mechanically applied

6. It is partly a matter of fact and partly a matter of implication[25] that the Respondents, inspired by the Supreme Court judgment of 2022, issued SCNs under the new GST Laws even though the judgment pertained to the erstwhile Service Tax regime. Further, it is established that each case depends on its own facts and in matters of deciding such cases, one should avoid deciding the cases by matching colour of one case against the colour of another. Therefore, deciding a case on the broad resemblance of a previous case can prove to be lethal.[26]
7. Furthermore, the GST Department published a circular instructing all the SCN Issuing Authorities (Proper Officers) from abstaining to issue SCNs mechanically and to look into the matter on a case-to-case basis.[27]
8. In the present case, there has been an Employer-Employee relation. Therefore, the application of any previous judgment will prove to be alien and indecisive for this case.

[2.3] Inherent Lack of Jurisdiction

9. It has been propounded that the master-servant relation was a concept of the by-gone era wherein the master used to be more skilled than the servant. In the changing times, the servants are hired keeping in mind their skills and the value addition to the institution post their joining.[28] This creates a balance between the Employer and the Employee. However, the agreement signed between both is a Service Agreement giving rise to the Employer-Employee relationship.
10. Similarly, in the present case, the highly skilled individuals joined as Employees in the office of the Petitioner with the intent of bettering the hold of the Petitioner in the market.

---

[23] Section 7 of CGST Act, 2017; Schedule III of the CGST Act, 2017.
[24] Uniworth Textiles (supra).
[25] Paragraphs 8, 9 and 12 of the Fact Sheet.
[26] Commissioner of Central Excise, Mumbai v. M/s Fiat India (P) Ltd.; (2012) 9 SCC 332.
[27] Circular dated 13.12.2023 bearing No. 05/2023-GST.
[28] Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments; (1974) 3 SCC 498.

And, as mentioned earlier, the Employer and the Employee service arrangement is exempted from the ambit of GST.[29] This proves the lack of jurisdiction of the Department on issuing the SCNs.

11. Additionally, it is also established that an order passed in the case of lack of inherent jurisdiction would be null and void.[30] Therefore, the above-said circumstances would reduce the SCNs to nullity.

[2.4] Employer - Employee Relationship

12. It is submitted that there have been several evolved definitions and tests of the employer-employee relationship. The recent judgment[31] on the same listed the following five factors as the test for the Employer-Employee Relationship – Control over work and manner; Level of integration of employee into employer's business; Manner in which the remuneration is disbursed; Economic control over employees and whether the work is being done for oneself or a third party.
13. The case for instance satisfies four of the five factors and differs on the aspect of disbursement of remuneration. It is humbly submitted that the disbursement was kept with the parent company in the United States of America ("**USA**") only for the sake of the brevity of the employees. Any contract, when propounded, looks for the convenience of both parties. Therefore, in furtherance of the same intention, the disbursement obligations were given to the company in the USA as the employees were the nationals of USA.
14. This brings the conclusion that there existed Employer-Employee relations and the very basis of issuance of the SCNs is flawed. Moreover, the Department has no jurisdiction to issue the SCNs.

Therefore*, it is asserted, implied and concluded that their exists no bad intent by SOS India and the SCN issued is not within the jurisdiction of the GST Department.*

III. WHETHER SECONDMENT ARRANGEMENT IN GENERAL LIABLE TO GST

1. The idea of Secondment Arrangement is very dynamic and is a matter to be dealt with on a case-to-case basis. Therefore, there is a four-fold argument as to why such type of an arrangement per se is not liable under GST. *Firstly*, **[3.1] Definition of Secondment**

[29] Section 7 of the CGST Act, 2017; Schedule III of the CGST Act, 2017.
[30] N.V. Nirmala v. Karnataka State Financial Corporation and Others; (2008) 7 SCC 639.
[31] Sushilaben Indravadan Gandhi v. The New India Assurance Company Ltd.; (2021) 7 SCC 151.

