BEFORE THE HON'BLE GST TRIBUNAL, DELHI BENCH, DELHI
Appeal No…….of 2025)

IN THE MATTER OF:

AUGSYA TRADING CO.
GSTIN. No. 1234567890 **APPELLANT**

VERUSES

COMMISSIONER, SGST, DELHI **RESPONDENTS**

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NARENDER AHUJA

ADVOCATE

ANNEXURE A 1

FORM GST APL – 05

[See rule 110(1)]

Appeal to the Appellate Tribunal

1. GSTIN - 1234567890
2. Name of the appellant - AUGUSYA TRADING CO.
3. Address of the appellant – Gaffar Market, Karol Bagh, New Delhi -110005
4. Order appealed against- Number – XXXXX Date- 08.02.2025
5. Name and Address of the Authority passing the order appealed against – JOINT COMMISSIONER (APPEALS), ZONE 1, NEW DELHI
6. Date of communication of the order appealed against – 08.02.2025
7. Name of the representative – Adv. Narender Ahuja (9810764296)
8. Details of the case under dispute:
   (i) Brief issue of the case under dispute

   The Input tax credit is denied on the basis of fake invoices being issued without supply of goods and services as alleged by the proper officer and confirmed by the appellate authority. The tax demanded is Rs. 32.40 Crores and Interest demand is Rs. 12.30 Crores along with the penalty as per the prescribed rules.

   (ii) Description and classification of goods/ services in dispute NA

   (iii) Period of dispute April 2020- March 2021

   (iv) Amount under dispute: 32,40,00,000

Description	Central tax	State/ UT tax	Integrated tax	Cess
a) Tax / Cess			32,40,00,000.	
b) Interest				
c) Penalty				
d) Fees				
e) Other charges				

   (i) Market value of seized goods NA

9. Whether the appellant wishes to be heard in person? YES
10. Statement of facts AS PER ANNEXURE A 1
11. Grounds of appeal AS PER ANNEXURE A 2
12. Prayer AS PER ANNEXURE A 3
13. Details of demand created, disputed and admitted NA

Particulars of demand	Particulars		Central tax	State/UT tax	Integrated tax	Cess	Total amount	
	Amount	a) Tax/ Cess			32,40,00,000		0	32,40,00,000

	demanded/ rejected >, if any (A)	b) Interest		,	18.30,00.000			18,30,00,000
		c) Penalty						
							>	
		d) Fees					<total >	
		e) Other charges					<total >	
	Amount under dispute (B)	a) Tax/ Cess			32.40,00.000			32,40,00.000
		b) Interest			18,30,00,000			18.30,00.000
		c) Penalty					< total >	
		d) Fees					< total >	
		e) Other charges					< total >	
	Amount admitted (C)	a) Tax/ Cess		0.00			0.00	0.00
		b) Interest		0.00			0.00	
		c) Penalty					< total >	

		d) Fees				< total >	
		e) Other charges				< total >	

14. Details of payment of admitted amount and pre-deposit:

(a)Details of amount payable:

Particulars			Central tax	State/UT tax	Integrated tax	Cess	Total amount	
	a) Admitted amount	Tax/ Cess		0.00			0.00	0.00
		Interest						
		Penalty						
		Fees						
		Other charges						

	b) Pre-deposit [10% of disputed tax/cess but not exceedingRs.20 crore each in respect of CGST, SGST or cess and not exceeding Rs.40 crore in respect of IGST	Tax/ Cess			3,24,00,000			

(b) Details of payment of admitted amount and [pre-deposit of 10% of the disputed tax and cess but not exceeding Rs. 20 crore each in respect of CGST, SGST or cess ornot exceeding Rs.40 crore in respect of IGST.

Sr. No.	Description	Tax payable	Paid through Cash/ Credit Ledger	Debit entry no.	Amount of tax paid			
					Integrated tax	Central tax	State/UT tax	CESS
1	2	3	4	5	6	7	8	9
1.	Integrated tax		Cash Ledger		40,00,000			
			Credit Ledger		2,84,00,000			
2.	Central tax		Cash Ledger					
			Credit Ledger					
3.	State/UT tax		Cash Ledger					
			Credit Ledger					
4.	CESS		Cash Ledger					
			Credit Ledger					

(c) Interest, penalty, late fee and any other amount payable and paid:

Sr. No.	Description	Amount payable				Debit entry no.	Amount paid			
		Integrated tax	Central tax	State/UT tax	CESS		Integrated tax	Central tax	State/UT tax	CESS
1	2	3	4	5	6	7	8	9	10	11
1.	Interest									
2.	Penalty									
3.	Late fee									
4.	Others (specify)									

15.[Place of supply wise details of the integrated tax paid (admitted amount only)mentioned in the Table in sub-clause (a) of clause 14 (item (a)), if any N A

Place of Supply (Name of State/UT)	Demand	Tax	Interest	Penalty	Other	Total
1	2	3	4	5	6	7]212
	Admitted amount[in the Table in sub-clause (a) of clause 14 (item(a))]					

Verification

I, A.K. Gupta, S/o Sh. G. K. Gupta hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

Name of the Appellant: AK. GUPTA

Place: Delhi

Status: PARTNER

Date: 02.05.2025

AUGUSYA TRADING CO.

Form GST APL – 02

[See rule 108(3)]

Acknowledgment for submission of appeal

<Name of applicant><GSTIN/Temp ID/UIN/Reference Number with date >

Your appeal has been successfully filed against < Application Reference Number >

1. Reference Number- 12345678902052025
2. Date of filing- 02.05.2025
3. Time of filing- 12 : 48 P.M.
4. Place of filing- GSTAT, DEHI BENCH, NEW DELHI
5. Name of the person filing the appeal- AUGUSYA TRADING CO.
6. Amount of pre-deposit- 3.24 CRORES
7. Date of acceptance/rejection of appeal- *ACCEPTED ON 02.05.2025*
8. Date of appearance- Date: 07.06.2025 12.50 P.M. Time:
9. Court Number/ Bench Court - Malviya Smriti Bhawan
10. Bench: Sh. Rajesh Khurana

Place: Delhi

Date:

Sd/-

Name: Designation:

On behalf of Appellate Authority/Appellate Tribunal/ Commissioner / Additional or Joint Commissioner

BEFORE THE HON'BLE GST TRIBUNAL, DELHI BENCH, DELHI
Appeal No…….of 2025)

IN THE MATTER OF:

AUGSYA TRADING CO.
GSTIN. No. 1234567890 **APPELLANT**

VERUSES

COMMISSIONER, SGST, DELHI **RESPONDENTS**

Appeal under Section 112 of DGST Act read with Rule 110 and 111, of Delhi GST Rules 2017, against the impugned order of the First Appellate Authority- KCS, dated 08.02.2025 denying the input tax credit against the purchases made from the 12 suppliers from Rajasthan alleging that all the 12 suppliers has not supplied goods and only raised the invoices for the purpose of passing the input tax credit.

HON'BLE PRESIDENT AND HIS COMPANION MEMBERS OF THE HON'BLE GST TRIBUNAL- NEW DELHI BENCH, NEW DELHI

The appellant respectfully submits for kind consideration of this Hon'ble Tribunal as under:-

The appellant has been registered with the GST Department since 01.07.2017 and has been doing his business of trading Marbles, tiles and other construction material since the vat regime. The Appellant bears a good record and there is no allegation levied earlier either in the Vat Regime or in the GST regime.

The Appellant feeling aggrieved by the order passed u/s 107(11) of the Delhi GST Act, 2017 for the Tax Period 2022-23 alleging that the appellant has not purchased any goods from the 12 suppliers named in the order passed u/s 74(9) by the proper officer-KCS and raised a total demand of Rs. 50.70 Crores. Apart from the above the proper officer also levied numerous other allegations against the appellant. The details of the demand raised by the proper officer and confirmed by the Appellate Authority is as below:-

Disputed Demand – Rs. 50.70 Crores

Disputed Tax Demand - Rs. 32.40 and Intt. – Rs. 18.30 Crores

ALL THE CONDITIONS PRECEDENT FOR FILING OF THE APPEAL HAVE BEEN SATISFIED AS UNDER:

- The appeal is filed within the limitation period as the order under appeal was received by the appellant on 08.02.2025. And the appeal has been filed on 02.05.2025.

- The Max prescribed Fees of Rs. 25,000/- is paid as the amount of dispute of Tax is Rs. 32.40 Crores and the Interest of Rs. 18.30. - **Annexures -1 Page No. 20**

- The Appellant has deposited the mandatory pre deposit of additional 10% of the tax which comes to Rs. 3.24 crores (Tax Demand is Rs. 32.40 Crores & Intt. Demand is Rs. 18.30 Crores. **(**The Act was amended through the Finance Act (2) 2024 as introduced in the Lok Sabha on 23rd July 2024 to make it mandatory to deposit additional 10% of the remaining tax subject to max. of 20 crores as against the original 20% subject to max. of 50 crores).**Annexures -2 Page No. 21**

- The order is appealable as per law and not debarred u/s 121.

- A copy of the Authorisation Letter in the name of Mr. A.K. Gupta to file the appeal and also appointing advocate Shri Narender Ahuja to present and argue the matter before this Hon'ble Tribunal is enclosed. - **Annexures- 3. P. No. 22**

- All copies annexed as per index are true copies of the originals.

FACTS OF THE CASE

1. The appellant has been a registered dealer with the Delhi GST Department with the above GSTIN No.1234567890 since 01.07.2017. The appellant has been engaged in the business of trading of marbles for the last 20 years. He has regularly filed all his GST returns till date and there is no such outstanding as on the date of filing of the appeal.

2. The Appellant is a law abiding person and never missed his returns to be filed on time. He also regularly paid the tax through electronic cash ledger and eligible electronic credit ledger. No such allegations were earlier levied against him either in the Vat Regime or in the GST Regime.

3. That an audit was conducted u/s 65 of the CGST Act, 2017 on 28.01.2024 after a search u/s 67 of the Act on 16.01.2024. The audit was started on 28.01.2024 and was completed on 24.06.2024. A report of audit conducted by the department was made available to the appellant on 03.07.2024.

4. Based on the audit report the proper officer himself issued a show cause notice dt. 14.10.2024 mentioning the details of the audit conducted and the levying of various charges against him. The audit team of the department used the AI module of the department in framing the allegations. That the show cause notice levied the understated allegations against the appellant:-

4.1 The First allegation was that the appellant has a turnover of over Rs. 375 Crores and the appellant was purchasing more than 75% of the goods from Rajasthan specially the Kishangargh and Markrana. The notice further alleged that 75% of the purchases were made from the 12 firms and out of the 12 firms, 7 have applied for the cancellation in 2022 while the registration of the remaining 5 firms was Suo-moto cancelled by the department with retrospective effect.

4.2 The next allegation was that the appellant has made payment to only 4 of the 12 suppliers through the bank account declared by them on the GST Portal. The remaining 8 suppliers did not declare their bank account on GST Portal in which the appellant has made payment against the receipt of the goods.

4.3 That the appellant has not made any payment of royalty which was necessary to be paid when the goods marbles are to be purchased from Rajasthan. The notice alleged that as per the quarry provisions the royalty must be paid to the Govt. for extracting marbles from the land.

4.4 That another allegation was that the HSN code, colour, and domestic or imported marble was not mentioned in the description column of the invoices issued by the suppliers except 100 sq. ft marble. Hence the provisions of section 31 were not followed by the appellant.

4.5 That the invoices issued by the appellant to its registered buyers did not meet the conditions of section 31 hence the invoices issued are vague.

4.6 That his customers had made payment in a bank account which was not declared on the GST Portal. The notice further alleged that the appellant has a secret bank account which has not been apparently shown neither in the balance sheet nor in the books of accounts and turnover to that extent is concealed.

5. At the time of personal visit to the department, the officer alleged that the appellant could not answer the query related to the name of the truck driver, type of the truck and the name of the GTA. The answers given by the counsel were not considered.

6. That the proper officer has raised numerous questions to the partner who personally visited the office of the proper officer along with his counsel including the size of the show room and the warehouse. The proper officer did not consider the answers given by the counsel.

7. That based on the aforementioned allegations, and without delving into the factual matrix or considering the answers by the counsel and the partner, the proper officer issued the impugned order dated 07.11.2024 under Section 74(9) of the DGST Act, raising a total demand of Rs. 52.7 crores, comprising Rs. 32.40 crores as tax and Rs. 18.30 crores as interest.

8. That feeling aggrieved the appellant filed an appeal before the first appellate authority who heard the appellant's counsel. Various judgements were cited. The appellate authority in a tearing hurry passed the impugned order u/s 107 of the DGST by confirming the adjudication order passed by the proper officer.

9. The appellant feels victimised and aggrieved, hence this appeal is filed before the Honourable GST Tribunal to seek justice.

