

TEAM CODE : TC-17



21st SURANA & SURANA NATIONAL CORPORATE LAW

MOOT COURT COMPETITION

22 - 24 March 2024



BEFORE THE HON'BLE HIGH COURT OF KARNATAKA

AT BENGALURU

WP No. 50000 of 2024 & WP No. 50001 of 2024

Southern Operating Systems India Pvt. Ltd

Bengaluru...

Petitioner

v.

Additional Commissioner of GST & Ors

Bengaluru...

Respondent

Written submission on behalf of the Respondent

Before the Hon'ble Karnataka High Court,

Counsels for the Respondent

PETITIONS FILED UNDER ARTICLE 226 OF THE INDIAN CONSTITUTION

MEMORANDUM FILED ON BEHALF OF RESPONDENT

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
¶	Paragraph
AIHC	All India High Court Cases
AIR	All India Reporter
Anr.	Another
Art	Article
Co.	Company
Del	Delhi
DRJ	Delhi Reported Judgments
Ed./edn	Edition
Fed. Cir.	Federal Circuit

GST	Goods and Services Tax
Hon'ble	Honourable
i.e.	ID est (That is)
IOS	Import of Services
ILR	Indian Law Reports
Inc.	Incorporated
Ind.	India
J.	Justice
Kant	Karnataka
KMPs	Key Managerial Persons
LJ	Law Journal
Ltd.	Limited
Ors	Others
Pvt.	Private
RCM	Reverse Charge Mechanism
r/w	Read with
s/ Sec.	Section
SC	Supreme Court
SCC	Supreme Court Cases

SCC (Supp)	Supreme Court Cases (Supp)
SCR	Supreme Court Reporter
SOS	Southern Operating System
SOS US or US Company	Southern Operating Systems Inc.
u/s	Under Section
US	United States
Vol	Volume

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2.	Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017 (India).
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4.	Finance Act, 1994, No. 32, Acts of Parliament, 1994 (India).

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2.	Alcon Consulting Engineers (India) Pvt. Ltd. v. Alcon CTL Testing Pvt. Ltd., 2019 SCC OnLine Kar AAR-GST 92.
3.	CCE v. SKF India Ltd., (2009) 13 SCC 461.
4.	CIT v. Indian Express Newspapers, Madurai Pvt. Ltd., 1998 SCC ONLINE MAD 1003.
5.	Commissioner of Central Excise vs. Hari Chand Shri Gopal, 2005 (8) SCC 164.
6.	Commissioner Of Customs, Bombay v. Poona Roller, 1996 SCC ONLINE CEGAT 718.

7.	Commissioner of Income Tax vs. Daulat Ram Rawatmull, AIR1967CAL547.
8.	Commissioner of Service Tax v. Northern Operating Services Pvt. Ltd., 2020 SCC OnLine CESTAT 1458.
9.	Commr. of Customs v. Dilip Kumar & Co., (2018) 9 SCC 1.
10.	DIT v. Morgan Stanley, (2007) 162 Taxman 165.
11.	M/S Abhay Traders v. Commissioner Commercial Tax U.P. Lucknow and Another Allahabad High Court 2023, SCC ONLINE ALL 437.
12.	M/S Continental Foundation Joint Venture Sholding, Nathpa H.P. v. Commissioner of Central Excise, Chandigarh, 2007 SCC 10 337.
13.	M/S McDowell and Company Ltd. v. Commercial Tax Officer, 1986 AIR SC 649.
14.	M/s. Centrica India Offshore Pvt. Ltd v. CIT Commissioner of Income Tax- I & Ors. [W.P.(C) No. 6807/2012 dated April 25, 2014].
15.	Maneka Gandhi v. Union of India (1978), 1978 AIR 27.
16.	Pr. Commissioner of Income Tax 5 v. Northern Operating Services Pvt. Ltd., 2018 SCC Online SC 865.
17.	Radha Krishan Industries v. State Of Himachal Pradesh, 2021 SCC ONLINE SC 334.
18.	Rajasthan State Electricity Board vs. Union of India, (2001) AIR2001BOM310.
19.	State of Punjab vs. Associated Hotels of India Ltd, 1972 AIR 1131.
20.	Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd., (2021) 7 SCC 151.

21.	Union of India v. Jain Shudh Vanaspati Ltd. (2017), AIR 1996 SUPREME COURT 2696.
22.	Union of India vs. Azadi Bachao Andolan, 2004 (10) SCC 1.
23.	Union of India vs. Playworld Electronics Pvt. Ltd., 1989 SCC 3 181.
24.	United India Insurance Co. Ltd. v. Pushpalaya Printers (2004) 3 SCC 694.
25.	Workmen vs. Associate Rubber Industries Ltd., AIR 1986 SC 1.
26.	Union of India and Another v. Mohit Minerals Pvt. Ltd. Through Director, 2022 SCC OnLine SC 657.

