

TEAM CODE TC-14

**21ST SURANA AND SURANA NATIONAL CORPORATE LAW MOOT COURT
COMPETITION 2024
JSS LAW COLLEGE, MYSURU**

Before
**THE HON'BLE HIGH COURT OF KARNATAKA
AT BENGALURU
WP NO. 50000 OF 2024 & WP NO. 50001 OF 2024
FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA**

IN THE MATTER BETWEEN

SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD.

BENGALURU

...PETITIONER

VS.

ADDITIONAL COMMISSIONER OF GST AND OTHERS

BENGALURU

...RESPONDENT

WRITTEN SUBMISSION ON BEHALF OF RESPONDENT

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&	And
¶	Paragraph
%	Percent
AIR	All India Reporter
Anr	Another
BOM	Bombay High Court
CAL	Calcutta High Court
Co.	Company
DEL	Delhi
DRJ	Delhi Reported Judgments
Deptt.	Department
edn.	Edition
Hon'ble	Honourable
KB	King Bench
i.e.	That is
ITR	Income Tax Report
INR	Indian Rupee

Ltd.	Limited
GST	Goods and Services Tax
Mrs.	Missus
ONGC	Oil and Natural Gas Corporation
Ors.	Others
Para	Paragraph
Pvt.	Private
RAJ	Rajasthan
S	Section
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
v.	Verses
WLR	Weekly Law Report
CST	Commissioner of Service Tax
W.B.	West Bengal
CIT	Commissioner of Income Tax

NLRC	National Labor Relations Commission
CST	Commissioner for Service Tax
AAR-GST	Authority for Advance Rulings- Goods and Services Tax
ALL E. R	All England Reports
LLR	Labour Law Reporter
EWHC	England and Wales High Court
The U.S.	United States of America
&	And
¶	Paragraph
%	Percent

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STATEMENT OF JURISDICTION

The RESPONDENTS humbly submit to the jurisdiction of the Hon'ble High Court of Karnataka, in the matter of *Southern Operating Systems India Pvt. Ltd. vs. Additional Commissioner of GST*, under Article 226 of the Constitution of India.

The present memorial puts forth the facts, contentions and arguments in the present case.

STATEMENT OF FACTS

THE SECONDMENT ARRANGEMENT

Southern Operating Systems India ('Assessee'), a Bengaluru subsidiary of Southern Operating Systems Inc. ('overseas entity'), established in 2010 to leverage the expanding software market in India and Asia-Pacific, entered into a secondment agreement with the parent company where it was agreed that the Assessee would incur the salary and other expenses of the seconded employees. The expats were legally the employees of the overseas entity but the Assessee was deemed to be the employer for economic purposes.

Initially, the overseas entity covered the salaries of expats for the Assessee. After two years once the subsidiary became profitable, it started reimbursing the overseas entity for these expenses. It also repaid the overseas entity for the expenses incurred during the first two years of its inception.

THE TAX DEMAND UNDER THE SERVICE TAX REGIME

In May 2017, the Revenue raised a demand for tax under the reverse charge mechanism ('RCM') for the period from April 2012 to March 2017. The Assessee challenged the show cause notices ('SCN') before the Karnataka High Court which upheld the Revenue's demand to treat the secondment arrangement as manpower supply services and quashed the notices to the extent they exceeded the usual limitation period under the Finance Act, 1994.

THE TAX PLANNING

The introduction of the Goods and Services Tax ('GST') in July 2017, prompted the overseas entity to terminate the expats and transfer them to the Assessee's payrolls by issuing new appointment letters in June 2022 for the entire secondment period to benefit from Indian social security policies. From 01st June 2022, if the Assessee required an expat, the overseas entity would terminate their services, and then it would subsequently re-hire them.

THE TAX DEMAND UNDER THE GST REGIME

The Revenue demanded GST for the secondment arrangement until 2022 and the subsequent arrangement from 1st June 2022 to 31st December 2023, alleging tax evasion. After a reply from the Assessee refuting the demand, the department confirmed the demand in March 2024. Thereafter, the Assessee filed two writ petitions before the High Court of Karnataka challenging the demands of the department.

ISSUES RAISED

ISSUE I

WHETHER THE PRESENT WRIT PETITION IS MAINTAINABLE?

ISSUE II

WHETHER THERE IS A GST IMPLICATION ON THE SECONDMENT ARRANGEMENT FOR THE PERIOD
UNTIL 2022?

ISSUE III

WHETHER THERE IS A GST IMPLICATION FROM 01.06.2022 ONWARDS?

ISSUE IV

WHETHER THE MEASURES TAKEN BY THE ASSESSEE AMOUNT TO TAX EVASION?

SUMMARY OF ARGUMENTS

ISSUE [1] THE PRESENT WRIT PETITION IS NOT MAINTAINABLE

It is submitted that the present writ petition is not maintainable as there are no substantial questions of law involved in the present matter and the application of the doctrine of alternative remedy. The Assessee has not pursued other equally efficacious remedies available, and there are no extraordinary circumstances warranting consideration of the petition. Notably, there has been no infringement of the Assessee's fundamental rights, and the proceedings initiated by the Revenue adhere to principles of natural justice. Moreover, the exercise of power by the Revenue is within its jurisdiction, evident from the timely issuance of the show cause notice and the exercise of its power to issue such notices.