Question of Substantial Law:-

The appellant feels that the Honourable GSTAT has to adjudicate on the following three questions of law.

1. Whether an audit report, prepared in contravention of the jurisdictional provisions under Section 65 of the DGST Act, can be considered valid because subsequent proceedings were based on this audit report, the following procedural lapses were found in the said audit report

   No order was issued by the Commissioner as required under Section 65(1) of the DGST Act. to conduct the audit, the mandatory 15-day prior notice under Section 65(3) was not served and the audit was not completed within the prescribed period of three months from its commencement, and no extension was sought from the Commissioner u/s 65(4) or communicated to the appellant

2. The proper officer scrutinised the returns, prepared the audit notice and then conducted the audit himself, submitted the audit report to himself and now issued the show cause notice himself and then adjudicated the show cause notice himself. Now the question of law is whether the proper officer in the present case can become a judge in his own course and can issue such a pre-decided adjudication order. It is a settled principle of law that no one can become a judge in his own course. **Honourable Odisha High Court in the case of National Trading Co. vs Asstt. Commissioner of Sales Tax, Cuttack -Range 1 decided the matter on the same issue that no one can be a judge in own cause. Annexure-9**

3. Whether all the unsubstantiated allegations with no evidence that brought on records can become the cause of the show cause notice u/s 74 to pass such a perverse order.

4. Whether the proper officer has verified and recorded in the Show Cause Notice about validity of GSTIN of the suppliers on the date of the registration and if not then why not? These were the crucial questions and have an impact on the liability of the appellant.

   There is no such section under the Act or the rules except in section 16(1) and Section 16(2) that cast any obligation on the appellant to take input tax credit

and no such allegations were levied against the appellant in the said show cause notice. Hence the impugned order based on the presumptive allegations levied in the show-cause notice is liable to be set aside.

GROUNDS OF THE APPEAL

Legal Ground no. 1

That on the facts and circumstances of the case and in law the audit conducted by the audit team did not follow the procedure laid down in section 65 of the Act.

1. Section 65(3) prescribes for the at least 15 working days' notice must be served before the start of the Audit. In our case the notice was served on 16.01.2025 while the audit team arrived on 24.01.2024 thus in our case the provisions for serving notice period was not followed and only the seven days' notice was served.

2. The audit under section 65 must be completed within a period of three months from start of the audit. The approval of commissioner is necessary if the audit goes beyond the prescribed limits of 3 months. No such approval was taken u/s 65(4) of the DGST Act or shown to the appellant.

3. The order of Adjudicating Officer is void ab initio as the adjudicating officer who passed the impugned order and the audit officer were the same persons – It is a settle principle of law that no one can be a judge in his own course – when the proper officer who scrutinised the returns of the appellant, found out alleged errors, himself issued the audit notice, himself prepared the audit report, gave the audit report to himself, himself prepared the show cause notice, himself considered the reply of the appellant and himself adjudicated the show cause notice and himself passed the impugned order? Can such a procedure be adopted by any officer in the common law jurisprudence? Hence, the whole proceedings under section 65 of the DGST Act are vitiated by not following the procedure.

The Honourable Supreme Court and the Honourable High Courts in numerous judgments clarified that NO **MAN CAN BE A JUDGE IN HIS OWN CAUSE**. LORDSHIP, I HAVE PROVIDED THE COPIES OF SOME OF THESE CASES. THE Supreme Court in:-

1. Menaka Gandhi vs. Union of India has also pointed out the same issue and also pointed out this version in the following judgments: -

2. J. Mohapatra and Co. and another's v. State of Orissa and Anr. (1984) 4 SCC

3. In Union of India v. Tulsiram Patel, AIR 1985 SC 1416

4. Ashok Kumar Yadav and Ors. v. State of Haryana and Ors., (1985) 4 SCC 417,

In all these cases, the honourable Supreme Court took the same issue that NO MAN CAN BE A JUDGE IN HIS OWN CAUSE.

The Honourable Odisha High Court even quashed the National Trading vs. Asstt. Commissioner of Sales Tax civil writ petition no. 2148/2000 on the same issue without going into the facts of the case**. (Page No. 39)**

4. The order is passed u/s 74(9) of the CGST Act, 2017 without issuing the notice u/s 74. The notice is not issued u/s 74 hence the order cannot be passed u/s 74. The allegations levied against the appellant were not so serious that could lead to invoke section 74.

5. The notice must be accompanied by a summary statement in DRC 01 that should mention the exact amount of the tax payable along with the interest and penalty. That means it is a vague notice and any order passed on the basis on this notice is impugned and likely to be set aside on this legal ground.

6. It is not a fit case for invoking section 74 as there is no such fraud, wilful misstatement or suppression of facts was established. Section 74 can be invoked only when the department can prove any fraud, wilful misstatement, or suppression of facts. Not even a single person issued a statement against the appellant that could lead to invoke section 74. The investigation team find some lapses in the audit but all the allegations levied in the notice are far from invoking section 74.

C.C.C.E AND S.T. Bangalore vs. Northern Operating Systems Pvt Ltd. Civil Appeal No. 2289=2293 of 2021 paragraph no. 62

"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful." (**Page No. 55-83)**

Legal Ground -3

7. That on the facts and circumstances of the case and in law neither the audit team nor the notice itself stated any tax period for which the audit was conducted or the notice was issued. The notice is vague. Even the order is also a vague and not a speaking order. The allegations levied were based on the AI module which cannot be relied on without proving that the appellant has the intention to deceive**.**

<u>Other Grounds</u>

8. That on the facts and circumstances of the case in law that the 7 out of the 12 firms has applied for the cancellation on their own in 2022 is not a ground to deny the input tax credit as the purchases were made before the cancellation of their registration. The suppliers might have some reason to get their registration cancelled. Not a single registration was cancelled before the date of the transactiions.

8.1 The registration of remaining 5 firms were Suo moto cancelled by the department with retrospective date but their registration was active when the appellant made purchases from them. They have filed their GSTR-1 and GSTR-3B well in time and even paid around 10% of the total liability in cash. Their returns in GSTR-1, GSTR-3B and the annual returns were produced before the authorities.

The Honourable Allahabad High Court in the writ petition no. 1282,1285,1287,1288 and 1289 of 2024 held at para no. 31 that under the GST regime all the details are available at GST Portal and therefore the authorities ought to have been verified the same as to whether the filing of GSTR-1, GSTR-3B, how much tax has been deposited by the seller but the authorities have failed to do so and the Honourable Allahabad High Court had quashed the order.

- We have also made correspondence with the suppliers mainly whose regn. were cancelled with retrospective effects. They had sent us the copy of APL 02 and informed us that they have filed the appeal to restore their regn. No. (**Separately Submitted under additional evidence.)**

8.2 That the appellant further submits that the supplier, in his case, has filed their returns u/s 39 and annual return u/s 44 of the Act, it means the supplier's registration was active at the time of the transactions. Though the Supreme Court in **the E Com Gill Coffee Trading Machine v/s Union of India pointed out that merely the production of invoices or reflection of input tax credit in GSTR-2A/2B is not an enough proof and put the responsibility on buyer to prove the genuineness of the transactions.** That the appellant submits that he had produced all his records including the transporter details etc. both at the time of audit and the personal visit.

8.2 The proper officer at the time of personal visit alleges that the Partner Mr. A.K. Gupta could not give answers to the question regarding truck no. and the name of the driver and the counsel was misleading the officer by his vague answers. The proper officer did not consider any of the answer given by the counsel and the allegation that the counsel was misleading the department was against the facts of the case. That the appellant now enclosing the receipt of the transporters which contains all the details of the goods and the agency. Annexures –

Allegation - Payment was not made in declared bank account.

9 That on the facts and circumstances of the case and in law the appellant has made the payment through the banking channel which neither the audit team nor adjudicating authority has denied. The ITC cannot be denied on the grounds that the supplier has not declared their bank account on the GST portal. Rule 10A makes it mandatory for a taxpayer to furnish the details of his valid bank account on GST Portal with the period of 30 days from the date of the registration.

9.1 Proviso to Section 16(2) (C) describes the payment of the invoices should be made to the supplier within the period of 180 days of the invoice. The appellant says and submit that there is no provision mentioned in the Act or rules made thereunder where it is written that the payment should be made in the bank account declared by the suppliers on the GST Portal. The Ledger Copies were also provided.

9.2 In a common parlance, the buyer has no mechanism to know about the status of the bank account at the GST portal hence the allegation for denying the input tax credit is totally a baseless.

Allegation – royalty not paid

9.1 There is a provisions of Royalty payments at a prescribed rates in Rajasthan when the marbles is extracted from the land. The royalty is paid by the person who extract the marbles to the Govt.

9.2 The buyer does not pay the royalty for extracting the marbles. It's the supplier who extract marbles from the land to pay the royalty to the lessor who owns the land. So the appellant in common prudence could not know that the supplier has paid the royalty to the Govt. or not. So, this allegation is baseless and is not a ground to deny the input tax credit.

Allegation - Purchase invoices were without HSN and the details of the marbles was not mentioned and the sales invoices were vague.

10. That on the facts and circumstances of the case in law, the appellant says submits that the SCN itself mention that the turnover of the appellant is Rs. 375 Crores and 75% of the purchases are made from 12 firms which comes to Rs. 281 crores. As per the E- invoice rule no. 48 of the CGST Act rules the following tax payers are required to issue E invoices

S.No	Threshold Limit	Date of Applicability	Notification
1	500Cr	1st October 2020	**61/2020- and 70/2020-Central Tax**
2	100Cr	1st January 2021	**88/2020–Central Tax**
3	50Cr	1st April 2021	**05/2021–Central Tax**
4	20Cr	1st April 2022	**01/2022-Central Tax**
5	10Cr	1st October 2022	**17/2022-Central Tax**
6	5Cr	1st August 2023	**10/2023-Central Tax**

10.1 That the E-Invoices contains all the columns like Description, HSN, weight, rates and GST rates etc. so the allegations are baseless. The Audit team found some Performa invoices cum purchase order from the premises which were without the HSN code. The appellant explain this fact but to no avail. Copy of the invoices are attached for your kind reference. **(Page No. 37)**

11. That on the Facts and circumstances of the case and in law, the appellant submits that though one bank account was not declared on the GST Portal by mistake but the same was declared in the books of accounts and the balance sheet. The appellant even declared all the bank on the GST portal as and when the lapses were pointed out by the audit team. The appellant had even informed and submit the screen shots of the details of the bank details submitted on the GST format**. (Page no**. **38)**

12. The appellant further submits that no bank account is opened without the PAN number so he refutes the allegation that he has some secret bank account to accept the payment. The Income tax portal provides the full details of the Assessee including the bank details hence this allegation seems to be baseless. The Department or the Proper office could extract the bank details from the AIS system of the Income Tax Portal and could verify the sales. The proper officer also doubted the credibility of the Statutory Auditor M/s RAMAN & CO, DOSA, JAIPUR, which is totally a baseless allegation. **(Certificate of CA attached at page no.35-36)**

13 The proper officer enquired about the size of the showroom and alleged that the appellant has a showroom measuring only 600 sq. ft. and the he has no other warehouse declared on the GST Portal. The counsel has replied that the goods were purchased and received in the trucks on the orders of the customers and after checking the goods at the showroom the same truck used to forward for the delivery. The appellant has enough space in front of his showroom to display the marbles etc. to the customers. The appellant needs not require a huge plot or warehouse to store the goods.

14. That on the facts and circumstances of the case and in law the appellant submits **that the impugned notice as well the order passed by the proper officer is totally** wrong on the ground that the Partner Mr. A. K. Gupta could not give the details of the transporter. The counsel answered all the questions but his answers were not considered stating that the counsel is misleading the proper officer. The partner Mr. A.K. Gupta was in deep shock and was afraid and I had provided the Vakalatanama. I knew the facts so I tried to answers but those were not considered.

15. That on the facts and circumstances of the case and in law the appellant submits that all the allegations levied by the proper officer in the show cause notice may be the procedural lapses but the firm has not an intention to evade tax. The appellant even

updated the details of his bank accounts as and when the audit team pointed out the lapses which shows its honesty.

PRAYERS

In lieu of the above facts and grounds, the appellant prays for the following relief

1. To set aside the impugned order passed by the proper officer and confirmed by the appellate authority u/s 107 of the DGST Act.

2. To delete the demand of Rs. 52.70 crores including the Tax of Rs. 32.40 crores and interest of Rs. 18.30 crores.

3. To direct the lower authority not to pass any adverse order of cancelling the registration or creating any demand based on the said orders passed by the proper office himself or passed by the appellate authority.

APPELLANT
Through Adv. Narender Ahuja Counsel

VERIFICATION.

