REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2289-2293 OF 2021

C.C.,C.E. & S.T. – BANGALORE (ADJUDICATION) ETC. **...APPELLANT(S)**

VERSUS

M/S NORTHERN OPERATING SYSTEMS PVT LTD. **...RESPONDENT(S)**

J U D G M E N T

S. RAVINDRA BHAT, J.

1. The Commissioner of Central Excise and Service Tax (hereafter variously described as "the revenue" or "the appellant") has preferred appeals[1], directed against the impugned orders of the Customs, Excise and Service Tax Appellate Tribunal (hereafter "CESTAT")[2] which set aside two orders dated 03.03.2014 and 04.03.2014 by the Commissioner of Service Tax (hereafter "the Commissioner"). The Commissioner had confirmed demands, made through show cause notices, for service tax along with interest and penalty. The commissioner had discharged, by an order (dated 27.02.2017/16.06.2017) the proceedings arising from another show cause notice (hereafter "SCN") in respect of a similar demand. That led to the revenue's appeal to CESTAT, challenging that order, discharging proceedings initiated by the revenue for the subsequent period. The CESTAT, by its common

[1] Under Section 35L (b) of the Central Excise Act, 1944.
[2] Dated 23.12.2020 in Service Tax Appeal (STA) Nos. 22573-74/2014; STA No. 21502/2017, Service Tax/CROSS/21077/2017 and Service Tax/CROSS/20255/2018.

order, rejected the revenue's appeals, and allowed that of the respondent, Northern Operating Systems (Pvt.) Ltd. (hereafter "the assessee" or "NOS").

Facts of the case

2. The assessee was registered with the revenue, as a service provider under the categories of "Manpower Recruitment Agency Service", "Business Auxiliary Service", "Commercial Training and Coaching Service", "TTSS", "Telecommunication and Legal Consultancy Service" etc., under the Finance Act, 1994 (hereafter "the Act"). Following an audit of the records by the revenue's officials, proceedings were initiated against the assessee alleging non-payment of service tax concerning agreements entered into by it with its group companies located in USA, UK, Dublin (Ireland), Singapore, etc. to provide general back-office and operational support to such group companies.

3. The nature and contents of the agreements, are discernible in their description, extracted from the impugned order - where the assessee has been referred to as "the appellant" by the CESTAT - which is as follows:

> *"The relevant terms of the agreement to understand the activity are as follows:*
>
> *a) When required Appellants requests the group companies for managerial and technical personnel to assist in its business and accordingly the employees are selected by the group company and they would be transferred to Appellants.*
>
> *b) The employees shall act in accordance with the instructions and directions of Appellants. The employees would devote their entire time and work to the employer seconded to.*
>
> *c) The seconded employees would continue to be on the payroll of the group company (foreign entity) for the purpose of continuation of social security/retirement benefits, but for all practical purposes, Appellants shall be the employer. During the term of transfer or secondment the personnel shall be the employee of Appellants. Appellants issue an employment letter to the seconded personnel stipulating all the terms of the employment.*
>
> *d) The employees so seconded would receive their salary, bonus, social benefits, out of pocket expenses and other expenses from the group company.*
>
> *e) The group company shall raise a debit note on Appellants to recover the expenses of salary, bonus etc. and the Appellants shall reimburse the group*

company for all these expenses and there shall be no mark-up on such reimbursement."

As a matter of fact, the assessee issues the prescribed forms to the seconded employees, in terms of the Income Tax Act, 1961 (hereafter "IT Act"). Those individuals too file income tax returns and contribute to the provident fund. Furthermore, NOS remits the above amounts in foreign exchange, which are reflected in its financial statements. The assessee is reimbursed (by the foreign entity, Northern Trust Company - hereafter described as such) for the amounts it pays as salaries, to these seconded employees. The assessee pays for certain services received from the group companies. The assessee used to discharge service tax on payments for such services in terms of Section 66A of the Act. The appropriate major expense heads were 'Salaries & Allowances', 'Relocation expenses', 'Consultancy Charges', 'Communication Expenses' and 'Computer Maintenance and repairs.'

4. The revenue issued four show cause notices[3] alleging that the assessee failed to discharge service tax under the category of *"manpower recruitment or supply agency service"* with regard to certain employees who were seconded to the assessee by the foreign group companies. The first two of these notices also invoked the proviso to Section 73 (1) read with Section 66A of the Act, proposing to demand service tax for the extended period. The assessee resisted these notices, refuting the allegations in the four SCNs. It was also given a hearing. By two orders[4] the commissioner confirmed the proposals in the notice (except the demand for the period from April 2006 to September 2006) accepting the fact that part of the demand has been raised @ 12.3% instead of 10.3%. The Commissioner confirmed the demand, holding that firstly, providing skilled manpower, 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. Secondly, the group companies and their

[3] Dated 23.04.2012; (for the period October 2006 - March 2011), 19.10.2012 (for the period April 2011 to March 2012), 07.05.2014 & 26.11.2015 (for the period April 2012 to September 2014).
[4] Order-in-Original No. 29/2013-14 dated 03.03.2014 and No. 30/2013-14 dated 04.03.2014.

various branches abroad, would be the service providers and the assessee, who receives skilled manpower, on secondment basis, is the service recipient. Thirdly, the definition of manpower recruitment or supply agency, under Section 65(68) has no exclusion clause, requiring service providers to possess the status of certain specified persons or organizations, for the purpose of providing the taxable service of manpower, recruitment or supply agency. It was held, fourthly, that in a secondment arrangement a secondee would continue to be employed by the original employer during the secondment, and will, following its termination return to the seconder/ original employer. As a consequence of this, the secondee does not become integrated into the host's organization. It was next concluded that the service provider's obligation ceases once employees were recruited and seconded. Hence the liability of service tax under Section 65 (105) (k) would be triggered at that event. Sixthly, it was held that there is no exclusive provision in law that restricts taxability of service of manpower recruitment or supply agency, when salaries are drawn by the assessee for manpower so supplied and TDS under the Income Tax Act had been affected. Regarding differential service tax liability, mere worksheets without documentary proof would be insufficient to grant relief as against the service tax of ₹ 41,11,473/- for the period 2008-2009.

5. It was also ruled that the assessee had not separately disclosed details of the gross receipts (as receiver of service) of the said services in the taxable value in the half-yearly ST-3 Returns filed by them with the department, with intent to evade payment of service tax. On the eligibility of CENVAT Credit, the onus of furnishing the evidence or documents indicating factual eligibility of CENVAT credit within the scope of Rule 3(1) of the CENVAT Credit Rules, 2004 (hereafter "CENVAT Rules") had not been discharged by the assessee. The Commissioner was of the view that the assessee was aware of the provisions of law and had placed nothing on record to indicate the circumstances that prevented it from approaching the department or accessing the CBEC website available on public domain. It led

no evidence to show reasonable cause. The extended period assessment and penalty was therefore, warranted.

6. Aggrieved by the impugned order, the assessee filed two appeals before the CESTAT. As far as the third appeal[5] by the department was concerned, the period involved was from April 2012 to September 2014. As a sequel to the earlier SCNs, the assessee was issued two SCNs[6] demanding service tax of ₹ 4,36,75,590/- and ₹ 7,55,48,448/- for the period April 2012 to April 2013, and April 2013 to September 2014 respectively, along with interest and penalty.