Arrangement and the implication of three parties, *secondly*, **[3.2] Disbursement of salary cannot determine the nature of the transaction**, *thirdly*, **[3.3]** I**dea of Vicarious Liability.**

[3.1] Definition of Secondment Arrangement and the implication of three parties

2. A typical secondment arrangement is one wherein the employees of overseas entities (seconder) are deputed to the host entity (Indian entity) to meet the specific needs and requirements of the host entity. During the arrangement, the employees (secondee) work under the control and supervision of the host entity and in relation to the work responsibilities of the Indian affiliate.[32]
3. It is an easy implication that in a secondment arrangement, there are three parties involved, one being the overseas entity, second being the host entity and third being the employees. This needs to be highlighted because in such type of an arrangement, all three parties are the stakeholders and beneficiaries of the arrangement.
4. This becomes an important point of implication because it is an established point of law that a Secondment Arrangement constitutes an independent contract of services in respect of employment between the host entity and the employees.[33]
5. Therefore, if an arrangement does not satisfy the above-stated set principles of law, the secondment arrangement cannot be said to have been executed. In *arguendo*, it is a matter of fact that, in the present case, there has been an agreement between the foreign entity (SOS US) and the host entity (SOS India).[34] The element of the employee is missing from the entire agreement.
6. Therefore, looking at the circumstances and principles above, it can be safely concluded that there has been no Secondment Arrangement in the case at hand.

[3.2] Disbursement of salary cannot determine the nature of the transaction

7. As has been submitted above, the idea of a Secondment Arrangement is very dynamic. There can be various permutations with respect to the execution of the arrangement. The mere involvement of any of the foreign entities does not make a usual Service Agreement a Secondment Agreement.

---

[32] C.C., C.E. & S.T. – Bangalore (Adjudication) Etc. v. M/s Northern Operating System Pvt. Ltd.; 2022 SCC OnLine SC 658.
[33] Director of Income Tax (International Taxation) v.Abbey Business Services India (P.) Ltd.; 2020 SCC OnLine Kar 5356.
[34] Paragraph 11 of the Fact Sheet.

8. It is a principle of law that has attained finality that the method of disbursement of salary cannot determine the nature of a transaction.[35] It also depends on a case-to-case basis if there was a supply of manpower rendered to the host entity.
9. Therefore, it can be concluded mere disbursement of salary cannot determine the nature of the transaction.
10. In *arguendo*, in the present case, it is a matter of fact that the alleged Expats drew their salaries from the SOS US.[36] But, it was done only for the sake of brevity and not for the sake of any Secondment Arrangement. The alleged Expats/Employees belonged to the United States of India. It was for their benefit that the salary was credited in their US account as they could then enjoy the benefits of social security schemes etc.

[3.3] Principle of Vicarious Liability

11. It is globally established that the concept of Principle of Vicarious Liability works on the principle of *Qui facit per alium facit per se*, which means one who acts through his servant is considered in law to act himself.
12. Time and again there have been judgments propounding the ideal of vicarious liability and has observed that the idea of vicarious liability comes in the concept of contract of service. Moreover, the Court has established certain factors[37] which, if complied with, would establish the existence of an employer-employee (master-servant) relationship. These factors include: -
    i. A person agrees to perform a service for a company in exchange for remuneration;
    ii. A person agrees, expressly or impliedly, to subject himself to the control of the company to a sufficient degree to render the company his "master", including control over the task's performance, means, time; and
    iii. The contractual provisions are consistent with ordinary contracts of service.
13. It is submitted that if the circumstances of the case concede to the three factors mentioned above, the employer-employee relationship shall be established.
14. In *arguendo*, in the present case, all three conditions have been fulfilled and therefore, there exists an employer-employee relation. This proves that there was no secondment arrangement between the two parties. Rather, there was a service agreement.

---

[35] M/s Volkswagen India (Pvt.). Ltd. v. CCE, Pune-I; 2014 (34) S.T.R. 135 (Tri.-Mumbai).
[36] Paragraph 3 of the Fact Sheet.
[37] Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance, (1968) 2 QB 497.

Therefore*, it is asserted, implied and concluded that true intent and objective secondment arrangement does not fall under the scope of 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.

1. It is submitted that the GST would not be applicable on the service received by Southern Operating Systems India Pvt. Ltd (service recipient) by the secondees, as they do share an employer – employee relationship, thereby exempted under the CGST Act, 2017. It is submitted under following grounds *firstly* **[4.1] Established definition of employee-employer under Indian Statute**, *secondly* **[4.2] Set Test for employer-employee relationship.**

[4.1] Established definition of employee-employer under Indian Statute

2. At the outset, the services contributed by the expats to the SOS India is an ongoing service, continued since 2010 exclusively for the Indian entity, and same can be remarked under experience letter[38] issued at SOS India letter head. Adding to it, it can be implied that the services given by the expats are since 2010, and so holds employer-employee relation with SOS India since then.
3. Additionally, it is set principle[39] show cause notice, need to have clear, complete and correct information, and so SCN-1 issued by the GST department is not supported with clear information, making it baseless and is not within the limitation period, thereby setting it to nullity.
4. Employees PF & Misc. Provisions Act, 1952, explains that the employee[40] can receive its salary and perks directly or indirectly from the employer and employer[41] as the authority which, has the control over the affairs of the establishment. Other acts[42], such as Payment of Gratuity Act, 1936 and Employees' State Insurance Act 1948 holds the similar definition, and stresses on the control over the employees and direction under which the employees perform their activity.