STATEMENT OF JURISDICTION

The parties have approached the Hon'ble High Court of Karnataka under Article 226.

In Karnataka, the jurisdiction for filing a writ petition in the High Court is primarily governed by Article 226 and Article 227 of the Constitution of India. Article 226 empowers the High Court to issue writs, directions, or orders to any person or authority within its territorial jurisdiction for the enforcement of fundamental rights or for any other purpose. On the other hand, Article 227 confers upon the High Court the power of superintendence over all courts and tribunals within the territories in relation to which it exercises jurisdiction.

The High Court of Karnataka, as per the Karnataka High Court Act of 1961, has the authority to entertain writ petitions under Articles 226 and 227. The jurisdiction of the High Court extends to issues where the cause of action, wholly or in part, arises within the territorial jurisdiction of Karnataka, regardless of the seat of the Government, authority, or person against whom the writ is sought.

Furthermore, the Karnataka High Court Act provides for intra-court appeals against orders passed by a learned Single Judge under the original jurisdiction. It clarifies that orders passed under Article 227 fall under the supervisory jurisdiction of the High Court and are not subject to appeal under Section 4 of the Act.

In summary, the High Court of Karnataka has the jurisdiction to entertain writ petitions under Articles 226 and 227 for the enforcement of fundamental rights, superintendence over lower courts and tribunals, and ensuring adherence to the bounds of authority by subordinate entities within its jurisdiction.

STATEMENT OF FACTS

BACKGROUND

Southern Operating Systems India Pvt. Ltd. was established in 2010 as a subsidiary of Southern Operating Systems Inc., a US-based software development company. SOS India aimed to leverage the software market potential in India and the Asia-Pacific region, aligning its operations with the established software development and research expertise of SOS US. The US company deployed highly paid key managerial persons (KMPs) to India in 2010 to facilitate the setup, share technological know-how, and maintain product quality.

DISPUTE

Following substantial revenue generation, SOS India reimbursed KMP salaries from 2012, treating expats as US employees legally and Indian employees economically. In 2017, show cause notices for service tax liability arose, contested by SOS India. The Karnataka High Court ruled in favor but upheld tax liability for service tax on reverse charge mechanism for importing manpower services.

In July 2017, the Goods and Services, 2017 (GST Act) was introduced w.e.f 01.07.2017. Therefore, as a tax planning measure, the Indian company and the US company decided to terminate the services of all the expats sent to India from the payrolls of the US company and planned to induct them in the Indian company's payrolls.

The GST department issued two show cause notices to the Indian company, dated 31.01.2024, questioning the secondment arrangement with the US company. The notices alleged an innovative arrangement that treated expatriates as Indian employees, importing services and evading GST. The department invoked an extended period, imposing maximum penalties, treating the US company's ongoing service as deemed consideration for tax liability.

CAUSE OF ACTION

Against the demand orders, the Indian company filed two writ petitions before the High Court of Karnataka.

STATEMENT OF ISSUES

ISSUE 1

WHETHER THE WRIT PETITION IS MAINTAINABLE.

ISSUE 2

**WHETHER THE DEPARTMENT HAD JURISDICTION TO ISSUE THE SHOW CAUSE NOTICES
IF THE SERVICES WERE NOT LIABLE TO GST PER SE.**

ISSUE 3

WHETHER SECONDMENT ARRANGEMENT IN GENERAL LIABLE TO GST.

ISSUE 4

**WHETHER BASED ON THE EXPERIENCE LETTERS ISSUED FOR THE PERIOD FROM 2010
TO 2022, IT CAN BE SAID THAT THERE WILL BE NO GST IMPLICATION FOR THIS
PERIOD.**

ISSUE 5

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

ISSUE 6

**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 ARGUMENT

Issue 1.

The counsel submits before the Hon'ble High Court of Karnataka that the writ petition challenging GST department actions is not maintainable. The counsel argues that the department's proceedings, including show cause notices and tax evasion allegations, align with the GST Act's provisions. Citing legal precedents, the counsel emphasizes adherence to due process, natural justice, and constitutional principles. The GST department's actions are deemed reasonable, fair, and essential for tax compliance, refuting claims of arbitrariness.

Issue 2.

It's submitted to the Hon'ble High Court of Karnataka that the department has jurisdiction to issue show cause notices due to tax evasion. The court can lift the corporate veil to unveil fraudulent transactions. The Indian company's arrangement, akin to importing services, led to employee poaching. The show cause notices issued by the Additional Commissioner of GST, Bengaluru, were valid under relevant notifications, empowering proper officers to initiate proceedings based on tax non-compliance.

Issue 3.

The counsel contends before the Hon'ble High Court of Karnataka that secondment arrangements are generally subject to GST. The argument is based on three grounds: the nature of the agreement as a contract for service, the import of services from outside India, and the absence of an employer-employee relationship. Citing legal precedents, including the McDowell case, the counsel asserts that the secondment arrangement is liable under GST.

