TEAM CODE: 03

21st SURANA AND SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION, 2023-24

BEFORE THE HON'BLE HIGH COURT OF KARNATAKA

UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

WRIT PETITION NO. __ OF 2024

In The Matter Of

SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD…….PETITIONER

V.

ADDITIONAL COMMISSIONER OF GST AND OTHERS……..…RESPONDENT

MEMORIAL ON THE BEHALF OF RESPONDENT

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TABLE OF ABBREVIATIONS

Sr. No.	Abbreviations	Expansion
1.	**&**	And
2.	**AIR**	All India Reporter
3.	**Anr.**	Another
4.	**ILR**	Indian Law Reporter
5.	**¶**	Paragraph
6.	**§**	Section
7.	**SC**	Supreme Court
8.	**SCC**	Supreme Court Cases
9.	**v.**	Versus
10.	**Ors.**	Others
11.	**SCR**	Supreme Court Reporter
12.	**GST**	Goods and Service Tax
13.	**CGST**	Central Goods and Services Tax
14.	**IGST**	Integrated Goods and Service Tax
15.	**Ed.**	Edition
16.	**SCN**	Show Cause Notice
17.	**HC**	High Court
18.	**Hon'ble**	Honorable
19.	**S.**	Section
20.	**WP**	Writ Petition

21.	**SOS India**	Southern Operating System India Pvt Ltd
22.	**SOS US**	Southern Operating Systems Inc.
23.	**NOS**	*C.C., C.E. & S.T. Bangalore v. Northern Operating Systems (P.) Ltd.*
24.	**OECD**	Organisation for Economic Co-operation and Development
25.	**Art.**	Article

INDEX OF AUTHORITIES

S. No.	STATUTES REFERRED
1.	The Constitution of India, 1949
2.	The Central Goods and Services Act, 2017
3.	The Integrated Goods and Services Tax Act, 2017
4.	Finance Act, 1994
5.	The CGST & SGST Rules, 2017.
6.	Circular No. 172/04/2022-GST, dt. 6th July 2020

S. NO.	CASES	CITATION
1.	*Baburam Prakash Chandra v. Antarim Zila Parishad*,	1969 SCR (1) 518.
2.	*Radha Krishan Industries v. State of H.P*	(2021) 6 SCC 77.
3.	*Rashid Ahmed v. The Municipal Board, Kairana*	1950 SCR 566.
4.	*The State of Maharashtra and Ors v. Greatship (India) Ltd*	MANU/SC/1206/2022
5.	*B. Ravishankar v. State of Karnataka*	MANU/KA/5338/2022
6.	*State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd.*	AIR 2005 SC 3856
7.	*Thansingh Nathmal & Ors v. A. Mazid, Superintendent of Taxes*	1964 SCR (6) 654
8.	*State of Maharashtra and Others v. Greatship (India) Limited*.	2022 SCC OnLine SC 1262.
9.	*State Trading Corporation v. Commercial Tax Officer*	1964 SCR (4) 89.
10.	*Ghanashyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Company.*	2021 SCC Online SC 313.
11.	*Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay*	1995(78) ELT 401(SC)
12.	*McDowell Co. Ltd., v. CTO*	154 ITR 148(SC)
13.	C.C., C.E. & S.T. Bangalore v. Northern Operating Systems (P.) Ltd	[2022] 138 taxmann.com 359 (SC)
14.	M/S Volkswagen India (Pvt.) Tld v. Commissioner of	2014 (34) S.T.R. 135

	Central Excise, Pune- I	(Tri. - Mumbai)
15.	*M/s Yutaka Auto Parts India Private Limited v. The Commissioner, Central Excise & Service Tax Commissionerate, Alwar*	2021 (3) TMI465 - CESTAT NEW DELHI
16.	*Computer Sciences Corporation India Pvt. Ltd. v. Commissioner of Service Tax*	Noida 2014-TIOL-434-CESTAT DEL
17.	*Killick Nixon Ltd. v. DCIT, Mumbai*	2012-TIOL-190-HC-MUM-IT
18.	*Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments*	1974 (1) SCR 747
19.	*Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd.*	7 (2021) 7 SCC 151
20.	*State of Orissa v. Titaghur Paper Mills Co. Ltd*	1985 Supp SCC 280
21.	*Super Poly Fabriks Ltd. v. Commissioner of Central Excise, Punjab*	(2008) 217 CTR (SC) 107 / (2008) 16 VST 115 (SC)
22.	*CIT v. A Raman Co.*	[1968] 67 ITR 11
23.	*Bhopal Sugar Industries Limited v. STO Bhopal*	(1977) (3 SCC 147)
24.	*Moped India Limited v. Assistant Collector of Central Excise Nellore and Others*	[1986 (23) E.L.T. 8 (S.C.) / (1986) 1 SCC 125]
25.	*Nippon Paint (India) Pvt Ltd. v. Deputy Commissioner of Income Tax*	(2019) 71 ITR 65 (CHENNAI)
26.	*Target Corporation India Pvt Ltd In Re*	(2012) 252 CTR 242
27.	*Director Income Tax v. M/S Morgan Stanley & Co. Inc*	8 (2007) 7 SCC 1
28.	*Centrica India Offshore Private Limited v. DCIT*	[364 ITR 336] (Del)
29.	*M/s Dell International Services India Pvt. Ltd. v. The Commissioner of Central Excise & Customs, Bangalore Commissionerate*	Appeal No. 3195 of 2011