---

[38] Paragraph 9 of the Fact Sheet.
[39] CCE v. Brindavan Beverages (P) Ltd.; (2007) 5 SCC 388.
[40] Sec. 2(e) of EPF Act, 1952.
[41] Sec. 2(f) of EPF Act, 1952.
[42] Payment of Gratuity Act 1936, S. 2(e) & (f); The Employees' State Insurance Act 1948, S. 2(9).

5. It is not an undisputed fact, that expats joined under as employee, works under the instruction and direction of the SOS India, thereby settled employer-employee relation as per Indian statute[43].
6. The expression 'employment' is to be construed if widely, a person may be said to be "employed" by an employer even if he is not a regular employee of the employer[44].

[4.2] Set Test for employer - employee relationship.

7. The control test, derived from common law application in vicarious liability claims, postulates that when the hirer has control over the work assigned and the manner in which it is to be done, an employer-employee relationship is established[45]. In the precedent set in *Shivanandan Sharma*[46] and the *Dharangadhara Chemical Works Ltd. v. State of Saurashtra.*[47], settled that the indirect employment would also fall under employer-employee relationship, to satisfy the test it was ruled that control must exist in two aspects. Firstly, control over the nature of work performed and, secondly, the manner in which work is conducted. Thus, the control test was expanded to mean due control and supervision. The control test postulates that when the hirer has control over the work assigned and the manner in which it is to be done, an employer-employee relationship is established.
8. Silver Jubilee Tailoring House[48] established the test of organisation/ integration test. The elements used to make this determination has evolved from a single element of control to a multifactor test looking at control, integration, mode of remuneration, nature of work, ownership of tools, economic control, and vicarious liability etc. Thereby such arrangement is of master servant relationship set under principles of Contract of service. It also held that that it is not necessary that the employee to be exclusive control of one employer, rather can be employed by more than one employer. Additionally,[49] service performed by the expats are not being performed by them as in person in business on their account, thereby have a contract of service with the SOS India.
9. It is implied that the SOS India have sufficient degree of control, over the working of the expats. Expats are completely integrated under SOS India and are not a mere accessory[50]

---

[43] Paragraph 2 & 5 of the Fact Sheet.
[44] Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited; (2021) 7 SCC 151.
[45] Dharangadhara Chemical Works Ltd v. State of Saurashtra (1957) 1 LLJ 477 (Supreme Court).
[46] Shivanandan Sharma v. Punjab National Bank Ltd; AIR 1955 SC 404.
[47] (1957) 1 LLJ 477.
[48] Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments (1974) 3 SCC 498.
[49] Market Investigations Ltd v. Minister of Social Security (1969) 2 WLR 1 (Queen's Bench Division).
[50] Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited; (2021) 7 SCC 151.

of it. 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 own account, is another important test. It is to be noted that Expats are working complete direction and discretion of SOS India, and doctrine of separation[51] makes SOS India a separate entity from SOS US. SOS India have full concern over the working of expats, who were exclusively utilising SOS India resources and working for it, and have consented freely for the same, and are being paid by SOS India and thereby have expats work do cover under vicarious liability of SOS India.

10. Ram Singh v UT of Chandigarh[52] stressed on utilising multifarious and pragmatic test for determining employment employer relationship which other than the above satisfied test, also includes other factor Factors, that is power of and appointment and dismissal and liability to pay and deduct contributions. It can be implied; SOS India have the power to terminate the agreement[53] and were paying for the perks and consideration of the expats.
11. Apex Court, under economic reality of control test[54], by the employer over employee subsistence, skill and continued employment, to such person making them the real employees of the employer.
12. The three-tier test laid down by *Ready Mixed Concrete (South East) Ltd. V/s Minister of Pensions & National Insurance*[55], is satisfied by the SOS India and expats relations thereby qualified as employer-employee relation, 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, inclusion of contract of service.

Therefore, it is asserted, implied and concluded that the SOS India do share employer-employee relationship with the expats, thereby exempted the CGST Act, 2017 and further, investigation under pre CGST Act, 2017 cannot be undertaken by the department, as such services are not accounted under GST.