ISSUE [2] THERE IS GST IMPLICATION ON THE SECONDMENT ARRANGEMENT

It is submitted that there is GST is leviable on the secondment arrangement for the period 2017-2022 as there does not exist an employee-employer relationship between the Assessee and expats as the arrangement is of the nature of contract for service. Notably, the Assessee is not the real employer of the expats, payment of salary and social security benefits are not determinative factors, and reimbursement of salary and other expenses is deemed consideration. Moreover, the secondment arrangement is taxable under the import of services under the category of manpower supply.

ISSUE [3] THERE IS GST IMPLICATION FOR THE PERIOD FROM 01.06.2022 ONWARDS

It is submitted that there will be GST implication from 1.06.2022 to 31.12.2023 because there is no employee-employer relationship as there is a contract of service between the Assessee and expats and the requirements of the control test are not met. The services provided by expats are under the scope of supply as the services provided are import of services which are classified under the category of manpower supply.

ISSUE [4] THE MEASURES UNDERTAKEN BY THE ASSESSEE AMOUNT TO TAX EVASION

It is humbly submitted that, in this matter before the Hon'ble High Court, the measures undertaken by the Assessee to avoid taxation under the GST regime on the secondment arrangement, amount to tax evasion as the tax planning has been done unlawfully because the colourable device has been used for tax avoidance and doctrine of separate legal entity has been abused to evade tax. It is further submitted that tax authorities must consider the substance of the transaction over form. Moreover, the Assessee is liable to pay the maximum penalty.

ARGUMENTS ADVANCED

ISSUE 1: THE PRESENT WRIT PETITION IS NOT MAINTAINABLE

¶ 1 It is submitted before the Hon'ble High Court that the present writ petition is not maintainable as there are no substantial questions of law involved in the present matter [I]; the doctrine of alternate remedy is applicable [II].

I. THERE ARE NO SUBSTANTIAL QUESTIONS OF LAW INVOLVED IN THE PRESENT MATTER

¶ 2 The test for the substantial question of law is whether the issue involved is of public importance or substantially affects the rights of the parties involved given that such issue has not been finally settled before the court in question or by a higher court.¹ Thus, a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision or the rights of the parties before it.²

¶ 3 It is humbly submitted that the judgement of the Hon'ble Apex Court *Northern Operating Systems*³ case has settled the debate regarding tax liability on secondment arrangement between an Indian entity and an overseas entity. Moreover, the definition of services and paragraph 4 of Schedule I read with section 7 of the CGST Act, 2017, clearly provides that the import of services from a related entity is a taxable service.⁴ Thus, the demand for the Revenue is legitimate and within the ambit of the Act. **Therefore**, it is submitted that there are no substantial questions of law involved in the present matter and the Hon'ble High Court should not entertain the present matter.

II. THE DOCTRINE OF ALTERNATIVE REMEDY IS APPLICABLE

¶ 4 The Respondent humbly submits before the Hon'ble High Court that the doctrine of alternative remedy is applicable in the present matter as the Assessee has not exhausted equally efficacious remedies available [A]; there are no extraordinary circumstances to entertain the present petition [B].

¹ *Sir Chunilal Mehta & Sons Ltd v Century Spg & Mfg Co Ltd* AIR 1962 SC 1314; *Hero Vinoth v Seshammal*, (2006) 5 SCC 545.

² *Nazir Mohamed v J Kamala* (2020) 19 SCC 57.

³ *M/s CC CE & ST, Bangalore (Adjudication) v Northern Operating Systems Pvt. Ltd.* [2022] (61) G.S.T.L. 129 (SC).

⁴ The Central Goods and Services Tax Act 2017, s. 7(1)(2).

A. *The Assessee has not exhausted equally efficacious remedies available*

¶ 5 The ‘adjudicating authority’ is defined as any authority that is authorized to adjudicate under the GST law except the ones stipulated in the provision.⁵ Further, section 107 of the Act provides that any appeal against the orders passed by an adjudicating authority lies before the appellate authority.⁶ Furthermore, any appeal against the order of appellate authority lies before the High Court under section 117 of the Act.⁷

¶ 6 It is submitted that the Revenue confirmed the demand raised in the SCNs issued on 31.01.2024 with appropriate reasons⁸. The Assessee had an efficacious remedy under the resolution mechanism enshrined in Chapter XVIII of the CGST Act, 2017.⁹ **Therefore**, the Hon’ble High Court must not entertain the present petition as there exists an equally efficacious alternative remedy under the Act.