S. No.	LIST OF BOOKS, DIGESTS, COMMENTARIES
1.	M.P. Jain, Indian Constitutional Law (7th Ed. 2014, Lexis Nexis Butterworth Wadhwa, Nagpur)
2.	Durga Das Basu, Commentary on The Constitution Of India (9th Ed., Lexis Nexis Vol. 1, 2015)
3.	M.P. Singh, V.N. Shukla's Constitution of India (13th Ed. Reprint 2017, Eastern Book Company, Lucknow)
4.	Rakesh Garg & Sandeep Garg, GST Law Manual Acts, Rules and Form (7th Ed.)
5.	C.A. (Dr.) Arpit Haldia, Taxman's GST Law & Practice (2nd Ed.)
6.	Dr. Vinod k Singhania & Dr. Monica Singhania Student's Guide to Income Tax Including GST (Taxmann's Flagship Publication, New Delhi, 26th edition, 2023)

S. No.	WEBSITES
1.	www.scconline.com
2.	www.manupatrafast.com
3.	www.taxmann.com
4.	www.aironline.in

STATEMENT OF JURISDICTION

The Petitioner has approached the Hon'ble High Court of Karnataka under Article 226 of the Indian Constitution, 1950, challenging the orders of the GST Department and proceedings initiated against the Petitioner. The Respondent poses its objection to the said jurisdiction.

ARTICLE 226: **Power of High Courts to issue certain writs**

(1) "Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises 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, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favor such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case be, the expiry of the said next day, stand vacation.

(4) The power conferred on a High Court by this article shall not be in derogation of

the power conferred on the Supreme Court by clause (2) of article 32.

STATEMENT OF FACTS

1. Southern Operating Systems India, an Indian subsidiary of US-based Southern Operating Systems Inc., was established in 2010 to capitalize on the Indian and Asia Pacific software market, with senior personnel initially seconded to India.
2. Initially, SOS India reimbursed SOS US for these salaries once it became profitable. US expats in India were treated as employees by the US company for legal purposes, while the Indian company was considered the employer for economic purposes.
3. However, the Indian Service Tax Department issued show cause notices in 2017, alleging SOS India's liability to pay service tax under the reverse charge mechanism (RCM) for importing services from SOS US.
4. The Karnataka HC ruled in favour of the service tax department, holding SOS India liable for service tax. The High Court quashed notices regarding the extended period of limitation under the Finance Act, 1994, stating that the Indian company's non-payment of service tax was not due to any exceptions.
5. Indian and US companies terminated expat services from US company payrolls and planned to induct them into Indian company payrolls for tax planning purposes. Subsequently, SOS India terminated expatriate employees' services from SOS US and hired them directly. This was intended to avoid GST implications post-2017, given a Supreme Court ruling holding companies liable for service tax on similar arrangements. However, the GST department issued show cause notices in 2024, alleging GST liability on the secondment arrangement.
6. SOS India contested these notices, arguing that under the GST Act, services by an employee to the employer are not considered supply of goods or services. For the period up to May 2022, SOS India asserted that expatriates were treated as employees solely of SOS India, thus not subject to GST.For period after June 2022, SOS India contended that direct hiring eliminated any reimbursement arrangement, further exempting it from GST.
7. The GST department rejected these arguments, maintaining that secondment arrangements constituted import of services, liable to GST. It upheld the demands and penalties, citing previous service tax payments by SOS India as evidence of willful tax evasion.
8. The writ petitions are now up for hearing in the Karnataka High Court.

STATEMENT OF ISSUES

THE RESPONDENT HAS PLACED BEFORE THIS HON'BLE HIGH COURT, THE FOLLOWING ISSUES FOR ITS CONSIDERATION:

ISSUE 1

WHETHER THE WRIT PETITION IS MAINTAINABLE?

ISSUE 2

WHETHER THE DEPARTMENT HAD JURISDICTION TO ISSUE SHOW CAUSE, IF THE SERVICES WERE NOT LIABLE TO GST PER SE?

ISSUE 3

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

I. THE WRIT PETITION IS NOT MAINTAINABLE

The writ petitions by Southern Operating Systems India Pvt. Ltd. are challenged on the grounds of being non-maintainable, as the petitioner failed to exhaust statutory remedies available under the Central Goods and Services Tax Act, 2017. The submission argues that a writ petition should not precede statutory remedies and questions the violation of fundamental rights and breach of natural justice principles by the GST Department, contending that the new setup by the company amounts to tax evasion. The court is urged to declare the petition unmaintainable and to refrain from interference until statutory remedies are exhausted.