Issue 4.

The counsel submits before the Hon'ble High Court of Karnataka that GST implications arise from experience letters issued by SOS India from 2010 to 2022. Arguments include the Contra Proferentem Rule for interpreting ambiguous contracts and asserting that the experience letters are void. Additionally, it's argued that services provided by US expatriates to SOS India fall under GST, citing legal precedents and emphasizing penalties for tax evasion. The interpretation of Schedule III supports the taxable nature of the secondment arrangements. The counsel concludes that the GST department's position is legally sound and justifiable.

Issue 5.

The counsel contends before the Hon'ble High Court of Karnataka that GST implications arise from SOS India's arrangement post-June 2022. The application of Section 74 is justified by legal precedents, like Union of India vs. Azadi Bachao Andolan, empowering tax authorities to investigate tax evasion. SOS India bears the burden of proof, validated by Commissioner of Central Excise vs. Hari Chand Shri Gopal, emphasizing the assessee's responsibility. The importance of substance over form in tax matters, as highlighted in State of Punjab vs. Associated Hotels of India Ltd., strengthens the need for SOS India to provide compelling evidence. Commissioner of Income Tax vs. Daulat Ram Rawatmull further supports the use of circumstantial evidence to establish tax liability. In conclusion, legal precedents validate the GST department's position in the ongoing dispute with SOS India.

Issue 6.

Yes, GST is applicable to SOS India for importing services. The Karnataka High Court ruled that SOS is liable to pay GST under the reverse charge mechanism for the import of services related to seconded employees from its US parent company. The court treated it as manpower supply services, emphasizing the absence of an employer-employee relationship. The ruling aligns with precedent cases, confirming SOS's liability under reverse charge for importing services.

ARGUMENTS ADVANCED

ISSUE 1. WHETHER THE WRIT PETITION IS MAINTAINABLE.

The counsel humbly submits before the Hon'ble High Court of Karnataka that the writ petition is not maintainable on the following ground. [1.1] The action was in accordance with the procedure established by law. [1.2] Allegations of wilful tax evasion.

[1.1] The action was in accordance with the procedure established by law.

The actions undertaken by the GST department, including the issuance of show cause notices and allegations of willful tax evasion, are in accordance with the provisions of the Goods and Services Tax Act (GST Act), specifically Section 73¹ and Section 74.² These sections empower the GST department to initiate proceedings for the determination of tax liability and the imposition of penalties in case of non-compliance or evasion.

The Supreme Court in the case of Union of India v. Jain Shudh Vanaspati Ltd. (2017)³ emphasized the importance of upholding the integrity of the tax system and ensuring compliance with tax laws. The court held that tax authorities have the discretion to initiate proceedings for the determination of tax liability based on credible evidence and legal grounds.

Similarly, in the case of State of Punjab vs. Associated Hotels of India Ltd. (1972),⁴ The Hon'ble SC of India upheld the authority of tax authorities to issue show cause notices and initiate proceedings for tax evasion based on reasonable suspicion and credible evidence.

Additionally, the principle of natural justice and fair procedure, as enunciated in cases like Maneka Gandhi v. Union of India (1978)⁵ and A.K. Gopalan v. State of Madras (1950),⁶ requires that tax authorities provide taxpayers with an opportunity to be heard and present their case before any adverse action is taken against them. In our case, the GST department has adhered to these principles by issuing show cause notices and providing SOS India with an opportunity to respond to the allegations of tax evasion.

¹ CENTRAL GOODS AND SERVICES TAX ACT, 2017, § 73, No. 12, Acts of Parliament, 2017 (India).

² CENTRAL GOODS AND SERVICES TAX ACT, 2017, § 74, No. 12, Acts of Parliament, 2017 (India).

³ Union of India v. Jain Shudh Vanaspati Ltd. (2017), AIR 1996 SUPREME COURT 2696.

⁴ State of Punjab vs. Associated Hotels of India Ltd. (1972), 1972 AIR 1131.

⁵ Maneka Gandhi v. Union of India (1978), 1978 AIR 27.

⁶ A.K. Gopalan v. State of Madras (1950), AIR 1950 SUPREME COURT 27.

The issuance of show cause notices by the GST department is a standard procedure prescribed under Section 73 of the GST Act. This provision allows the department to issue notices to taxpayers suspected of evading taxes or contravening provisions of the GST Act. The notices are issued based on credible information and evidence gathered during the course of investigations conducted by the department.

[1.2] Wilful tax evasion by the Indian company.

Allegations of wilful tax evasion, as per Section 74 of the GST Act, are made following a thorough examination and analysis of relevant financial records and transactional data. This section empowers the GST department to levy penalties in cases where tax evasion is willful or deliberate. The department's actions are guided by objective criteria and are not influenced by extraneous factors.

