TC -11

21ST SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION

BEFORE

THE HON'BLE HIGH COURT OF KARNATAKA AT BENGALURU

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

IN THE MATTER OF

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

SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD

BENGALURU

... PETITIONER

V.

ADDITIONAL COMMISSIONER OF GST AND OTHERS

BENGALURU

... REPONDENTS

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
%	Percentage
¶	Paragraph
§	Section
A.T.	Appellate Tribunal
AIR	All India Reporter
ANR.	Another
ART.	Article
ASST.	Assistant
C.A	Civil Appeal
CCE	Collector of Central Excise
CGST	Central Goods and Services Tax Act
CIT	Commissioner of Income Tax
CL.	Clause
CO.	Company
COMM'R	Commissioner
DEL.	Delhi
EDN.	Edition
ETC.	Et Cetera
FY	Financial Year
GST	Goods and Service Tax
GUJ.	Gujrat
HC	High Court
HON'BLE	Honourable
INT'L	International
KMP	Key Managerial Persons
LTD.	Limited
MOU	Memorandum of Understanding
NO.	Number
ORS.	Others

PG.	Page
PVT.	Private
RCM	Reverse Charge Mechanism
SC	Supreme Court
SCC	Supreme Court Cases
SCN	Show Cause Notice
SCH.	Schedule
SUPP.	Supplementary
U.S.	United States
V.	Versus
VOL.	Volume
W.P.	Writ Petition

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STATEMENT OF JURISDICTION

THE COUNSELS APPEAR ON BEHALF OF THE RESPONDENT IN THE MATTER OF SOUTHERN OPERATING SYSTEMS INDIA PVT. LTD V. ADDITIONAL COMMISSIONER OF GST AND OTHERS BEFORE THE HON'BLE HIGH COURT OF KARNATAKA UNDER ARTICLE 226.

THE COUNSELS ON BEHALF OF THE RESPONDENT HAVE ENDORSED THEIR RESPONSE TO THE TWO WRIT PETITIONS FILED BY THE PETITIONER.

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

STATEMENT OF FACTS

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

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

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

Thereafter, in the year 2022, as a Tax planning measure the Indian Co. and the US Co. keeping the expats in confidence, decided to terminate the services of all the expats sent to India from the payrolls of the US company and planned to induct them in the Indian company's payrolls. The terms of new employment were such that the expats, for all legal and other purposes, will be treated as employees of the Indian company.

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

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

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

STATEMENT OF ISSUES

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

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

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

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

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

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

SUMMARY OF ARGUMENTS

Issue 1 – The Counsels humbly submit that the present writ petitions are not maintainable as no right of the Petitioner is being violated. The Petitioner has not exhausted its alternative and efficacious remedy. Further, the Petitioner has failed to show the grounds for invoking writ jurisdiction of the High Court at the pre-mature stage of show cause notice.

Issue 2 – The Counsels humbly submit that the Department has the jurisdiction to issue the SCNs even though the services were not liable to GST per se. The assertion is based on the fact that under §73 and §74 of the Act, the Department has power to issue SCNs for a multitude of reasons. Further, this issuance is a mere a scrutiny and not an adverse order against the Petitioner and all proper procedures have been followed by the Respondents while issuing the SCNs.

Issue 3 – The Counsels humbly submit that secondment arrangements in general are liable to GST, and their tax liability is ascertained on a case-to-case basis. The substance and the form of the arrangement should be closely observed to differentiate between an employer-employee relationship and a supply of manpower services.

Issue 4 – The Counsels humbly submit that the petitioner did not have any power to issue any experience letter to the secondees for the period of 2010 to 2022 as they were not its employees and the Petitioner cannot issue such letter which have the effect of retrospectively employing/terminating the secondees. Further, the Petitioner had accepted its liability to pay service tax on the same arrangement in 2017.

Issue 5 – The Counsels humbly submit that post 2022, the Petitioner was receiving the service of identifying/arranging employees from SOS US and the previous arrangement is being continued only under the garb of the 'innovative arrangement'. Further, both the companies are related persons and as per Schedule IV, consideration is immaterial if the service is between related persons and in furtherance of business.

Issue 6 – The Counsels humbly submit that there is an import of service, as the service provider is situated outside India and the service recipient resides within the taxable territory. In case of import of service, it is the service recipient i.e. the petitioner, who becomes liable to pay tax under Reverse Charge Mechanism.