II. THE GST DEPARTMENT DOES NOT HAVE JURISDICTION TO ISSUE SHOW CAUSE NOTICES

Section 74 of the Goods and Services Tax (GST) Act empowers the proper officer to issue show cause notices for suspected contraventions. The petitioner's deliberate use of tax planning as a colorable device to evade taxes is challenged, arguing that the notices and proceedings were fair and in compliance with the law and natural justice principles.

III. WHETHER THERE IS ANY IMPORT OF SERVICES UNDER GST AND WHETHER THE INDIAN COMPANY IS LIABLE TO PAY GST?

The Respondent argues before the Hon'ble Court that the Indian company is liable to pay (GST). The Respondent contends that secondment arrangements are generally liable to GST, citing statutory provisions and the ruling in the case of NOS. They assert that the company's issuance of experience letters in June 2022 is a colourable device to evade GST for the period from 2010 to 2022, highlighting the change in arrangement and perceived deceit. The Respondent further disputes the petitioner's claim of no GST liability from June 2022, asserting that the new arrangement merely alters the form while maintaining the substance of secondment, making it subject to GST. They emphasize the importance of scrutinizing the substance of the contract over its form. Further, the secondment arrangement existed until May 2022, attracting GST under the reverse charge mechanism. The Respondent invokes Section 74(1) of the CGST Act, arguing that the company's misstatements and suppression of facts warrant an extended period of limitation for issuing show cause notices. They conclude that the secondment arrangement, with the associated consideration paid, falls under the ambit of 'supply of services,' making GST liability applicable.

ARGUMENTS ADVANCED

I. THE WRIT PETITION IS NOT MAINTAINABLE

(¶ 1.) It is humbly submitted before this Hon'ble Court that the writ petitions filed by Southern Operating Systems India Pvt. Ltd. (hereinafter referred to as the Petitioner) are not maintainable as the latter disturbed the hierarchy that had to be followed by not seeking the alternate remedy available, i.e., approaching Appellate Authority and Appellate Tribunal before the High Court of Karnataka under Article 226 of the Constitution, under section 107 and 109-110, respectively.

(¶ 2.) The Central Goods and Services Tax Act, 2017 is a single unified umbrella code, covering the entire gamut of the law relating to levy and collection of tax on intra- State supply of goods or services or both by the Central Government and for matters connected or incidental thereto. The Act provides a four-tier mechanism, as a remedy to the order by the adjudicating authority according to the Act, namely,

a. the Appellate Authority (Section 107),
b. the Appellate Tribunal (Section 112),
c. the High Court (Section 117),
d. the Supreme Court (Section 118), which is the final authority.

(¶ 3.) It is hereby submitted that when a law provides a viable remedy, a writ petition should not be considered. This is particularly true when a statute creates a right and specifies the procedure or remedy that must be followed in order to enforce the right or liability. In such cases, resort to the statutory remedy must be made before using the discretionary remedy granted by Article 226 of the Constitution[1]. This rule of exhaustion of statutory remedies is a rule of policy convenience[2] and discretion[3].

(¶ 4.) As the Apex court has rightly pointed out, in the case of ***The State of Maharashtra and Others v. Greatship (India) Limited***[4]*,* held that there is no denying that the statutes grant the right to file an appeal or revision before the Tribunal against the assessment order issued

[1] *Baburam Prakash Chandra v. Antarim Zila Parishad*, 1969 SCR (1) 518.

[2] *Radha Krishan Industries v. State of H.P,* (2021) 6 SCC 77.

[3] *Rashid Ahmed v. The Municipal Board, Kairana,* 1950 SCR 566.

[4] The State of Maharashtra and Others v. Greatship (India) Limited MANU/SC/1206/2022

by the Assessing Officer and against the order issued by the first appellate authority. Given the existence of a statutory remedy under the Act, the High Court should not have accepted the writ petition challenging the assessment order filed under Article 226 of the Indian Constitution. This rational was also reiterated to by this court in its order of ***B. Ravishankar v. State of Karnataka***.[5]

(¶ 5.) It is requested that, the Court declare the petition unmaintainable on the grounds that the company did not follow the statutory procedure, even though it is true that the presence of a statutory remedy does not impact the High Court's competence to issue a writ[6]. These provisions were enacted to ease strain on higher judiciary and expedite law enforcement. Petitioner's avoidance undermines judicial authority. Court urged to refrain from interference until all alternative remedies are exhausted, as per submission.[7].

1.1 THAT FUNDAMENTAL RIGHTS HAVE NOT BEEN VIOLATED

(¶ 6.) It is humbly submitted before the Hon'ble Court that the new setup incorporated by the company was tax evasion rather than tax planning; therefore it cannot be veiled under the garb of Article 19(1) (g) of the Constitution of India.

