

## CBIC issues instructions emphasising the taxability of secondment of employees on a case-specific basis

14 December 2023



## Summary

The Central Board of Indirect Taxes and Customs (CBIC) has issued an instruction clarifying that the decision of the Hon'ble Supreme Court (SC) in M/s. Northern Operating Systems Private Limited [CA No. 2289-2293/2021] (NOS) cannot be extended to each and every secondment transaction mechanically. The taxability of the transaction would be determined only after evaluating the different factual matrices, specifically the terms of the contract between the overseas company and the group company. The CBIC has further underlined that an extended period of limitation can only be invoked by establishing fraud, wilful misstatement or suppression of facts to evade tax and not solely non-payment of tax.

## Background

- The SC, in the NOS decision, 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 are exigible to service tax on reverse charge basis.
- The SC had taken into consideration various factors involved therein, such as the agreement between the Indian entity and the overseas group companies, etc., and taking into account the principle of substance over form, decided on the levy of service tax.
- The intent, therefore, was not to base the taxability upon a 'singular test' but rather assess all the relevant facets involved to correctly determine whether the tax liability would arise on said transaction.
- Since the question of the taxability of the transaction would arise under the present Goods and Services Tax (GST) regime as well, the same principles would be applicable.
- Accordingly, the CBIC has issued Instruction No. 05/2023-GST dated 13 December 2023 (Instruction), clearing the

looming confusion and lack of clarity on the subject matter.

## CBIC Instruction No. 05/2023-GST dated 13 December 2023

- It has been emphasised that there may be a difference in arrangements with respect to the secondment transaction, resulting in a difference in tax implication. Accordingly, the NOS decision should not be applied mechanically.
- Further, each and every case shall be carefully evaluated, taking into consideration the different factual matrices, especially the contractual terms, to determine taxability under GST in consonance with the principles laid down by the SC in the NOS decision.
- Moreover, the extended period of limitation, as prescribed under Section 74 of the Central Goods and Services Tax (CGST) Act, cannot be applied in the absence of fraud or wilful misstatement or suppression of facts to evade tax. Accordingly, the evidence for the invocation of the extended period shall form part of the show cause notice.

## Our comments

The SC, in the case of Fiat India (P) Ltd., had categorically underscored the importance of a factual matrix in a case and how even a single significant detail can alter the entire aspect. Taking reference to the same, the CBIC has highlighted that the colour of the NOS decision cannot be applied to other cases without duly examining the factual background of a secondment transaction. These guidelines will aim to ensure fair investigations and issuance of show cause notices.

Pursuant to the NOS decision and the Directorate General of Goods and Services Tax Intelligence (DGGI) enquiry, the taxpayers have sought recourse before different High Courts (HCs). Recently, various jurisdictional HCs have granted relief to Indian entities, considering the difference in the factual matrix. The Punjab and Haryana HC, in the case of Kanematsu India Private Limited, have restrained the department from taking any coercive steps considering the difference in terms of employment agreement. Similar interim reliefs have also been granted to BMW India and Mitsubishi Electric by the Punjab and Haryana HC, Metal One Corporation by the Delhi HC and Alstom Transport India by the Karnataka HC.

In the midst of the ambiguity surrounding this issue, the taxpayers are eagerly awaiting the verdict in the case of Komatsu India Private Limited, currently under consideration by the Supreme Court.

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