ARGUMENTS ADVANCED

I. WHETHER THE WRIT PETITION IS MAINTAINABLE.

¶ 1. It is humbly submitted that the Writ Petitions filed by Southern Operating System India Pvt. Ltd. (hereinafter referred to as 'Petitioner') are not maintainable and should not be entertained before this court, namely for two reasons, *firstly,* the petitioner has failed to bring on record any plausible reason as to why this writ has been filed short-circuiting the alternative remedy available to it under the CGST Act (hereinafter, the Act) ; and *secondly,* the petitioner has failed to bring out on record any conditions stipulated under Article 226 for filing the writ against the Show Cause Notices(herein after, SCNs) under reference.

1.1. THE PETITIONER HAS NOT EXHAUSTED ALTERNATE REMEDIES

¶ 2. It is humbly submitted that the writ petition should not be entertained when an efficacious remedy is provided by law,[1] especially when a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that statutory remedy before invoking the discretionary remedy under Article 226 of the constitution.[2]

¶ 3. The Hon'ble Apex Court has held for High Courts not to entertain a writ petition under Article 226 if an effective remedy is available.[3] It is now well recognised that where a right or liability is created by a statute that gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.[4]

¶ 4. It has been held that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, etc.[5]

¶ 5. The High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves since they not only

[1] Union of India (UOI) v. T.R. Varma, MANU/SC/0121/1957.

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

[3] Authorized Officer, State Bank of Travancore and Ors v. Mathew K.C., (2018) 2 SCC 72.

[4] Ttitaghur Paper Mills Co. Ltd. v. Stat of Orissa, AIR 1983 SC 603.

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

contain comprehensive procedures for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person.[6]

¶ 6. The Petitioner should have approached the Tribunal as provided under section 107 of the Act, which states that any person aggrieved by an order or decision of the Department can appeal against it within a period of three months from the date the decision was communicated. Further, no decision has been passed by the Department as of yet, the instant petitions are against SCNs, and such SCNs have neither violated nor hindered any fundamental rights of the Petitioner for them to approach this Hon'ble Court.

¶ 7. Therefore, the Department humbly concludes that in all such cases discussed above, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.[7] Hence, the writ petition of the petitioner must be held as unmaintainable before this Hon'ble High Court.

1.2. THAT NO CONDITIONS GIVEN UNDER ARTICLE 226 OF THE INDIAN CONSTITUTION ARE FULFILLED FOR THE HIGH COURT TO HAVE THE POWER TO ENTERTAIN THESE WRIT PETITIONS.

¶ 8. It is humbly submitted that for writ petitions to be entertained in exceptional circumstances there should be (i) a breach of fundamental rights; (ii) a violation of the principles of natural justice; (iii) an excess of jurisdiction; or (iv) a challenge to the vires of the statute or delegated legislation.[8] The Petitioner fails to fulfil any of the above-mentioned conditions for this Hon'ble Court to entertain the writ petitions.

¶ 9. It is further submitted that there is no violation of principles natural justice on the part of the Petitioner. The Respondent has adhered to the procedure laid down in the statute while issuing the SCNs. Furthermore, the Petitioner is given time to file their replies; and as stated earlier, under §107(1) of the Act, the Petitioner has the right to appeal before the Advance Ruling Authority within three months from the date of communication of any order, and no such order is given by the department as of yet.

¶ 10. It is humbly submitted that the writ is premature and such a writ is liable to be dismissed.[9] A writ will become maintainable only when the taxing authority has acted beyond the scope of their jurisdiction. In the instant case, the SCNs issued by the

[6] *Supra* note 3.

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

[8] Assistant Commissioner of State Tax and Others v. Commercial Steel Limited, CA No. 5121 of 2021.

[9] Kapan v. Jagmohan, AIR 1981 SC 126.

Respondent are sustainable and the proceedings fairly took place, compliant with the relevant law. Ordinarily, a court should confine itself to the facts at hand and not delve into assumptions.[10]

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

¶ 11. It is humbly submitted that the SCNs have been issued by proper officer as per the powers and the procedure prescribed under the provisions of GST Act, 2017. Therefore, in *arguendo,* even if the serviced received by the Petitioner are not liable to GST *per se* it cannot be said that any jurisdictional boundaries have been breached merely on the count of a proceeding being initiated again the Petitioner. Further, since the Department has reasons to believe that the services provided by the secondees to the Petitioner are liable to GST, the authority to issue a SCN cannot be hindered with at this stage.

2.1. THE DEPARTMENT HAS POWER TO ISSUE SCN UNDER §73 AND §74 OF THE ACT

¶ 12. It is humbly submitted that the Department herein has the power to issue SCNs in case of non-payment of GST under §73(1); and in cases of fraud, wilful-misstatement or suppression of facts to evade tax a SCN can be issued under §74(1) of the Act.