(¶ 7.) Moreover, a company is not a citizen of India and is a juristic or artificial person[8] within this ambit. It cannot claim fundamental rights as most of them have been conferred upon the citizens exclusively[9]. Thus, it is submitted that the Petitioner, seeking relief under Article 19(1) (g) of the Constitution, cannot claim the same. Additionally, on account of the Code being a self-contained one, it is contended that the Hon'ble Court should refrain from interfering with the resolution process[10].

1.2 THERE WAS NO BREACH OF PRINCIPLE OF NATURAL JUSTICE

(¶ 8.) It is respectfully submitted to this Honorable Court that the GST Department did not violate any natural justice principles. It is pertinent to note that the GST Department is a

[5] B. Ravishankar v. State of Karnataka MANU/KA/5338/2022

[6] *State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd.,* AIR 2005 SC 3856.

[7] *Thansingh Nathmal And Ors v. A. Mazid, Superintendent of Taxes*, 1964 SCR (6) 654; Also *State of Maharashtra and Others v. Greatship (India) Limited*, 2022 SCC OnLine SC 1262.

[8] Supra Note, 6.

[9] *State Trading Corporation v. Commercial Tax Officer*, 1964 SCR (4) 89.

[10] *Ghanashyam Mishra & Sons Private Ltd v. Edelweiss Asset Reconstruction Co.,* 2021 SCC Online SC 313.

quasi-judicial authority vested with the power to investigate, issue show cause, and pronounce relevant orders, according to the Central Goods and Services Rules, 2017.

(¶ 9.) The Rule 142[11] states about the essentialities to be fulfilled to issue a show cause notice under the Act. The said notice must

a. Indicate the amount demanded, interest and penalty payable

b. Call upon the assessee to show cause if he has any objection for such demand.

c. It is humbly submitted that the Department mentioned all the essential requirements including the valuation, the basis of valuation, the ground under which the Company will be assessed by the department and the Show Cause Notice asked for the reply as to why they will not be liable to pay the GST amount from the period of 01.07.2017 to 31.05.2022, and subsequently the other show cause notice asked to show why this new arrangement will not be liable to GST from 31.05.2022.

(¶ 10.) The Department had provided the company with a fair chance to file the reply upon the material contentions provided in the show cause notice. It is therefore, humbly submitted that for the aforesaid reasons, the Principles of Natural Justice as described by the maxim *"Audi Alteram Partem"* was not violated by the Government in the instant case.

II. THE GST DEPARTMENT DOES NOT HAVE JURISDICTION TO ISSUE SHOW CAUSE NOTICES

(¶ 11.) The Department derives its power from section 74 (1) of the Act. Section 74 of the GST Act provides the authority for the proper officer to issue a show cause notice to a registered person if there are reasons to believe that such person has contravened the provisions of the Act or the rules made thereunder, resulting in the evasion of tax. This provision serves as a cornerstone in the enforcement of GST laws, providing the statutory framework for initiating proceedings against alleged offenders.

(¶ 12.) Section 74 of the Goods and Services Tax (GST) Act serves as a pivotal provision empowering the proper officer to initiate proceedings against registered persons suspected of contravening GST laws, thereby ensuring compliance and preventing tax evasion. It has been stated by the Hon'ble Supreme Court, that "Suppression of facts" in the context of taxes can only mean that accurate information was withheld in order to evade taxes. Further it held that

[11] Central Goods and Services Rules, 2017

the term should be construed strictly, it does not mean any omission, and the act must be deliberate and wilful to evade taxes[12].

(¶ 13.) It is hereby humbly submitted that, in the present case the petitioner had deliberately resorted to the new setup by using the colourable device of tax planning to evade the tax payments. Moreover, the company made the so called "tax-planning" retrospective in its effect to veil its wrong intentions since the Act came into effect. Furthermore, in the reply to the Show Cause Notice the company intentionally concealed its purpose of retrospective effect and stated "complete devotion" as an reason to be exempted from the tax liability. The Court has held that, if tax planning falls within the parameters of the law, it might be acceptable. Tax planning cannot include colourable devices, and it is improper to promote or entertain the idea that using questionable means for evading taxes is honorable. Every citizen has a duty to pay taxes in a truthful manner without using any deceit[13].

(¶ 14.) In the instant case, the Show Cause Notices and subsequently the demand orders issued by the Respondent are sustainable and the proceedings took place in a fair manner, compliant with the relevant law and the principles of Natural Justice. This is evident from the fact that the Respondent served the notices on time; gave sufficient time to the company to respond to the department and the demand orders were passed only after the reply was filed.