B. *There are no extraordinary circumstances to entertain the present petition*

¶ 7 It is a well-settled principle of law that the mere availability of an alternative remedy would not prohibit the High Court from entertaining a writ petition under Article 226 of the Constitution.¹⁰ Despite non-exhaustion of alternative remedy, the High Court may exercise its writ jurisdiction in at least three extraordinary circumstances, namely, where a writ petition has been filed to enforce Fundamental Rights, where there has been a breach of the principle of natural justice, or proceedings lack jurisdiction entirely or the vires of an Act is challenged.¹¹

¶ 8 The High Court while exercising its writ jurisdiction, having regard to the facts of the case, has a discretion to entertain or not to entertain a petition under Article 226 of the Constitution.¹²¹³ As a rule of policy, convenience, and discretion, the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the court would not normally exercise its jurisdiction.¹⁴ The High Court must not exercise its writ jurisdiction based on irrelevant or extraneous considerations.¹⁵

⁵ The Central Goods and Services Tax Act 2017, s 2(4).

⁶ The Central Goods and Services Tax Act 2017, s 107.

⁷ The Central Goods and Services Tax Act 2017, s 117.

⁸ The Moot Proposition, ¶ 12.

⁹ The Central Goods and Services Tax Act 2017, ch xviii.

¹⁰ *UP Power Transmission Corpn Ltd v CG Power & Industrial Solutions Ltd* (2021) 6 SCC 15.

¹¹ *Whirlpool Corporation v Registrar of Trademarks Mumbai* (1998) 8 SCC 1; *Harbanslal Sahnia v Indian Oil Corpn Ltd* (2003) 2 SCC 107.

¹² *State of Himachal Pradesh v Gujarat Ambuja Cement Ltd* AIR 2005 SC 3856.

¹³ *Godrej Sara Lee Ltd v Excise & Taxation Officer* 2023 SCC OnLine SC 95.

¹⁴ *L & T Hydrocarbon Engineering Ltd. v State of Karnataka* [2020] 117 taxmann.com 569 (Karnataka); *Hind Logistic v State of UP* [2018] 93 taxmann.com 337 (Allahabad).

¹⁵ *Union of India v WN Chanda* AIR 1993 SC 1082.

¶ 9 It is humbly submitted before the Hon'ble High Court that the present matter cannot be entertained by the court on the following grounds: there has been no infringement of the fundamental rights of the Assessee [i]; the proceedings are in consonance with the principles of natural justice [ii]; the proceedings initiated by the Revenue are within their jurisdiction [iii].

i. *There has been no infringement of the fundamental rights of the Assessee*

¶ 10 The revenue has the power to issue notice to a taxable person who has not paid, has short paid, or has been erroneously refunded, wrongly availed or utilized ITC due to fraud, wilful misstatement, or suppression of facts to evade tax.¹⁶ Moreover, the adjudicating authority has the power to decide on matters under the purview of the CGST Act, 2017.

¶ 11 Where discretion is conferred on the executive authorities, such discretion must be exercised within the four corners of the law.¹⁷ The statutory authorities are obligated to follow the due procedure while interfering with the legal and constitutional rights of a person as per Article 21 of the Constitution.¹⁸ Further, the principle of reasonableness read in Article 19 of the Constitution¹⁹ ensures fairness and non-arbitrariness.²⁰

¶ 12 In the present case, the Revenue has functioned well within the four corners of the law while issuing the show cause notices and confirming the tax demand. The department provided the Assessee with the opportunity to be heard through a written reply and gave a well-reasoned order while confirming the tax demand.²¹ **Therefore**, it is submitted that the present petition must not be entertained as there is no infringement of the fundamental rights of the Assessee.

ii. *The proceedings are in consonance with the principles of natural justice*

¶ 13 Section 75(4) of the CGST Act lays down a requirement that accords an opportunity for a hearing to be given to a person against whom any adverse action is contemplated or makes a written request for a hearing.²² It is established that the opportunity for a hearing can be provided either through written representation or through a personal hearing.²³ Even if there is non-adherence to the statutory requirement outlined in section 75(4), a writ petition based on

¹⁶ The Central Goods and Services Tax Act 2017, s 74.

¹⁷ *SG Jaisinghani v Union of India* (1967) 65 ITR 34.

¹⁸ The Constitution of India 1950, a 21.

¹⁹ The Constitution of India 1950, a 19.

²⁰ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

²¹ The Moot Proposition, ¶ 12.

²² The Central Goods and Services Tax Act 2017, s 75(4); The Karnataka Goods and Services Tax Act 2017, s 75(4).

²³ *Ram Prasad Ganga Prasad v Assistant Commissioner* [2022] 137 taxmann.com 406 (Calcutta).

such grounds would be subject to dismissal owing to the availability of an equally efficacious alternative remedy.²⁴

¶ 14 In this instance, the Petitioner was given the opportunity to reply to the show cause notices and as they did not request a personal hearing and failed to demonstrate any legal requirement mandating such a hearing,²⁵ there is no basis for alleging a violation of the principles of natural justice. *In arguendo*, even if there is a non-compliance with the requirement to provide an opportunity for a hearing, then the High Court cannot exercise its writ jurisdiction. **Therefore**, the Hon'ble High Court should not entertain the present writ petition as the proceedings of the Revenue are in consonance with the principles of natural justice.