¶ 13. It should be emphasized that determining tax liability is within the purview of the "proper officer," as defined by §2(91), who may do so by using the powers granted by Chapter XV of the GST Act. §73 of the Chapter addresses the "determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts".[11] The proper officer in this particular case has issued the relevant SCNs and utilized Section 73 to determine the petitioner's tax liability. Therefore, it cannot be contended that these SCNs are invalid or vague.

¶ 14. These provisions grant the Department the power to issue a show cause notice even in the presence of slightest doubt that the Petitioner was liable to pay tax but has not paid. The department has within its authority the power to issue a SCN, asking the Petitioner for the reason for not levying tax in the given facts or circumstances.[12]

¶ 15. These SCNs cannot be equated with recovery of tax, as they are only meant to assess the liability of the Assessee to prevent any tax evasion. For this purpose the law has invested

[10] Channan Singh v. Registrar Co-op Societies, AIR 1976 SC 1821.

[11] Muna Pani v. State of Odisha and Ors., MANU/OR/0950/2022.

[12] Khem Chand v. Union of India, AIR 1958 SC 300.

the authority and power upon the proper officers to issue show cause notice in cases wherever the Department has reason to believe that material indicating the liability of the Petitioner, then the Department has the power to issue a SCN.

2.2. SERVICE IS ALREADY HELD LIABLE TO BE TAXED BY THIS HON'BLE COURT

¶ 16. It is humbly submitted that in the present case, the arrangement of the Petitioner from the period of 2017-2022 has already been held as liable to service tax by this Hon'ble court vide its order of 2017. Therefore, the department was not acting out of its powers/jurisdiction while issuing the SCN for the same. It had sufficient reason to believe that the Petitioner was liable to pay the service tax under the current regime as well.

¶ 17. It is a settled law that court can look into the reasons on which belief has been formed by the taxing authority. However, the court cannot question the decision of the authority on the basis of sufficiency of reason.[13] The Court has the power to look into the legality of the SCN and not the reason behind it.[14]

¶ 18. Further, it is humbly submitted that the Petitioner had knowledge of its liability and it has not paid these taxes deliberately with the intent of evading tax. Such deliberate non-payment amounts to tax evasion and is not allowed in law. Hence, the notice issued by the department is completely within its jurisdiction.

2.3. PROPER PROCEDURE IS FOLLOWED BY THE RESPONDENT

¶ 19. In *Union of India and another vs. Guwahati Carbon Limited,*[15] it was concluded; "*The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution*", the same reasoning can be followed for GST. CGST Act is a code in itself and how a body made by the act will proceed as per the procedure established by that code.

¶ 20. An elaborate procedure has been provided under the act to ensure that no injustice happens to the Petitioner. While issuing SCN, the department provides the Petitioner an opportunity to be heard. It does not straightaway imply that the Petitioner is liable to pay taxes, it first asks the Petitioner to explain the reason for non-payment of tax and only after properly hearing both the sides, the proper authority pronounces its order. The procedure

[13] N.K. Jewellers and Another v. Commissioner of Income Tax, New Delhi, (2018) 12 SCC 627.

[14] Principal Director of Income Tax(Investigations) & Ors. v. Laljibhai Kanjibhai Mandalia, CA NO. 4081 OF 2022.

[15] (2012) 11 SCC 651.

in itself provides the power to the department to issue SCN in case of any doubt and it is humbly submitted that the department has followed every procedure laid down in the Act.[16]

¶ 21. It is humbly submitted that if any power has been given to the executive by any Act, then it is the administrative discretion of the department as to how it wants to exercise its power under that act, as long as it is acting within the law. The respondent in the present case has acted well within the law, followed the procedure, then there is nothing in the law barring it from issuing SCN for seeking clarifications of non-payment of petitioner's dues.

III. WHETHER SECONDMENT ARRANGEMENT IN GENERAL LIABLE TO GST.

¶ 22. In a secondment agreement, foreign workers, also referred to as "secondees," are sent by the parent entity to an Indian entity under the terms of the secondment agreement. In this arrangement, the secondee continues to be paid by a foreign company while receiving their wages in their home country. The Indian company reimburses the salary expenses of the secondee to the foreign company.[17]

¶ 23. There is no straight jacket formula for ascertaining the GST liability over a secondment agreement, it arises on a case-to-case basis.