III. WHETHER THERE IS ANY IMPORT OF SERVICES UNDER GST AND WHETHER THE INDIAN COMPANY IS LIABLE TO PAY GST?

(¶ 15.) It is most humbly submitted before the Hon'ble HC that there is an import of services under GST and the Indian company is liable to pay GST under the reverse charge mechanism ***firstly***, secondment arrangement in general is liable to GST **[3.1]**; ***secondly***, there is GST implication for the period from 2010 to 2022 **[3.2]**; ***thirdly***, there is GST implication for the period from 01.06.2022 to to 31.12.2023 **[3.3]**; and ***fourthly,*** the invocation of limitation period and penalty is justified **[3.4].**

3.1 SECONDMENT ARRANGEMENT IN GENERAL IS LIABLE TO GST

[12] *Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay*: 1995(78) ELT 401(SC)

[13] *McDowell Co. Ltd., v. CTO,* 154 ITR 148(SC).

(¶ 16.) It is humbly submitted before the Hon'ble HC that secondment arrangements are in general liable to GST because: ***firstly,*** the statute expressly provides for GST implication **[i]**; and ***secondly,*** the ruling of NOS is applicable on secondment agreements **[ii]**.

i. The statute expressly provides for GST implication

(¶ 17.) It is submitted that in the GST regime, a taxable event is the supply of goods or services or both. Anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged is termed as "Services".[14]

(¶ 18.) S. 7(1) of the CGST Act, 2017 provides for an inclusive definition of the "Supply" such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

(¶ 19.) As per S. 7(1)(b) of the same Act, "Supply" includes the import of services for consideration whether or not in the course or furtherance of business.

(¶ 20.) S. 2(11) of the IGST Act, defines "import of services" as a supply of service where:

a. (i) the supplier of the service is located outside India;

b. (ii) the recipient of the service is located in India; and

c. (iii) the place of supply of service is in India.

(¶ 21.) In a typical secondment arrangement, employees of overseas entities are deputed to the host entity (Indian associate) on the latter's request to meet the specific needs and requirements of the Indian associate.[15] This secondment of employees k/a secondees/expatriats is termed as manpower supply services which is taxed.

(¶ 22.) The place of supply of services shall be the location of the recipient of the services.[16] Further, since the place of supply is in India and the location of the supplier is outside India, thereby, as per Sr. No.1 of the Notification no.10/2017 IT(R) dated 28.06.2017, any service supplied by any person who is located in non-taxable territory to any person other than a non-

[14] S. 2(102) of CGST ACT, 2017

[15] C.C., C.E. & S.T. Bangalore v. Northern Operating Systems (P.) Ltd. [2022] 138 taxmann.com 359 (SC)

[16] S. 13(2) of IGST Act, 2017.

taxable online recipient shall be paid on a reverse charge basis by the recipient of such services.

(¶ 23.) It is submitted, therefore, that in a secondment agreement where the overseas entity deputes its employees (secondees) to an Indian entity, the said arrangement is liable to GST as S. 7(1)(b) as an import of services and the Indian entity is liable to pay the taxes under RCM.

ii. The ruling of NOS is applicable on secondment agreements

(¶ 24.) It is submitted that the decision of the Apex Court in NOS is applicable on the secondment agreements.

(¶ 25.) The Central Board of Indirect Taxes and Customs, in its **Instruction No. 05/2023-GST** [17], dated 13th December 2023, has clarified that:

"It is noted that secondment as a practice is not restricted to Service Tax and issue of taxability on secondment shall arise in GST also."

(¶ 26.) Although the ruling was based on the erstwhile service tax regime, Finance Act, 1995, the supply of manpower from an overseas entity to an Indian entity is fairly governed by S.7 read with Schedule I of the CGST Act, 2017.[18]

(¶ 27.) Prior to NOS judgement, in a secondment arrangement, where the employees of one company are deployed to another company under an agreement between the companies, the salaries paid to deputed employees was not taxable under service tax.[19] A similar position was adopted by CESTAT in other cases.[20]

(¶ 28.) However, it is most differentially submitted, that this position has been changed. The SC in NOS have categorically overruled these judgments stating the nullity in their precedential value.[21] The court held that if the foreign entity is treated as the employer of the

[17] Central Board of Indirect Taxes and Customs, Instruction No. 05/2023-GST, dated 13th December 2023.

[18] Ibid.

[19] M/S Volkswagen India (Pvt.) Tld v. Commissioner of Central Excise, Pune- I 2014 (34) S.T.R. 135 (Tri. - Mumbai).

[20] Yutaka Auto Parts India Private Limited v. Commissioner, Central Excise & Service Tax Commissionerate; Computer Sciences Corporation India Pvt. Ltd. v. Commissioner of Service Tax, Noida 2014-TIOL-434-CESTAT DEL.

[21] Supra Note 15, NOS.

seconded employee, then the services provided by the foreign entity would be treated as service and become taxable.

(¶ 29.) Hence, the ruling of the NOS judgement is applicable on secondment agreements.