iii. *The proceedings initiated by the Revenue are within their jurisdiction*

¶ 15 It is submitted that the proceedings initiated by the Revenue within their jurisdiction as the show-cause notice for tax demand for the period 2017 to 2022 is well within the extended period of limitation [a]; the Revenue has exercised its powers to issue show-cause notices [b].

a. *The Show Cause Notice is well within the period of limitation*

¶ 16 The show cause notice can be issued three months before the end of the period of limitation i.e. three years from the due date for filing of annual return for the year to which the amount relates, in case there is no fraud.²⁶ Whereas in cases of fraud, willful misstatement, or suppression of facts, the notice must be sent six months before the maximum extendable period of limitation i.e. five years from the due date for filing of annual return for the year to which the amount relates.²⁷

¶ 17 It is submitted that the revenue has invoked the extended period of limitation owing to the fraudulent tax avoidance measures employed by the Assessee to evade taxation for the period from 01.07.2017 to 31.05.2022 and 01.06.2022 to 31.12.2023.²⁸ The due date for filing of annual returns has been extended for 2017-18, 2018-19, and 2019-20, to 07.02.2020²⁹,

²⁴ *K Periyasamy v Deputy State Tax Officer* [2023] 152 taxmann.com 25 (Madras).

²⁵ The Moot Proposition, ¶ 12.

²⁶ The Central Goods and Services Tax Act 2017, s 73 (10).

²⁷ The Central Goods and Services Tax Act 2017, s 74 (10).

²⁸ The Moot Proposition, ¶ 14.

²⁹ Department of Revenue, Ministry of Finance, *Notification No. 6/2020-Central Tax* (F. No. 20/06/07/2019-GST, 03.02.2020).

31.12.2020³⁰, and 31.03.2021³¹, respectively.³² Hence, the said demand for GST is clearly within the extended period of limitation of a period of five years from the due date for furnishing of annual return for the financial year.

¶ 18 **Therefore**, the proceedings initiated against the secondment arrangement between the overseas entity and Assessee are well within the period of limitation provided under the Act.

b. *The Revenue has exercised its powers to issue show-cause notices*

¶ 19 The proper officer has the power to issue a show cause notice on the person chargeable with tax which has not been paid or short-paid at least six months before the expiry of the extended period of limitation.³³ If the person chargeable pays the tax along with interest and a 25 percent penalty within thirty days of the service of notice, then the proceedings are deemed to be concluded.³⁴ The proper officer, considering the representation made by the Assessee, shall determine the tax liability along with interest and penalty due and issue an order.³⁵

¶ 20 It is submitted that the Revenue issued the show cause notices on 31.01.2024 in consonance with section 74 of the CGST Act, 2017.³⁶ The Assessee was given a proper opportunity to be heard and the revenue confirmed the demand based on the reply received. Moreover, the order was passed in March 2024 within the period of limitation provided in section 74(10). **Therefore**, the exercise of powers is *intra vires* the Act and the proceedings initiated by the revenue are well within the jurisdiction.

³⁰ Department of Revenue, Ministry of Finance, *Notification No. 80 /2020 - Central Tax* (F. No. CBEC-20/06/09/2019-GST, 28.10.2020).

³¹ Department of Revenue, Ministry of Finance, *Notification No. 6/2020-Central Tax* (F. No. CBEC-20/06/13/2020-GST, 28.02.2021).

³² Arpit Haldia and Mohd Salim, *GST Law & Practice* (5th edn, Taxmann 2023).

³³ The Central Goods and Services Tax Act 2017, s 74 (2).

³⁴ The Central Goods and Services Tax Act 2017, s 74 (8).

³⁵ The Central Goods and Services Tax Act 2017, s 74 (9).

³⁶ The Moot Proposition, ¶ 12.

ISSUE 2: THERE IS GST IMPLICATION ON THE SECONDMENT ARRANGEMENT

¶ 21 There is GST implication on the secondment arrangement from 2017 to 2022 as, there does not exist an employee-employer relationship between the Indian company and the secondees [I]; the secondment arrangement is taxable under import of services [II].

**I. THERE DOES NOT EXIST AN EMPLOYEE-EMPLOYER RELATIONSHIP
BETWEEN THE INDIAN COMPANY AND THE SECONDEES**

¶ 22 There does not exist an employee-employer relationship between the Indian company and the secondees as it is a contract for service [A]; Assessee is not the real employer [B]; payment of salary and social security benefits are not determinative factors [C]; reimbursement of salary and other expenses is deemed consideration [D].

A. The secondment arrangement is a contract for service

¶ 23 For a contract of service, the following criteria need to be satisfied: the master's power of selection of servant, payment of remuneration, right to control the method of doing the work, and the right of suspension.³⁷ However, there can be a contract of service where the master cannot control the manner in which the work is to be done.³⁸ When the people are not under the control of the management, they cannot be termed as employees.³⁹

¶ 24 In the present case, the control regarding payment of salary and other expenses, selection of the expats for secondment, and right of termination from employment lie with the overseas entity as the expats were guided by their technical requirements and it also controlled the method of their work.⁴⁰ **Therefore**, the secondment arrangement is a contract for service and is taxable under the CGST Act, 2017.