---

[51] Vodafone International Holdings BV v. UOI; 2012 6 SCC 613.
[52] (2004) 1 SCC 126.
[53] Paragraph 5 of the Fact Sheet.
[54] Hussainbhai v. Alath Factory Thezhilali Union; (1978) 4 SCC 257.
[55] (1968) 2 QB 497.

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

1. It is submitted before this Hon'ble Court that based on the arrangement from 1 June 2022 there exists an employer-employee relationship between SOS India and the fresh recruits/ secondees. It is submitted on the following grounds *firstly* **[5.1] Employer-Employee Test**, *secondly* **[5.2] Payment of Salaries and Reimbursement Scheme** and *lastly,* **[5.3] Complete Localization of Employees.**

[5.1] Employer-Employee Test

2. There exists an employer-employee relationship between SOS India and its employees. The same can be observed by tests laid down in various judgements. One of the tests being *Organization/ Integration Test*. This particular test looks at the degree of integration in work committed in the hirer's primary business with the understanding that the higher the level of integration, the more likely the worker is to be an employee. It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. It is submitted that employees of SOS India were working for SOS India completely. These employees were not employed for any back-end service[56].
3. The second test that is to be relied upon is the *Economic Reality Test*. The same has been dealt in Sushilaben Indravadan Gandhi & Anr v. The New India Assurance Co Ltd & Ors – "*The economic reality test laid down by various U.S decisions and the test of whether the employer has economic control over the workers' subsistence, skill and continued employment can also be applied when it comes to whether a particular worker works for himself or for his employer*". It is hence, submitted that SOS India is the ***legal employer*** as SOS India can terminate the employees by itself as well as economic ***employer*** of such employees.

[5.2] Payment of Salaries and Reimbursement Scheme

4. It is stated that the salaries paid under the new arrangement are being directly made to the employees of SOS India in India[57] on a cost-to-cost basis without any mark-up to SOS US instead of the prior arrangement where the employees were being paid directly in their regular US salary accounts[58]. It is further stated that under the new arrangement, there was

[56] Flipkart Internet Pvt Ltd vs. DY. CIT (IT) 2022 SCC OnLine Kar 1738.
[57] Paragraph 13 of the Fact Sheet.
[58] Paragraph 3 of the Fact Sheet.

no reimbursement of salary from SOS India to SOS US. This further establishes that SOS India is the real employer of its employees.

[5.3] Complete Localization of employees

5. Thus, it is submitted that post this arrangement there is complete localization of the employees in India. The employees have been physically staying in India and and devoted to the work of SOS India. To establish the same, factors such as payment of salaries, absence of any reimbursement, the relationship between employer-employee are to be looked at. Moreover, with the new arrangement, the employees will benefit from the Indian employment laws[59] like gratuity, employees' insurance etc. This further strengthens the point of localization of employees of SOS India.
6. It is therefore submitted that *"Tax planning may be acceptable provided it is done within the framework of law."*[60]

Therefore, it is asserted, implied and concluded that from the new arrangement would not attract GST implication since they share an employer-employee relationship and therefore is out of the ambit of GST.

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

1. It is submitted based on the statute, set doctrines and the precedents, that there does not exist an Import of service and therefore in-regards contended that SOS India does not become liable to pay GST under Reverse charge Mechanism. The same is drawn under the following grounds *firstly* [**6.1] Scope of Supply and Import of Service under the law**, *secondly* **[6.2] Doctrine of Internal Co-relation,** and *lastly* **[6.3] Settled principle for application of Reverse Charge Mechanism**.

[6.1] Scope of Supply and Import of Service under the law

2. The prior essence of import of services is that there need to presence of supply of services. As per CGST Act[61], 2017, primary requirement of for supply is service need to be transferred by other entity or agent of the other entity. Under the precedents62 set, it is

[59] Paragraph 10 of the Fact Sheet.
[60] McDowell and Co Ltd v. CTO, (1985) 3 SCC 230.
[61] Section 7, Scope of Supply.
[62] Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited; (2021) 7 SCC 151.

asserted that in the present case there since the services rendered by the employees of an Indian company to an Indian company, will fall out of the purview of supply, and same is exempted under CGST Act[63], 2017.

3. Predominant condition for Import of service is that supplier of service is located outside[64] territorial jurisdiction of GST Department, but same is not the case in the present matter as SOS US neither directly nor indirectly supplying services and same cannot be treated as the supplier[65] of the services. Adding to it, SOS India, is separate entity[66] and formed not to work on direction or as back-end of SOS US rather acted in the individual manner[67], and thereby their complete control by SOS India over the expats. So, it can be deduced wen there is no supply there exist no import of service.

