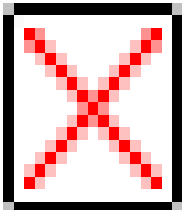


Manpower supply - Apex Court ruling and implications in GST law

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1. THERE

is a rapid growth in number of the Companies set up in India post 2010, who are either 100 % subsidiary of parent Company located abroad or part of Group Company of such foreign Company but having independent legal status, as for as, the status of such Company in India. In order to have a global standard on technical and commercial field and to have uniformity, there has been interchange of employees between such foreign Companies and Companies set up in India and vice versa, which augments exchange of knowledge gathered from either side.

2. The above is achieved by way of entering into secondment agreement between parent Company and Indian Company and the employee is deputed to Indian Company for a specified period and in some cases, there is a tripartite agreement signed by Foreign Company, Indian Company, and the expats. During the deputation period, such expats are employee of Indian Company and must abide by laws in India, as well viz. filing of Income tax returns, pay the applicable Income tax and Form 16 is also issued by Indian Company, which means the expats are in par with any Indian employee as for as employment is concerned.

3. Infact, Indian Company provides employment letter, with designation to such expats, and they are reporting to Indian head during the tenure of the employment in India and expats do not undertake any activity of foreign Company nor they take any advice from foreign parent Company to deal with their jobs assigned. The salary paid to such expats can entirely be paid in India or it can be partly/ fully paid by parent Company, but such parent Company claim reimbursement from Indian Company. But invariably social security money is paid by foreign Company and reimbursement of the same is also claimed from Indian Company by issue of debit notes.

4. In the above background, while the department raised an issue to demand service tax on the money paid to foreign Company in foreign exchange on the premise that the said services rendered by expats amounts to **"Supply of Manpower"** but the Company case is that expats are employees of Indian Company during their tenure of employment like any other Indian employee and hence, it cannot be regarded as Service rendered in terms of Section 65 B (44) (b) of FA, 1994, as such services of employees to employer are excluded from the ambit of service tax.

5. When this matter of dispute came up before Tribunal, in the case of Volkswagen India Pvt. Ltd reported in [2013-TIOL-1640-CESTAT-MUM](#) the Hon'ble Tribunal held in favour of assessee to treat expats as employee and not under manpower supply and thereby it was held that it is covered by the exclusion of services from service tax under said Section 65 B (44) (b) of FA, 1994. The said Tribunal decision was upheld by Hon'ble High Court of Allahabad in the case of COMPUTER SCIENCES CORPN. INDIA P. LTD. Central Excise Appeal No. 173 of 2014, decided on 16-10-2014 reported in [2014-TIOL-1896-HC-ALL-ST](#) and further upheld by apex Court in Commissioner v. Volkswagen India (Pvt.) Ltd. reported in 2016 (42) S.T.R. J145 (S.C.).

6. But the said Apex Court decision has been set aside by Larger Bench decision in COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICES TAX-BANGALORE (ADJUDICATION) ETC Vs M/s NORTHERN OPERATING SYSTEMS PVT LTD reported in - [2022-TIOL-48-SC-ST-LB](#) in Civil Appeal No. 2289-2293 Of 2021 which decision was passed on May 19, 2022, overruling all the decisions including that of Apex Court earlier divisional bench and it was held that it is not a service between employee and employer but the transactions entered are between two Companies and hence, it is a **"Manpower Supply"** attracting Service tax.

"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."

relating to service rendered by employee to employer being outside the scope of "**Services**" both in FA, 1994 and as per CGST [act, 2017](#)

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

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

SCHEDULE III of CGST act, 2017 [See Section 7]

ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

1. Services **by an employee to the employer in the course of or in relation to his employment.**

9. The Hon'ble Apex Court to arrive at the decision that it is indeed service rendered by foreign Company as ***"manpower supply"*** , made the following observations at Para 53 and 57, which are reproduced as under:

"Para 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 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)."

Para 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."

10. It would be a great relief for the trade if the CBIC comes out with a Circular on the subject matter, both in relation to service tax as well the new tax dispensation.

11. Nonetheless, -

i. If Service tax is now demanded based on Apex Court decision (supra), since CENVAT credit cannot be claimed due to emergence of GST, in these peculiar circumstances, the Board has to consider allowing ITC credit of such service tax in **"other credits"** in GSTR 3B, where such services are used as input services under the law.

ii. Further, the Government may also consider waiver of recovery of service tax for such assesses who have not paid the service tax based on the then prevailing judicial view.

iii. The above relief also needs to be extended in GST.

iv. Though, suppression of fact does not exist as it is a pure interpretational issue, yet the tax to be paid for normal period coupled with interest, will be huge, both in Service tax law and GST law, no matter even if in GST law, one can take ITC credit of such tax paid.

[The views expressed are strictly personal.]

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