7. The assessee filed detailed replies on 02.07.2014 and 31.12.2015, mainly arguing that service tax cannot be demanded as the services provided by foreign affiliates do not fall under manpower recruitment or supply agency services for the period prior to negative list. Further, for the period after the introduction of the negative list, the definition of the term *'service'* under the Finance Act, specifically excluded service provided by the employee to the employer. Therefore, the amount paid to the foreign entity as reimbursement of salary of the seconded employees cannot be construed as consideration for supply of manpower services.

8. The Commissioner, Bangalore by order[7] dropped the proposals in the SCN for the period April 2012 to March 2013 and April 2013 to September 2014, thereby setting aside demands for service tax of ₹ 4,36,75,590/- and ₹ 7,55,48,448/- respectively (total ₹ 11,92,24,038/-). However, based on a reading of the Secondment Agreement, the Commissioner by order dated 27.02.2017/16.06.2017[8] held that *firstly,* seconded employees continued on their foreign employer's payroll only for continuing social security benefits and for all practical purposes the asseesee was the employer of such seconded employee. *Secondly,* during secondment, those employees had to entirely devote their skill

[5] Service Tax Appeal No. 21502/2017
[6] Bearing C No. IV/16/153/2014- ST. Adjn. (SCH No. CAU/153/Div. III/Gr 29 dated 07.05.2014 and C. No. IV/16/293/2015 ST II Adjn./2043/15 dated 26.11.2015
[7] Order-in-Original No. 54-55/2016-17 dated 27.02.2017/16.06.2017
[8] Order-in-Original No. 54-55/2016-17 dated 27.02.2017/16.06.2017

and knowledge towards achieving the purpose of their secondment. *Thirdly,* each employee had to report to and be responsible to the assessee. *Fourthly,* a look at one sample agreement showed that it was between the individual and the asseesee, and not between the overseas entity and the asseesee. *Fifthly,* the obligation to honour the compensation agreement was upon the assessee only. *Sixthly,* the facts were parallel to *Volkswagen India Pvt. Ltd*[9], in which the CESTAT decided the matter in favour of the assessee. *Seventhly,* there was no supply of manpower rendered to the assessee by the foreign holding company and the method of salary disbursement is not determinative of the nature of the transaction. *Eighthly,* for the period post 2012, the remittance is a reimbursement based on actuals and there is no amount which is payable in respect of the activity in question and therefore there is no consideration involved.

9. Aggrieved by the Commissioner's order dropping the demand, the Revenue has filed an appeal challenging it, in which the assessee too filed its cross objection.

The impugned order

10. The CESTAT, by its order noted the position in law – that earlier, the definition of taxable services under Section 65(105) (k) included service by a manpower recruitment or supply agency in relation to recruitment or supply of manpower temporarily or otherwise. It was noted that the scope of the term "manpower recruitment of supply agency" was spelt out in Para 22.3 in the Circular of 27.07.2005[10]. Next, the CESTAT noted that the position in law changed in that manpower and recruitment services was *per se* included since it did not form part of the negative list. In this regard, it noticed Section 65B (44) in which by clause (b), provision of service by an employee or employer by or in relation to employment is an excluded service. CESTAT, therefore, reasoned that the essential ingredients for any activity to be called as manpower recruitment or supply agency

[9] 2014 (34) STR 135
[10] *Circular F.No.B1/6/2005-TRU*

was that it should be "any person", engaged in providing a specified service; the specific service ought to be recruitment of manpower which should be provided temporarily or otherwise; such service may be provided directly or indirectly and in any manner – further that the service should be provided to some other person. According to CESTAT, the definition of "manpower recruitment or supply agencies" brought under its ambit two types of activity, i.e., manpower recruitment and manpower supply, and furthermore, service became taxable only if provided by a manpower recruitment or supply agency. CESTAT reasoned that in the present case, it was concerned with supply of manpower after July 2012, when definition of service specifically excluded certain transactions, such as the one provided by an employee to an employer in relation to employment.

11. The CESTAT then, on an examination of the agreements, interpretation of documents on record (including the agreements entered by the respondent with its group company), held that the subject matter of the contract was not supply of manpower. The group companies were not engaged in supply of manpower. The CESTAT held that those seconded to the assessee working in the capacity of employees and receiving salaries by group companies were only for disbursement purposes. The employee-employer relationship existed and that the activity, therefore, could not be termed as "manpower recruitment and supply agency." It was held that the assessee obtained from its group companies directly or by transfer, service of expatriate employees who were paid salaries by the assessee in India, for which tax was deducted and paid to statutory benefits – such as provident fund. The assessee also remitted contributions to be paid toward social security and other benefits on account of the employees, under the laws applicable to the group companies abroad. In these circumstances, it was held that the overseas group companies which had contracted with the assessee were not in the business of supply of manpower and that the assessee was not a service recipient. On the strength of this reasoning, the assessee's appeals were allowed and the revenue's appeals were rejected.

Contentions of Revenue

12. Mr. Balbir Singh, learned ASG relied upon the materials produced before the CESTAT. He submitted that in terms of the Services Agreement (dated 01.09.2006), by Clause 8, the assessee NOS agreed to perform or provide to the foreign group company (Northern Trust Company) various services which were enumerated in Attachment 1 or such other services as would be agreed to by the parties in future. In terms of Attachment 1, the assessee was to provide "IT enabled services" supporting back-up and office related operations. It was submitted that the remuneration to be provided for the service was fixed at the actual cost plus a mark-up of 15%. The ASG then referred to the master services agreement between the assessee and Northern Trust Company dated 12.02.2009. In terms of this master agreement the assessee was to provide "general back office and operational support" to the foreign group company which included foreign investment, investment management liaison group cash, evaluations and reporting, IRAS fund accounting, securities, lending operations; tax related operations, including tax reclaimed, etc. It was pointed out that in terms of Clause 2.1, though the assessee was to perform and provide services to the foreign group company, such services could be delivered to other parties nominated by the Northern Trust Company.

13. The third document referred was the secondment agreement entered into with effect from 01.04.2007 between the Northern Trust Management Services Ltd. (an overseas group company - also "NTMS") and the assessee. The ASG relied broadly on Article I by which parties agreed that the assessee would request for the secondment of employees to be remunerated through the payroll of their foreign employer. Reliance was also placed upon Article III which stated that the assessee had to reimburse the expenses paid during the secondment period, in respect of remuneration of the seconded employees, including the salary, incentive, out of pocket expenses, etc. It was urged that this clause specifically stated that the

payments by the assessee would be limited to actual costs incurred, including administrative clause reasonably attributable to services. The payment mechanism was spelt out in Article IV. The learned ASG also referred to the independent letter of agreement between the foreign group company and one of the seconded employees which specifically stated that secondment was a limited duration assignment in terms of which the employee had the right to terminate the engagement. It was submitted that a clause would clearly indicate that apart from the remuneration normally paid, such seconded employees were entitled to annual home leave allowance – including for members of the family; car rental costs; and housing – monthly rent for which was fixed at ₹3,97,500. Furthermore, allowances toward packing, shipment, storage, temporary lodging, rest and recreation, trip allowance, etc. were fixed. It was highlighted that in terms of this agreement, the base salary and bonus of the employee clause read as follows:

> *"Effective with your assignment in Bangalore, India, your base salary will be US$ 3,30,000/-.*
> *In addition to the salary liability, servant allowance and hardship allowance (fixed at 20% of the base salary during the assignment in Bangalore was payable.."*

14. The revenue contended that looking at an overall reading of the agreement, i.e. services agreement dated 01.09.2006 and its attachment, the master service agreement dated 12.02.2009 (with its annexures), the secondment agreement dated 01.04.2007, and the secondment assignment letter or agreement with the concerned employee clearly showed that the overseas employer provided the services of its employees to the assessee for the performance of agreed tasks. These tasks were handed over to the assessee by the overseas group company. It was not as if the assessee was free in regard to the manner of performance of the jobs assigned to it. The consideration provided to it was fixed (15% markup over the actual costs incurred); the costs included the remuneration nominally paid by the assessee to the seconded employee. Further, those were reimbursed. For a temporary period, the seconded employee was only *operationally* under the control of the assessee. It

was submitted that this arrangement was essential because without such control, it would not have been practicable for the assessee to have ensured performance of the tasks, it was expected to, through the seconded employees concerned. Yet, the fact remained that upon the cessation of the assignment, the employees reverted back to their original position in the overseas companies to work there or to be deployed elsewhere in terms of the global policy.

