

TAX FLASH NEWS

25 May 2022

Assessee liable to pay service tax on secondment of employee from overseas group companies

Supreme Court of India has held¹ that service tax is payable on secondment of employee from overseas group companies as there is quid pro quo since the Assessee, located in India, has had the benefit of experts for limited period of secondment.

Facts of the case

- Assessee has got into an agreement with its group company located outside India which includes agreement for secondment of personnel to assist in its business in India. The employees are selected by the group company and transferred to Assessee. As per the terms of the agreement with the seconded employees:
 - they shall act in accordance with instructions and directions of the Assessee;
 - they shall continue to be on payroll of group company but shall be employee of Assessee;
- they would receive salary and other expenses from the group company.
- Assessee reimburses group company for all these expenses with no markup.
- In addition to above, Assessee pays for certain other services received from the group company on which it has discharged service tax.
- Revenue issued show cause notice and thereafter confirmed the demand on the contention that the Assessee has failed to discharge service tax under the category of "manpower recruitment or supply agency service" holding that the group company is service provider and Assessee is the service recipient.

- Revenue filed appeal before the Supreme Court against the order of CESTAT which held that overseas group company which had contracted with the Assessee is not in the business of supply of manpower and that the Assessee was not a service recipient.

Revenue's contentions

- Through the combined reading of the agreements/documents on record, the arrangement between the Assessee and the overseas group company is of a contract for service (i.e. contract between the parties was essential for the supply of services by the concerned overseas company to the Assessee).
- Tasks performed by seconded employees were to aid Assessee's work which was undertaken by it through the service agreement with the overseas group company.
- Mere fact that the temporary control by the Assessee over the manner of performance of duties of the employees seconded did not take away or diminish the fact that the real employer was the overseas group 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.

Assessee's contentions

- Employee-employer relationship is outside the scope of service.
- Service becomes a taxable service only if it is provided by a manpower recruitment or supply agency. Category of supply of manpower covers those cases where the manpower so supplied comes under the direction and control of the recipient without contractual employment.

¹ C.C.,C.E. & S.T. v. Northern Operating Systems Pvt Ltd. [2022-VIL-31-SC-ST]

- Overseas group company is not in the business of supplying manpower.
- Salaries cannot be said to be consideration paid to group company for provision of service.

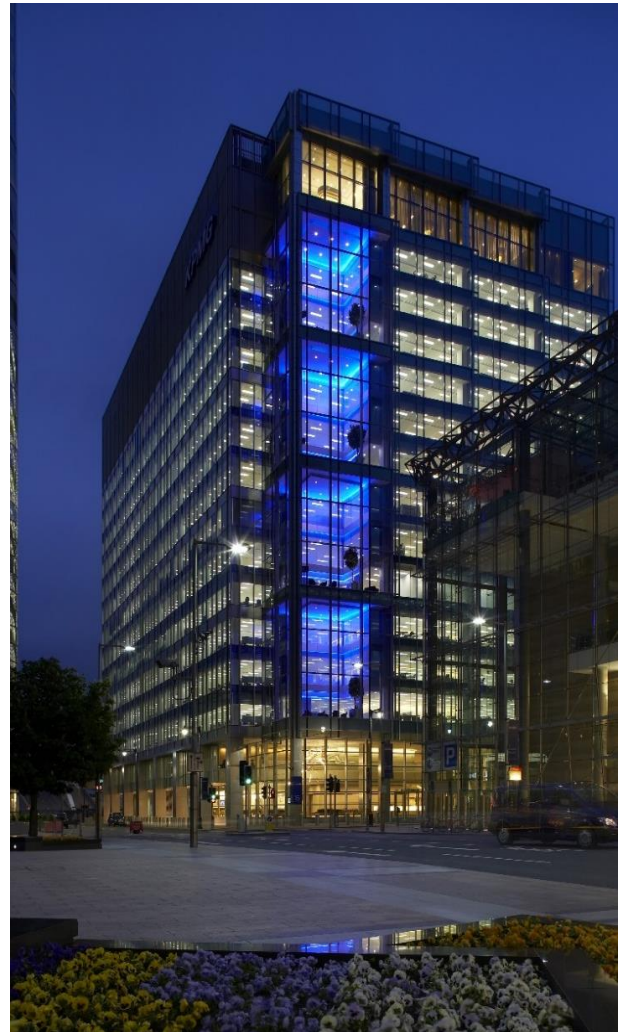
Supreme Court's decision

Supreme Court set aside the order of CESTAT based on substance versus form and upheld the contentions of the Revenue. Below is the gist of the prominent inferences pronounced by the Court:

- Agreements entered by the Assessee with overseas group company clearly point to the fact that overseas group company has a pool of highly skilled employees, who are entitled to a certain salary structure as well as social security benefits. Upon the cessation of the term of secondment, seconded employees return to their overseas employer, or are deployed on some other secondment.
- While the control over performance and right to ask the seconded employees to return is with the Assessee, the fact remains that their overseas employer in relation to its business, deploys them to the Assessee on secondment.
- Overseas group company pays the salary. Terms of employment is as per policy of overseas group company.
- 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.

Our comments

This is very critical judgement on levy of service tax on secondment of employees to India as until now several judgments held that tax is not payable. The general view of the industry over the years has been that since 'control' over the seconded employees is with the Indian entity, no tax is payable as there is employee-employer relationship. Due to this judgment, Companies will have to review their existing arrangement and secondment contracts. This judgment will not just impact past service tax litigations but could also impact the position in GST regime. Further, there could be corporate tax and transfer implications in this judgment.



KPMG in India addresses:

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate
Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru –
560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2, Serilingampally
Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

2nd Floor, Block T2 (B Wing),
Lodha Excelus, Apollo Mills
Compound, N M Joshi Marg,
Mahalaxmi, Mumbai- 400011
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

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KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011
Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

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