3.1. THE SUBSTANCE AND THE FORM OF THE AGREEMENT ARE RELEVANT TO GST BEING LEVIED ON SECONDMENT

¶ 24. It is humbly submitted that the Supreme Court in the case of *Northern operating Systems* has affirmed that while assessing the tax liability of a company, there is not one single determinative factor, which the courts give primacy to, while deciding whether an arrangement is a contract of service (as the Petitioner asserts the arrangement to be) or a contract for service. Most of the cases that have been determined are positioned from the facts. The Court has consistently applied one test: substance over form, requiring a close look at the terms of the contract, or the agreements[18], and this doctrine itself helps differentiate between tax planning and tax evasion.

¶ 25. However, in the instant case, using the doctrine, it can be said that the secondment arrangement between the Petitioner and the foreign entity would be liable of GST. Applying the doctrine, form and style of employee secondment agreement was "not decisive of its

[16] Oryx Fisheries Pvt. Ltd. v. Union of India, (2010) 13 SCC 427.

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

[18] McDowell and Co. Ltd. v. CTO (1985) 3 SCC 230/ CTO (1985) 154 ITR 148 (SC).

nature", at least before 2022, after which the arrangement was changed specifically for the purpose of avoiding tax liability.

¶ 26. The payment of service tax on reverse charge mechanism for the period of 2012 to 2017, in addition to the lack of economic and actual control over the secondees asserts that the Petitioner had seconded the employees only for the furtherance of their business and they were not actually their employees.

3.2. GST CAN BE LEVIED ON SECONDMENT ARRANGEMENT

¶ 27. It is further humbly submitted that CGST Act, Schedule III Entry 1 read with §7 states that services by an employee to the employer in the course of or in relation to his employment are activities or transactions which shall be treated neither as supply of goods nor as supply of services.[19]

¶ 28. However, secondment arrangements are rarely *per se* in nature of employer-employee relationship, they are usually a supply of manpower services for the furtherance of one's own business activities, since these secondment arrangements are a 'contract for service' and not 'contract of service'.

¶ 29. In order to determine the tax liability in a contract for service between the secondees and the Petitioner, a conglomerate of tests may be applied.[20] However, simply observing the economic reality of control of the instant case, the Petitioner has only reimbursed the salary expenses of the secondees, and the actual salaries have been paid out by SOS US, till 2022; after which the arrangement was changed for the purpose of tax evasion.

¶ 30. In the instant case, referring to the case of *Centrica Offshore India Pvt. Ltd.,*[21] the salaries of the secondees were being paid by the foreign entity and the Petitioner was simply reimbursing the salary on a cost to cost to basis, hence, even if the secondees were to be terminated by the Petitioner, they would not be terminated of the payroll of SOS US, ergo, the Petitioner had no effective control over the employment and thus, no employer-employee relationship existed between the secondees and the Petitioner, and therefore, their secondment arrangement would be liable to GST.

¶ 31. Hence, GST liability over secondment arrangements should be seen on a case-to-case basis, however, strictly speaking in terms of the present case, the Petitioner is liable to pay GST for the secondment of employees.

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[19] Central Goods and Service Tax, Schedule III Entry 1, read with § 7, Acts of Parliament No. 12 of 2017.

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

[21] Centrica India Offshore Private Ltd., In re, 2012 SCC OnLine AAR-IT 14.

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

¶ 32. It is humbly submitted that the experience letters issued by the Petitioner for the period of 2010 to 2022, have been done for the purpose of factual misrepresentation, and tax evasion, and that the Petitioner had no power to issue such experience letters in the first place, and thus tax liability arises on the Petitioner for the supply of manpower services.

4.1. THE PETITIONER DOES NOT HAVE THE POWER TO ISSUE SUCH EXPERIENCE LETTERS

¶ 33. Experience letters are issued from employers to employees, and hence, in the present case, to issue such experience letters, the Petitioner must prove that they were the employers of the secondees, however, such the Petitioner cannot assert the same, as the secondees were KMPs supplied by SOS US, the parent company of the Petitioner, and hence, such secondees were not under the control of the Petitioner, and hence were not employees of the Petitioner.

a) AN EMPLOYER-EMPLOYEE RELATIONSHIP DID NOT EXIST BETWEEN THE PETITIONER AND THE SECONDEE.

¶ 34. It is submitted that at least for the period of 2010 to 2022, no employer-employee relationship existed between the secondees and the Petitioner. The contract was simply of secondment of employees and it was a 'contract for service' and the parties entering did not have the intent to create an employer-employee relationship as the secondment agreements were entered for the period of five years.[22] Contracts have to be interpreted in such a way that its terms may not be varied[23] and courts can imply terms in a contract only when literal interpretation fails.[24] Altering the nature of the contract may affect the interest of either of the parties adversely.[25]

¶ 35. In the case of *Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd.* the Court observed that one single test may not be adequate to discern the nature of the contract.