B. The Assessee is not the real employer

¶ 25 The real employer is the one that issues appointment letters to the employees, who in turn work for the benefit of such employer.⁴¹ The three-tier test laid down is the remuneration paid by the employer, a sufficient degree of control by him, and who ultimately makes a profit or loss to determine whether a business is being run for the employer or on one's account.⁴²

³⁷ *Short v J & W Henderson Ltd* [1945] 79 L.I.L.Rep.271.

³⁸ *Cassidy v Ministry of Health* [1951] 2 KB 343.

³⁹ *Shri Chintaman Rao v State of MP* [1958] SCR 1340.

⁴⁰ The Moot Proposition, ¶ 5.

⁴¹ *M/s Flipkart Internet Private Limited v. DCIT* [2022] 139 taxmann.com 595 (Karnataka).

⁴² *Indian Banks Association v Workmen of Syndicate Bank* [2001] AIR SC 946.

¶ 26 It is submitted that the employer-employee relationship exists when control is in the form of rules that merely serve as guidelines towards the achievement of results without dictating the means or methods to attain them. An employer-employee relationship exists when control is in the form of rules that bind the worker to adopt a methodology to attain a specified result.⁴³

¶ 27 In the present case, the rights such as the secondment of its employees were retained by an overseas entity.⁴⁴ The ultimate profit or loss is of the overseas entity as the Assessee is its subsidiary with almost 100% equity.⁴⁵ **Therefore**, the secondment arrangement is not liable to GST as the Assessee cannot be termed as the real employer.

C. *Payment of salary and social security benefits are not determinative factors*

¶ 28 The expenses of social security benefits are an important test of determining employer-employee relationship. Where social security contributions and salary in respect of the expatriate employees are ultimately paid by the overseas company and later reimbursed by the Indian company, factors like operational control, social security benefits, and other emoluments are limited and sparse which cannot displace the and established context of employment abroad.⁴⁶

¶ 29 In the present case, the social security and other emoluments provided by the overseas entity to the secondee, and more generally, its employees, still govern the secondee in its relationship with Assessee as it holds almost 100 percent of the company.⁴⁷ The overseas entity, for the first two initial years, paid the salary and other emoluments to the expats.⁴⁸ Whilst Assessee may have operational control over these persons in terms of the daily work, and may be responsible for their failures as per the secondment agreement, however such limited factors cannot make the Assessee the employer of the expats who are key managerial persons in the overseas entity and receive salary and other benefits in their regular US salary accounts.⁴⁹

¶ 30 **Therefore**, there is no employer-employee relationship between the expats and the Assessee as the social security benefits are provided by the overseas entity to the expats.

⁴³ *Insular Life Assurance Co Ltd v NLRC* [1989] G.R. No. 84484.

⁴⁴ The Moot Proposition, ¶ 5.

⁴⁵ The Moot Proposition, ¶ 1.

⁴⁶ *Centrica India Offshore P Ltd v CIT* 2014 SCC OnLine Del 2739.

⁴⁷ The Moot Proposition, ¶ 1.

⁴⁸ The Moot Proposition, ¶ 3.

⁴⁹ The Moot Proposition, ¶ 4.

D. Reimbursement of salary and other expenses is deemed consideration

¶ 31 Any transaction involving the supply of goods or services without consideration is not a supply, barring a few exceptions, in which a transaction is deemed to be a supply even if it is without consideration.⁵⁰ It is submitted that the method of disbursement of salary cannot determine the nature of the transaction.⁵¹ In a secondment arrangement, if the overseas entity is regarded as the employer, the arrangement is treated as a service provided by the overseas entity and is subject to taxation.⁵²

¶ 32 In the present case, as per the secondment arrangement, the Assessee reimbursed the salary and other expenses of the expats to the overseas entity from its inception till 31.05.2022.⁵³ Throughout this period, the expats were included in the payroll of the overseas entity, thus the Assessee is subject to taxation under the CGST Act, 2017.⁵⁴ **Therefore**, there exists tax liability on the secondment arrangement between the Assessee and the overseas entity from the period of 01.07.2017 to 31.05.2022 owing to the consideration involved in the transaction.

II. THE SECONDMENT ARRANGEMENT IS TAXABLE UNDER IMPORT OF SERVICES

¶ 33 Service means 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 currency or denomination to another form, currency or denomination for which a separate consideration is charged.⁵⁵ Supply includes the import of services from a related person in the course or furtherance of business.⁵⁶

¶ 34 Section 2(11) of IGST Act, 2017⁵⁷ states that import of services means the supply of service where: (i) the supplier of service is located outside India; (ii) the recipient of service is located in India and; (iii) the place of supply of service is in India. When these conditions are met, it comes under the ambit of import of services,⁵⁸ “place of supply” shall be determined as per the location of the recipient.⁵⁹

⁵⁰ The Central Goods and Services Tax Act, 2017

⁵¹ *Honeywell Technology Solutions Lab (P) Ltd v CST* Final Order No. 20208 of 2020.