I, A.K. Gupta hereby solemnly affirm and declare that the above appeal has been drafted under my instructions and I am fully aware of the Facts and nothing has been concealed therefrom.

APPELLANT
Through Adv. Narender Ahuja Counsel

ANNEXURE A 2

Form GST PMT-06 Payment Challan							
(See Rule 87(2))							
Challan for deposit of goods and services tax							
CPIN	123456780302052025		Challan Generated On	02-05-2025 14: 58			
Details of Taxpayer							
GSTIN	1234567890		Email	Gst.XXXXXX2005@gmail.com		Mobile	8XXXXXXXX443
Legal Name	AUGUSYA TRADING CO.		Address	XXXXXXXXXXXXX Delhi,11____			
Reason for Challan							
Reason	Any other payment						

Details of Deposit (All Amount in Rs.)							
Government	**Major Head**	**Minor Head**					
		Tax	**Interest**	**Penalty**	**Fee**	**Others**	**Total**
Government of India	CGST(0005)	0	0	0	0	0	0
	IGST(0008)	0	0	0	0	0	0
	CESS(0003)	0	0	0	0	0	0
	Sub-Total	0	0	0	0	0	0
Delhi	SGST(0007)	0	0	0	25000	0	25000
Total Amount		0	0	0	25000	0	25000
Total Amount (in words)	Rupees Twenty Five Thousand Only						

Mode of Payment							
E-Payment	YES	Over the Counter(OTC)			NEFT / RTGS		

Particulars of depositor	
Name R JAIN	
Designation/Status (Manager partner etc.)	
Signature SIGNED	
Date 02/05/2025	
Paid Challan Information	
GSTIN _____	1234567890
Taxpayer Name	AUGUSYA TRADING CO.
Name of the Bank	CENTRAL BANK OF INDIA
Amount	25000
Bank Reference No.(BRN)UTR	123456789
CIN	123456780302052025
Payment Date	02/5/2025
Bank Ack No.	00000000001234567
(For Cheque / DD deposited at Bank's counter)	

ANNEXURE A 3

Form GST PMT-06 Payment Challan							
(See Rule 87(2))							
Challan for deposit of goods and services tax							
CPIN	123456790302052025		Challan Generated On	02-05-2025 14: 58			
Details of Taxpayer							
GSTIN	1234567890		Email	Gst.XXXXXX2005@gmail.com		Mobile	8XXXXXXXX443
Legal Name	AUGUSYA TRADING CO.		Address	XXXXXXXXXXXXX Delhi,11____			
Reason for Challan							
Reason	Any other payment						

Details of Deposit (All Amount in Rs.)							
Government	**Major Head**	**Minor Head**					
		Tax	**Interest**	**Penalty**	**Fee**	**Others**	**Total**
Government of India	CGST(0005)	0	0	0	0	0	0
	IGST(0008)	3,24,00, 000	0	0	0	0	0
	CESS(0003)	0	0	0	0	0	3,24,00, 000
	Sub-Total	0	0	0	0	0	0
Delhi	SGST(0007)	0	0	0	0	0	0
Total Amount		3,24,00, 000	0	0	0	0	3,24,00, 000
Total Amount (in words)	Rupees Three Crores Twenty Four Lakh Only						

Mode of Payment							
E-Payment	YES	Over the Counter(OTC)			NEFT / RTGS		

Particulars of depositor	
Name R JAIN	
Designation/Status (Manager partner etc.)	
Signature SIGNED	
Date 02/05/2025	
Paid Challan Information	
GSTIN _____	1234567890
Taxpayer Name	AUGUSYA TRADING CO.
Name of the Bank	CENTRAL BANK OF INDIA
Amount	3,24,00, 000
Bank Reference No.(BRN)UTR	123456799
CIN	123456790302052025
Payment Date	02/5/2025
Bank Ack No.	00000000001234567
(For Cheque / DD deposited at Bank's counter)	

ANNEXURE-3

AUGUSYA TRADING CO.
Karol Bagh, New Delhi

Authorisation Letter

This is for the information of the all those concern that M/s Augusya Trading Co, Gaffer Market, represented by two partners i.e. Mr. A.K. Gupta and Mr. B.K. Gupta. Mr. A.K. Gupta who takes all the decisions regarding finances and accounts is hereby authorised to represent the firm before any government authority, statutory body, regulatory authority, bank, financial institution, or any other third party, and to take such steps as may be necessary or incidental to give effect to this resolution.

This is further inform to all those concern that Mr. A.K. Gupta has appointed Mr. Narender Ahuja Advocate to file the appeal before the Honourable GST Tribunal. Mr. A.K. Gupta has done this job in consultation with Mr. B.K. Gupta and Mr. B.K. Gupta has no objection to his decision.

All the Acts done in this regards by Mr. A.K. Gupta shall be binding on the firm.

For AUGUSYA TRADING CO.

B.K. Gupta **A.K. Gupta**

Partner **Partner**

BEFORE THE JOINT COMMISSIONER (APPEALS) KCS, GST DEPTT, DELHI

IN THE MATTER OF : AUGSYA TRADING CO
GAFFAR MARKET
KAROL BAGH
NEW DELHI
GSTIN NO. 1234567890

DIN NO. 111111111111 **8. 2.2025**

ORDER UNDER SECTION 107(11) OF THE DGST ACT 2017 AGAINST THE ORDERS PASSED BY THE PROPLER OFFICER UNDER SECTION 74 OF THE ACT FOR THE YEAR 2022-23 – DENING THE INPUT TAX CREDIT

Appeal filed on 20.12.24

Present Shri Narender Ahuja, Advocate with POA

The appellant has preferred this appeal under section 107 of the DGST Act against the order under section 74 of the DGS Act creating a demand of 32.4 crores for the tax and Rs.18.30 crores for the interest. The appellant has enclosed a challan towards deposit of 10 percent of 32.4 crores after adjusting the excess input tax credit lying in his electronic credit ledger. Looking into the circumstances of this case, he has been advised to make sure this input tax credit is eligible to be used failing which action may be initiated. The Counsel has assured that there is nothing wrong with this input tax credit.

The counsel has taken me through the show cause notice, reply filed by the appellant and the adjudication order passed by the proper officer.

I have inquired the counsel on each and every issued raised in the impugned order and the replies were the same and nothing more has been brought before me including the law and the documentary evidence. Except the counsel has stated this trade the materials are procured on constructive delivery only to ensure there is no breakage or defective pieces with hair line breakages on the marble that can cause tremendous financial loss to the buyers. Further he has tried to explain the factum of secret bank account where the payments from the buyers in Delhi were routed through even though the tax invoices did not find place in official documents. The whole scenario as brought out by the proper officer in his show cause notice based

on investigation report received from the investigation wing could not be explained satisfactorily by the counsel except stating that the taxpayer is being harassed for ulterior motives. On this issue he was advised that this is the not proper forum for such allegations.

I have heard the counsel at some length. Nothing fruitful was brought on record either in terms of legal provisions or books of accounts or facts or any other material where some relief could be given to the tax payer.

The question raised before me is that this is not a case where section 74 of the DGST Act is invokable as the proper officer has failed to initiate proceedings satisfying the essentials pre-jurisdiction issues of section 74 – I am in total disagreement with the counsel. If this is not a fit case for invoking section 74 than there can be no other case. The jurisdiction under section 74 was rightly invoked by the proper officer and the contention of the counsel is too flimsy and baseless.

The proper officer has dug out the facts of the case in precision like manner and those findings are directly relevant in law in terms of Section 16(1) read with Section 16(2). Clearly the proper officer has been able to establish that there was no purchased of goods in the course of business or in furtherance of business and nothing could be brought on record to satisfy the pre-conditions in section 16(2) before the appellant became eligible to claim input tax credit.

While on this issue it is in the fitness of things to quote judgment of the Supreme Court of India in the State of KARNATKA V ECOM GILL COFFEE TRADING Private Limited where the apex court ruled as follows:

- Mere claim by dealer that he is a bona fide purchaser is not enough and sufficient to claim credit. The burden of proving the correctness of credit remains upon the dealer claiming such credit. Such a burden of proof cannot get shifted on the revenue.
- Mere production of the invoices or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under section 70 of the KVAT Act.
- The dealer claiming credit has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars, etc.
- For claiming credit, genuineness of the transaction and actual physical movement of the goods are the sine qua non and the aforesaid can be proved only by furnishing the details referred above.
- If the purchasing dealers fail to establish and prove the important aspect of physical movement of the goods alleged to have been purchased by them from the concerned dealers and on which the credit have been claimed, the Assessing Officer is absolutely justified in rejecting such claim.

In ***Ecom Gill,*** the assessees had only furnished invoices and payment proof to satisfy the burden of proof cast under Section 70 of the KVAT Act. Having elucidated on the scope of Section 70 and the documents required to satisfy the burden of proof, the Supreme Court allowed the Revenue appeals and restored the orders of the Assessing Officer denying credit to the assesses for not satisfying the burden of proof required under Section 70 of the KVAT Act.

It is pertinent to note that the counsel for the assessees placed reliance on the Delhi High Court's decision in ***On Quest Merchandising India Pvt. Ltd. v. Government of NCT of Delhi,*** wherein Section 9(2)(g) of the Delhi VAT Act, which blocked credit to the recipient when the supplier failed to pay the tax to the Government, was read down as violative of Article 14 of the Constitution. However, the Supreme Court distinguished *On Quest (supra)* on the reasoning that the burden of proof as per Section 70 of the KVAT Act was not under issue in the said case.

Even though the above case related to VAT Regime the factual matrix is para material to the GST Regime as well. Here to Section 155 of the DGST Act is akin to Section 70 of the KVAT Act. Hence, this judgment is directly relevant for the case in hand.

Such an hopeless case deserve no mercy and the appeal is being dismissed with the directions that recovery of amount be initiated as per process of law. Further this authority has no power to order stay of any proceedings as prayed for by the counsel.

The appeal is thus devoid of any merits and is dismissed with the above directions.

Joint Commissioner (A) – KCS
Digitally Signed.

BEFORE THE ASSISTANT COMMISSIONER, GST ZONE KCS, NEW DELHI

IN THE MATTER OF : AUGSYA TRADING CO
GAFFAR MARKET
KAROL BAGH
NEW DELHI
GSTIN NO. 1234567890

DIN NO. 2345678912 **14.10.2024**

Pursuant to search at your business premises under Section 67 of the DGST Act on 16.1.24 and after receiving the report therefrom to which you were a party, in order to give you full opportunity of being heard, an audit under section 65 was ordered by the Commissioner in terms of power given under Section 65(1) a copy of which was handed over to you and a note recorded on the order sheet to this effect.

An audit team therefore arrived at your business premises on 28.1.24 and completed the audit on 24.6.24. After examining the audit report a copy of which was given to you in person on 3.7.24 and after investigating the matter on Department's AI Module, I have following observations to make based on your 3B returns and output tax liability statement. It is clear that you deal with trading of marble and marble products and primarily your items are sourced from Rajasthan, especially Kishangarh and Makrana.

a) That the total turnover recorded by your firm is Rs 375 crores.
b) Total top 75 per cent purchases made by you are from just 12 firms (as per Annexure A with addresses) and these purchases duly appear in your 3B returns.
c) We have made investigations against the above 12 firms in details. It is shocking that the registration certificates of 7 firms (Annexure B) were cancelled in 2022 itself on their own applications and the registration certificates of the remaining 5 firms have been cancelled retrospectively by the proper officer under section 29(2) of the CGST Act by Rajasthan GST Department. (Annexure C). The reasons

given for cancellation are totally fraudulent activities and circular training and violations of the provisions of the Act and of the Rules.

d) We even verified their bank accounts to know whether any payments were made by you to those firms through banking channels and to our surprise we found that of all the 12 firms only in four firms bank accounts (Annexure D) we found payments made by you in their official and declared bank accounts as per their registration certificates.

e) We also found out the quarry's reports two months prior to the date of billing to you and we found no royalty payment was made by them to the authorities, which we believe, is mandatory to be made when marble moves from Rajasthan.

f) Further we found that in their invoices as found out in Audit proceedings there was no HSN Code or color or domestic or imported marble mentioned; except "100 sq ft marble". This was a mandatory requirement.

g) And in your sales invoices made to various B to B Customers vague tax invoices were issued that do not meet the requirements of Section 31 of the DGST Act (Annexure E – a few samples for you).

h) Another shocking result of our investigations is that a few of your buyers (Annexure F) when called on summons under Section 70 gave information about payments made by them to you – but to an account which is not declared in your records. We tried to find out the bank account with your PAN but could not trace that account; obviously it is a secret account where you seem to have taken the payments. And more so, many of the bills you issued to these buyers in Delhi, do not find mention in 3B or GSTR 1 returns – that is why payments were made to a secret bank accounts. Clearly you may have concealed huge turnover too during this year or earlier years or subsequent years – for which investigations are on.