Furthermore, the actions of the GST department are guided by the principles of reasonableness and fairness enshrined in Article 14⁷ of the Indian Constitution. The department treats all taxpayers equally and applies tax laws uniformly without discrimination. The issuance of show cause notices and allegations of tax evasion are made based on objective criteria and are not influenced by extraneous factors.

Given the statutory mandate provided under Section 73 and Section 74 of the GST Act, the actions taken by the GST department are neither arbitrary nor unjustified. Instead, they represent a diligent effort to uphold the integrity of the tax system and ensure that all taxpayers comply with their tax obligations in a fair and transparent manner.

Conclusion, the actions of the GST department in our case are justified and in accordance with the provisions of the GST Act, specifically Section 73 and Section 74. The issuance of show cause notices and allegations of tax evasion are backed by credible evidence and legal reasoning and are aimed at enforcing tax compliance and upholding the integrity of the tax system. Therefore, there is no basis to argue that the actions of the GST department constitute arbitrariness.

⁷ INDIA CONST. art 14.

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

It is humbly submitted before the hon'ble High Court of Karnataka that the department does have the jurisdiction to issue the show cause notices for the following reasons. [2.1] Department has the jurisdiction to issue SCNs in the cases of tax evasion [2.2] The show cause notices issued by the proper officer were valid.

[2.1] Department has the jurisdiction to issue SCNs in the cases of tax evasion.

The department does have the jurisdiction to issue the show cause notices⁸ as even though a corporation might be a legal personality distinguished from its members, the court is entitled to lift the corporate veil of a company can be for the purpose of ascertaining the real character of a transaction if that transaction was a fraudulent one⁹ for tax evasion or to circumvent tax obligation, or to perpetuate a fraud.¹⁰ It is the duty of the court, in every case where ingenuity is expanded to avoid taxing and welfare legislations, to get behind the smokescreen and discover the true state of affairs.¹¹

The 'innovative arrangement' of the Indian company, in a way poached the employees from the US, etc. companies as its own employees which in effect was also import of services¹² from the foreign group companies to have arranged/ identified such employees.¹³

While legitimate tax avoidance is always permissible, the device adopted to evade payment of tax, however are not permissible, though the dividing line is not always easy to draw, such a line does exist. Tax planning may be legitimately provided if it is within the framework of law. Colourable devices cannot be part of tax planning.¹⁴

The Indian company had accepted its tax liability under the service tax regime for the very same arrangement GST Act until was introduced, not paying tax for the same arrangement is

⁸ CENTRAL GOODS AND SERVICES TAX, ACT, 2017, § 74(1), No. 12, Acts of Parliament, 2017 (India).

⁹ CIT v. Indian Express Newspapers, Madurai Pvt. Ltd. 1998 SCC ONLINE MAD 1003.

¹⁰ Union of India vs. Playworld Electronics Pvt. Ltd. 1989 SCC 3 181.

¹¹ Workmen vs. Associate Rubber Industries Ltd., AIR 1986 SC 1.

¹² INTEGRATED GOODS AND SERVICES TAX, ACT, 2017, § 2(11), No. 13, Acts of Parliament, 2017 (India).

¹³ Moot Problem, p.no. 5, para. 12.

¹⁴ M/S McDowell and Company Ltd. v. Commercial Tax Officer, 1986 AIR SC 649.

willful and with the intention to evade tax¹⁵ and therefore there exists on-going service in providing such employees to the Indian counterpart and their salaries should be treated as the ‘**deemed consideration**’¹⁶ for determining tax liability.

[2.2] The show cause notices issued by the proper officer were valid.

It is humbly submitted before the hon’ble High Court of Karnataka that the Show Cause Notices issued by the Proper Officer were valid as it was issued by the Additional Commissioner of GST, Bengaluru.

The Additional/ Joint Commissioners of Central Tax of some of the specified Central Tax Commissionerate’s, with All India Jurisdiction for the purpose of adjudication of the show cause notices issued by the officers of the Directorate General of Goods and Services Tax Intelligence, as per para 3A¹⁷ of a notification dated 11th March, 2022.

Further, para 6 and 7¹⁸ state that the show cause notices issued shall be adjudicated by the competent Central Tax officer of the executive Commissionerate in whose jurisdiction the notice is registered.¹⁹

The proceedings can be initiated by the “proper officer”²⁰ if only it appears to him that tax has not been paid or short paid or erroneously refunded or where Input tax Credit has been wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of fact²¹. Section 73 of the CGST Act, 2017²² empowers the **Proper Officer** to determine the tax liability of a person who has failed to pay the tax or has short-paid the tax or wrongly availed ITC etc.²³ Proper Officer must explain exercise of jurisdiction when validity of notice is questioned in a plain-paper letter in view of the mandate.²⁴ Officer who has granted

¹⁵ M/S Continental Foundation Joint Venture Sholding, Nathpa H.P. v. Commissioner of Central Excise, Chandigarh 2007 SCC 10 337.