15. Learned counsel submitted that a combined reading of the materials on record clearly establish that the arrangement between the assessee and its overseas group companies – apparent through the various conditions spelt out in different documents- was one of a contract *for* service. In other words, what was provided to the assessee by the overseas counterpart or group companies were services through its employees. These services directly pertained to the discharge of functions of the assessee.

16. It was argued that CESTAT's reasoning that the contract between the parties was not one in which the overseas group company supplied services, was erroneous. In this context, it was urged that the mere fact that the temporary control over the manner of performance of duties of the employees seconded did not take away or diminish the fact that their real employer was none other than the overseas company. The scale of payments made to such seconded employees was of such magnitude that they were regarded as highly skilled for the performance of specific tasks by the assessee.

17. It was argued that the real reason or purpose for the secondment by the overseas companies to the assessee was to ensure that their expertise was utilized for the performance of tasks by the assessee in terms of the service agreement and the master services agreement. Such secondment, it was contended, used their skill sets and expertise, to ensure the quality required by the overseas employer.

18. The learned ASG relied upon the decision of the Supreme Court in *Commissioner of Income Tax v. M/s. Eli Lilly & Company India Pvt. Ltd.*[11]. Reliance was also placed on *Klaus Vogel's* Treatise on Double Taxation[12]. He also placed reliance on the judgment of this Court in *Smt. Savita Garg v. The Director, National Heart Institute*[13]; *Workmen of Nilgiri Cooperative Marketing Limited v. State of Tamil Nadu & Ors.*[14]; *Silver Jubilee Tailoring House v. Chief Inspector of Shops*[15]; *Hussain Bhai Calicut v. Alath Factory Thozhilali*[16] and *Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd.*[17].

19. It was submitted that whether a particular contract is one for providing services or not is to be decided on the facts of an individual case. Further, the fact of control over the manner of performance of duties or any one such singular factor cannot be decisive. It was submitted that the facts of the present case clearly establish that the overseas company entered into specific secondment agreements by which its employees were deputed to work in the assessee's establishment. The tasks performed by them were in aid of the assessee's work which was undertaken by it in the service agreement with the overseas company. The salary, allowances the duration of the secondment, were all determined by the overseas employer and not by the assessee. Upon completion of the assignment, the seconded employees were to return to their original positions and in the overseas company. The control if any, which was with the assessee was for a limited duration – it was not enabled to impose sanctions, such as cut in salary, etc. In case it was dissatisfied, it could only ask for return of the employee to her or his original position with the foreign employer. Upon an overview of all these circumstances, it was clear that the contract between the parties was essential for the supply of services by the

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[11] (2009) 15 SCC 1
[12] *Klaus Vogel on Double Tax Conventions*, Den Haag: Wolters KLuwer, Law and Business (2015).
[13] (2004) 8 SCC 56
[14] (2004) 3 SCC 514
[15] (1974) 3 SCC 498
[16] (1978) 4 SCC 257
[17] (2021) 7 SCC 151

concerned overseas company to the assessee. Therefore, it was a taxable service and not excluded by virtue of amended Section 65 of the Finance Act, 1994.

Contentions of the assessee

20. Mr. V. Sridharan, learned senior counsel appearing for the assessee urged that a conjoint reading of Section 65(68) with Section 65(105)(k) of the Finance Act, 1994 makes it clear that the *'manpower recruitment and supply agency service'* seeks to bring under its ambit two types of activities i.e. recruitment of manpower and supply of manpower. Further the service becomes a taxable service only if provided by a manpower recruitment or supply agency. In the present case, the dispute pertains to whether the secondment of employees by the group companies to the Respondent will be regarded as supply of manpower.

21. It was argued that Circular F. No. B1/6/2005-TRU dated 27.07.2005 clarified the scope of *'Manpower Recruitment or Supply Agency'* service to include staff who are not contractually employed by the recipient but come under his direction. This view is further strengthened by Master Circular No. 96/7/2007-ST, dated 23.08.2007. It was contended that post July 2012, under the Negative List Regime, by Section 65 (44) of the Finance Act, 1994, the services provided by an employee to the employer in the course of employment are kept beyond the ambit of the definition of 'service'. Thus, the position of law both prior to as well as post July 2012 is same. Employee-employer relationship is outside the scope of the said service. The category of supply of manpower by an agency covers those cases where the manpower so supplied, comes under the direction and control of the recipient without contractual employment.

22. Learned counsel argued that, ever since the introduction of service tax in India, service by an employee to an employer was never subject to service tax. There is no country in the world which levies VAT/GST on employment service, or any services rendered by an employee to the employer.

23. Counsel urged that the agreements entered by the assessee with its group companies were to provide certain specialized services. The seconded personnel are contractually hired as the assessee's employees. Control over them is exercised by the assessee. Such employees devote all their time and efforts under the direction of the assessee; their remuneration is also fixed by it. The employees seconded to India are required to report to the assessee's designated offices. They are accountable for their performance to the assessee; the process of dispersal of the salaries and allowances is solely for the sake of convenience and continual of the social security benefits in the expats home county.

24. It was urged that in *Collector of Central Excise & Service Tax v. Nissin Brake India (P) Ltd*[18], this court while considering similar set of facts dismissed the revenue's appeal, which had challenged the CESTAT's ruling that expenses reimbursed by the Indian companies to the foreign group companies in relation to seconded employees cannot be subject to service tax under Manpower Recruitment or Supply Agency Service.

25. It was also urged that the group companies are not in the business of supplying manpower. The foreign group companies are engaged in providing personal financial services (PFS) and Corporate and Institutional services along with investment products. The foreign group companies cannot be considered as "Manpower Supply Agency'.

26. It was next urged that service tax is leviable only on the gross amount charged for the provision of service. It was argued that assuming but not admitting that service is provided by the group companies to the assessee, it cannot be said that the value of consideration for that service is the amount of salaries paid to the expats. To determine value of taxable services for charging Service Tax, gross amount charged for providing the services is to be determined. Reliance is placed on the judgment of the Delhi High Court in *Intercontinental Consultants and*

[18] Civil Appeal Diary No(s). 45344/2018 (C.A. No. 2408 / 2019)

Technocrats Pvt. Ltd. v. Union of India[19], which held that Rule 5(1) of Service Tax (Determination of Value) Rules, 2006 goes beyond the mandate of Section 67 of the Finance Act, 1994 as quantification of the value of the service can never exceed the gross amount charged by the service provider for the service provided by him. This position was upheld by this court in *Intercontinental Consultants and Technocrats Pvt. Ltd*[20]. In the present case, the demand of the service tax is being computed on the salaries and allowances paid to the employees. The salaries cannot be said to be consideration paid to group companies for provision of service and thus such demand (of service tax in lieu of salaries), is untenable. Therefore, any cost or expense reimbursed does not represent the gross value of taxable service and cannot be a consideration for charging service tax.

