F. No. CBIC-20004/3/2023-GST
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs
GST Policy Wing
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New Delhi, dated the 13th December 2023

To,

All the Principal Chief Commissioners / Chief Commissioners / Principal Commissioners /Commissioners of Central Tax

All the Principal Directors General/ Directors General of Central Tax

Madam/Sir,

Subject: Judgment of the Hon'ble Supreme Court in the case of Northern Operating Systems Private Limited (NOS).

Attention is invited to the Hon'ble Supreme Court's judgment dated 19.5.2022 in the case of CC, CE & ST, Bangalore (Adj.) etc. Vs. Northern Operating Systems Private Limited (NOS) in Civil Appeal No. 2289-2293 of 2021 on the issue of nature of secondment of employees by overseas entities to Indian firms and its Service Tax implications. Representations have been received in the Board that, subsequent to the aforesaid judgment, many field formations have initiated proceedings for the alleged evasion of GST on the issue of secondment under section 74(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act').

2.1 The matter has been examined by the Board. It appears that the Hon'ble Supreme Court in its judgment *inter-alia* took note of the various facts of the case like the agreement between NOS and overseas group companies, and held that the secondment of employees by the overseas group company to NOS was a taxable service of 'manpower supply' and Service Tax was applicable on the same. It is noted that secondment as a practice is not restricted to Service Tax and issue of taxability on secondment shall arise in GST also. A careful reading of the NOS judgment indicates that Hon'ble Supreme Court's emphasis is on a nuanced examination based on the unique characteristics of each specific arrangement, rather than relying on any singular test.

2.2 Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai Versus M/s Fiat India(P) Ltd in Civil Appeal 1648-49 of 2004 has given the following observation -

> *" 66. .....Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, thebroad resemblance to another case is not at all decisive."*

2.3 It may be relevant to note that there may be multiple types of arrangements in relation to secondment of employees of overseas group company in the Indian entity. In each arrangement, the tax implications may be different, depending upon the specific nature of the contract and other terms and conditions attached to it. Therefore, the decision of the Hon'ble Supreme Court in the NOS judgment should not be applied mechanically in all the cases. Investigation in each case requires a careful consideration of its distinct factual matrix, including the terms of contract between overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Hon'ble Supreme Court's judgment in NOS case.

3.1 It has also been represented by the industry that in many cases involving secondment, the field formations are mechanically invoking extended period of limitation under section 74(1) of the CGST Act.

3.2 In this regard, section 74 (1) of CGST Act reads as follows:

> "(1) *Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized* ***by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax***, "

3.3 From the perusal of wording of section 74(1) of CGST Act, it is evident that section 74(1) can be invoked only in cases where there is a fraud or wilful mis- statement or suppression of facts to evade tax on the part of the said taxpayer. Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis-statement or suppression of fact to evade tax on the part of the taxpayer, provisions of section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.

4. The above aspects may be kept in consideration while investigating such cases and issuing show cause notices.

5. Difficulties, if any, in implementation of these instructions may be informed to the Board (gst-cbec@gov.in).

(Sanjay Mangal)
Principal Commissioner (GST)

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1. The Joint Secretary, GST Council Secretariat, New Delhi, for circulating the same to all States/ UTs for information and necessary action at their end.
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