From the above it is more than evident that you have been indulging in wrongful availment of input tax credit (just invoices but no supply of goods physically) and also based on your fake tax invoices, issued without supplying materials, the buyers are claiming fake input tax

credit. Clearly such wilful misstatements, misrepresentation and suppression of facts call for strict action under Section 74 of the DGST Act and also to launch criminal prosecution against your partners and the firm including cancellation of your registration certificates for which separate proceedings have been initiated.

Now therefore, you are called upon to show cause notice:

1) **Why your input tax credit for purchases made from these 12 firms, that are apparently not genuine at all, be not denied unless you prove to the contrary:**

2) **Why interest under section 50 (1) be not imposed upon you?**

3) **Why penalty as per law be not imposed upon you?**

You should be present for personal hearing on 2.11.24 with all your books of accounts and bank statements along with your reply, if required, to the above issues, especially the 12 firms mentioned against Annexure A to this show cause notice.

You shall remain present in the Department till you are asked to leave.

DIGITALLY SIGNED
ASSISTANT COMMISSIONER -KCS

BEFORE THE ASSISTANT COMMISSIONER, GST ZONE KCS, NEW DELHI

IN THE MATTER OF: AUGSYA TRADING CO
GAFFAR MARKET
KAROL BAGH
NEW DELHI
GSTIN NO. 1234567890

REPLY TO YOUR SHOW CAUSE NOTICE DATED 14.10.24

DATED: 3.11.24

Present for the firm : Shri Narender Ahuja, Advocate
Shri A K Gupta, Partner of the firm

The taxpayer has not filed any formal reply. The counsel of the firm has brought all the records with their dealing of 12 firms. The total turnover of purchases made from these firms as per books of accounts as narrated by the counsel in the present of the partner is Rs 180 crores @ 18 percent involving an input tax credit IGST of Rs 32.4 crores for the tax period 2022-23 alone.

The counsel has refuted all the allegations as per the above show cause notice and has alleged harassment to the tax payer. He has further vehemently argued that these are fishing inquiries being made for ulterior motives. He has further stated that the taxpayer has a genuine business for the last many decades in Delhi and no such a serious allegation has been levelled against him. Further he has stated that for the wrong doing of any other supplier there is no responsibility that could be fixed on the taxpayer. What the suppliers do is not in the hands of the tax payer and any inaction, negligence or even fraud committed by them cannot result the innocent tax payer getting penalised with huge tax liabilities. He has further vociferously argued the goods were duly received by the taxpayer at the business place of the supplier and brought to Delhi by way of own truck of the taxpayer. Hene, he claims that there was a constructive delivery. The truck is on hire by the tax payer and works only for the tax payer. When asked who were the drivers who brought the goods, what kind of truck was that that could carry so much weight and also which transport company the truck belonged to; on these questions the Partner of the firm Shri A K Gupta could not speak a word. The Counsel tried to ward off such questions but he was told that these are facts and hence on facts the counsel argument cannot take place.

Regarding undeclared bank accounts, the taxpayer fairly admitted that this bank account was not advised to the GST Department but is a part of the balance sheet. He has produced the balance sheet that has been kept for examination.

Further the tax payer was questioned about the payments made to the suppliers; the tax payer maintained his line of action continuously that whatever bank details were given by the supplier, the payments were transferred to them and the tax payer was not required to do the due diligence on such a issue. The crus of the matter is that the payments have been made through banking channels.

Regarding non mentioning of HSN Codes that are mandatorily to be mentioned the counsel stated that these are procedural lapses and for which legitimate claims of the taxpayer cannot be denied.

The taxpayer was confronted with 6 invoices of two parties mentioned in Annexure A (XYZ & Co and LMN & CO, both registered but RC cancelled in 2022, much prior to date of supply. The pointed question was that each invoices of these parties show a total weight of 40 tons and the tax payer stated that this much materials came in one truck i.e. 40x 3 - 12o tones. The taxpayer could not answer at all and tried to wriggle out that there may be more vehicles. Further he was questioned at what time the materials came and where did you unoad the same; the question again got no answer.

Even the purchase and sale reconciliation that was shown to the taxpayer for 4 randomly picked up in voices of the above two parties showed huge differences – beige color purchased and pink sold on back to back basis, more so in Bill to Ship to basis.

The counsel has quoted many judgments in the PRE GST REGIME on the issue that for sellers' mistakes buyers cannot suffer even if they do not pay tax.

Further the tax payer was questioned how big is his show room; he replied that around 600 sq fit. When further questioned the Bill to Ship To transactions for this year are just 15 percent of his turnover; than where does he keep the stocks that he buys – the date of purchase and date of sales shows a gap of over 40 days on an average? Against there was no explanation to this question.

Finally the counsel vehemently argued that all the transactions are genuine and hence there is no question of denial of input tax credit as the tax payer is not

responsible for the inaction, negligence or even fraud of the supplier. With these the reply was completed.

The counsel also prayed that pending adjudication on this issue the show cause notice for cancellation of registration certificate be kept in abeyance and so also the criminal action in the interest of justice.

THE COUNSEL ALSO FORCEFULLY ARGUED THAT THIS CANNOT BE A CASE OF SECTION 74 AS THE TAX PAYER HAS NOT WILFULLY MISSTATED ANY FACT OR MADE A MIRESPRESENTAION OR SUPPRESSED THE FACTS NOR WILFULLY ATTEMPTED TO DRFRAUT THE REVENUE.

The reply having been completed without any additional documents filed except that were shown to the tax payer. Kept for orders.

Digitally Signed
ASSISANT COMMISSIONER, KCS

DRC 07

BEFORE THE ASSISTANT COMMISSIONER, GST ZONE KCS, NEW DELHI

IN THE MATTER OF : AUGSYA TRADING CO
GAFFAR MARKET
KAROL BAGH
NEW DELHI
GSTIN NO. 1234567890

Din NO. 2345678912 **7.11.2024**

ADJUDICATION ORDER UNDER SECTION 74(9) OF THE DGST ACT FOR THE YEAR 2022-23

The tax payer deals with whole sale trade of marble – both domestic and imported- and has a show room of around 600 sq ft with no additional place of business or warehouse declared as per records.

Pursuant to search proceedings under Section 67 of the DGST a highly incriminating report was received from investigation wing. The allegations were very serious ranging from colluded transactions worth tens of crores and fraudulently claiming input tax credit and even passing on the fraudulent input tax credit – without physically receiving or sending the materials as per invoices issued.

Instead of straightaway taking action against the tax payer including attachment of bank accounts or criminal action, it was decided by the Commissioner to conduct a detailed audit of the business affairs of the company and accordingly audit was conducted between January 24 to June 24 at the business premises of the tax payer. Sufficient opportunities were granted to the taxpayer in as much as over 18 audit memos were issued to the taxpayer and his replies sought – none of the audit memos wsa replied in writing except some oral submissions and the taxpayer clearly told the audit team that they shall wait for the show cause notice.

Hence a show cause notice was issued to the taxpayer on 14.10.2024 and no formal reply was filed but the taxpayer personally presented himself with his counsel Shri Narender Ahuja, Advocate on 3.11.24.

During detailed and pointed questioning the taxpayer or his counsel just were clueless on the information sought from them including bank accounts, truck movement physically receipt of goods, wilfully wrong tax invoices issued without following the mandate of law, mismatch between materials received and sold, no warehouse but stocks kept for over 30 days and that too marble, non -declaration of a secret bank account and buying and producing tax invoices from firms whose registration certificates were either surrendered for cancellation or were cancelled by the department retrospectively by properly issuing the show cause notice that went unattended and un-replied from those suppliers. Even the royalty receipts in favor of the tax payers that are mandatory to be issued when marble is taken out for supply were not produced.

Regarding receipt of marble in Delhi, the taxpayer came out with an unsubstantiated reply that there was a constructive delivery from the suppliers when their own man received the materials after checking – the name of the person and his designation and whether he was employee of the firm were not told by the partner. Instead the counsel levelled allegations of ulterior motives against the undersigned and said the inaction or negligence or even fraud on the part of the supplier cannot result in levy of tax on the tax payer.

The balance sheets have been produced but detailed trial balance was not produced.

Even the payments allegedly made for the purchases were not made in the authorised bank accounts and there too there were secret bank accounts of the suppliers – how the statutory auditors reconciled such bank accounts also is a big question that need to be answered and for this summons are in the process of being issued to the auditor RAMAN & CO, DOSA, JAIPUR.

The counsel prayed that no other proceeding be initiated against the tax payer as they would like to contest this determination, if not in favor of the tax payer before the higher forums including criminal proceedings and suo moto cancellation of registration certificate of the tax payer under Section 29(2) of the DGST Act.

I HAVE HEARD THE COUNSEL AND THE PARTNER IN DETAIL and provided them sufficient opportunities to come clean on legitimate issues raised in the show cause notice that were a result of detailed investigation done by the investigation team and further to be fair to the tax payer detailed audit was also conducted – and the conclusions by investigation team were reinforced during audit proceedings and examination of the partner of the firm.

Under the unfortunate circumstances it is more than established that the tax payer indulged into fraudulent activities in collusion with suppliers or based on tacit understanding with them to book fake bills in the books of accounts and claimed input tax credit wrongfully with a clear intention to evade tax. And such invoices were used to pass on fake input tax credit to other buyers of the tax payer for which investigation is likely to be initiated.

The tax payer suppressed the facts, wilfully, made intentional misrepresentations and thus violated the provisions of Section 16(1) and 16(2) of the DGST Act and hence provision of section 74 were rightly invoked and are justified.

In view of the above the entire input tax credit claimed by the tax payer against those 12 firms (Annexure A) is hereby denied and additional liability to tax @ 32.4 crores is determined along with Interest @ 18 percent that works out to Rs 18.3 crores for the assessment year 2022-23. Penalty proceedings shall be initiated separately after following the due process of law.

Request of the taxpayer to halt other proceedings is premature as no such action has yet been initiated.

Demand note is accordingly issued and is being put on the portal directly today itself.

Assistant Commissioner – KCS
Digitally signed.

RAMAN AND CO.

CHARTERED ACCOUNTANTS

To
Honorable Chairman,
GST Tribunal, New Delhi Bench
New Delhi-

Subject:- Issue of Certificate regarding Bank Accounts in the name of Augsya Trading Co.

Sir,

This is to certify that M/s Augsya Trading co. (PAN no. AAAFA1234M and GST no. 1234567890) having registered office at Gaffar Market, Karol Bagh, New Delhi-110005 is currently maintaining 5 bank accounts as per the below mentioned details:

Name of the Bank	Type of Accounts	Account No.
A Bank Ltd.	Current Account	12345
B Bank Ltd.	Current Account	23456
C Bank Ltd.	Current Account	35890
D Bank Ltd.	Current Account	23333
E Bank Ltd.	Current Account	66777

This is further certified that though M/s Augsya Trading Co. has declared on current account no. 12345 maintained with A Bank Ltd. on the GST Portal but the firm has declared all the bank accounts in the Balance Sheet for the financial year 2022-23.

All the banks have also been linked with PAN card and are also appearing in the AIS system of the Income Tax. The firm, in our knowledge has no other account that is not declared in Income Tax Portal.

We further certify that we have prepared the balance sheet for the financial year 2022-23 considering all the above said bank accounts and the turnover is reconciled with the payment received in these bank accounts. The Turnover as declared in the GSTR-1 and GSTR-3B is also reconciled with the payment received in all the bank accounts maintained by the firm

This certificate is issued on the behest of the firm M/s Augsya Trading Co.

105, Amber Market, Quila Road, Jaipur, Rajasthan87

Phone: +91 87XXXXXX34, Email: ramanXXXX@gmail.com

Place: Jaipur

Date: 01.05.2025

For Raman & Co.

Chartered Accountants

Raman Singh

Partner

Firm Regn. No. FRN12345

M. no. 0123223

UDIN : 250123223FB2025

RAMAN AND CO.

CHARTERED ACCOUNTANTS

To
Honorable Chairman,
GST Tribunal, New Delhi Bench
New Delhi-

Subject:- Issue of Certificate regarding Bank Accounts in the name of Augsya Trading Co.

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All the banks have also been linked with PAN card and are also appearing in the AIS system of the Income Tax. The firm, in our knowledge has no other account that is not declared in Income Tax Portal.

We further certify that we have prepared the balance sheet for the financial year 2022-23 considering all the above said bank accounts and the turnover is reconciled with the payment received in these bank accounts. The Turnover as declared in the GSTR-1 and GSTR-3B is also reconciled with the payment received in all the bank accounts maintained by the firm

This certificate is issued on the behest of the firm M/s Augsya Trading Co.