27. Counsel argued that debit notes raised by the overseas entity upon the assessee show that amounts paid were towards reimbursement of salaries and other allowances to employees. There was no mark-up charged by the foreign company.

28. It was next submitted that the demand to the extent of ₹ 8,12,62,382/- for the period October 2006 to September 2010, should be set aside. The assessee was under the *bona fide* belief that the seconded employees were its employees and therefore, not covered under the ambit of manpower supply services. Further, in any case, the assessee is entitled to avail refund of the service tax paid on input services under Rule 5 of the CENVAT Rules read with Rule 6A of the Service Tax Rules, 1994. Therefore, there can be no intention to evade tax. Counsel also urged that the *bona fide* belief was further strengthened by the fact that for the subsequent period (April 2012 to September 2014), the Adjudicating Authority itself dropped the demand by recording favourable findings.

29. It was lastly urged that services received by the assessee from foreign group companies would qualify as input services and that it is eligible to avail credit of service tax paid on such input services. Therefore, even if the said demand of

[19] 2013 (29) S.T.R. 9 (Del.)
[20] (2018) 4 SCC 669.

service tax is paid, the entire amount is available as input credit and is refunded to the Respondent in cash by virtue of Rule 5 of the CENVAT Rules read with Rule 6A of the Service Tax Rules, 1994 ("1994 Rules"). The assessee relied on detailed facts in this regard through affidavit on record by its affidavit dated 17.08.2021 before this court. It is also on record that all the refund claims filed by the assessee had largely been granted barring small amounts which were paid against input services such as Clearing and Forwarding Agent Services, Courier Services, Information Technology Software Services. In this regard, reliance is placed on *SRF Ltd. v. Commissioner*[21] and *Commissioner of Central Excise v. Coca Cola India Pvt.* Ltd[22].

Relevant provisions of the Finance Act, 1994 with amendments

30. Before amendment of the Finance Act, its provisions, to the extent they are relevant, are extracted hereunder. The definition of "manpower recruitment or supply agency" and "Taxable service" under the definition clause, in Section 65 are extracted below:

Old provisions of the Act

"Definitions.
65. In this Chapter, unless the context otherwise requires, - (1) "actuary" has the meaning assigned to it in clause (1) of section 2 of the Insurance Act, 1938 (4 of 1938); who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management;]

xxxxxx xxxxxx xxxxxx

[23] (68) "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);]

[21] 2016 (331) ELT A 138 (S.C.)
[22] 2007 (213) ELT 490 (S.C)
[23] *Substituted by the Finance Act, 2005, w.e.f. 16.06.2005.*

xxxxxx xxxxxx xxxxxx

(105) "taxable service" means any service provided [24][or to be provided],-

xxxxxx xxxxxx xxxxxx

[25][(k) [26][to any person], by a manpower recruitment or supply agency in relation
to the recruitment or supply of manpower, temporarily or otherwise, in any manner.]
[27][Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate;.."

The provisions, post amendment in 2012 (w.e.f. 01.07.2012), read as follows:

Amended provisions of the Act

"Interpretations.

65B. In this Chapter, unless the context otherwise requires, -

xxxxxx xxxxxx xxxxxx

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.- For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,-

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[24] *Inserted by the Finance Act, 2005, w.e.f. 16.06.2005.*
[25] *Substituted by the Finance Act, 2005, w.e.f. 16.06.2005.*
[26] *Substituted for "to a client" by the Finance Act, 2008, w.e.f. 16.05.2008.*
[27] *Inserted by the Finance Act, 2007, w.e.f. 01.06.2007.*

> *(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or*
> *(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or*
> *(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.*
>
> *Explanation 2.- For the purposes of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.*
> *Explanation 3.- For the purposes of this Chapter --*
> *(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;*
> *(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.*
> *Explanation 4.- A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;"*

The agreements and their relevant stipulations

31. The first in the series of relevant documents, is the *Services Agreement.* It was entered into between Northern Trust Company (the overseas group entity, known hereafter as "NTC") and the assessee. In terms of the services agreement (dated 01.09.2006), it was acknowledged that the assessee was engaged in providing "incidental back-office support services" which it agreed to provide to NTC. By clause 2, it was agreed that:

> *"2. Consideration: The consideration for performance of the services shall be paid on a mutually agreed basis as described in Attachment 1*"

By clause 8, the services to be performed by the assessee were also set out in Attachment 1. Their description reads as follows:

> *"Service: IT enabled services supporting back-office banking and related operations"*

The part relating to consideration, i.e., fee (payable to the assessee) reads as follows:

> *"Beginning September 1 2006, NOS shall charge Northern Trust for all actual costs incurred in providing the agreed services, plus a mark up of 15.0%. ..."*

32. The provisions of the secondment agreement, entered between NTMS and the assessee, to the extent relevant read as follows:

> *"SECONDMENT AGREEMENT*
>
> *This SECONDMENT AGREEMENT (this "Agreement") is entered into and effective April 1, 2007 by and between:*
>
> *Northern Trust Management Services Ltd a company incorporated under the laws of the United Kingdom with its principal office located at 50 Bank Street, London, E14 5NT, (hereinafter referred to as "NTMS'),*
> *and*
> *Northern Operating Services Private Limited, a company organised and existing under the laws of India and having its principal office at RMZ Ecospace Campus 1C, Sarjapur Outer Ring Road, Bangalore-5600037, India (hereinafter referred to as "NOS").*
>
> *WITNESSETH:*
> *xxxxxx* *xxxxxx* *xxxxxx*
>
> *ARTICLE I*
>
> *SECONDMENT*
>
> *NOS shall request NTMS to provide employees ("the Employees) who have the expertise required by NOS. In order to help NTMS make the selection, NOS shall provide NTMS with a description of the skills and competencies required by NOS. Based on the list provided by NOS, NTMS shall identify the people and select the employees.*
>
> *NTMS hereby agrees to second the employees to NOS for time period(s) ("the Secondment Period") with commencement dates and completion dates, as reflected in Appendix I and Appendix II of this agreement. Appendix I and Appendix II will be updated from time to time to reflect any changes made as a result of Article II (E) or Article II (G) or Article II (H).*
> *The employees seconded to NOS shall continue to be remunerated through the payroll of NTMS only for the purpose of continuation of social security, retirement and health benefits but for all practical purposes, NOS shall be the employer.*
>
> *ARTICLE II*

DUTIES AND OBLIGATIONS

NTMS shall ensure that:

(A) The Employee shall act in accordance with the instructions and directions of NOS.
(B) During the Secondment Period, the Employees shall devote the whole of their time, attention and skills to the duties of their secondment.
(C) The employees shall be reportable and responsible to NOS.
(D) All the responsibility and risk for work undertaken by the Employees will remain with NOS during the Secondment Period.
(E) NOS shall have the right, at any time, to approve or reject the Employee selected for secondment and to request from NTMS the replacement of any Employees who, in the opinion of NOS, are not qualified or do not meet the requirements necessary to fulfil their Secondment,
xxxxxx xxxxxx xxxxxx

(H) All terms and conditions of employment with NTMS will cease during the Secondment Period. The terms and conditions of employment with NOS, as stated in the employment agreements between the Employees and NOS will remain in force during the Secondment Period.
xxxxxx xxxxxx xxxxxx

ARTICLE III

DUTIES AND OBLIGATIONS OF NOS

NOS reimburse expenses paid by NTMS as follows:

During the Secondment Period, as defined in Appendix I and Appendix II hereto, NOS shall reimburse NTMS for the following amounts (collectively the "Reimbursable Expenses"):

(1) All remuneration of the Employees, including but not limited to, salary, incentives and employment benefits of the Employees paid by NTMS; and

(2) All out-of-pocket expenses incurred by the seconded Employees and reimbursed by NTMS, including but not limited to, business travel expenses and other miscellaneous expenses, directly related to the secondment of the Employee.