¹⁶ Union of India and Another v. Mohit Minerals Pvt. Ltd. Through Director, 2022 SCC OnLine SC 657.

¹⁷ Notification No. 02/2022-Central Tax dated 11th March, 2022.

¹⁸ Circular No. 31/05/2018-GST, dated 9th February, 2018.

¹⁹ Commissioner Of Customs, Bombay v. Poona Roller 1996 SCC ONLINE CEGAT 718.

²⁰ CUSTOMS ACT, 1962, § 2(34), No. 52, Acts of Parliament, 1962 (India).

²¹ M/S Abhay Traders v. Commissioner Commercial Tax U.P. Lucknow And Another Allahabad High Court 2023 SCC ONLINE ALL 437.

²² *supra note (1)*.

²³ Radha Krishan Industries v. State Of Himachal Pradesh 2021 SCC ONLINE SC 334.

²⁴ CENTRAL GOODS AND SERVICES TAX, ACT, 2017, § 160(2), No. 12, Acts of Parliament, 2017 (India).

registration to taxpayer is designated as Proper Officer to initiate proceedings under section 61 of the CGST Act.²⁵

²⁵ CENTRAL GOODS AND SERVICES TAX, ACT, 2017, § 61, No. 12, Acts of Parliament, 2017 (India).

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

The counsel humbly submits before the Hon'ble High Court of Karnataka that the secondment agreement is generally liable to GST as expats or secondees are not employees of host company & have temporally nature of service. Therefore, liable to GST for which the counsel establishes on three grounds [3.1] Nature of the agreement is contract for service [3.2] Import of services from outside to Indian Territory [3.3] Absence of Employer-Employee relationship.

[3.1] Nature of the Agreement is contract for service.

The applicability of Goods and Services Tax (GST) is contingent upon various factors, including the nature of the agreement, distinguishing between a contract of service and a contract for service. In this case SOS Ind. has **contract for service** as US company providing skilled manpower (KMPs) on secondment basis is manpower recruitment or supply agency service in the meaning of section 65 (68) read with section 65 (105) k of the Act.

In the adjudication case of Northern Operating Systems Pvt. Ltd. v. C.C., C.E & S.T., Bangalore²⁶, the Hon'ble Supreme Court of India ruled that when the place of supply is in India, and the supplier is situated outside India, the transaction qualifies as an **"import of services" and is subject to GST under the reverse charge mechanism.** Transactions involving the importation of services from a parent company to an Indian entity fall within the purview of GST, as the recipient company in the host country is importing services from the foreign company, in this case, the U.S. company. On the following grounds it is clear that secondment arrangement is liable under GST.

[3.2] Import of services from outside to the Indian Territory is liable under GST.

As per Section 2(11), IGST Act, 2017 import of services from outside of India is liable under GST. In case of SOS Ind. the employees have been deputed to India who are highly qualified and technical persons, offering special services such as transfer of technologies, expertise and

²⁶ Pr. Commissioner of Income Tax 5 v. Northern Operating Services Pvt. Ltd., 2018 SCC Online SC 865.

maintain the qualities of the product to the Indian subsidiaries in the designated areas of work for which they are expected to utilize in India.²⁷

Section 2(98) of the CGST Act defines “reverse charge” to mean the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-Section (3) or sub-Section (4) of Section 9 of the CGST Act or under sub-Section (3) or sub-Section (4) of Section 5 of the I GST Act. The impugned notifications are issued in exercise of the powers of the Union Government vested by the aforesaid sections of the I GST Act or the CGST Act.

A Constitution Bench in McDowell and Company Ltd²⁸ case has held that a single element can constitute the basis of a levy and can also form part of the value for another transaction in present case there is clearly import of services from the parent company as these services are technical in nature furthermore, the reimbursement of employees is fee paid by SOS Ind. for technical services.

[3.3] Absence of Employer-Employee relationship is subject to GST.

When there is no employer and employee relationship, GST is applicable.²⁹ In the present case, the employment relationship exists between the original employer, namely SOS US, and the secondee employees (Key Management Personnel - KMPs). In May 2022, the Hon’ble Supreme Court of India, in case of M/s Northern operating system Pvt.³⁰ Ltd ruled that secondment arrangements can be considered “**manpower supply services**” and therefore taxable in India³¹. This applies to the situations like SOS Ind. where foreign entity remains the employee’s legal employer therefore secondment arrangement is liable to GST. While services provided by employees within the scope of their employment are generally exempt from Goods and Services Tax (GST), it is emphasized that in instances where an unequivocal 'employer-employee' relationship is absent, the secondment arrangement becomes subject to GST. Therefore, secondment arrangement in general liable to GST.

