

## Karnataka HC grants ad-interim stay on adjudication proceedings levying IGST on secondment of employees

3 November 2023



## Summary

The Karnataka High Court (HC) has granted an ad-interim stay on the adjudication proceedings seeking the levy of IGST on the salaries paid directly to expatriates. The department had issued a show cause notice (SCN) in pursuance of the decision of the Supreme Court (SC) in the case of Northern Operating Systems. The petitioner assailed the proceedings on the grounds that primarily, the NOS decision is distinguishable on facts and cannot be applied to them and that the salary paid to employees is specifically excluded from the ambit of taxable supply of services.

### Facts of the case

- M/s. Alstom Transport India Limited (the petitioner) had employed expatriates from an overseas entity and paid salaries to them in INR.
- The petitioner had also paid the social security costs on account of the lien maintained by the employees with the overseas entity.
- The Supreme Court, in the case of *M/s. Northern Operating Systems Private Limited [CA No. 2289-2293/2021]* (NOS), had held that the secondment of employees by the overseas entity qualifies as 'manpower supply services' provided to the Indian entity, and therefore, the salaries and other expenses recovered from the Indian entity is exigible to service tax on a reverse charge basis.
- In furtherance of the above, the department had issued an SCN seeking to levy IGST on the above transaction.

- The petitioner assailed the SCN and contended that the SC's decision in NOS applied only in the context of the peculiar factual background in that case. The same is distinguishable from their own case and does not apply to them. Further, the salary paid to employees does not fall within the purview of taxable supply of service. Accordingly, the petitioner pleaded for an interim stay on the adjudication proceedings.

### Karnataka HC's observations and ad-interim order [WP No. 23915/2023; Order dated 2 November 2023]

- The HC, taking into consideration the petitioner's contentions, stayed the adjudication of the impugned SCN.
- The HC also granted liberty to the authorities to seek vacation of such stay.

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## Our comments

The taxability of salary paid to seconded employees is an impending issue before the apex court and also in various high courts. The SC, in the case of NOS, had decided that service tax is applicable on the secondment of employees by overseas entities on the grounds *inter alia* that mere test of control is insufficient to determine the existence of an employer-employee relationship accurately. Therefore, employees working under a secondment arrangement cannot be considered actual employees of the Indian company.

However, the factual background remains distinguishable in various cases, and the judgement of the SC cannot be extended or interpreted in the same way in all the scenarios.

It is also pertinent to note that on a similar matter, the Division Bench of the SC has issued a notice in the case of M/s Komatsu India Pvt. Ltd, and has tagged the case, along with the case of M/s. Nortel Networks India Pvt. Ltd. The final verdict is awaited.

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