[6.2] Doctrine of Internal Co-relation

4. Doctrine of internal co-relation exist between the SOS US and SOS India, as being the almost 100% subsidiary of the SOS US, and the same is not bad in law[68]. As group members, subsidiaries work together to make the same or complementary services and hence they are subject to the same market supply and demand conditions. They are financially interlinked. Parent entities own majority equity stakes in their subsidiaries. Such grouping is based on the principle of internal correlation[69], and same is treated as genuine tax planning.

[6.3] Settled principle for application of Reverse Charge Mechanism

5. It is undernoted that for application for RCM[70], supply of service is a must criterion. Without setting the basics of supply reverse charge mechanism for payment of tax cannot be involved. Moreover, when there exists neither supply of services to SOS India nor import of service via SOS India, the question of place of supply and even RCM applicability does gets evolve.

Therefore, it is asserted, implied and concluded that there exists no import of services and thereby SOS India is not liable to pay GST under reverse charge mechanism and same does not need to be applied.

---

[63] Schedule III, Clause 1.
[64] Section 2(11), IGST Act, 2017.
[65] Section 2(105), CGST Act, 2017.
[66] Vodafone International Holdings BV v. UOI, 2012 6 SCC 613.
[67] Paragraph 1 of the Fact Sheet.
[68] Balwant Rai Saluja v. Air India Ltd 2014 9 SCC 407.
[69] Vodafone International Holdings BV v. UOI, 2012 6 SCC 613.
[70] Section 2(98) of the CGST Act, 2017.

VII. WHETHER EXTENDED PERIOD OF LIMITATION IS APPLICABLE TO THE CASE?

1. It is submitted by the NOS India there no requirement for application of extended period of limitation as no breach committed by Southern Operating Systems India Pvt. Ltd (service recipient), under following grounds *firstly* **[7.1] Interpretation of Statute is involved**, *secondly* **[7.2] No wilful default and suppression of facts,** *lastly* **[7.3] Central Government instruction on the Extended Period of Limitation.**

[7.1] Interpretation of Statute is involved

2. It is contended that them exist statutory interpretation of CGST Act, 2017 with concern to secondment arrangement under GST regime. Being an un-decided matter by the it involves unbiased analysis of the same. Such regime should not be imposed retrospectively, to maintain the fairness and justice and similar contention is also expressed by apex court in International Merchandising Co. LLC V/s CST[71]

[7.2] No wilful default and suppression of facts

3. The fact that the SOS India about its liability as it neither untenable, nor mala fide. This exists no ill intent by the SOS India to showcase 'wilful suppression' of facts, or deliberate misstatement. Additionally, there happens no voluntary default nor contravention of any of the provisions of this Act or rules, with the intent to evade tax.
4. Additionally, deed of past judgment of Karnataka HC, was also adequately followed by the SOS India and any scheme introduced clearly lands up with the current provisions of law and should be consider as tax planning rather as tax evasion.

[7.3] Central Government instruction on the Extended Period of Limitation.

5. The Central Government[72] makes Extension of limitation under Section 168A of CGST Act, for the financial year 2018-19, up to the cases 31st day of March, 2024. Therefore, it is clearly noted, that present matter falls under this bracket as it is filed in March, 2024, thereby making SCN 1 beyond the period of limitation and so should not be entertained.

Therefore, it is asserted, implied and concluded that there exists no statutory interpretation, missing of malifide intention of wilful default and government instruction of 2023 notification, which is clear factors for not granting extended period of limitation.

---

[71] (2023) 3 SCC 641.
[72] Notification No. 09/2023-Central Tax Dated 31st March 2023.

PRAYER

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

1) That the writ petitions filed by the Petitioner be admitted and declared as maintainable.

2) That the department had no jurisdiction to issue the SCNs and therefore the demand orders be disposed of.

3) That the secondment agreements are not liable to GST per se.

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

6) That there is no import of services under GST and that SOS India is not liable to pay GST under reverse charge mechanism.

7) That extended period of limitation is not applicable to this case.

And/ or

Pass any such order, judgement or direction that the Hon'ble Court may deem fit in the interest of equity, justice and good conscience. For this act of kindness, the Counsels for the Petitioner as in duty bound shall forever pray.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd/-

COUNSELS FOR THE PETITIONER