105, Amber Market, Quila Road, Jaipur, Rajasthan87

Phone: +91 87XXXXXX34, Email: ramanXXXX@gmail.com

Place: Jaipur

Date: 01.05.2025

For Raman & Co.

Chartered Accountants

Raman Singh

Partner

Firm Regn. No. FRN12345

M. no. 0123223

UDIN : 250123223FB2025

Invoice

ABC & CO.
Makrana, Rajasthan.

GSTIN/UIN 12345678
Rajasthan 08 341505
9188XXXXXX15
e-Mail abc@gmail.com

Invoice No. 0012/2022-23	Dated 12.06.2022
Delivery Note 001/ABC/2022	Mode/Terms of Payment By Road,
Reference No. & Date.	Other References
Buyer's Order No. ABC/001/2022	Dated 05.06.2022
Dispatch Doc No 0012/2022-23	Delivery Note Date
Dispatched through DL 1XX 1XX4	Destination GAFFAR MARKET, KAROL BAGH
Bill of Lading/LR-RR No. RJ 17XXXX12 dt. 12.06.2022	Motor Vehicle No. DL1XX 1XX4

Consignee (Ship to)

Company's Name Augsya Trading Co.
Gaffar Market, Karol Bagh, New Delhi 110 005

GSTIN/UIN 1234567890
State 07 Delhi 110005

Buyer (Bill to)

Company's Name Augsya Trading Co.
Gaffar Market, Karol Bagh, New Delhi 110 005

GSTIN/UIN 1234567890
State 07 Delhi 110005

Terms of Delivery
Delivery of goods will be done on advane payment of 50% of the order.

Sl. No.	Description of Goods	HSN/SAC	Quantity	Rate	per	Amount
1	**GRANITE**	68022191	**700 Nos**	55.00	Sq Ft	**38500.00**
2	**Marble Slab**	2515 1100	**600**	45	Sq Ft	**27000.00**
3	**Grouty**	3824 2020	**9**	50	Kg	**450.00**
4	**Chemical**	69071010	**4**	250	Bag	**1000.00**
		Total				**66950.00**
	CGST					**6025.50**
	SGST					**6025.50**
	Total					**₹ 79001.00**

Amount Chargeable (in words) Seventy Nine Thousand one only

HSN/SAC	Taxable	CGST		SGST/UTGST		Total
		Rate	Amount	Rate	Amount	Tax Amount
68022191	38500.00	9%	3465.00	9%	3465.00	6930.00
2515 1100	27000.00	9%	2430.00	9%	2430.00	4860.00
3824 2020	450.00	9%	40.50	9%	40.50	81.00
6907 1010	1000.00	9%	90.00	9%	90.00	180.00
Total			**6025.50**		**6025.50**	**12051.00**

Tax Amount (in words) :

SD/-

Declaration

We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct.

Customer's Seal and Signature

Authorised Signatory

National Trading Co. vs Assistant Commissioner Of Sales Tax, ... on 5 July, 2000

Equivalent citations: [2001]122STC212(ORISSA)

Author: P.K. Misra

Bench: P.K. Misra

JUDGMENT

1. Heard learned counsel for the parties.

2. Pursuant to the order dated June 27, 2000 the petitioner has filed today the certified copy of the assessment order dated January 21, 1999 under the Orissa Sales Tax Act which relates to the year 1996-97. Although many contentions were raised in support of the writ petition, we need not examine them as the matter can be decided on the following : short point being that the reporting officer himself cannot be the assessing officer. It is said that justice should not only be done but should manifestly be seen to be done. Justice can never be seen to be done if a person acts as a Judge in his own cause or is himself interested in its outcome. This principle applies not only to judicial proceedings but also to quasi-judicial and administrative proceedings. In the case at hand, there is no dispute that the reporting officer himself took up the impugned assessment proceedings and completed the same. This he could not have done.

3. In the result, the assessment order dated January 21, 1999 passed by the Sales Tax Officer, Cuttack-I, East Circle, Cuttack at annexure 5 and the first appellate order of the Assistant Commissioner of Sales Tax, Cuttack-I Range, Cuttack dated December 9, 1999 in Sales Tax Appeal No. AA 656 CU-I E/98-99 at annexure I are hereby set aside. The department is free to proceed with the matter in accordance with law.

4. It was brought to our notice that the same officer is still continuing as the Sales Tax Officer in Cuttack-I East Circle, Cuttack. In the fitness of things, the assessment proceeding may be taken up by any other officer of the same rank.

5. The writ petition is accordingly allowed.

6. Urgent certified copy of the order be granted on proper application.

A.F.R

Neutral Citation No. - 2025:AHC:42270

Judgement reserved on 28.02.2025

Judgement delivered on 24.03.2025

Court No. - 10

Case :- WRIT TAX No. - 1287 of 2024

Petitioner :- M/S Solvi Enterprises

Respondent :- Additional Commissioner Grade 2 And Another

Counsel for Petitioner :- Aditya Pandey

Counsel for Respondent :- C.S.C.

With

Case :- WRIT TAX No. - 1285 of 2024

Petitioner :- M/S Solvi Enterprises

Respondent :- Additional Commissioner Grade-2 And Another

Counsel for Petitioner :- Aditya Pandey

Counsel for Respondent :- C.S.C.

With

Case :- WRIT TAX No. - 1288 of 2024

Petitioner :- M/S Solvi Enterprises

Respondent :- Additional Commissioner Grade 2 And Another

Counsel for Petitioner :- Aditya Pandey

Counsel for Respondent :- C.S.C.

With

Case :- WRIT TAX No. - 1289 of 2024

Petitioner :- M/S Solvi Enterprises

Respondent :- Additional Commissioner Grade-2, (Appeal)- 5 And Another

Counsel for Petitioner :- Aditya Pandey

Counsel for Respondent :- C.S.C.

And

Case :- WRIT TAX No. - 1282 of 2024

Petitioner :- M/S Solvi Enterprises

Respondent :- Additional Commissioner Grade 2 And 3 Others

Counsel for Petitioner :- Aditya Pandey

Counsel for Respondent :- C.S.C., Manish Trivedi

HON'BLE PIYUSH AGRAWAL, J.

1. Since the similar issues are involved in aforesaid writ petitions, the same are being decided together by this common judgment.

2. For convenience, the facts of the Writ Tax No.1287 of 2024 is being delineated here-in-below:

3. Heard Sri Aditya Pandey, learned counsel for the petitioner, and Sri RS. Pandey, learned Additional Chief Standing Counsel for the State-respondents as well as Sri Manish Trivedi, learned counsel appearing for the respondent-Bank.

4. By means of this writ petition, the following prayer has been made:-

> *"I. Issue a suitable writ, order or direction in the nature of certiorari quashing the impugned order dated 20.10.2023 passed by the respondent no.1 in Appeal No.GST – AD091222030324L/2022 F.Y. 2018-19, under the provisions of Section 74 of the U.P.G.S.T./C.G.S.T. Act (Annexure No.1 to the writ petition).*
>
> *II. Issue a suitable writ, order or direction in the nature of certiorari quashing the impugned order dated 12.09.2022 passed/issued by the respondent no.2 (Annexure no.4 to the writ petition).*
>
> *III. ……..*
>
> *IV. ……..."*

5. Learned counsel for the petitioner submits that the petitioner is a registered dealer, which is engaged in the business of sale and purchase of scraps etc., against which, proceedings under Section 74 of the UPGST Act were initiated by the respondent no.2 for the

tax period December, 2018-19, F.Y. 2018-19 vide notice DRC-01 dated 29.07.2022 to which a detailed reply was submitted by the petitioner, however, without considering the same, the impugned order dated 12.09.2022 was passed in violation of Section 75 (4) of the UPGST/CGST Act. Being aggrieved by the said order, an appeal was filed by the petitioner, which was dismissed vide impugned order dated 20.10.2023.

6. Learned counsel for the petitioner submits that the petitioner purchased the goods from a registered dealer namely M/s. Radhey International (hereinafter referred to as "the seller"), vide tax invoice dated 06.12.2018, which was generated by the seller from the GST Portal.

7. He further submits that the authorities have power under the Act for cancelling the registration with retrospective effect, but in the case at hand, the date of transaction in question is of 06.12.2018 and whereas the registration of the selling dealer has been cancelled with effect from 29.01.2020.

8. The transaction in question is fully covered by the statutory documents prescribed under the Act. He further submits that merely at the subsequent stage, if the selling dealer was not found in a disclosed place of business, or registration has been cancelled, the petitioner cannot be held responsible for the same. He further submits that the selling dealer filed its return therefore, GSTR-2A was auto generated, showing the transaction are genuine. He prays for allowing the writ petition.

9. *Per contra,* learned Standing Counsel supports the impugned order and submits that the petitioner has failed to bring on record any cogent material about the actual physical motion of the goods and therefore, the impugned order has rightly been passed.

10. In support of his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court passed in the case of ***State of Karanataka Vs. Ecom Gill Coffee Trading Private Limited, 2023 LiveLaw (SC) 187*** as well as judgments of this Court passed in ***Writ Tax No. 128 of 2024 (M/s Rajshi Processors Raebareli Thru. Its Partner Ashok Kumar Lakhotia Vs. State of U.P. Thru. Prin. Secy. Deptt. Of State Tax, Lko and 2 Others)*** and ***Writ Tax No.1421 of 2022 (M/s Shiv Trading Vs. State of U.P. and 2 others)***. The judgment of ***Shiv Trading (supra)***, decided on 28.11.2023 was challenged before the Hon'ble Apex Court by way of filing S.L.P. (c) No.3345 of 2024, which has been dismissed vide order dated 12.02.2024. He prays for dismissal of the aforesaid writ petitions.

11. To the said submission, learned counsel for the petitioner submits that the case of ***M/s Ecom Gill Coffee (supra)*** is not applicable in the present case as therein, the seller was not registered and had not filed his return, nor GSTR-2A was generated; whereas in the case in hand, the selling dealer was a registered dealer at the time of transaction took place and auto generated GSTR-2A was populated which shows the transaction in question is genuine.

12. Further, the judgment relied upon by the learned Standing Counsel on ***M/s. Rajshi Processors Raebareli (supra)*** is also distinguished by stating that the proceedings were initiated after being survey conducted at the place of the petitioner i.e. the purchaser in which certain discrepancies in documents were found, on that basis, further, the place of the seller was inspected which was found not in existence.

13. Upon hearing the parties, the Court has perused the records.

14. It is not in dispute that the purchase was made by the petitioner from the firm, which was duly registered under the GST Act at the time when the transaction was made.

15. For deciding the issue in hand, Sections 16 & 74 of the GST Act, 2017 will be relevant, which reads as follows:-

> *"16. Eligibility and conditions for taking input tax credit.*
>
> *(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.*
>
> *(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,*
>
> *(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*
>
> *(b) he has received the goods or services or both.*
>
> *Explanation. For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;*
>
> *(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and*
>
> *(d) he has furnished the return under section 39:*
>
> *Provided that where the goods against an invoice are received in lots or instalments,*

the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed: Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.

(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 utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order. (10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.
(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1. For the purposes of section 73 and this section,?

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2. For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

16. The perusal of the contents of above-quoted Section 16 of the GST Act, 2017 shows that the input tax credit can be claimed only on the fulfilment of conditions mentioned therein. It also clarifies that no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both.

17. The contents of above-quoted Section 74 of the GST Act, 2017 provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of fact.

18. Further, the Rule 36 of the GST Rules, 2017 provides for document and condition required for claiming input tax credit, which reads as under:-

""Rule 36. Documentary requirements and conditions for claiming input tax credit.-
(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely,-

(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;

(b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;

(c) a debit note issued by a supplier in accordance with the provisions of section 34

(d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;

(e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of rule 54.

(2) Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document and the relevant information, as contained in the said document, is furnished in FORM G.S.T.R.-2 by such person:

[Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, G.S.T.I.N. of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.]

(3) No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.

[(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished by the suppliers under sub-section (1) of Section 37 [In FORM G.S.T.R.-01 or using the invoice furnishing facility] shall not exceed [5 per cent] of the eligible credit available. In respect of invoices or debit notes the details of which have been furnished by the suppliers under sub-section (1) of Section 37 [In FORM G.S.T.R.-01 or using the invoice furnishing facility] under sub-

[Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in FORM G.S.T.R.-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the

said months in accordance with the condition above:]

[Provided further that such condition shall apply cumulatively for the period April, May and June, 2021 and the return in Form G.S.T.R.-3B for the tax period June 2021 or quarter ending June, 2021, as the case may be, shall be furnished with the cumulatively adjustment of input tax credit for the said months in accordance with the condition above:]"

19. Perusal of the contents of afore-quoted Rule 36 of the GST Rules, 2017 provides that the required documents for claiming input tax credit should be made available and the same may be reflected in GSTR-3B.