⁵² *M/s CC CE & ST, Bangalore (Adjudication) v Northern Operating Systems Pvt. Ltd.* [2022] (61) G.S.T.L. 129 (SC).

⁵³ The Moot Proposition, ¶ 4.

⁵⁴ The Moot Proposition, ¶ 9.

⁵⁵ The Central Goods and Services Tax Act 2017, s 2(102).

⁵⁶ The Central Goods and Services Tax Act 2017, sch i.

⁵⁷ The Integrated Goods and Services Tax Act 2017, s 2(11).

⁵⁸ *In re IVL India Environmental R & D Private Limited GST-ARA-50/2020-21/B-108.*

⁵⁹ The Integrated Goods and Services Act 2017, s 13(2).

¶ 35 In the present case, the services of the expats are being imported from a related overseas entity. The expats brought their expertise and knowledge from the overseas entity.⁶⁰ As the recipient is located in India, the place of supply will also be India. **Therefore**, the secondment arrangement is taxable under the import of services from related persons in the course or furtherance of business under the reverse charge mechanism.

⁶⁰ The Moot Proposition, ¶ 1.

ISSUE 3: THERE IS GST IMPLICATION FOR THE PERIOD FROM 1.06.2022 ONWARDS

¶ 37 It is submitted that there will be GST implication from 1.06.2022 to 31.12.2023 because, there is no employer-employee [I]; the services provided by expats are under scope of supply [II].

I. THERE IS NO EMPLOYER-EMPLOYEE RELATIONSHIP

¶ 38 There is no legal and economic control of the expats with the Assessee as, there is a contract for service between the Assessee and expats [A]; the requirements of the control test are not met [B].

A. There is a contract for service between the Assessee and expats.

¶ 39 It is submitted that the master should have the right to suspend or dismiss the employee.⁶¹ The relationship between master and servant is determined not only by the right of the master to supervise and control the work but also by directing the manner in which the work shall be done.⁶² The hirer should have the authority to control the manner of execution of the act in question.⁶³

¶ 40 It is further, submitted that when a worker or group of workers labours to produce goods or services which are for the business of another person, then he is the employer of such worker or group of workers. Such an employer has economic control over the workers' subsistence, skill and continued employment and workers will automatically be laid off if the employer ceases to use their goods or services.⁶⁴

¶ 41 In the present case, the Assessee did not have direct supervision on the expats as they were being terminated from the home company, thereafter the Assessee re-hired the expats who usually were seconded for at least five years.⁶⁵ This innovative arrangement was employed to evade the tax liability, however, in reality, the expats are working for the Assessee for a temporary period. **Therefore**, there is no employer-employee relationship with the expats as the rights of the employer are not vested with the Assessee.

⁶¹ *ibid.*

⁶² *Dharangadhara Chemical Works Ltd v State of Saurashtra* [1957] AIR 264.

⁶³ *Mersey Docks and Harbour Board v Coggins & Griffith Ltd* [1952] SCR 696, 702.

⁶⁴ *Hussainbhai v Alath Factory Thezhilali Union* [1978] AIR 1410.

⁶⁵ The Moot Proposition, ¶ 11.

B. The requirements of the control test are not met

¶ 42 The control test postulates that the employer-employee relationship gets established when the hirer has control over the work and the manner in which it is to be done.⁶⁶ The general rule is that the greater the control or the right of control over the individual, the more likely he is to be an employee.⁶⁷ When a direct application of control and supervision cannot be exercised, it is ascertained whether the employer has the right to reject the final product.⁶⁸ The taxing authorities have to consider the “substance of the matter” and the legal nature of the transaction to determine its taxability.⁶⁹

¶ 43 In the present case, the expats were not under the direct control of the Assessee and the right to control the manner of work and decide the outcome of the service remained with the overseas entity as the transaction was in the nature of secondment.⁷⁰ **Therefore**, the essentials of the control test are not met.

II. THE SERVICES PROVIDED BY EXPATS ARE COVERED UNDER THE SCOPE OF SUPPLY

¶ 44 The services provided by expats are covered under the scope of supply as, the services provided constitute import of services [A]; the services provided are classified under manpower supply [B].

A. The services provided constitute the import of services

¶ 45 According to section 7(b) of the GST Act, supply includes the import of services in the course or furtherance of business even if there is no consideration involved.^{71,72} When support services are received by the subsidiary company in India, without whose expertise and experience it cannot function, it will be termed as import of services.⁷³ Further, where the services are being provided without any consideration, it qualifies as supply under Para 2 Schedule I as the supply is between related persons.⁷⁴

¶ 46 Persons shall be deemed to be ‘related persons’ if any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares

⁶⁶ *Dharangadhara Chemical Works* (n=21).

⁶⁷ *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] 160 CLR 16.

⁶⁸ *Birdhichand Sharma v Civil Judge Nagpur* [1961] AIR 644.

⁶⁹ *CCE v Acer India Ltd* [2004] AIR SC 4805.

⁷⁰ The Moot Proposition, ¶ 11.

⁷¹ The Central Goods and Services Tax Act 2017, s 7(b)

⁷² Taxmann, *GST Case Laws Digest* (2nd edn, Taxmann 2020).