(¶ 30.) Therefore, it is humbly submitted before the Hon'ble Court that secondment agreements are in general liable to GST because the statute expressly provides for GST implications and ruling of NOS judgement is applicable on secondment agreements.

3.2 THERE IS GST IMPLICATION FOR THE PERIOD FROM 2010 TO 2022

(¶ 31.) The petitioner most reverently submits before the Hon'ble Court that based on the experience letters issued, there will still be GST implication for the period 2010 to 2022 because ***firstly***, the experienced letters issued are a colourable device undergone to evade payment of GST **[i]**; and ***secondly***, there is a contract for service between the expats and SOS India **[ii]**.

i. The experience letters issued are a colourable device to evade payment of GST

(¶ 32.) In the case of **Mcdowell**[22], the Hon'ble Apex court has held that:

"tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods."

(¶ 33.) Therefore, it is humbly submitted that a colourable device cannot be a part of tax planning. Where a transaction is a sham and not genuine, then it cannot be considered a part of tax planning or legitimate avoidance of tax liability.[23]

(¶ 34.) The kind attention of the Hon'ble HC is drawn upon the fact that subsequent to the NOS ruling by the Hon'ble SC in May, the petitioner immediately in the month of June, 2022, issued the impugned experience letters, coloured the services with the nomenclature of employment with SOS India. The ratio of Apex Court in NOS was summarily that for a transaction to be free of service tax, it must essentially meet the test of employer-employee otherwise the transaction would suffer from service tax liability.

[22] Mcdowell & Co Ltd. v. Commercial Office [1985] 154 ITR 148 (SC).

[23] Killick Nixon Ltd. v. DCIT, Mumbai 2012-TIOL-190-HC-MUM-IT.

(¶ 35.) Earlier, the expats were neither in the payrolls of SOS India nor they were employees of the assessee for legal and other purposes. Additionally, they were not entitled to social security benefits like gratuity, employer's insurance etc.[24] Further, it was well within the knowledge of the Petitioner that, had been the prior arrangement, it would be liable to GST, but nonetheless, it deceitfully converted the impugned arrangement into a genuine one. The preceding arrangement was fabricated just to evade the payment of GST from 01.07.2017 to 31.05.2022.

(¶ 36.) The Respondent hereby contends that such an exercise of annuling the secondment arrangement for the purpose of evading tax liability arising out of the GST Act, 2017, the Indian Co. has contradicted its own commitment which it had made by paying the tax for the duration of April 2012 till March 2017.

(¶ 37.) On one side the Petitioners contends that there was no secondment arrangement in the first place and the Employer-Employee relationship existed right from 2010, and on the other side it pays the tax for the period of April 2012 till March 2017 under the liability arising out of 'import of services'. Such a behaviour by the Indian Co. clearly suggests that it has come up with this 'innovative arrangement' to evade any form of tax liability. Thus, it is humbly submitted that this kind of "innovative arrangement" is nothing but a sham transaction and is liable to be struck down.

(¶ 38.) Hence, it is reverently submitted that the petitioners sought such a dubious method by issuing the experience letters which are a colourable device just to evade the payment of GST.

ii. There is a contract for service between the expats and SOS India

(¶ 39.) As already established, if the Indian company be regarded as an employer of the expats, i.e. the relationship is of "contract *of* service", the payment would effectively be considered a reimbursement and would not be subject to taxation & the negative of the same, i.e. the case of "contract *for* service", would be a subject of GST.

(¶ 40.) Therefore, the most crucial element in determining tax liability is to ascertain the nature of employment between the expats and SOS India.

[24] ¶10, Moot Proposition.

(¶ 41.) It is submitted that there is no hard and fast rule as to which factors should in any case be treated as the determining ones to differentiate between contract of service & contract for service.[25] No one test of universal application can ever yield the correct result.

(¶ 42.) In ***Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd.***[26], the Hon'ble SC has held that:

"a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the factual situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight."

(¶ 43.) In ***State of Orissa v. Titaghur Paper Mills Co. Ltd***[27], it was held that:

"120. It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. These, however, 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 as the Court did in the Orient Paper Mills case (1977) 2 SCR 149)".

(¶ 44.) It is submitted that when the terms used in the agreement are not conclusive one has to look at the substance of the transaction over form such that it is not always possible that the name given to a transaction would depict the real nature of the transaction to ascertain valid taxes.[28] The courts have throughout followed the **"substance over form"**[29] approach.[30]

(¶ 45.) Further, even in NOS judgement, the court relied on the doctrine of substance over form to ascertain the true nature of the relationship between the seconded employees and the

[25] Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments 1974 (1) SCR 747.
[26] Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd. 7 (2021) 7 SCC 151.

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

[28] Super Poly Fabriks Ltd. v. Commissioner of Central Excise, Punjab (2008) 217 CTR (SC) 107 / (2008) 16 VST 115 (SC).