It is specifically agreed that the payments by NOS to NTMS shall be limited to actual costs incurred, including administrative costs, as may be reasonably attributable to payroll services provided by NTMS. Administrative cost for this purpose would be 1% of actual cost incurred. The parties agree that during the Secondment Period, the role of NTMS is restricted to that of a payroll services provider only.

ARTICLE VII

INDEMNIFICATION

NTMS will endeavor to provide appropriate qualified Employees for secondment under this Agreement. Nothing in this Agreement, shall be construed as a warranty of the quality of the seconded Employees.

Further NOS shall hold NTMS harmless and shall indemnify NTMS from all claims, demands, suits, actions, loss, damage, costs and expenses (excluding consequential loss or damage) to which NTMS may become liable in respect to any and all loss, damage or injury as a result of any act or omission by the seconded Employee.

The master services adverted to earlier, between NTC (group company) and the assessee, reads as follows:

"THIS MASTER SERVICES AGREEMENT ("this Agreement") is dated February 12th, 2009 and made

BETWEEN:

(1) THE NORTHERN TRUST COMPANY, a company established under the laws of the State of Illinois in the United States of America, whose principal place of business in the U.S.A. is at 50 South LaSalle Street, Chicago 60603, Illinois, U.S.A. ("TNTC Chicago"); and (2) NORTHERN OPERATING SERVICES PRIVATE LIMITED, a company established under the laws of India, whose principal place of business in India is at 2nd Floor, RMZ Ecospace Campus 10, Sarjapur Outer Ring Road, Bangalore 560037, India ("NOS"). TNTC Chicago and NOS are hereinafter collectively referred to as "Parties" and individually as "Party".

3. Duties of NOS

3.1 NOS agrees that it will use reasonable efforts to ensure that the Services contemplated under this Agreement are performed by NOS promptly and to the best of its ability and in accordance with the Standard of Care. TNTC Chicago agrees that it will provide proper information and assistance to NOS by making reasonable efforts in order for NOS to have access to the data and assistance required in order to properly carry out the duties contemplated by this Agreement to be performed by it.

3.2 It is understood and agreed that the Services performed hereunder by NOS for TNTC Chicago shall be carried out in accordance with policies, authorities, and procedures as are or may be established and authorized by TNTC Chicago.

SCHEDULE 3 — FEES & DETERMINATION THEREOF

1. The fees for the Services shall be payable by TNTC Chicago for the Services rendered by NOS for TNTC Chicago.

2. The fees for the Services performed by NOS under the Agreement shall be the Total Service Costs (as defined below) incurred by NOS for rendering the Services plus a mark-up on the Total Service Cost. Mark-up shall be 15% on Total Service Costs for the period of agreement. This shall be revised from time to time depending upon the market conditions and transfer pricing requirements.

xxxxxx xxxxxx xxxxxx"

The letter of understanding issued to one of the seconded employees, to the extent it is relevant, reads as follows:

"LETTER OF UNDERSTANDING

August 6, 2012

Dear Brian Ovaert,

This letter of agreement between Northern Operating Services Private Limited (NOS) and Brian Ovaert confirms our mutual understanding of the terms and conditions applying to your employment with the Company while on international assignment to Northern Operating Services Pvt. Ltd. in the position of Regional Executive reporting directly to NOS Board of Directors.

xxxxxx xxxxxx xxxxxx

Duration

The effective date of your international assignment is July 1, 2012, and it is expected that your assignment to and employment with NOS will be 12 months in duration. At its conclusion, repatriation will be in accordance with the Global Mobility Repatriation Policy. Alternatively, by mutual agreement, your assignment to and employment with NOS may be extended. Should this be the case, an extension letter will be entered into between NOS and yourself.

However, you have the right to terminate your employment at any time for any reason and the Company has the same right.

xxxxxx xxxxxx xxxxxx

Vacation/Local Public Holidays
Your annual vacation entitlement is currently 20 days. You will be entitled to all local public holidays observed by NOS. However, you must use vacation days to observe any United States public observed holiday that is not observed in NOS. A list of NOS' public holidays may be found on My Place.

Home Leave During your assignment, you will be provided the following Home Leave Options:

You may elect to receive an annual home leave allowance for each member of your immediate family to Chicago for two home leave trips.

This allowance is non-accountable and is intended to cover airfare and ground transportation to and from the airports in your home and at Bangalore, India.
If you prefer, you may book your travel directly through BCD Travel for direct reimbursement according to Northern's Travel Policy.
In the final year of your assignment, home leave entitlement will continue if you are on assignment at least six months from your assignment anniversary date. You will be granted an additional 2 travel days (round trip) in any year in which you are entitled to home leave You should plan to address all of your repatriation matters during your final annual home leave visit.
All accommodation and car rental costs during home leave are your personal responsibility.
xxxxxx *xxxxxx* *xxxxxx*

Housing
Northern Trust will make arrangements directly with the landlord/owner of the property of your choice in Bangalore, India. Do not enter into personal agreements. You should aim to identify and select a property that will suit you and your family for the duration of your assignment (taking into account schools/location). The monthly rent of your selected accommodation should be limited to INR 366,700. In addition, an annual utility allowance of (NR 397,500 will be paid to you. This allowance will cover water, sewer, gas, oil, electricity, basic telephone service, basic satellite/cable TV service and initial set-up for broadband service, but will exclude the cost of monthly premium satellite/cable TV, monthly telephone calls, and monthly broadband service.
Packing/Shipping/Storage
A moving firm designated by Northern Trust will ship your household goods via air and ocean freight. Insurance at a reasonable value amount on both of these shipments will also be covered by the Company. Household goods that are not shipped to Bangalore, India will be stored if required for the duration of your assignment and the costs of storage and Insurance premiums will be met. You should note that certain items may be excluded from shipment and storage. You will be advised if this is the case. Your air shipment allotment Is 600 lbs. for you and your spouse.
Furniture Allowance in Lieu of Shipment
In lieu of shipping some or all of your current household furnishings via ocean freight to Bangalore, India, you can receive a "furniture allowance" which would be an amount based on country norms. Your furniture allowance is USD $9,000.
xxxxxx *xxxxxx* *xxxxxx*

Personal Vehicle Disposal

You will be reimbursed for a loss you incur when selling your personal vehicle(s), upon initial transfer to Bangalore, India up to a maximum of US$5,000 for each car. Details of the car losson-sale policy are described in the Global Mobility Policy.

R&R Trips

You will be provided two (2) R & R trips in a 12 month period for you and your spouse to leave Bangalore, India. These trips are in addition to your two annual home leave trips. The R & R allowance is non-accountable and is intended to assist with hotel and airfare costs. Providing an allowance allows you the flexibility to choose the length and destination of your R & R trips. The allowance per trip for your family size of 2 is USD$2,100.

xxxxxx xxxxxx xxxxxx

Base Salary and Bonus

Effective with your assignment in Bangalore, India your base salary will be USD $330,000.

Mobility Allowance

You will be paid a one-time sum of USD $7,500 prior to your departure by deposit to your checking account. The Mobility Allowance is specifically compensating you for any incidental additional expenses incurred as a result of your assignment.