⁷³ *IVL India Environmental R&D (P) Ltd, In re* 2022 SCC OnLine Mah AAR-GST 35.

⁷⁴ The Central Goods and Services Tax Act 2017, sch i para 2.

of both of them.⁷⁵ Further, IGST will be payable on a reverse charge basis by the recipient if the supplier is located in a non-taxable territory and the recipient of the service is located in a taxable territory.⁷⁶

¶ 47 In the present case, the service of expats is being imported from the overseas entity through an arrangement in the nature of secondment.⁷⁷ Without their expertise, the company will be rendered non-functional. **Therefore**, the transaction is under the ambit of the scope of supply as it qualifies as an import of services.

B. The services provided are classified under manpower supply

¶ 48 As per Notification No. 11/2017-Central Tax (Rate), the manpower supply or labour supply services by the manpower supply agency fall under SAC 98519. The quid pro quo for the secondment agreement, where the Assessee has the benefit of experts for limited periods, is implicit in the overall scheme of things. As the Assessee was the service recipient of the group company for the period, which can be said to have provided manpower supply service, or a taxable service.⁷⁸

¶ 49 In the present case, even if the performance is being regulated by the Indian company, the fact remains that the overseas employees are deployed by an overseas entity through an arrangement in the nature of secondment. **Therefore**, the manpower supply services provided are taxable under the reverse charge mechanism on the Assessee.

⁷⁵ The Central Goods and Services Tax Act 2017, s 15.

⁷⁶ Department of Revenue, Ministry of Finance, *Notification No. 10/2017-Integrated Tax (Rate)*.

⁷⁷ The Moot Proposition, ¶ 13.

⁷⁸ *M/s CC CE & ST, Bangalore (Adjudication) v. Northern Operating Systems Pvt. Ltd.* [2022] (61) G.S.T.L. 129 (SC).

ISSUE 4: THE MEASURES UNDERTAKEN BY THE ASSESSEE AMOUNT TO TAX EVASION

¶ 50 The measures undertaken by the Assessee amount to tax evasion as, the tax planning has been done unlawfully [I]; Substance over form test is applicable [II]; the Assessee is liable to pay the maximum penalty [III].

I. TAX PLANNING HAS BEEN DONE UNLAWFULLY

¶ 51 Tax planning has been done unlawfully as, a colourable device has been used for tax avoidance [A]; The doctrine of separate legal entity has been abused to evade tax [B].

A. Colorable devices have been used for tax avoidance

¶ 52 Where the transaction is not genuine but a colourable device, there could be no question of tax planning. A colourable device cannot be a part of tax planning.⁷⁹ Tax planning is only permissible when it is within four corners of the law but colourable devices are not part of tax planning and such a transaction should be disregarded without giving benefits of it to the Assessee. Dubious methods of tax avoidance must not be honoured.⁸⁰

¶ 53 The taxing authority is entitled to determine the true legal relationship of a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to taxing authorities to unravel the device and to determine the true character of the relationship.⁸¹ It needs to be analyzed whether the transaction is a device to avoid tax.⁸² The Revenue should look at the transaction as a whole to ascertain its true legal nature.⁸³ Every person is entitled to arrange his affairs to avoid taxation but the arrangement must not be a sham or make-believe.⁸⁴

¶ 54 In the present case, the Assessee issued back-dated appointment letters to the expats to evade tax for the secondment arrangement from 2010 to 2022.⁸⁵ For the period from June 2022 onwards, the “innovative arrangement” employed by the Assessee was only a way to second US employees and the intention is clearly to evade tax liability.⁸⁶ **Therefore**, a colourable device has been used by the Assessee for tax avoidance.

⁷⁹ *Mathuram Agarwal v. State of Madhya Pradesh* [1999] 8 SCC 667.

⁸⁰ *M/s McDowell and Company Limited v. Commercial Tax Officer* [1986] AIR 649.

⁸¹ *CIT v BM Kharwar* [1966] 60 ITR 370.

⁸² *ibid.*

⁸³ *Craven v White* [1988] 3 All E.R. 495.

⁸⁴ *Jiyajeerao Cotton Mills Ltd. v. Commissioner of Income- Tax* [1959] AIR SC 270.

⁸⁵ The Moot Proposition, ¶ 9.

⁸⁶ The Moot Proposition, ¶ 11.

B. The doctrine of separate legal entity has been abused to evade tax

¶ 55 In a case where associated companies are inextricably connected to each other as to be in reality part of one concern, the corporate veil should be lifted.⁸⁷ The company should be a mere camouflage or sham deliberately created to avoid liability.⁸⁸ The Court is entitled to lift the corporate veil if it is being used for tax evasion.⁸⁹

¶ 56 When a situation arises where there is an intention to defraud, the court ignores the corporate character and looks at the true nature behind the corporate veil.⁹⁰ The separate character of the corporate entity can also be disregarded when the corporate personality is opposed to justice, convenience, or interest of the revenue.⁹¹ The corporate veil can be lifted when there is some impropriety, such impropriety is linked to the company structure to avoid or conceal liability and when the company is merely a façade being used for the purpose of deception at the time of relevant transactions.⁹²

¶ 57 In the present case, the Assessee has deceptive activities by modifying the secondment arrangement retrospectively through the issuance of appointment letters and experience letters and adopted an arrangement in the nature of secondment as a way to conceal that the real employer remains overseas entity.⁹³ **Therefore**, the corporate veil needs to be lifted to determine the tax liability of the Assessee.