20. From the afore-quoted Sections 16 & 74 of the GST Act, 2017 as well as Rule 36 of the GST Rules, 2017, it is clear that the provisions as provided, certain benefit of input tax credit to the registered person should be provided on the fulfilment of conditions as well as documents required to be provided therein.

21. Furthermore, Section 74 of the GST Act, 2017 provides the power to the State-authorities to proceed against the registered dealer if I.T.C. has wrongly availed or utilized by reason of fraud or wilful misstatement of fact or by means of fraud, and upon the adjudication, can recover the same.

22. In the case in hand, the proceedings were initiated against the petitioner under Section 74 of the GST Act, 2017 as the registration of the seller dealer has been cancelled on subsequent date i.e. with effect from 29.01.2020, thus, the date of transaction was admittedly took place prior to it i.e. on 06.12.2018.

23. Further, the record shows that the GST authorities are empowered to cancel the registration from the date of inception of proceedings, but the authorities in their wisdom cancelled the registration of the seller on a subsequent date i.e. with effect from 29.01.2020.

24. It is not the case of the Revenue that at the time when the transaction took place, the selling dealer was not registered and was not having valid registration under the GST Act.

25. The record shows that the supplier has filed its returns i.e. GSTR-01 and GSTR-3B. It is a matter of common knowledge that after filing of GSTR-01, an auto populated window would be open for filling the GSTR-3B for payment of tax and GSTR-2A can be viewed by the purchaser of the goods in question. Once the said form was generated and the said fact has not been disputed by the authorities below while passing the impugned order, the authorities have failed to consider the fact that GSTR-3B & GSTR-2A, as prescribed under the Act, which was auto populated to which not a single word has been whispered in the impugned orders. On the contrary, an observation has been made against the petitioner that he had failed to bring on record any cogent material that the seller has deposited the tax.

26. At the time when the transaction took place, the purchaser i.e. the petitioner and the seller both were registered, however, at the subsequent time, the seller was found non-existing and the registration of the seller has not cancelled retrospectively i.e. from the date of transaction.

27. The judgment of ***M/s Rajshi Processors (supra)***, cited by the Revenue, has been passed on the pretext that the supplier was non-existing dealer and its registration was cancelled from the date of its inception, but in the case in hand, registration of the selling dealer has been cancelled w.e.f. 29.01.2020, which shows that the transaction took place on 06.12.2018 and on the said date, the selling dealer was having valid registration. Thus, on the said facts, the judgment passed in the ***M/s Rajshi Processors (supra)*** is of no aid to the Revenue.

28. Further, the judgment of ***Shiv Trading (supra)*** wherein the reliance has also been placed upon the judgment of ***Ecom Gill Coffee Trading Private Limited (supra)***, decided on 28.11.2023 was challenged before the Hon'ble Apex Court by way of filing S.L.P. (c) No.3345 of 2024, which has been dismissed and the order dated 28.11.2023 was confirmed vide order dated 12.02.2024. In the said judgment, the finding of GSTR-3B was not taken care of and therefore, the said judgment on facts of the present case is of no aid to the respondents.

29. This Court in the case of ***M/S Rama Brick Field Vs. Additional Commissioner Grade-2 and 2 others (Writ Tax No. 909 of 2022)***, in paragraph nos. 8, 9 & 10 has held as under:-

> *"8. It is not in dispute that the petitioner has opted for compounding which has been accepted by the respondent authorities for a period of 1.10.2017 to 21.3.2019. The disputed purchase as shown by the petitioner from Rohit Coal Trader pertains to May 2018 to June 2018, which falls under the aforesaid period of composition. The petitioner in support of his contention has adduced evidence such as tax invoice, e-way bill, G.R., payment receipts etc. to show that the purchases have been made from the registered dealer. It is also admitted that the registration of Rohit Coal Traders has been cancelled vide order dated 24.10.2019 in other words at the time of transaction in question, the seller i.e. Rohit Coal Traders was registered firm under the G.S.T. Act. It has been argued on behalf of petitioner that Rohit Coal Traders has filed his return for A.Y. 2018-19 ie. GSTR-1 and GSTR-3B. It is a matter of common knowledge that after filing of GSTR -1, an auto pop up widow would be opened for filing of Form GSTR 3 B for payment of tax and form GSTR 2 A can be viewed by the purchaser of goods in question. Once the said form was generated and the said fact has not been disputed by the authorities below while passing of the impugned order, which goes without saying that at the time of transaction, purchaser and supplier both were registered. However at the*

subsequent time if the seller i.e. Rohit Coal Trader was found non- existence, the proceeding can be initiated but the authorities has failed to consider the fact that GSTR returns as prescribed under the Act was filed by the seller to which not a single word has been whispered while passing the impugned order. On the contrary an observation has been made that the petitioner has failed to bring on record any cogent material to show that Rohit Coal Traders has deposited the tax and therefore proceedings were held to be justified.

9. Under the GST regime all details are available in the portal of GST department. The authorities could have very well verified as to whether after filing of GSTR-1 and GSTR 3 B how much tax has been deposited by the selling dealer i.e. Rohit Coal Traders but the authorities have failed to do so. Thus looking to the said facts, the impugned orders cannot be sustained in the eyes of law.

10. In view of the facts as stated above, the writ petition succeeds and is allowed. The impugned orders are set aside. The matter is remanded to the first appellate authority, who shall pass a fresh order in accordance with law, expeditiously, preferably within a period of two months from the date of producing a certified copy of this order, without granting any unnecessary adjournment to the parties."

30. Once the seller was registered at the time of the transaction in question, no adverse inference can be drawn against the petitioner. Further, the record shows that the registration of the selling dealer was cancelled retrospectively i.e. w.e.f. 29.01.2020 and not from its inception which goes to show that the transaction between petitioner and seller was registered and having valid registration in his favour.

31. That under the GST regime, all details are available in the GST Portal and therefore, authorities ought to have been verified the same as to whether the filing of GSTR-1A and GSTR-3B, how much tax has been deposited by the seller, but the authorities have failed to do so.

32. Thus, looking to the above facts and circumstances of the cases, the matters require re-consideration.

33. Accordingly, the impugned orders cannot be sustained in the eyes of law and the same are hereby quashed.

34. The writ petitions are **allowed**. The matter is **remanded** to the authority concerned for deciding afresh by passing a reasoned and speaking order, after hearing all the stakeholder, within a period of two months from the date of production of certified copy of this order.

35. Any amount deposited by the petitioner pursuant to the impugned orders, shall be subject to the outcome of the fresh orders to be passed by the authority concerned.

Order Date :-24.03.2025
Pravesh Mishra/-

(PIYUSH AGRAWAL, J.)

C.C. C.E. And S.T. Bangalore ... vs M/S Northern Operating Systems Pvt. ... on 19 May, 2022

Author: S. Ravindra Bhat

Bench: Pamidighantam Sri Narasimha, S. Ravindra Bhat, Uday Umesh Lalit

1

REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2289-2293 OF 2021

C.C.,C.E. & S.T. – BANGALORE
(ADJUDICATION) ETC. ...APPELL

VERSUS

M/S NORTHERN OPERATING SYSTEMS
PVT LTD. ...RESPONDE

JUDGMENT

S. RAVINDRA BHAT, J.

1. The Commissioner of Central Excise and Service Tax (hereafter variously described as “the revenue” or “the appellant”) has preferred appeals1, directed against the impugned orders of the Customs, Excise and Service Tax Appellate Tribunal (hereafter “CESTAT”)2 which set aside two orders dated 03.03.2014 and 04.03.2014 by the Commissioner of Service Tax (hereafter “the Commissioner”). The Commissioner had confirmed demands, made through show cause notices, for service tax along with interest and penalty. The commissioner had discharged, by an order (dated 27.02.2017/16.06.2017) the proceedings arising from another show cause notice (hereafter “SCN”) in respect of a similar demand. That led to the revenue’s appeal to CESTAT, challenging that order, discharging proceedings initiated by the revenue for the subsequent period. The CESTAT, by its common Under Section 35L (b) of the Central Excise Act, 1944.

Dated 23.12.2020 in Service Tax Appeal (STA) Nos. 22573-74/2014; STA No. 21502/2017, Service Tax/CROSS/21077/2017 and Service Tax/CROSS/20255/2018.

order, rejected the revenue's appeals, and allowed that of the respondent, Northern Operating Systems (Pvt.) Ltd. (hereafter "the assessee" or "NOS").

Facts of the case

2. The assessee was registered with the revenue, as a service provider under the categories of "Manpower Recruitment Agency Service", "Business Auxiliary Service", "Commercial Training and Coaching Service", "TTSS", "Telecommunication and Legal Consultancy Service" etc., under the Finance Act, 1994 (hereafter "the Act"). Following an audit of the records by the revenue's officials, proceedings were initiated against the assessee alleging non-payment of service tax concerning agreements entered into by it with its group companies located in USA, UK, Dublin (Ireland), Singapore, etc. to provide general back- office and operational support to such group companies.

3. The nature and contents of the agreements, are discernible in their description, extracted from the impugned order - where the assessee has been referred to as "the appellant" by the CESTAT - which is as follows:

> "The relevant terms of the agreement to understand the activity are as follows:
>
> a) When required Appellants requests the group companies for managerial and technical personnel to assist in its business and accordingly the employees are selected by the group company and they would be transferred to Appellants.
>
> b) The employees shall act in accordance with the instructions and directions of Appellants. The employees would devote their entire time and work to the employer seconded to.
>
> c) The seconded employees would continue to be on the payroll of the group company (foreign entity) for the purpose of continuation of social security/retirement benefits, but for all practical purposes, Appellants shall be the employer. During the term of transfer or secondment the personnel shall be the employee of Appellants. Appellants issue an employment letter to the seconded personnel stipulating all the terms of the employment.
>
> d) The employees so seconded would receive their salary, bonus, social benefits, out of pocket expenses and other expenses from the group company.
>
> e) The group company shall raise a debit note on Appellants to recover the expenses of salary, bonus etc. and the Appellants shall reimburse the group company for all these expenses and there shall be no mark-up on such reimbursement." As a matter of fact, the assessee issues the prescribed forms to the seconded employees, in terms of the Income Tax Act, 1961 (hereafter "IT Act"). Those individuals too file income tax returns and contribute to the provident fund.

Furthermore, NOS remits the above amounts in foreign exchange, which are reflected in its financial statements. The assessee is reimbursed (by the foreign entity, Northern Trust Company - hereafter described as such) for the amounts it pays as salaries, to these seconded employees. The assessee pays for certain services received from the group companies. The assessee used to discharge service tax on payments for such services in terms of Section 66A of the Act. The appropriate major expense heads were 'Salaries & Allowances', 'Relocation expenses', 'Consultancy Charges', 'Communication Expenses' and 'Computer Maintenance and repairs.'

4. The revenue issued four show cause notices3 alleging that the assessee failed to discharge service tax under the category of "manpower recruitment or supply agency service" with regard to certain employees who were seconded to the assessee by the foreign group companies. The first two of these notices also invoked the proviso to Section 73 (1) read with Section 66A of the Act, proposing to demand service tax for the extended period. The assessee resisted these notices, refuting the allegations in the four SCNs. It was also given a hearing. By two orders4 the commissioner confirmed the proposals in the notice (except the demand for the period from April 2006 to September 2006) accepting the fact that part of the demand has been raised @ 12.3% instead of 10.3%. The Commissioner confirmed the demand, holding that firstly, providing skilled manpower, on secondment basis, is manpower recruitment or supply agency service in the meaning of Section 65(68) read with Section 65(105) (k) of the Act. Secondly, the group companies and their Dated 23.04.2012; (for the period October 2006 - March 2011), 19.10.2012 (for the period April 2011 to March 2012), 07.05.2014 & 26.11.2015 (for the period April 2012 to September 2014).

Order-in-Original No. 29/2013-14 dated 03.03.2014 and No. 30/2013-14 dated 04.03.2014.

various branches abroad, would be the service providers and the assessee, who receives skilled manpower, on secondment basis, is the service recipient. Thirdly, the definition of manpower recruitment or supply agency, under Section 65(68) has no exclusion clause, requiring service providers to possess the status of certain specified persons or organizations, for the purpose of providing the taxable service of manpower, recruitment or supply agency. It was held, fourthly, that in a secondment arrangement a secondee would continue to be employed by the original employer during the secondment, and will, following its termination return to the seconder/ original employer. As a consequence of this, the secondee does not become integrated into the host's organization. It was next concluded that the service provider's obligation ceases once employees were recruited and seconded. Hence the liability of service tax under Section 65 (105) (k) would be triggered at that event. Sixthly, it was held that there is no exclusive provision in law that restricts taxability of service of manpower recruitment or supply agency, when salaries are drawn by the assessee for manpower so supplied and TDS under the Income Tax Act had been affected. Regarding differential service tax liability, mere worksheets without documentary proof would be insufficient to grant relief as against the service tax of 41,11,473/- for the period 2008-2009.

