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# Service tax demand upheld on salary, bonus and allowances paid to employees seconded from foreign entity, relying on SC's decision - CESTAT

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## Summary

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) Chennai bench has upheld the service tax liability on the salary paid to expatriate employees seconded from a foreign entity on the ground that it constitutes consideration for the manpower services received from the foreign entity. The CESTAT relied upon the landmark ruling by the Supreme Court (SC) in the case of the Northern Operating System Private Limited (NOS decision) and observed that the facts in the present case are similar to that of the NOS decision. The CESTAT observed that in terms of the agreement between the parties, it was clear that the appellant had to pay the salary, bonus, allowances, etc., to the secondees working for it in India. Therefore, as the term 'consideration' includes any amount payable for the taxable services provided or to be provided, the CESTAT stated that the salary, bonus, allowances, etc., paid by the appellant were the cost of such manpower services received by it.

While the CESTAT upheld the demand for the normal period, along with interest, it set aside the demand for the extended period on the basis that the case does not involve suppression of facts and it was a revenue-neutral situation.


## Facts of the case

- Renault Nissan Automotive India Pvt. Ltd (the appellant) was engaged in providing business auxiliary services.
- The appellant had entered into a secondment agreement with Nissan Motor Company Ltd (NMC) to hire expatriate foreign workers. The appellant had also signed separate employment contracts with the foreign expatriates.
- The appellant treated the secondees as its own employees and TDS (tax deducted at source) was deducted on the salary paid to them and Form 16 was issued. The appellant had also accounted for expenditure in its financial statements as personnel expenses.
- The salary paid to the seconded employees was based on a split formula, i.e., a part was paid by the appellant, and the other part was paid by the NMC in the form of social security obligations and employees' retirement benefit plans. The part paid by the NMC was reimbursed by the appellant.
- The adjudicating authority issued a show cause notices to demand service tax under the reverse charge mechanism (RCM) on the transaction as manpower supply services for the FYs 2008–09 to 2013–14.
- The appellant had contended that the employees have employment visa, therefore there exists an employer-employee relationship between the appellant and the seconded employees.
- The appellant was discharging the service tax liability on the reimbursement of social security charges, under RCM.
- The Commissioner upheld the service tax demand along with interest on the ground that the amount paid towards the salary and perks of the expats are to be considered as part of the consideration for the supply of manpower service, which will be included in the assessable value.
- Aggrieved, the appellant filed the appeal (Service Tax Appeal No. 41736 of 2019) before the CESTAT.

### Issue before CESTAT:

Whether the salary and other benefits provided to the secondees by the appellant are includible as part of the assessable value within the meaning of Section 67 of the Finance Act.

### Appellant's contentions:

- The appellant had furnished documents such as employment visa, TDS certificates and provident fund registration, which proved that the expats were on the payroll of the appellant. This was not the case in the NOS decision.
- The expatriates had to carry out the assigned work as per the instructions of the NMC but under the guidance, direction, and supervision of the appellant. During the entire period of secondment, the secondees were under the complete control of the appellant.

- Even if the portion of the demand order was to be accepted, the arrangement between the NMC and the appellant would only result in dual employment, meaning thereby that both would become joint employers for the expatriates, in which event the cost of such employees would be shared by the joint employers. Hence, there would be no service provider-recipient relationship between the appellant and NMC.
- Other than the reimbursement of the social security amount, the appellant did not pay any other amount to the NMC. The demand on such reimbursements was contrary to the decision in the case of M/s. Intercontinental Consultants and Technocrats Private Limited, which held that reimbursements were not taxable prior to the amendment in definition of 'consideration'.
- The appellant had disclosed the amounts paid to the secondees as salary under the head 'salaries, wages and bonus'. Hence, there was no service provider-service recipient relationship between the appellant and the NMC.
- The appellant had complied with the principle laid down in the case of the NOS decision by discharging the service tax on the reimbursement of social security charges paid under the RCM; hence the ratio of the said judgement was in favour of the appellant.

**CESTAT observations and ruling [Final Order No. 40436/2023, dated 15.06.2023]**

- **Consideration paid towards service received:** The term 'consideration' under Section 67 of the Finance Act, 1994, includes any amount payable for the taxable services provided or to be provided. As per the terms of the agreement between the parties, the CESTAT observed that the appellant had to pay the salary, bonus, allowances, etc., to the secondees working for it in India. Therefore, the salary, bonus, allowances, etc., paid by the appellant were the cost of such manpower services received by it and shall be treated as 'consideration' for the purpose of levying service tax under the RCM.
- **Service tax is leviable on services of seconded employees:** The CESTAT referred to the decision of the SC in the case of the NOS and held that the terms and conditions and the scope of the secondment agreement in the present case were identical to that of the facts of that case. Therefore, the appellant is required to pay applicable service tax.
- **Manpower recruitment or supply agency terms include 'recruitment' as well as 'supply' of manpower:** The CESTAT referred to the decision of the SC in the case of International Merchandising Company, LLC, wherein, it was held that the definition of 'manpower recruitment' or 'supply agency' is wide enough to include 'recruitment' as well as 'supply of manpower', and the expression 'supply' is of a wider connotation than recruitment.
- **Revenue neutral situation:** The CESTAT referred to the decision of the SC in the case of Pragathi Concrete Products, wherein it has been held that when a unit of the taxpayer therein was audited several times during the period and there were also physical inspections by the department as well, there could not be any case of suppression, and held that it is the case of a revenue neutral situation, and that by suppressing the same, the appellant / assessee could not have achieved any benefit.
- **Invocation of the extended period of limitation is unjustified:** The whole of the activities were within the knowledge of the Revenue/officials of the department; hence, there was no scope to allege suppression of any facts. The demand pertaining to the extended period of limitation was set aside based on the NOS decision and on the basis that it was a revenue neutral situation.

## Our comments

Pursuant to the SC's decision in the case of Northern Operating Systems Pvt Ltd., investigations have been initiated on secondment transactions and the industry is closely monitoring any developments in this matter.

This is a significant decision on the taxability of secondment arrangements where the CESTAT has applied the ratio of the SC's decision and upheld the service tax demand on the salary paid to expatriate employees seconded from a foreign entity. However, it is important to note that the appellant in this case had already discharged service tax on the reimbursement of social security contribution. Hence, the CESTAT has discussed only the applicability of service tax on the salary payments made to the secondees. The CESTAT observed that the appellant had to pay the salary, bonus, allowances, etc., to the secondees working for it in India. Therefore, it has been held that the salary, bonus, allowances, etc., paid by the appellant were the cost of such manpower services received by it and shall be treated as 'consideration' for the purpose of levying service tax under the RCM.

Relying on the SC's decision earlier, the Bangalore bench of the CESTAT, in the case of Dell International, had upheld the taxability on similar secondment arrangements. However, there was no discussion on the valuation or inclusion of reimbursements to constitute consideration. In the case of M/s. Boeing India Defense Pvt. Ltd., the Delhi Bench of the CESTAT had held that the costs incurred towards other facilities of accommodation, hotel stay, education, etc., were not includible in the gross value for the levy of service tax.

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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