Hardship Allowance

You will be paid a hardship allowance of 20% of your base salary during your assignment to Bangalore, India. This amount may be adjusted during your assignment as independent data is updated. Any changes will be communicated prior to implementation. This amount will be paid semi-monthly along with your normal salary.

Servant Allowance

While on assignment in Bangalore, India, it may be necessary to have the use of household servants to maintain a household, ship for groceries, perform daily living duties, etc. An allowance of $2,000/yr. will be paid to you by Brookfield Global Relocation Services to facilitate this."

Analysis and Conclusions

33. The issue which this court has to decide is whether the overseas group company or companies, with whom the assessee has entered into agreements,

provide it manpower services, for the discharge of its functions through seconded employees.

34. The contemporary global economy has witnessed rapid cross-border arrangements for which dynamic mobile workforces are optimal. To leverage talent within a transnational group, employees are frequently seconded to affiliated or group companies based on business considerations. In a typical secondment arrangement, employees of overseas entities are deputed to the host entity (Indian associate) on the latter's request to meet its specific needs and requirements of the Indian associate. During the arrangement, the secondees work under the control and supervision of the Indian company and in relation to the work responsibilities of the Indian affiliate. Social security laws of the home country (of the secondees) and business considerations result in payroll retention and salary payment by the foreign entity, which is claimed as reimbursement from the host entity. The crux of the issue is the taxability of the cross charge, which is primarily based on who should be reckoned as an employer of the secondee. If the Indian company is treated as an employer, the payment would in effect be reimbursement and not chargeable to tax in the hands of the overseas entity. However, in the event the overseas entity is treated as the employer, the arrangement would be treated as service by the overseas entity and taxed.

35. In *Director Income Tax v. M/S Morgan Stanley & Co. Inc*[28] this court had to consider whether an arrangement involving secondment, in the context of liability to income tax. The court had observed:

> *"17. As regards the question of deputation, we are of the view that an employee of MSCo when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with MSCo. As long as the lien remains with MSCo the said company retains control over the deputationist's terms and employment. The concept of a service PE finds place in the UN Convention. It is constituted if the multinational enterprise renders services through its employees in India provided the services are rendered for a specified period. In this case, it extends to two years on the request of MSAS. It is important to note that where the activities of the multinational enterprise entails*

[28] (2007) 7 SCC 1

> *it being responsible for the work of deputationists and the employees continue to be on the payroll of the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge.*
>
> *18. Applying the above tests to the facts of this case we find that on request/requisition from MSAS the applicant deputes its staff. The request comes from MSAS depending upon its requirement. Generally, occasions do arise when MSAS needs the expertise of the staff of MSCo. In such circumstances, generally, MSAS makes a request to MSCo. A deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCo as he retains his lien..''*

36. In *Eli Lilly* (supra) the appellant was incorporated in India under the Companies Act, 1956 and was a joint venture between M/s Eli Lilly, Netherlands B.V. and Ranbaxy Laboratories (Ltd.). The foreign partner had seconded four expatriates to the Indian joint venture. The employees, however, continued to remain on the rolls of the foreign company. They received home salary outside India from the foreign partner. The joint venture company deducted tax under Section 192(1) in respect of the salary paid by it to the expatriates in India, and did not deduct tax in respect of the home salary paid by the foreign company. This court held that the provisions of the tax deduction at source (TDS) under the Income Tax Act, were applicable in relation to the salary paid by the foreign employer.

37. The CESTAT, in this case, relied on its previous rulings in *Honeywell Technology Solutions Pvt. Ltd.* v. *CST, Bangalore*[29]. It held that that the method of disbursement of salary cannot determine the nature of the transaction, based on the ruling in *Volkswagen India Pvt. Ltd.* v. *CCE, Pune-I*[30] which was affirmed by this court by an order[31]. Another order, in *Computer Sciences Corporation India Pvt. Ltd.* v. *Commissioner of Service Tax, Noida*[32] similarly affirmed by this court by another order, was relied on.

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[29] 2020-TIOL-1277-CESTAT-BANG
[30] 2014 (34) S.T.R. 135 (Tri. - Mumbai)
[31] *Commissioner* v. *Volkswagen India (Pvt.) Ltd.* - 2016 (42) S.T.R. J145 (S.C.).
[32] 2014-TIOL-434-CESTAT DEL

38. Questions that have repeatedly arisen, in different contexts, and at different times, is whether the facts of a given case reveal, who is the employer, and whether the relationship between an employee and another, is one of master servant, or whether there is an underlying contract for service, by which the real employer, lends the services of his employee to another. In *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*[33] this court observed as follows:

> *"The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at p. 23 in Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd. [(1952) SCR 696, 702] "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question."*

39. In *D.C. Dewan Mohideen Sahib and Sons v. Secretary, United Beedi Workers' Union*[34], the court analysed the sample agreement which disclosed the facts of the case before it, and, for the first time, held that the "control" test is not necessarily determinative to discern the real employer:

> *"…There is in our opinion little doubt that this system has been evolved to avoid Regulations under the Factories Act. Further there is also no doubt from whatever terms of agreement are available on the record that the so-called independent contractors have really no independence at all. As the appeal court has pointed out they are impecunious persons who could hardly afford to have factories of their own. Some of them are even ex-employees of the Appellants. The contract is practically one-sided in that the proprietor can at his choice supply the raw materials or refuse to do so, the so-called contractor having no right to insist upon the supply of raw materials to him. The so-called independent contractor is even bound not to employ more than nine persons in his so-called factory. The sale of raw materials to the so-called independent contractor and resale by him of the manufactured bidis is also a mere camouflage, the nature of which is apparent from the fact that the so-called contractor never paid for the materials. All that happens is that when the manufactured bidis are delivered by him to the Appellants, amounts due for the so-called sale of raw materials is deducted from the so-called price fixed for the bidis. In effect all that happened is that the so-called independent contractor is supplied with tobacco and leaves and is paid certain amounts for the wages of the workers employed and for his own trouble. We can therefore see no difficulty in holding that the so-called contractor is merely an employee or an agent of the Appellants as held by the appeal court and as such employee or agent he*

[33] 1957 SCR 158
[34] 1964 (7) SCR 646

> *employs workers to roll bidis on behalf of the Appellants. The work is distributed between a number of so-called independent contractors who are told not to employ more than nine persons at one place to avoid Regulations under the Factories Act."*

40. In *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments*[35] this court remarked how the test of control, or manner of performance of a task, by an employee by another is not conclusive to decide if an employer employee relationship subsists:

> *"This distinction (viz., between telling a servant what to do and telling him how to do it) was based upon the social conditions of an earlier age; it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanization) a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the profession of technical knowledge and skill in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer i.e. what to modern eyes appears as an imperfect division of labour. [See Prof. Kahn-Freund in (1951), 14 Modern Law Review, at p. 505]*
>
> *27. It is, therefore, not surprising that in recent years the control test as traditionally formulated has not been treated as an exclusive test.*
>
> *28. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction [See Atiyah, PS. "Vicarious Liability in the Law of Torts", pp. 37-38]."*

[35] 1974 (1) SCR 747

41. The ruling in *Silver Jubilee* (supra) about the flexibility in regard to deciding the question of whether a contract is one for service or one of service, has been followed in other decisions, such as *Indian Banks Association v. Workmen of Syndicate Bank*[36] and *Indian Overseas Bank v. Workmen*[37]. The recent decision in *Sushilaben Indravadan* (supra) reviewed a large number of previous judgments, and observed that:

> *"24. A conspectus of all the aforesaid judgments would show that in a society which has moved away from being a simple agrarian society to a complex modern society in the computer age, the earlier simple test of control, whether or not actually exercised, has now yielded more complex tests in order to decide complex matters which would have factors both for and against the contract being a contract of service as against a contract for service. The early 'control of the employer' test in the sense of controlling not just the work that is given but the manner in which it is to be done obviously breaks down when it comes to professionals who may be employed. A variety of cases come in between cases which are crystal clear-for example, a master in a school who is employed like other employees of the school and who gives music lessons as part of his employment, as against an independent professional piano player who gives music lessons to persons who visit her premises. Equally, a variety of cases arise between a ship's master, a chauffeur and a staff reporter, as against a ship's pilot, a taxi driver and a contributor to a newspaper, in order to determine whether the person employed could be said to be an employee or an independent professional. The control test, after moving away from actual control of when and how work is to be performed to the right to exercise control, is one in a series of factors which may lead to an answer on the facts of a case slotting such case either as a contract of service or a contract for service. The test as to whether the person employed is integrated into the employer's business or is a mere accessory thereof is another important test in order to determine on which side of the line the contract falls. The three-tier test laid down by some of the English judgments, namely, whether wage or other remuneration is paid by the employer; whether there is a sufficient degree of control by the employer and other factors would be a test elastic enough to apply to a large variety of cases. The test of who owns the assets with which the work is to be done and/or who ultimately makes a profit or a loss so that one may determine whether a business is being run for the employer or on one's own account, is another important test when it comes to work to be performed by independent contractors as against piece-rated labourers. Also, the economic reality test laid down by the U.S. decisions and the test of whether the employer has economic control over the workers' subsistence, skill and continued employment can also be applied when it comes to whether a particular worker works for himself or for his employer. The test laid down by the Privy Council in Lee Ting Sang v. Chung Chi-Keung [1990] 2 A.C. 374, namely, is the person who has engaged himself to perform services performing them as a person in business on his own account, is also an*

[36] 2001 (1) SCR 1011
[37] (2006) 3 SCC 729

> *important test, this time from the point of view of the person employed, in order to arrive at the correct solution. No one test of universal application can ever yield the correct result. It is a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight. Ultimately, the Court can only perform a balancing act weighing all relevant factors which point in one direction as against those which point in the opposite direction to arrive at the correct conclusion on the facts of each case."*

42. The assessee's contention before the CESTAT, *inter alia,* was that apart from it having control over the nature of work of the seconded employees, no consideration was charged by the foreign entities from it for providing the supply of manpower as the revenue alleged.

43. A plain reading of the definition of "manpower recruitment agency" (per Section 65 (68) of the unamended Act) requires that to fall within that description,

(a) a person (the expression is not defined; however, by Section 3 (42) of the General Clauses Act, the term includes *"any company or association or body of individuals whether incorporated or not"*);

(b) provides service

(c) directly or indirectly,

(d) in any manner for recruitment or supply of manpower,

(e) temporarily *or otherwise*

44. The question is what are the services provided to the assessee, and by whom? Do they include the provision of services, through employees, by its overseas group companies or affiliates? After 01.07.2012, the definition of "service" underwent a change. Except listed categories of activities excluded from, or kept out of the fold of the definition, *every activity* virtually is "service". Now, by Section 65 (44), "service" means

(a) any activity

(b) carried out by a person for another

(c) for consideration, and

(d) includes a declared service (the term "declared service" is defined in Section 66E).

45. Section 65 (44), however, *excludes* from its sweep [by clause (b)], *"a provision of service by an employee to the employer in the course of or in relation to his employment."* The assessee contends that the secondment agreement has the effect of placing the overseas employees under its control, so to say, and enables it to require them to perform the tasks for its purposes. It emphasizes that the real nature of the relationship between it and the seconded employees is of employer and employee, and outside the purview of the service tax regime.

46. From the above discussion, it is evident, that prior to July 2012, what had to be seen was whether a (a) person provided service (b) directly or indirectly, (c) in any manner for recruitment or supply of manpower (d) temporarily *or otherwise*. After the amendment, all activities carried out by one person for another, for a consideration, are deemed services, except certain specified excluded categories. One of the excluded category is the provision of service by an employee to the employer *in relation to his employment.*

47. One of the cardinal principles of interpretation of documents, is that the nomenclature of any contract, or document, is not decisive of its nature. An overall reading of the document, and its effect, is to be seen by the courts. Thus, in *State of Orissa v. Titaghur Paper Mills Co. Ltd*[38] it was held as follows:

> ***"120.*** *It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. These, however, have to be determined from all the terms and clauses of the document and all the rights and results flowing therefrom and not by picking and choosing certain clauses and the ultimate effect or result as the Court did in the Orient Paper Mills case (1977) 2 SCR 149)"* .

This principle was reiterated in *Prakash Roadlines (P) Ltd. v. Oriental Fire & General Insurance Co. Ltd.*[39]

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[38] 1985 Supp SCC 280
[39] (2000) 10 SCC 64

48. The task of this court, therefore is to, upon an overall reading of the materials presented by the parties, discern the true nature of the relationship between the seconded employees and the assessee, and the nature of the service provided – in that context - by the overseas group company to the assessee.

49. A co-joint reading of the documents on record show that:

(i) Attachment 1 to the service agreement ensures that the overseas group company assigns, *inter alia,* certain tasks to the assessee, including back office operations of a certain kind, in relation to its activities, or that of other group companies or entities;

(ii) The assessee is paid a mark up of 15% of the overall expenditure it incurs, by the overseas company (clause 2, read with attachment 1 of the Service Agreement);

(iii) By the Secondment Agreement, the parties agree that the overseas employee is *temporarily loaned* to the assessee (Article I read with the Schedule);

(iv) During the period of secondment, the assessee has control over the employee, i.e. it can require the seconded employee to return, and likewise, the employee has the discretion to terminate the relationship (Article II);

(v) The overseas employer (group company) pays the seconded employee, which is reimbursed to the overseas company, by the assessee (Article III);

(vi) The assessee is responsible for the work of the seconded employee, i.e., the overseas employer, during the secondment period, is absolved of any liability for the job or work of its seconded employees (Article VII);

(vii) The secondment is for a specified duration, and the employment with the assessee ceases upon the expiration of that period (Article II of the secondment agreement and the *"Duration"* clause in the letter of understanding with the seconded employee);

(viii) The letter of understanding issued to the seconded employee specifies that the tenure with the assessee is an assignment (in one place, the term used is "*At its conclusion, repatriation will be in accordance with the Global Mobility Repatriation Policy*");

(ix) The terms include the salary payable as well as other allowances, such as hardship allowance, vehicle allowance, servant allowance, paid leave, housing allowance, etc. The nature of salary and other perks underscore the fact that the seconded employees are of a certain skill and possess the expertise, which the assessee requires.

50. The above features show that the assessee had *operational or functional* control over the seconded employees; it was potentially liable for the performance of the tasks assigned to them. That it paid (through reimbursement) the amounts equivalent to the salaries of the seconded employees – because of the obligation of the overseas employer to maintain them on its payroll, has two consequences: one, that the seconded employees continued on the rolls of the overseas employer; two, since they were not performing jobs in relation to that employer's business, but that of the assessee, the latter had to ultimately bear the burden. There is nothing unusual in this arrangement, given that the seconded employees were performing the tasks relating to the assessee's activities and not in relation to the overseas employer. To put it differently, it would be unnatural to expect the overseas employer to not seek reimbursement of the employees' salaries, since they were, for the duration of secondment, not performing tasks in relation to its activities or business.