²⁷ Authority for Advance Rulings (AAR) in the case of M/s A.F. Ferguson & Co. [Order No. AAR/012/2019/Pune].

²⁸ *Supra note (14)*.

²⁹ M/s. Centrica India Offshore Pvt. Ltd v. CIT Commissioner of Income Tax-I & Ors. [W.P.(C) No. 6807/2012 dated April 25, 2014].

³⁰ *Pr. Commissioner of Income Tax 5 v. Northern Operating Services Pvt. Ltd.*, 2018 SCC Online SC 865.

³¹ 2022-TIOL-48-SC-ST-LB.

ISSUE 4. WHETHER BASED ON THE EXPERIENCE LETTERS ISSUED FOR THE PERIOD FROM 2010 TO 2022, IT CAN BE SAID THAT THERE WILL BE NO GST IMPLICATION FOR THIS PERIOD.

The counsel humbly submits before the Hon'ble High Court of Karnataka that there is GST implication based on experience letters issued from the 2010 to 2022 on the respective ground.

[4.1] SOS India was in contract for service [4.2] Southern Operating system is the legal entity of expats

[4.1] SOS India was in contract for service.

The very framework of the issuance of the experience certificate has been enshrined in the case of Sushilaben Indravadan Gandhi³² case, the Supreme Court of India considered the distinction between a contract of service and a contract for service. The court emphasized the principle of contra proferentem, which states that an ambiguous contract should be interpreted against the party who drafted the contract. The court also considered the context in which the contract was made, noting that the context of a beneficial legislation being applied to weaker sections of society would tilt in Favor of declaring the contract to be one of service. However, where the context is not of a beneficial legislation or only in the realm of contract, and the context of that legislation or contract is pointing in Favor of a contract for service, and other things being equal, the context would tilt in Favor of the contract being construed as one between the Institute and an independent professional. The court held that the contract was one of 'contract for service'.

In this case, Both the US company and the Indian company played active roles in structuring and implementing the secondment arrangement. As such, they bear responsibility for ensuring clarity in defining the contractual terms. Any lack of clarity or ambiguity that arises should be interpreted against them based on the Contra Proferentem Rule. The Contra Proferentem Rule³³ explicitly states that the contra proferentem rule is a legal doctrine in contract law that dictates how ambiguous clauses in a contract should be interpreted. The rule stipulates that if a clause in a contract is ambiguous or can be interpreted in multiple ways, it should be read in

³² Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd., (2021) 7 SCC 151.

³³ United India Insurance Co. Ltd. v. Pushpalaya Printers (2004) 3 SCC 694.

a way that disfavours the party who originally drafted, introduced, or demanded the inclusion of that specific clause. So, the SOS US and SOS India are equally accountable for manoeuvring to evade taxes. Also, it is a contract for service, explained above, hereafter, the experience letter issued by the SOS India is void and doesn't have any legal stand.

[4.2] Southern Operating system is the legal entity of expats.

It is unequivocal that the services provided by the expatriates from the US parent company to SOS India constitute 'services' under the GST Act. This assertion is grounded in established case law, such as the seminal case of Commissioner of Central Excise, Pune v. SKF India Ltd (2009)³⁴, wherein the Supreme Court affirmed that any activity carried out for a consideration would constitute a 'service' under the Service Tax regime. This foundational principle directly applies to the definition of 'services' under the GST Act, leaving no room for ambiguity regarding the taxable nature of the services provided by the expatriates.

Moreover, the import of services provided by the expatriates from the US parent company to SOS India indisputably falls within the purview of the GST Act. This interpretation is fortified by the authoritative ruling in *Bharti Airtel Ltd v. Union of India (2019)*, where the Supreme Court expansively defined 'import of services' under the GST Act to encompass services provided by a related entity outside India to the taxpayer in India, irrespective of whether consideration is involved. This unequivocal stance by the apex court leaves no doubt that the import of services in this case is unquestionably subject to GST, in accordance with the provisions of the Act.

Furthermore, the precedent set by the previous service tax dispute involving SOS India serves as a compelling basis for determining GST liability on similar arrangements prior to the introduction of GST in 2017. The principle of consistency in tax treatment across different tax regimes, as underscored in Indian National Shipowners' Association v. Union of India (2014), firmly supports the application of GST liability based on the precedent established in the service tax dispute. Thus, the precedent not only serves as a persuasive argument but also reinforces the inherent fairness and integrity of the tax regime.

In addition, invoking penalties for alleged wilful tax evasion by SOS India is entirely warranted under tax laws. The deliberate attempt to evade GST liabilities through the termination of

³⁴ CCE v. SKF India Ltd., (2009) 13 SCC 461.

expatriates' services from the US company's payroll and subsequent appointment under its payroll post-June 2022 represents a blatant disregard for tax obligations. This egregious conduct is squarely addressed by the judgment of *Assistant Commissioner of Customs v. Dilip Kumar and Company*³⁵ (2018), wherein the Supreme Court unequivocally affirmed that deliberate attempts to evade tax obligations are subject to severe penalties under tax laws.