[29] OECD (2019), "Commentary on Article 15: Concerning the Taxation of Income From Employment", in Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris, https://doi.org/10.1787/b0354940-en.

[30] CIT v. A Raman Co. [1968] 67 ITR 11; Bhopal Sugar Industries Limited v. STO Bhopal (1977) (3 SCC 147); Moped India Limited v. Assistant Collector of Central Excise Nellore and Others [1986 (23) E.L.T. 8 (S.C.) / (1986) 1 SCC 125]

assessee, rejecting the contention of the assessee that the secondment agreement was a contract of service.

(¶ 46.) It is submitted that the experience letters providing for the legal employment of the secondees from 2010, do not provide a true image of the relationship, camouflaging the substance within itself. There was no employer–employee relationship between the expats and SOS India which will be proved by the following facts and terms of the secondment agreement:

a. The expats were subject to the payrolls of the US Co., they were paid their salaries, etc. in the US as usual in their regular US salary accounts.

b. Reimbursement of salaries does amount to deemed consideration for services rendered by the foreign entity.[31]

c. The secondees were only the economic employees of SOS, for all legal purposes they were the employees of US Co. 'Right to terminate employment' a 'sure test' for determining employer-employee relationship and not 'right to terminate secondment'.[32]

d. They were not entitled to the employment laws and social security benefits in India, like gratuity, employees' insurance, etc.

e. After the end of the secondment period, the expats would return to their jobs with the US Co. and may in fact, be sent elsewhere on secondment, this is to say that the secondee has a lien on his employment with the US. As long as the lien remains with the oversees entity the overseas entity retains control over the deputationist's terms and employment.[33]

f. the Indian entity could not terminate the original employment with the seconder. Also, the secondees cannot sue the host for non-payment of the salary.[34]

(¶ 47.) One another important point of consideration is that the Petitioners paid the tax for 'import of services' or 'manpower supply services' earlier for the duration of April, 2012 to March, 2017, upon the order of the Karnataka HC in 2017, which evidences that the Indian

[31] Supra Note 15, NOS, Nippon Paint (India) Pvt Ltd. v. Deputy Commissioner of Income Tax (2019) 71 ITR 65 (CHENNAI).

[32] Target Corporation India Pvt Ltd In Re (2012) 252 CTR 242.

[33] Director Income Tax v. M/S Morgan Stanley & Co. Inc 8 (2007) 7 SCC 1.

[34] Centrica India Offshore Private Limited v. DCIT [364 ITR 336] (Del).

Co. has acknowledged the fact that the arrangement made by it until the March of 2017 was of **'Supply of Manpower' thereby falling under 'Import of Services'.**

(¶ 48.) Further, it is evident that the change in the arrangement of employment was made on 01.06.2022, meaning that prior to this date, the original regime of employment that was prior to 2017 continued till 31.05.2022, that implies the **regime of 'supply of manpower' continued from 2010 until 31.05.2022.**

(¶ 49.) It is also submitted that the CESTAT, Bengaluru in ***M/s Dell International Services India Pvt. Ltd. v. The Commissioner of Central Excise & Customs, Bangalore Commissionerate***[35] compared the facts of the said appeal with NOS judgement and had come to the conclusion that the assessee is service recipient and liable to pay service tax.

(¶ 50.) Therefore, it is submitted that the entire arrangement between SOS India and the deputed personnel was one of a "contract *for* service." In substance, both the colourable device & the earlier arrangement are import of services, and neither of them aligns with the defence of the Petitioners. Thereby, it is not immune by the exception of employer-employee, nonetheless, it's an import of services and there is GST implication as per S.7 of the CGST Act.

3.3 THERE IS GST IMPLICATION FOR THE PERIOD FROM 01.06.2022 TO 31.12.2023

(¶ 51.) It is submitted that the contention of the Petitioner that there were fresh recruitments post June, 2022 is wholly untenable. Although 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). However, The salary in India was based on the salary that was paid to such expats in the US.

(¶ 52.) It is submitted that the fact that "The salary in India was based on the salary that was paid to such expats in the US.", shows that the terms of this new arrangement was based on Global Policy. The nature of salary and other perks underscore the fact that the seconded employees are of a certain skill and possess the expertise, which the assessee requires. This shows distinguishment between an ordinary arrangement and a secondment arrangement to evade tax.

[35] M/s Dell International Services India Pvt. Ltd. v. The Commissioner of Central Excise & Customs, Bangalore Commissionerate Service Tax Appeal No. 3195 of 2011.

(¶ 53.) Additionally, the secondments were for a duration of at least five years which highlights that the secondment is for a specified duration, and the employment with the assessee ceases upon the expiration of that period.

(¶ 54.) It is asserted that the court ought to look the substance and not the form of the contract, which is the presence case, clearly points that the SOS India, colours the secondment agreement to evade tax.