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[22] Moot Proposition, pg no. 4, ¶11.

[23] Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond & Gem Development Corporation Ltd. & Anr., (2013) 5 SCC 470.

[24] Adani Power (Mundra) Limited v. Gujarat Electricity Regulatory Commission, Civil Appeal No.11133 OF 2011,(SC).

[25] United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, (2004) 8 SCC 644.

A "*conglomerate of all applicable tests taken on the totality of the fact situation*" has to be applied to determine whether there is 'contract of service' or 'contract for service'.

¶ 36. Similar facts were observed in the NOS case (*Supra*) applying the control test[26] where the court held that while the control (over performance of the seconded employees' work) and the right to ask them to return, if their functioning is not as is desired, is with the Petitioner, the fact remains that their overseas employer in relation to its business, deploys them to the Petitioner, on secondment. Secondly, the overseas employer for whatever reason, pays them their salaries.[27] Additionally, the employer did not exercise the same level of control over the employee in question as he does over his other employees, then 'contract for service' exists.[28]

¶ 37. Furthermore, referring to the *Centrica*[29] case, the court held that there was an absence of any employment relationship between the Indian entity and the secondees because direct costs of the secondees were borne by the overseas entities; a similar arrangement can be observed in the instant case.

¶ 38. Furthermore, the Petitioner has no control over termination of employment of the secondees. Even if the Petitioner is to terminate the secondment of the secondees, they would still remain employees of SOS US. The agreement is temporary in nature and has been entered for a specific objective. Once that objective is achieved, the secondees will go back to their job at SOS US for which they had retained a lien when they were seconded to the Petitioner company. The petitioner is not the employer of the secondees and is merely availing their services and the *real* employer is SOS US.

¶ 39. The secondees were only *operationally* under control of the Petitioner. The amount of salary and other benefits were decided by SOS US. The control given to the petitioner was only for practical purposes as the secondees were staying in India and working for the Petitioner. Upon completion of the assignment, the seconded employees were to return to their original positions and in the overseas company.

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

[27] *Ibid.*

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

[29] *Supra* note 21.

¶ 40. The Supreme Court in *Bengal Nagpur Cotton Mills v. Bharat Lal*[30] laid down two factors to be considered to determine the true nature of the hiring entity, one of which is to determine who disburses the salary of the employees and in the present case, it is SOS US who disburses the salary of the secondees and the Petitioner only reimburses those salary expenses. Hence, the real employer is SOS US, the contract is for service and the reimbursement of salary expenses are deemed to be the consideration of the service provided.

¶ 41. The control with the petitioner, if any, was only of temporary nature and for limited purposes. The relationship of the Petitioner and the secondees is not independent of the employment relationship of SOS US and the secondees and hence, the Petitioner cannot be said to be the employer of the secondees.

¶ 42. Applying economic reality of control test, in *Hussainbhai v. Alath Factory Thezhilali Union,*[31] the Apex court held that where a worker labours to produce goods or services which are for the business of another person, then he is the employer of such worker. Here, the secondees are present by the virtue of being an employee of SOS US and they are merely providing their services to the Petitioner as agreed in the secondment agreement.

¶ 43. Further, no specific contract of employment was entered into between the Petitioner and the secondees. The only contract which was entered was of secondment. In absence of such specific contract, the Petitioner cannot assume the existence of employer-employee relationship. Contracts have to be read strictly according to what has been written in the terms and conditions and the intent of the parties has to be derived from them.[32] A term not mentioned in the contract cannot be assumed by the court.[33]

¶ 44. Hence, if no employer-employee relationship exists between the Petitioner and the secondees, then the Petitioner is liable to pay GST for the supply of manpower services.

b) EMPLOYMENT AND TERMINATION CANNOT HAVE RETROSPECTIVE EFFECTS

¶ 45. It is humbly submitted that neither employment nor termination can be retrospective in effect,[34] hence, the termination of the secondees in 2022 by the US SOS, with effective

[30] Bengal Nagpur Cotton Mills v. Bharat Lal, 2011 1 SCC 635.

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

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

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

[34] Shyam Babu Kumar v. State of Bihar and Ors., MANU/BH/0510/2008.

termination from a back date of 2017, which is essentially an unlawful termination of employment, was done so that the Petitioner may re-employ these secondees as their own employees; this arrangement was done to evade tax liability.