51. As discussed previously, 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 assessee asserts the arrangement to be) or a contract for service. The general drift of cases which have been decided, are in the context of facts, where the employer usually argues that the person claiming to be the employee is an intermediary. This court has consistently applied one test: substance over form, requiring a close look at the terms of the contract, or the agreements.

52. A vital fact which is to be considered in this case, is that the nature of the overseas group companies business appears to be to secure contracts, which can be performed by its highly trained and skilled personnel. This business is providing

certain specialized services (back office, IT, bank related services, inventories, etc.). Taking advantage of the globalized economy, and having regard to locational advantages, the overseas group company enters into agreements with its affiliates or local companies, such as the assessee. The role of the assessee is to optimize the economic edge (be it manpower or other resources availability) to perform the specific tasks given it, by the overseas company. As part of this agreement, a secondment contract is entered into, whereby the overseas company's employee or employees, possessing the specific required skill, are *deployed for the duration the task is estimated to be completed in.* This court is not concerned with unravelling the nature of relationship between the overseas company and the assessee. However, what it has to decide, is whether the secondment, for the purpose of completion of the assessee's job, amounts to manpower supply.

53. Facially, or to put it differently, for all appearances, the seconded employee, for the duration of her or his secondment, is *under the control of the assessee, and works under its direction.* Yet, the fact remains that they are on the pay rolls of their overseas employer. What is left unsaid- and perhaps crucial, is that this is *a legal requirement, since they are entitled to social security benefits in the country of their origin.* It is doubtful whether without the comfort of this assurance, they would agree to the secondment. Furthermore, the reality is that the secondment is a part of the global policy – of the overseas employer *loaning their services, on temporary basis.* On the cessation of the secondment period, they have to be repatriated in accordance with a global repatriation policy (of the overseas entity).

54. The letter of understanding between the assessee and the seconded employee nowhere states that the latter would be treated as the former's employees *after the seconded period* (which is usually 12-18 months). On the contrary, they revert to their overseas employer and may in fact, be sent elsewhere on secondment. The salary package, with allowances, etc., are all expressed in foreign currency (e.g., US $ 330,000/- per annum in the letter produced before court, extracted above). Furthermore, the allowances include a separate hardship allowance of 20% of the

basic salary *for working in India.* The monthly housing allowance in the specific case was ₹ 366,700. In addition, an annual utility allowance of ₹3,97,500/- is also assured. These are substantial amounts, and could have been only by resorting to a standardized policy, of the overseas employer.

55. The overall effect of the four agreements entered into by the assessee, at various periods, with NTS or other group companies, clearly points to the fact that the overseas company has a pool of highly skilled employees, who are entitled to a certain salary structure- as well as social security benefits. These employees, having regard to their expertise and specialization, are seconded (a term synonymous with the commonly used term in India, *deputation*) to the concerned local municipal entity (in this case, the assessee) for the use of their skills. Upon the cessation of the term of secondment, they return to their overseas employer, or *are deployed on some other secondment.*

56. This court, upon a review of the previous judgment in *Sushilaben Indravadan* (supra) held that there no one single determinative test, but that what is applicable is *"a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight."*

57. Taking a cue from the above observations, 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 assessee, the fact remains that their overseas employer *in relation to its business, deploys them to the assessee, on secondment.* Secondly, the overseas employer- for whatever reason, pays them their salaries. Their terms of employment – *even during the secondment* – are in accord with the policy of the overseas company, who is their employer. Upon the

end of the period of secondment, they return to their original places, *to await deployment or extension of secondment.*

58. One of the arguments of the assessee was that *arguendo,* the arrangement was "manpower supply" (under the unamended Act) and a service [(not falling within exclusion (b) to Section 65 (44)] yet it was not required to pay any consideration to the overseas group company. The mere payment in the form of remittances or amounts, by whatever manner, either for the duration of the secondment, or per employee seconded, is just one method of reckoning if there is consideration. The other way of looking at the arrangement is the economic benefit derived by the assessee, 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 assessee has the benefit of experts for limited periods, is implicit in the overall scheme of things.

59. As regards the question of revenue neutrality is concerned, the assessee's principal contention was that assuming it is liable, on reverse charge basis, nevertheless, it would be entitled to refund; it is noticeable that the two orders relied on by it (in *SRF* and *Coca Cola*) by this court, merely affirmed the rulings of the CESTAT, without any independent reasoning. Their precedential value is of a limited nature. This court has been, in the present case, called upon to adjudicate about the nature of the transaction, and whether the incidence of service tax arises by virtue of provision of secondment services. That a particular rate of tax- or no tax, is payable, or that if and when liability arises, the assessee, can through a certain existing arrangement, claim the whole or part of the duty as refund, is an irrelevant detail. The incidence of taxation, is entirely removed from whether, when and to what extent, Parliament chooses to recover the amount.

60. This court is also of the view, for similar reasons, that the orders of the CESTAT, affirmed by this court, in *Volkswagen* and *Computer Sciences Corporation,* are unreasoned and of no precedential value.

61. In view of the above discussion, it is held that the assessee was, for the relevant period, service recipient of the overseas group company concerned, which can be said to have provided manpower supply service, or a taxable service, for the two different periods in question (in relation to which show cause notices were issued).

Invocation of the extended period of limitation

62. The revenue's argument that the assessee had indulged in wilful suppression, in this court's considered view, is insubstantial. The view of a previous three judge ruling, in *Cosmic Dye Chemical* v. *Collector of Central Excise*[40] - in the context of Section 11A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that:

> *"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."*

63. This decision was followed in *Uniworth Textiles* v. *Commissioner of Central Excise*[41] where it was observed that *"(t)he conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts"* is *"untenable"*. This view was also followed in *Escorts v. Commissioner of Central Excise*[42], *Commissioner of Customs v. Magus Metals*[43] and other judgments.

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[40] (1995) 6 SCC 117
[41] (2013) 9 SCC 753
[42] (2015) 9 SCC 109
[43] (2017) 16 SCC 491

64. The fact that the CESTAT in the present case, relied upon two of its previous orders, which were pressed into service, and also that in the present case itself, the revenue discharged the later two show cause notices, evidences that the view held by the assessee about its liability was neither untenable, nor *mala fide.* This is sufficient to turn down the revenue's contention about the existence of "wilful suppression" of facts, or deliberate misstatement. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten liability on the assessee.

Conclusions

65. It is held, for the foregoing reasons, that the assessee was the service recipient for service (of manpower recruitment and supply services) by the overseas entity, in regard to the employees it seconded to the assessee, for the duration of their deputation or secondment. Furthermore, in view of the above discussion, the invocation of the extended period of limitation in both cases, by the revenue is not tenable.

66. In light of the above, the revenue's appeals succeed in part; the assessee is liable to pay service tax for the periods spelt out in the SCNs. However, the invocation of the extended period of limitation, in this court's opinion, was unjustified and unreasonable. Resultantly, the assessee is held liable to discharge its service tax liability for the normal period or periods, covered by the four SCNs issued to it. The consequential demands therefore, shall be recovered from the assessee.

67. The impugned common order of the CESTAT is accordingly set aside. The commissioner's orders in original are accordingly restored, except to the extent they seek to recover amounts for the extended period of limitation. The demand against the assessee, for the two separate periods, shall now be modified, excluding any liability for the extended period of limitation.

68. The appeals are partly allowed, to the above extent, with no order on costs.

.....J.
[UDAY UMESH LALIT]

….....J.
[S. RAVINDRA BHAT]

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

New Delhi,
May 19, 2022.