5. It was also ruled that the assessee had not separately disclosed details of the gross receipts (as receiver of service) of the said services in the taxable value in the half-yearly ST-3 Returns filed by them with the department, with intent to evade payment of service tax. On the eligibility of CENVAT Credit, the onus of furnishing the evidence or documents indicating factual eligibility of CENVAT

credit within the scope of Rule 3(1) of the CENVAT Credit Rules, 2004 (hereafter "CENVAT Rules") had not been discharged by the assessee. The Commissioner was of the view that the assessee was aware of the provisions of law and had placed nothing on record to indicate the circumstances that prevented it from approaching the department or accessing the CBEC website available on public domain. It led no evidence to show reasonable cause. The extended period assessment and penalty was therefore, warranted.

6. Aggrieved by the impugned order, the assessee filed two appeals before the CESTAT. As far as the third appeal5 by the department was concerned, the period involved was from April 2012 to September 2014. As a sequel to the earlier SCNs, the assessee was issued two SCNs6 demanding service tax of 4,36,75,590/- and 7,55,48,448/- for the period April 2012 to April 2013, and April 2013 to September 2014 respectively, along with interest and penalty.

7. The assessee filed detailed replies on 02.07.2014 and 31.12.2015, mainly arguing that service tax cannot be demanded as the services provided by foreign affiliates do not fall under manpower recruitment or supply agency services for the period prior to negative list. Further, for the period after the introduction of the negative list, the definition of the term 'service' under the Finance Act, specifically excluded service provided by the employee to the employer. Therefore, the amount paid to the foreign entity as reimbursement of salary of the seconded employees cannot be construed as consideration for supply of manpower services.

8. The Commissioner, Bangalore by order7 dropped the proposals in the SCN for the period April 2012 to March 2013 and April 2013 to September 2014, thereby setting aside demands for service tax of 4,36,75,590/- and 7,55,48,448/- respectively (total 11,92,24,038/-). However, based on a reading of the Secondment Agreement, the Commissioner by order dated 27.02.2017/16.06.20178 held that firstly, seconded employees continued on their foreign employer's payroll only for continuing social security benefits and for all practical purposes the asseesee was the employer of such seconded employee. Secondly, during secondment, those employees had to entirely devote their skill Service Tax Appeal No. 21502/2017 Bearing C No. IV/16/153/2014- ST. Adjn. (SCH No. CAU/153/Div. III/Gr 29 dated 07.05.2014 and C. No. IV/16/293/2015 ST II Adjn./2043/15 dated 26.11.2015 Order-in-Original No. 54-55/2016-17 dated 27.02.2017/16.06.2017 Order-in-Original No. 54-55/2016-17 dated 27.02.2017/16.06.2017 and knowledge towards achieving the purpose of their secondment. Thirdly, each employee had to report to and be responsible to the assessee. Fourthly, a look at one sample agreement showed that it was between the individual and the asseesee, and not between the overseas entity and the asseesee. Fifthly, the obligation to honour the compensation agreement was upon the assessee only. Sixthly, the facts were parallel to Volkswagen India Pvt. Ltd9, in which the CESTAT decided the matter in favour of the assessee. Seventhly, there was no supply of manpower rendered to the assessee by the foreign holding company and the method of salary disbursement is not determinative of the nature of the transaction. Eighthly, for the period post 2012, the remittance is a reimbursement based on actuals and there is no amount which is payable in respect of the activity in question and therefore there is no consideration involved.

9. Aggrieved by the Commissioner's order dropping the demand, the Revenue has filed an appeal challenging it, in which the assessee too filed its cross objection.

The impugned order

10. The CESTAT, by its order noted the position in law – that earlier, the definition of taxable services under Section 65(105) (k) included service by a manpower recruitment or supply agency in relation to recruitment or supply of manpower temporarily or otherwise. It was noted that the scope of the term "manpower recruitment of supply agency" was spelt out in Para 22.3 in the Circular of 27.07.200510. Next, the CESTAT noted that the position in law changed in that manpower and recruitment services was per se included since it did not form part of the negative list. In this regard, it noticed Section 65B (44) in which by clause

(b), provision of service by an employee or employer by or in relation to employment is an excluded service. CESTAT, therefore, reasoned that the essential ingredients for any activity to be called as manpower recruitment or supply agency 2014 (34) STR 135 Circular F.No.B1/6/2005-TRU was that it should be "any person", engaged in providing a specified service; the specific service ought to be recruitment of manpower which should be provided temporarily or otherwise; such service may be provided directly or indirectly and in any manner – further that the service should be provided to some other person. According to CESTAT, the definition of "manpower recruitment or supply agencies" brought under its ambit two types of activity, i.e., manpower recruitment and manpower supply, and furthermore, service became taxable only if provided by a manpower recruitment or supply agency. CESTAT reasoned that in the present case, it was concerned with supply of manpower after July 2012, when definition of service specifically excluded certain transactions, such as the one provided by an employee to an employer in relation to employment.

11. The CESTAT then, on an examination of the agreements, interpretation of documents on record (including the agreements entered by the respondent with its group company), held that the subject matter of the contract was not supply of manpower. The group companies were not engaged in supply of manpower. The CESTAT held that those seconded to the assessee working in the capacity of employees and receiving salaries by group companies were only for disbursement purposes. The employee-employer relationship existed and that the activity, therefore, could not be termed as "manpower recruitment and supply agency." It was held that the assessee obtained from its group companies directly or by transfer, service of expatriate employees who were paid salaries by the assessee in India, for which tax was deducted and paid to statutory benefits – such as provident fund. The assessee also remitted contributions to be paid toward social security and other benefits on account of the employees, under the laws applicable to the group companies abroad. In these circumstances, it was held that the overseas group companies which had contracted with the assessee were not in the business of supply of manpower and that the assessee was not a service recipient. On the strength of this reasoning, the assessee's appeals were allowed and the revenue's appeals were rejected.

Contentions of Revenue

12. Mr. Balbir Singh, learned ASG relied upon the materials produced before the CESTAT. He submitted that in terms of the Services Agreement (dated 01.09.2006), by Clause 8, the assessee NOS agreed to perform or provide to the foreign group company (Northern Trust Company) various services which were enumerated in Attachment 1 or such other services as would be agreed to by the parties in future. In terms of Attachment 1, the assessee was to provide "IT enabled services" supporting back-up and office related operations. It was submitted that the remuneration to be provided for the service was fixed at the actual cost plus a mark-up of 15%. The ASG then referred to the master services agreement between the assessee and Northern Trust Company dated 12.02.2009. In terms of this master agreement the assessee was to provide "general back office and operational support" to the foreign group company which included foreign investment, investment management liaison group cash, evaluations and reporting, IRAS fund accounting, securities, lending operations; tax related operations, including tax reclaimed, etc. It was pointed out that in terms of Clause 2.1, though the assessee was to perform and provide services to the foreign group company, such services could be delivered to other parties nominated by the Northern Trust Company.

13. The third document referred was the secondment agreement entered into with effect from 01.04.2007 between the Northern Trust Management Services Ltd. (an overseas group company - also "NTMS") and the assessee. The ASG relied broadly on Article I by which parties agreed that the assessee would request for the secondment of employees to be remunerated through the payroll of their foreign employer. Reliance was also placed upon Article III which stated that the assessee had to reimburse the expenses paid during the secondment period, in respect of remuneration of the seconded employees, including the salary, incentive, out of pocket expenses, etc. It was urged that this clause specifically stated that the payments by the assessee would be limited to actual costs incurred, including administrative clause reasonably attributable to services. The payment mechanism was spelt out in Article IV. The learned ASG also referred to the independent letter of agreement between the foreign group company and one of the seconded employees which specifically stated that secondment was a limited duration assignment in terms of which the employee had the right to terminate the engagement. It was submitted that a clause would clearly indicate that apart from the remuneration normally paid, such seconded employees were entitled to annual home leave allowance – including for members of the family; car rental costs; and housing – monthly rent for which was fixed at 3,97,500. Furthermore, allowances toward packing, shipment, storage, temporary lodging, rest and recreation, trip allowance, etc. were fixed. It was highlighted that in terms of this agreement, the base salary and bonus of the employee clause read as follows:

> "Effective with your assignment in Bangalore, India, your base salary will be US$ 3,30,000/-.
>
> In addition to the salary liability, servant allowance and hardship allowance (fixed at 20% of the base salary during the assignment in Bangalore was payable.."

14. The revenue contended that looking at an overall reading of the agreement, i.e. services agreement dated 01.09.2006 and its attachment, the master service agreement dated 12.02.2009 (with its annexures), the secondment agreement dated 01.04.2007, and the secondment assignment

letter or agreement with the concerned employee clearly showed that the overseas employer provided the services of its employees to the assessee for the performance of agreed tasks. These tasks were handed over to the assessee by the overseas group company. It was not as if the assessee was free in regard to the manner of performance of the jobs assigned to it. The consideration provided to it was fixed (15% markup over the actual costs incurred); the costs included the remuneration nominally paid by the assessee to the seconded employee. Further, those were reimbursed. For a temporary period, the seconded employee was only operationally under the control of the assessee. It was submitted that this arrangement was essential because without such control, it would not have been practicable for the assessee to have ensured performance of the tasks, it was expected to, through the seconded employees concerned. Yet, the fact remained that upon the cessation of the assignment, the employees reverted back to their original position in the overseas companies to work there or to be deployed elsewhere in terms of the global policy.

15. Learned counsel submitted that a combined reading of the materials on record clearly establish that the arrangement between the assessee and its overseas group companies – apparent through the various conditions spelt out in different documents- was one of a contract for service. In other words, what was provided to the assessee by the overseas counterpart or group companies were services through its employees. These services directly pertained to the discharge of functions of the assessee.

16. It was argued that CESTAT's reasoning that the contract between the parties was not one in which the overseas group company supplied services, was erroneous. In this context, it was urged that the mere fact that the temporary control over the manner of performance of duties of the employees seconded did not take away or diminish the fact that their real employer was none other than the overseas company. The scale of payments made to such seconded employees was of such magnitude that they were regarded as highly skilled for the performance of specific tasks by the assessee.

17. It was argued that the real reason or purpose for the secondment by the overseas companies to the assessee was to ensure that their expertise was utilized for the performance of tasks by the assessee in terms of the service agreement and the master services agreement. Such secondment, it was contended, used their skill sets and expertise, to ensure the quality required by the overseas employer.

18. The learned ASG relied upon the decision of the Supreme Court in Commissioner of Income Tax v. M/s. Eli Lilly & Company India Pvt. Ltd.11. Reliance was also placed on Klaus Vogel's Treatise on Double Taxation12. He also placed reliance on the judgment of this Court in Smt. Savita Garg v. The Director, National Heart Institute13; Workmen of Nilgiri Cooperative Marketing Limited v. State of Tamil Nadu & Ors.14; Silver Jubilee Tailoring House v. Chief Inspector of Shops15; Hussain Bhai Calicut v. Alath Factory Thozhilali16 and Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd.17.

19. It was submitted that whether a particular contract is one for providing services or not is to be decided on the facts of an individual case. Further, the fact of control over the manner of

performance of duties or any one such singular factor cannot be decisive. It was submitted that the facts of the present case clearly establish that the overseas company entered into specific secondment agreements by which its employees were deputed to work in the assessee's establishment. The tasks performed by them were in aid of the assessee's work which was undertaken by it in the service agreement with the overseas company. The salary, allowances the duration of the secondment, were all determined by the overseas employer and not by the assessee. Upon completion of the assignment, the seconded employees were to return to their original positions and in the overseas company. The control if any, which was with the assessee was for a limited duration – it was not enabled to impose sanctions, such as cut in salary, etc. In case it was dissatisfied, it could only ask for return of the employee to her or his original position with the foreign employer. Upon an overview of all these circumstances, it was clear that the contract between the parties was essential for the supply of services by the (2009) 15 SCC 1 Klaus Vogel on Double Tax Conventions, Den Haag: Wolters KLuwer, Law and Business (2015).

(2004) 8 SCC 56 (2004) 3 SCC 514 (1974) 3 SCC 498 (1978) 4 SCC 257 (2021) 7 SCC 151 concerned overseas company to the assessee. Therefore, it was a taxable service and not excluded by virtue of amended Section 65 of the Finance Act, 1994.

Contentions of the assessee

20. Mr. V. Sridharan, learned senior counsel appearing for the assessee urged that a conjoint reading of Section 65(68) with Section 65(105)(k) of the Finance Act, 1994 makes it clear that the 'manpower recruitment and supply agency service' seeks to bring under its ambit two types of activities i.e. recruitment of manpower and supply of manpower. Further the service becomes a taxable service only if provided by a manpower recruitment or supply agency. In the present case, the dispute pertains to whether the secondment of employees by the group companies to the Respondent will be regarded as supply of manpower.