¶ 46. Further, the Petitioner cannot claim that the secondees were *only* their employees starting from 2010, this assertion would not be plausible as the KMPs were clearly seconded from the foreign entity. For legal purposes, the US expats (seconded employees to India) were treated as employees of the US company.[35] Hence, such a claim is being made only for the purpose of evading taxes.

¶ 47. Furthermore, the Petitioner had paid service tax on the manpower supply of the secondees for the period of 2012 to 2017 complying with the order of Hon'ble High Court of Karnataka in 2017. They accepted that the secondees were not their employees and they were only availing their services till 2017. Hence, they cannot claim that the secondees were retrospectively their employees, where the secondees only became the employees of the Petitioner after 2022.

c) REIMBURSEMENT OF SALARIES CAN BE CONSIDERED AS DEEMED CONSIDERATION

¶ 48. It is further submitted that for the period of 2010 to 2022, as per the terms of the secondment, the salaries of the secondees were paid by the foreign entity which was later reimbursed by the Petitioner. The Petitioner contends that such reimbursements were paid on a cost-to-cost basis and no markup was paid to the US Company. However, such reimbursements should be deemed to be a consideration for the supply of manpower services from the foreign entity to the Petitioner.

¶ 49. In the present arrangement, the economic benefit is derived by the Petitioner, which also secures specific jobs or assignments, from the overseas group companies, which result in its revenues. The *quid pro quo* for the secondment agreement, where the Petitioner has the benefit of experts for limited periods, is implicit in the overall scheme of things.[36]

4.2. PAYMENT OF SERVICE TAX THE PERIOD FROM 2012 TO 2017 BARS ISSUANCE OF SUCH EXPERIENCE LETTERS.

¶ 50. It is humbly submitted that the Petitioner, SOS India upon being produced a SCN by the service tax department chose to pay the service tax, complying an order of the Karnataka High Court, thereof, the issuance of experience letters, claiming that the secondees were only the employees of the Petitioner is in contravention to the order of the Hon'ble

[35] Moot Proposition, pg no. 2, ¶ 5.

[36] Union of India v. Intercontinental Consultanats and Technocrats Pvt. Ltd., 2018 (4) SCC 669.

Karnataka HC, and can also be termed as contempt of the court. The Petitioner also had all the right to appeal against such an order, and their compliance with the order shows their acceptance of the supply of services.

¶ 51. The very payment of the service tax proposes that the Petitioner has accepted the fact that the secondees were not their employees but a supply of manpower services, hence, since, the secondees were not employees of the Petitioner, no experience letters could be issued by the Petitioner to the secondees, and based on that fact, the Petitioner becomes liable for the payment of GST on supply of services.

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

¶ 52. It is humbly submitted that post 2022, the Petitioner has entered into an 'innovative arrangement' with SOS US. As per the new arrangement, *firstly,* SOS US is providing the service of identifying/arranging employees and *secondly,* that there is 'supply' of service even in the absence of consideration by the virtue of Schedule I

5.1. SERVICE OF IDENTIFYING/ARRANGING EMPLOYEES HAS BEEN PROVIDED BY SOS US TO PETITIONER

¶ 53. "Manpower Recruitment or Supply Agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, [to any other person] Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute.[37] The section leaves open a path for other possibilities to be included under the category of Manpower Recruitment or Supply.

¶ 54. A large number of business or industrial organizations engage the services of commercial concerns for temporary supply of manpower which is engaged for a specified period or for completion of particular projects or tasks. Services rendered by commercial concerns for supply of such manpower to clients would be covered within the purview of service tax."[38]

¶ 55. It is humbly submitted that it was the US company who identified which employee has to be seconded to the Indian company and accordingly terminated their employment with

[37] Black's Law Dictionary by Henry Campbell Black, M. A., sixth edition, ST. PAUL, MINN. WEST PUBLISHING CO. 1990.

[38] Future Focus Infotech India (P) Ltd. v. Commissioner of Service Tax, MANU/CC/0024/2010.

the company. As per the "innovative arrangement" of the parties, the terminated employees were then appointed by the Petitioner. This whole process is a sham and its only objective is to evade tax and hence this arrangement needs to be struck down.[39]

¶ 56. It is a settled law that the substance and not the form of the contract is material in determining the nature of transaction.[40] Before determining the taxes which could be imposed in relation to an agreement the intention of the parties and nature of transaction is to be determined.[41]

¶ 57. It is humbly submitted that there is no 'substantial' change in the arrangement, only the form of the arrangement has been changed. The substance is still to identify/arrange and send the personnel from the US company to the Petitioner for its furtherance of business. The only purpose of changing the form of the arrangement is to evade taxes and nothing else. It is humbly submitted that there are a set of transactions that we know are all inter-linked in such manner that the commercial substance can be determined only by putting together all these transactions, treating them as "interlinked". Applying the doctrine of substance over form,[42] when these transactions are looked together, the intent of evading tax can be seen.