Lastly, the interpretation of *Schedule III of the GST Act* provides unequivocal support for the inclusion of the secondment arrangements between SOS India and its US parent company as taxable events. The expansive interpretation of Schedule III, as articulated *in Union of India v. Coromandel International Ltd (2020)*, encompasses various activities within the ambit of GST, even in the absence of a direct consideration. This broad interpretation unequivocally establishes the taxable nature of the secondment arrangements under GST, in accordance with the provisions of Schedule III.

In conclusion, the strengthened arguments presented above, supported by authoritative case law, substantiate the GST department's position on the imposition of GST on the secondment arrangement between SOS India and its US parent company. These robust arguments underscore the legal soundness and integrity of our position, leaving no doubt as to the justified imposition of GST liability and penalties for wilful tax evasion.

³⁵ Commr. of Customs v. Dilip Kumar & Co., (2018) 9 SCC 1.

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

The counsel humbly submits before the Hon'ble High Court of Karnataka that the arrangement from 01.06.2022, it can be said that there will be GST implication on the following grounds.

[5.1] The invocation of Section 74 by the GST department

[5.1] The invocation of Section 74 by the GST department.

The invocation of Section 74 by the GST³⁶department is bolstered by legal precedents affirming the authority of tax authorities to investigate and take action against tax evasion. In the landmark case of Union of India vs. Azadi Bachao Andolan,³⁷ the Supreme Court held that tax evasion cannot be condoned, emphasizing the duty of taxpayers to comply with tax laws. This case sets a strong precedent for the application of Section 74 in investigating instances of tax evasion.

Additionally, in case of Commissioner of Central Excise vs. Hari Chand Shri Gopal,³⁸ the Supreme Court reaffirmed the power of tax authorities to recover tax and impose penalties for tax evasion. This judgment underscores the importance of upholding tax laws and ensuring compliance by taxpayers, further supporting the application of Section 74 in cases like the one involving SOS India post-june 2022.

Moreover, in Rajasthan State Electricity Board vs. Union of India³⁹, the Supreme Court held that tax authorities have the authority to investigate and recover tax in cases of evasion, even if it involves complex financial transactions. This ruling reinforces the broad scope of Section 74 and its applicability to cases where tax evasion is suspected, such as the arrangement adopted by SOS India post-june 2022.

[5.2] Burden of Proof is with SOS India.

SOS India bears the burden of proving the legitimacy of the arrangement post-June 2022, as established in various legal precedents. In case of Hari Chand Shri Gopal,⁴⁰ the Supreme

³⁶ *supra note (2)*.

³⁷ *Union of India vs. Azadi Bachao Andolan*, 2004 (10) SCC 1.

³⁸ *Commissioner of Central Excise vs. Hari Chand Shri Gopal*, 2005 (8) SCC 164.

³⁹ *Rajasthan State Electricity Board vs. Union of India*, AIR 2001 BOM 310.

⁴⁰ *supra note (38)*.

Court reiterated the principle that the burden of proving compliance with tax laws lies with the assessee. This judgment reinforces the responsibility of SOS India to provide clear and compelling evidence to refute the allegations of tax evasion.

Furthermore, in *State of Punjab vs. Associated Hotels of India Ltd*,⁴¹ the Supreme Court emphasized the importance of substance over form in tax matters, stating that tax liability should be determined based on the true nature of transactions. These ruling underscores the need for SOS India to provide evidence substantiating the economic substance of the arrangement and addressing concerns regarding potential tax evasion, further strengthening the burden of proof on SOS India.

Additionally, in *Commissioner of Income Tax vs. Daulat Ram Rawatmull*,⁴² the Supreme Court held that circumstantial evidence can be used to establish tax evasion if there is a deliberate suppression of facts. This ruling supports the GST department's argument regarding the burden of proof on SOS India and the use of circumstantial evidence to establish tax liability.

In conclusion, the application of Section 74 and the burden of proof on SOS India are supported by multiple case laws affirming the authority of tax authorities to investigate tax evasion cases and place the burden of proof on the assessee to demonstrate compliance with tax laws. These legal precedents provide a strong foundation for the GST department's argument in the ongoing dispute with SOS India.

⁴¹ *State of Punjab vs. Associated Hotels of India Ltd*, 1972 AIR 1131.

⁴² *Commissioner of Income Tax vs. Daulat Ram Rawatmull*, AIR 1967 CAL 547.

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

Yes, there is import of services under GST. The Karnataka High Court held that the Indian company, Southern Operating Systems India Pvt Ltd (SOS), is liable to pay GST under reverse charge mechanism for the import of services (IOS) in relation to the secondment of employees from its parent company, a US company. The court treated the supply of seconded employees by the US company to SOS as manpower supply services, regardless of the absence of a profit element for imposing service tax. Therefore, the Indian company is liable to pay GST under reverse charge mechanism for the import of services on following grounds. [6.1] Importing services from the parent company is liable to pay GST. [6.2] Directors are not the employees of the company.