II. SUBSTANCE OVER FORM TEST IS APPLICABLE

¶ 58 The taxing authorities have to look at the “substance of the matter” and the legal nature of the transaction cannot be ignored to determine its taxability.⁹⁴ When the transaction seems to be legal but in substance and spirit is a clear violation of law, then the ultimate test for legality of a transaction would be its conformity with the intendment of a statute.⁹⁵ The contract has to be read as a whole to understand the object of the parties and if the terms are not conclusive, one has to look at the substance of the transaction over form.⁹⁶ The name of the transaction given by the parties does not necessarily decide its nature. It is the substance and

⁸⁷ *LIC of India v. Escorts Ltd* [1986] AIR 1370.

⁸⁸ *Balwant Rai Saluja v. Air India* [2014] LLR 1009.

⁸⁹ *CIT v Sri Meenakshi Mills Ltd* [1967] AIR SC 819.

⁹⁰ *Delhi Development Authority v Skipper Construction Co (P) Ltd* [1966] AIR 2005.

⁹¹ *New Horizons Ltd. v Union of India* [1995] SCC (1) 478.

⁹² *Ben Hashem v Ali Shayif* [2009] EWHC 864.

⁹³ The Moot Proposition, ¶ 13.

⁹⁴ *CCE v Acer India Ltd.* [2004] AIR SC 4805.

⁹⁵ *Gregory v Helvering* [1935] 239 U.S. 465.

⁹⁶ *Super Poly Fabriks Ltd. v Commissioner of Central Excise Punjab* [2008] 11 SCC 398.

not the form of the contract that should be regarded.⁹⁷ The mere formal description of a person as an employee is not conclusive unless there is intention.⁹⁸

¶ 59 In the present case, the Assessee with a fraudulent intention to avoid tax for the period 2017-22, issued back-dated appointment letters to make the expats employees of the Assessee from the inception. Prospectively, the Assessee restructured the secondment arrangement to terminate-rehire arrangement to evade tax liability. **Therefore**, applying the test of form over substance, it is submitted that the Assessee has committed tax evasion for the two periods i.e., 2017-22 and 2022-23.

III. THE ASSESSEE IS LIABLE TO PAY THE MAXIMUM PENALTY

¶ 60 The *Black's Law Dictionary* defines a penalty as a "Punishment imposed on a wrongdoer, in the form of imprisonment or fine; especially a sum of money exacted as punishment for either a wrong to the state or a civil wrong."⁹⁹ It is provided that if any person has paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilized to evade tax, will be liable to pay a penalty of ten thousand rupees or the tax due from such person, whichever is higher.¹⁰⁰ It is submitted that a penalty cannot be imposed unless there is a fraudulent intent to evade tax.¹⁰¹

¶ 61 In the present case, the Assessee to evade the tax liability on the secondment arrangement, in June 2022, issued back-dated appointment letters to the expats to establish an employer-employee relationship,¹⁰² which is exempted from GST. It also adopted an innovative terminate-rehire arrangement to second employees by the Assessee to evade tax.¹⁰³ Tax avoidance measures of such nature are fraudulent, thus amounting to tax evasion.

¶ 62 **Therefore**, the maximum penalty imposed by the Revenue is sustainable and within the jurisdiction conferred under the CGST Act, 2017.

⁹⁷ *Nilkantha Narayan Singh v CIT* AIR 1951 PAT 165.

⁹⁸ *Sundaram Finance Ltd. v the State of Kerala and Another* [1966] AIR 1178.

⁹⁹ *Black's Law Dictionary*, 1247 (8th ed., 2004).

¹⁰⁰ The Central Goods and Services Tax 2017, s 122(2)(b).

¹⁰¹ *Citykart Retail Pvt Ltd v Commissioner of Commercial Tax 2018* 144 taxmann.com 155 (Allahabad).

¹⁰² The Moot Proposition, ¶ 9.

¹⁰³ The Moot Proposition, ¶ 10.

PRAYER FOR RELIEF

In light of facts presented, questions raised, arguments advanced and authorities cited, Counsel for the Respondent most humbly prays before this Hon'ble High Court, to adjudge and declare that:

- (1.) The present writ petition is not maintainable.
- (2.) The Revenue has the jurisdiction to demand tax under the CGST Act, 2017.
- (3.) The Assessee is liable to pay the tax and penalty raised by the Revenue.

The Court being satisfied may in like manner make any such demand as it may regard fit in the light of Justice, Equity and Good Conscience.

*And for this demonstration of kindness the **Respondent** might as compelled bound ever humble pray.*

Date: __.03.2024

Place: BENGALURU

S/d-

(Counsel Appearing for Respondent)