¶ 58. Further, the SOS US is a holding company and the Petitioner is its subsidiary company. Upon lifting the corporate veil for economic purposes,[43] it can be verified that the present arrangement is utilising this relation as a way for evasion of tax.

¶ 59. For the purpose of levying tax, substance of a transaction is looked into rather than the form of the transaction and therefore, this transaction is an import of service where the US company is providing its service by identifying/arranging the employees and then sending them to the Indian company, which essentially is taxable as per CGST act as import of services.

5.2. CONSIDERATION IS NOT NECESSARY IF THE SERVICE IS FOR FURTHERANCE OF BUSINESS

¶ 60. Notably, §7(1)(c) of the CGST Act read with Schedule I of the CGST Act carves out an exception by deeming 'activities' between related/distinct persons as 'supply' even if

[39] McDowell & Company Ltd. v. Commercial Tax Officer, (1985)3 SCC 230.

[40] Kone Elevators Pvt. Ltd. v. State of Tamil Nadu, (2005) 3 SCC 389.

[41] BSNL v. Union of India, (2006) 3 SCC 1.

[42] *Supra* note 39.

[43] CIT v. Sri Meenakshi Mills Ltd., AIR 1967 SC 819.

carried out without consideration. Simply put, Schedule I has relaxed the 'consideration' aspect for transactions between related parties.[44]

¶ 61. "Related persons" as defined under §15(5)(iv) of CGST Act states *"Any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares of both of them;"* which means that a subsidiary company and a holding company are related persons and any service exchanged between them will be covered by the Entry 4 of Schedule I.

¶ 62. Parent and subsidiary companies are related persons. Supply of goods or services or both between related persons or between distinct persons as specified in §25, when made in the course or furtherance of business is liable for paying GST. Further, import of services by a person from a related person or from any of his other establishments outside India, in the course or furtherance of business.

¶ 63. Further, it is humbly submitted that the service exchanged between the Petitioner and the US company are done in the furtherance of business of the Petitioner. The Petitioner has benefited heavily from the presence of the KMPs who are seconded. The reason for bringing the personnel from the US to India, as mentioned in the moot problem para 2, is to help in setting up the Indian company and to transfer the technical knowledge, expertise and to maintain quality of the product. This clearly shows that the intent of sending the secondees to India is the furtherance of business.

¶ 64. Supply of services between related persons as parent and subsidiary are treated as related persons under GST law and by virtue of Entry 2 of Schedule I, the transactions between related persons made in the course or furtherance of business are treated as taxable supplies, even if made without consideration.[45]

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

¶ 65. It is humbly submitted that the petitioner is liable to pay tax under Reverse Charge Mechanism There exists import of services under GST as *firstly,* has imported the service from SOS US under the category of 'Manpower Recruitment and Supply Services' and

[44] The Meaning and Scope of Supply, (The_Meaning_and_Scope_of_Supply_new.pdf (cbic.gov.in)), last visited 10 March, 2024.

[45] The Meaning and Scope of Supply, (51 GST Flyer_Chapter 3.pdf (cbic.gov.in)), Last visited 10 March, 2024.

secondly, in presence of import of service, it is the recipient of service who becomes liable to pay tax.

¶ 66. It is humbly submitted that the import of services under GST exists in the present case. The analysis of whether the import of manpower supply in the current case constitutes a valid category can be delineated on two prongs: *firstly*, the classification of import of service as a "deemed supply' of service is valid under §7(1)(c) of the CGST; and *secondly,* the facts of the present case satisfy the ingredients under CGST to establish a taxable event.

6.1. THERE IS IMPORT OF SERVICE UNDER GST

¶ 67. It is humbly submitted that there exists a "deemed Supply" for the supply of managerial services without any consideration by the US Company to the Indian Company. A supply is defined as "supplies specified in Schedule I, made or agreed to be made without consideration" under §7(1)(c) of the Act. Therefore, even if a service is provided without consideration, it will still be regarded as a supply under Schedule I.

¶ 68. It is humbly submitted that the Indian Company is the recipient of two dozen highly paid KMPs seconded by the US Company to set up the company in India so that there would be a transfer of technological know-how, expertise and to maintain the quality of the products manufactured. It is admitted that the onus is on the Indian Company to pay the salaries and other benefits to the seconded employees, however, it is to be noted that the decision of which employees to be seconded, rests with the US Company. Hence, there exists a transaction between both companies as per Entry 4 of Schedule I of the CGST Act.