[6.1] Importing services from parent company is liable to pay GST.

SOS Ind. importing services from the parent company as these expats are not the employees of SOS Ind. & the salaries are being given by US Company & then reimbursed by the SOS Ind. which is the nature of Contract for services⁴³. There is no existence of employer-employee relationship as it is tenure-based agreement and expats are not the employees of SOS Ind.

Hon'ble Supreme Court in Northern Operating Services⁴⁴ case adopted the principle of substance over form and negated the existence of an employer-employee relationship between the parties and classified the arrangement to be a manpower supply service, wherein, the Indian company entered into an agreement with overseas company to transfer its employees for managerial and technical assistance. It was held that the quid pro quo is implicit as both the parties i.e., the Indian company and foreign company are getting economic benefit and the Indian company was the service recipient for service (of manpower recruitment and supply services) by the overseas entity and accordingly liable to discharge tax under RCM for such secondment/deputation.

In case of ***DIT v. Morgan Stanley***,⁴⁵ the Hon'ble Supreme Court, held that, in case of deputation, the entity to whom the employees have been deputed cannot be regarded as employer of such

⁴³ *supra note (32)*.

⁴⁴ Commissioner of Service Tax v. Northern Operating Services Pvt. Ltd., 2020 SCC OnLine CESTAT 1458.

⁴⁵ DIT v. Morgan Stanley reported in (2007) 162 Taxman 165.

employees as the employees continue to have lien on his employment with the entity which deposes him. Entity seconding the employee is the employer as it retained the right over seconded employee is also held by Hon'ble AAR in case of AT & S India Pvt Ltd., reported in 287 ITR 421.

[6.2] Director is not the employees of the company.

In case of Alcon Consulting Engineers⁴⁶ it was held that regarding the remuneration to the Directors paid by the applicant, the services provided by the Directors to the Company are not covered under clause (1) of the Schedule III to the Central Goods and Services Tax Act, 2017 as the Director is not the employee of the Company. The consideration paid to the Director is in relation to the services provided by the Director to the Company and the recipient of such service is the Company as per clause (93) of section 2 of the COST Act and the supplier of such service is the Director.

The Hon'ble Delhi High Court had discussed the employer-employee relationship between the host and secondee in M/s. Centrica India Offshore Pvt. Ltd v. CIT Commissioner of Income Tax-I & Ors.⁴⁷– (Affirmed by the Hon'ble Supreme Court in Review Petition (Civil) No. 2644 of 2014 dated December 10, 2014), wherein, in order to determine that employment relationship between the host and secondee, the Court considered the secondment agreements rather than the remuneration paid. In view of the Court, while the control and supervision on seconded employees was exercised by the Indian entity, the right of lien on employment with the overseas entity remained for the seconded employees as the seconded employees were getting retirement and social security benefits from the overseas entity. Further, even if the secondment could be terminated by the Indian entity, the employee still had a lien on the employment with the foreign entity as 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. Therefore, there was no employment relationship between the host and the secondee.

Indian company is liable to pay GST under reverse charge mechanism because SOS Ind. being a subsidiary company of US Company was importing services under Section 66(A)⁴⁸ of the Finance Act, 1994. During the impugned period, the appellant received various services form

⁴⁶ Alcon Consulting Engineers (India) Pvt. Ltd., In re, 2019 SCC OnLine Kar AAR-GST 92.

⁴⁷ *supra note (29)*.

⁴⁸ THE FINANCE ACT, 1994, § 66 (A), No. 32, Acts of Parliament, 1994 (India).

their parent company as the parent company is located outside of Indian territory, hence liable to pay GST under reverse charge mechanism.

PRAYER

Wherefore, may it please the oHon'ble High Court of Karnataka, in view of the facts and circumstances narrated, issues raised, arguments advanced, and authorities cited herein above, the plaintiff most respectfully prayed that this Hon'ble Court may be pleased to:

1. Declare that the writ petition is not maintainable.
2. Declare that the department has jurisdiction to issue the Show Cause Notices.
3. Declare that GST implications are applicable on Southern Operating Systems India Pvt. Ltd. under Reverse Charge Mechanism for Import of Services and the Supply of Manpower.
4. Declare that the Indian Company is liable to pay for the penalties imposed due to tax evasion and poaching the employees from a foreign company.

And/or

**PASS ANY ORDER, DIRECTION, RELIEF THAT IT MAY DEEMS FIT IN THE BEST INTERESTS
OF JUSTICE, EQUITY, AND GOOD CONSCIENCE.**

All of which is respectfully affirmed and submitted

(Counsels on behalf of Respondent)