3.4 THE INVOCATION OF EXTENDED PERIOD OF LIMITATION AND PENALITY IS JUSTIFIED

(¶ 55.) The Respondent hereby contends that on one side the Indian Company contends that there was no secondment arrangement in the first place and the Employer-Employee relationship existed right from 2010, and on the other side the company pays the tax for the period of April 2012 till March 2017 under the liability arising out of 'import of services', however, when the GST Department orders the payment of taxes under the same liability of 'import of services', the Indian Company contends that no such liability would arise due to absence of any 'import of servies' from the parent company. Such a behaviour by the Indian Company clearly suggests that it has come up with this 'innovative arrangement' to evade any form of tax liability and decided to use this arrangement to evade tax liability of not just future errands but also the past ones.

(¶ 56.) Such an act of the Indian Company clearly depicts the ***presence of a guilty mind*** to evade taxes arising out of the operations. Therefore, such a tax evasive arrangement is illegal, it attracts an extended period of limitation and issuance of Show Cause notices to the Indian Company according to the **Section 74(1) of the CGST Act**, referred to in the **F. No. CBIC-20004/3/2023-GST**, which clearly states;

"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……in the notice."

(¶ 57.) Upon perusal of this statute, the respondent submits that this provision applies to the inherent case because there was a **wilful-misstatement of facts** from the Indian Company since the Company wilfully stated that there was no secondment arrangement in place at any point of time, however, in fact, the secondment arrangement was in place which is evident through the Companies' act of paying the tax for supply of manpower from the parent

company, from April 2012 till March 2017, and, further, the absence of any arrangement that annuls the secondment arrangement from April 2017 till 31.05.2022, there appears no reason to believe that secondment arrangement did not exist for such time period. In a nutshell, there existed a secondment arrangement, in fact, until 31.05.2022, which implies that the tax liability shall accrue from 01.07.2017 till 31.05.2022.

(¶ 58.) Regarding limitation, it is submitted that the SCN discussed in detail the reasons for invoking extended period. It is asserted that the scheme of GST is self-assessment; the assesee would take steps to find out whether there is tax liability on them; the assessee never approached the Department for any clarification and evasion of service tax was detected only after an investigation by the Department.[36]

(¶ 59.) It was only when the Department had pursued the assesse vigorously by issuing several SCNw that the petitoner disclosed the information related to the matter. The issue of interpretation of statutory provisions cannot be an excuse for not following the statutory provisions of law.[37]

(¶ 60.) It is now pertinent to prove that the secondment arrangment that existed in the Indian Company from 01.07.2017 till 31.05.2022 accrues tax liability in GST under Reverse Charge Mechanism (RCM). As has been aforementioned, there existed a secondment arrangement between the Indian Company and the US Company, and the same shall fall within the ambit of **'import of services'** according to case of ***NOS***[38], wherein the court held that the provision of technical expertise by the KMPs to the Secondee company shall amount to the import of service from the Parent Company to the secondee company and the reimbursement paid by the secondee company shall represent the consideration paid for the services rendered by the parent company and thereby shall be liable to service tax in India. The Court held that an arrangement, where the employees, for all other reasons except the payment of salaries, are employees of the Indian Company, shall be deemed to be a **Contract *for* Service**, and therefore the service tax regime shall be applicable to such a contract.

[36] (¶ 1.) Vidarbha Cricket Association- MANU/CM/0408/2013 : 2015 (38) STR 99 (Tri. Mumbai); Shree Guru Kirpa Construction Company- 2019-TIOL-3501-CESTAT-AHM.

[37] Lakshay International Pvt. Limited and Ors. V,. The Commissioner of Central Excise, Ludhiana Service Tax Appeal Nos. 537 and 538 of 2011

[38] Supra Note 15, NOS.

(¶ 61.) Further, the respondent submits that, referring to the case of ***Intercontinental Consultants and Technocrats Pvt. Ltd. vs. Union of India***[39], wherein the Supreme Court held;

"The secondment of employees from an overseas company to an Indian entity would not fall under the category of a "supply" under the GST law, provided that the overseas company does not levy any consideration for the services rendered by its employees to the Indian entity."

which clearly implies that the arrangement shall amount to 'supply of services' if the consideration is paid. The salary of the employees is the deemed consideration as per the ruling of NOS. This applies to the inherent case in which the consideration was paid in the form of reimbursement for the services of the KMPs to the US Company and thereby the arrangement in the inherent case shall amount to 'supply of services'

PRAYER FOR RELIEF

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

I. That the writ petitions filed by the Company are not maintainable.

II. That the department has jurisdiction to issue show cause if the services were not liable to GST per se.

III. That there is an import of services under GST and the Indian company is liable to pay GST.

AND/ OR

Pass any such order, judgment or direction that the Hon'ble Court may deem fit in

[39] Intercontinental Consultants and Technocrats Pvt. Ltd. vs. Union of India (CIVIL APPEAL NO. 2013 OF 2014).

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 RESPONDENT