6.2. FACTS OF THE PRESENT CASE AMOUNT TO TAXABLE EVENT UNDER GST

¶ 69. It is humbly submitted that such a secondment arrangement is taking place with the motive of the US Company to establish a productive offshore unit, which is the Indian Company. The manpower supply and their know-how have acted in furtherance the business activities of the Indian Company, and it was evident when the Indian Company started generating revenues within two years of commencement of business.

¶ 70. It is to be noted that 'consideration' is not the key ingredient to establish 'supply' under Schedule I of the CGST Act. The event of 'supply' taking place in the form of the US Company sending KMPs, which is for the furtherance of the recipient's business activities, is enough to satisfy the taxability requirements of the event according to Schedule I.

6.3. THE PETITIONER IS LIABLE TO PAY GST UNDER REVERSE CHARGE MECHANISM

¶ 71. It is humbly submitted that Reverse Charge Mechanism (hereinafter referred to as RCM) means the liability to pay tax by the recipient of the supply of goods or services or

both instead of the supplier of such goods or services or both. It means the liability to pay tax is on the recipient of supply of goods or services instead of the supplier of such goods or services in respect of notified categories of supply.[46]

¶ 72. Vide its notification[47], CBIC listed out the services for which RCM will be applied. Entry 1 of the said notification covers import of services.

¶ 73. It is humbly submitted that the Petitioner is liable to pay GST under the Reverse Charge Mechanism because the Petitioner is a taxable entity in India. It has received a supply of a 'managerial' nature from an entity, the US Company, that is outside of India. The US Company is a related person of the Indian Company as it falls under the ambit of the definition of 'person' under §2(84) CGST Act.

¶ 74. It is humbly submitted that the activities of the applicant squarely fit to be treated as supply in terms of §7(1)(c), even in the absence of consideration and hence it can be construed that the Indian Company is the recipient of manpower imported from the US Company and that such a transaction is a taxable event.[48] The Apex Court in the case *Northern Operating Systems (Supra)* has observed that the managerial and technical expertise provided by a secondee to the Indian entity qualifies as a provision of service by the foreign entity to the Indian entity.

¶ 75. The conditions for an "import of service" would entail three aspects: (i) the supplier of service must be located outside India; (ii) the recipient of the service must be located in India; and (iii) the place of supply ought to be in India.[49]

¶ 76. Additionally, with Notification No. 13/2017 Central Tax (Rate) dated 28th June 2017, the government has notified for '*Services supplied by a director of a company or a body corporate to the said company or the body corporate located in the taxable territory*' to be subjected to tax under §9 of the CGST on reverse charge basis by the recipient of such services.[50]

¶ 77. Therefore, it is humbly submitted that the Indian Company is liable to pay GST under the reverse charge mechanism.

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[46] Reverse Charge Mechanism, (Reverse charge Mechanism.pdf (cbic.gov.in)), Last visited 10 March, 2024.

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

[48] International Merchandising Co. LLC v. CST, (2023) 3 SCC 641.

[49] Union of India v. Mohit Minerals (P) Ltd., (2022) 10 SCC 700.

[50] Sl. No. 6, Notification No. 13/2017 Central Tax (Rate) dated 28th June 2017.

PRAYER

WHEREFORE, IN THE LIGHT OF FACTS STATED, ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE COUNSELS ON BEHALF OF THE RESPONDENT HUMBLY PRAY BEFORE THE HON'BLE HIGH COURT THAT IT MAY BE PLEASED TO ADJUDGE AND DECLARE THAT:

1. THE WRIT PETITIONS FILED BY THE PETITIONER ARE NOT MAINTAINABLE BEFORE THIS HON'BLE COURT.
2. THE IMPUGNED SHOW CAUSE NOTICES ISSUED ARE WITHIN THE JURISDICTION OF THE GST DEPARTMENT.
3. THE PETITIONER BE MADE TO ABIDE BY THE PROCEDURE INITIATED BY THE DEPARTMENT.

AND PASS ANY ORDER THAT THE HON'BLE HIGH COURT MAY DEEM FIT IN THE LIGHT OF JUSTICE, EQUITY AND GOOD CONSCIENCE.

AND FOR THIS ACT OF KINDNESS OF YOUR LORDSHIPS THE RESPONDENT SHALL DUTY BOUND EVERY PRAY.

Sd/-

Counsels for the Respondent