21. It was argued that Circular F. No. B1/6/2005-TRU dated 27.07.2005 clarified the scope of 'Manpower Recruitment or Supply Agency' service to include staff who are not contractually employed by the recipient but come under his direction. This view is further strengthened by Master Circular No. 96/7/2007-ST, dated 23.08.2007. It was contended that post July 2012, under the Negative List Regime, by Section 65 (44) of the Finance Act, 1994, the services provided by an employee to the employer in the course of employment are kept beyond the ambit of the definition of 'service'. Thus, the position of law both prior to as well as post July 2012 is same. Employee-employer relationship is outside the scope of the said service. The category of supply of manpower by an agency covers those cases where the manpower so supplied, comes under the direction and control of the recipient without contractual employment.

22. Learned counsel argued that, ever since the introduction of service tax in India, service by an employee to an employer was never subject to service tax. There is no country in the world which levies VAT/GST on employment service, or any services rendered by an employee to the employer.

23. Counsel urged that the agreements entered by the assessee with its group companies were to provide certain specialized services. The seconded personnel are contractually hired as the assessee's employees. Control over them is exercised by the assessee. Such employees devote all their time and efforts under the direction of the assessee; their remuneration is also fixed by it. The employees seconded to India are required to report to the assessee's designated offices. They are accountable for their performance to the assessee; the process of dispersal of the salaries and allowances is solely for the sake of convenience and continual of the social security benefits in the expats home county.

24. It was urged that in Collector of Central Excise & Service Tax v. Nissin Brake India (P) Ltd18, this court while considering similar set of facts dismissed the revenue's appeal, which had challenged the CESTAT's ruling that expenses reimbursed by the Indian companies to the foreign group companies in relation to seconded employees cannot be subject to service tax under Manpower Recruitment or Supply Agency Service.

25. It was also urged that the group companies are not in the business of supplying manpower. The foreign group companies are engaged in providing personal financial services (PFS) and Corporate and Institutional services along with investment products. The foreign group companies cannot be considered as "Manpower Supply Agency'.

26. It was next urged that service tax is leviable only on the gross amount charged for the provision of service. It was argued that assuming but not admitting that service is provided by the group companies to the assessee, it cannot be said that the value of consideration for that service is the amount of salaries paid to the expats. To determine value of taxable services for charging Service Tax, gross amount charged for providing the services is to be determined. Reliance is placed on the judgment of the Delhi High Court in Intercontinental Consultants and Civil Appeal Diary No(s). 45344/2018 (C.A. No. 2408 / 2019) Technocrats Pvt. Ltd. v. Union of India19, which held that Rule 5(1) of Service Tax (Determination of Value) Rules, 2006 goes beyond the mandate of Section 67 of the Finance Act, 1994 as quantification of the value of the service can never exceed the gross amount charged by the service provider for the service provided by him. This position was upheld by this court in Intercontinental Consultants and Technocrats Pvt. Ltd20. In the present case, the demand of the service tax is being computed on the salaries and allowances paid to the employees. The salaries cannot be said to be consideration paid to group companies for provision of service and thus such demand (of service tax in lieu of salaries), is untenable. Therefore, any cost or expense reimbursed does not represent the gross value of taxable service and cannot be a consideration for charging service tax.

27. Counsel argued that debit notes raised by the overseas entity upon the assessee show that amounts paid were towards reimbursement of salaries and other allowances to employees. There was no mark-up charged by the foreign company.

28. It was next submitted that the demand to the extent of 8,12,62,382/- for the period October 2006 to September 2010, should be set aside. The assessee was under the bona fide belief that the seconded employees were its employees and therefore, not covered under the ambit of manpower

supply services. Further, in any case, the assessee is entitled to avail refund of the service tax paid on input services under Rule 5 of the CENVAT Rules read with Rule 6A of the Service Tax Rules, 1994. Therefore, there can be no intention to evade tax. Counsel also urged that the bona fide belief was further strengthened by the fact that for the subsequent period (April 2012 to September 2014), the Adjudicating Authority itself dropped the demand by recording favourable findings.

29. It was lastly urged that services received by the assessee from foreign group companies would qualify as input services and that it is eligible to avail credit of service tax paid on such input services. Therefore, even if the said demand of 2013 (29) S.T.R. 9 (Del.) (2018) 4 SCC 669.

service tax is paid, the entire amount is available as input credit and is refunded to the Respondent in cash by virtue of Rule 5 of the CENVAT Rules read with Rule 6A of the Service Tax Rules, 1994 ("1994 Rules"). The assessee relied on detailed facts in this regard through affidavit on record by its affidavit dated 17.08.2021 before this court. It is also on record that all the refund claims filed by the assessee had largely been granted barring small amounts which were paid against input services such as Clearing and Forwarding Agent Services, Courier Services, Information Technology Software Services. In this regard, reliance is placed on SRF Ltd. v. Commissioner21 and Commissioner of Central Excise v. Coca Cola India Pvt. Ltd22.

Relevant provisions of the Finance Act, 1994 with amendments

30. Before amendment of the Finance Act, its provisions, to the extent they are relevant, are extracted hereunder. The definition of "manpower recruitment or supply agency" and "Taxable service" under the definition clause, in Section 65 are extracted below:

> Old provisions of the Act "Definitions.
>
> 65. In this Chapter, unless the context otherwise requires, -
>
> (1) "actuary" has the meaning assigned to it in clause (1) of section 2 of the Insurance Act, 1938 (4 of 1938); who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management;] xxxxxx xxxxxx xxxxxx (68) "manpower recruitment or supply agency" means any [person) engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, "[to any other person);] 2016 (331) ELT A 138 (S.C.) 2007 (213) ELT 490 (S.C) Substituted by the Finance Act, 2005, w.e.f. 16.06.2005.
>
> xxxxxx xxxxxx xxxxxx (105) "taxable service" means any service provided 24[or to be provided],-

xxxxxx xxxxxx xxxxxx [(k) 26[to any person], by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner.] [Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate;..” The provisions, post amendment in 2012 (w.e.f. 01.07.2012), read as follows:

Amended provisions of the Act “Interpretations.

65B. In this Chapter, unless the context otherwise requires, -

xxxxxx xxxxxx xxxxxx (44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

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

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.- For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,-

Inserted by the Finance Act, 2005, w.e.f. 16.06.2005.

Substituted by the Finance Act, 2005, w.e.f. 16.06.2005.

Substituted for “to a client” by the Finance Act, 2008, w.e.f. 16.05.2008.

Inserted by the Finance Act, 2007, w.e.f. 01.06.2007.

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or (B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or (C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2.- For the purposes of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

Explanation 3.- For the purposes of this Chapter --

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4.- A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;" The agreements and their relevant stipulations

31. The first in the series of relevant documents, is the Services Agreement. It was entered into between Northern Trust Company (the overseas group entity, known hereafter as "NTC") and the assessee. In terms of the services agreement (dated 01.09.2006), it was acknowledged that the assessee was engaged in providing "incidental back-office support services" which it agreed to provide to NTC. By clause 2, it was agreed that:

> "2. Consideration: The consideration for performance of the services shall be paid on a mutually agreed basis as described in Attachment 1" By clause 8, the services to be performed by the assessee were also set out in Attachment 1. Their description reads as follows:
>
> "Service: IT enabled services supporting back-office banking and related operations" The part relating to consideration, i.e., fee (payable to the assessee) reads as follows:
>
> "Beginning September 1 2006, NOS shall charge Northern Trust for all actual costs incurred in providing the agreed services, plus a mark up of 15.0%. ..."

32. The provisions of the secondment agreement, entered between NTMS and the assessee, to the extent relevant read as follows:

"SECONDMENT AGREEMENT This SECONDMENT AGREEMENT (this "Agreement") is entered into and effective April 1, 2007 by and between:

Northern Trust Management Services Ltd a company incorporated under the laws of the United Kingdom with its principal office located at 50 Bank Street, London, E14 5NT, (hereinafter referred to as "NTMS'), and Northern Operating Services Private Limited, a company organised and existing under the laws of India and having its principal office at RMZ Ecospace Campus 1C, Sarjapur Outer Ring Road, Bangalore-5600037, India (hereinafter referred to as "NOS").

WITNESSETH:

xxxxxx xxxxxx xxxxxx

ARTICLE I

SECONDMENT

NOS shall request NTMS to provide employees ("the Employees) who have the expertise required by NOS. In order to help NTMS make the selection, NOS shall provide NTMS with a description of the skills and competencies required by NOS. Based on the list provided by □OS, NTMS shall identify the people and select the employees.

NTMS hereby agrees to second the employees to NOS for time period(s) ("the Secondment Period") with commencement dates and completion dates, as reflected in Appendix I and Appendix II of this agreement. Appendix I and Appendix II will be updated from time to time to reflect any changes made as a result of Article II (E) or Article II (G) or Article II (H). The employees seconded to NOS shall continue to be remunerated through the payroll of NTMS only for the purpose of continuation of social security, retirement and health benefits but for all practical purposes, NOS shall be the employer.

ARTICLE II DUTIES AND OBLIGATIONS NTMS shall ensure that:

(A) The Employee shall act in accordance with the instructions and directions of NOS.

(B) During the Secondment Period, the Employees shall devote the whole of their time, attention and skills to the duties of their secondment. (C) The employees shall be reportable and responsible to NOS. (D) All the responsibility and risk for work undertaken by the Employees will remain with NOS during the Secondment Period.

(E) NOS shall have the right, at any time, to approve or reject the Employee selected for secondment and to request from NTMS the replacement of any Employees who, in the opinion of NOS, are not qualified or do not meet the requirements necessary to fulfil their Secondment, xxxxxx xxxxxx xxxxxx (H) All terms and conditions of employment with NTMS will cease during the Secondment Period. The terms and conditions of employment with NOS, as stated in the employment agreements between the Employees and NOS will remain in force during the Secondment Period.

xxxxxx xxxxxx xxxxxx

ARTICLE III
DUTIES AND OBLIGATIONS OF NOS
NOS reimburse expenses paid by NTMS as follows:

During the Secondment Period, as defined in Appendix I and Appendix II hereto, NOS shall reimburse NTMS for the following amounts (collectively the "Reimbursable Expenses"):

(1) All remuneration of the Employees, including but not limited to, salary, incentives and employment benefits of the Employees paid by NTMS; and (2) All out-of-pocket expenses incurred by the seconded Employees and reimbursed by NTMS, including but not limited to, business travel expenses and other miscellaneous expenses, directly related to the secondment of the Employee.

It is specifically agreed that the payments by NOS to NTMS shall be limited to actual costs incurred, including administrative costs, as may be reasonably attributable to payroll services provided by NTMS. Administrative cost for this purpose would be 1% of actual cost incurred. The parties agree that during the Secondment Period, the role of NTMS is restricted to that of a payroll services provider only.

ARTICLE VII INDEMNIFICATION NTMS will endeavor to provide appropriate qualified Employees for secondment under this Agreement. Nothing in this Agreement, shall be construed as a warranty of the quality of the seconded Employees.

Further NOS shall hold NTMS harmless and shall indemnify NTMS from all claims, demands, suits, actions, loss, damage, costs and expenses (excluding consequential loss or damage) to which NTMS may become liable in respect to any and all loss, damage or injury as a result of any act or omission by the seconded Employee.

The master services adverted to earlier, between NTC (group company) and the assessee, reads as follows:

“THIS MASTER SERVICES AGREEMENT ("this Agreement") is dated February 12th, 2009 and made BETWEEN:

> (1) THE NORTHERN TRUST COMPANY, a company established under the laws of the State of Illinois in the United States of America, whose principal place of business in the U.S.A. is at 50 South LaSalle Street, Chicago 60603, Illinois, U.S.A. ("TNTC Chicago"); and (2) NORTHERN OPERATING SERVICES PRIVATE LIMITED, a company established under the laws of India, whose principal place of business in India is at 2nd Floor, RMZ Ecospace Campus 10, Sarjapur Outer Ring Road, Bangalore 560037, India ("NOS").

TNTC Chicago and NOS are hereinafter collectively referred to as "Parties" and individually as "Party".

3. Duties of NOS 3.1 NOS agrees that it will use reasonable efforts to ensure that the Services contemplated under this Agreement are performed by NOS promptly and to the best of its ability and in accordance with the Standard of Care. TNTC Chicago agrees that it will provide proper information and assistance to NOS by making reasonable efforts in order for NOS to have access to the data and assistance required in order to properly carry out the duties contemplated by this Agreement to be performed by it.

3.2 It is understood and agreed that the Services performed hereunder by NOS for TNTC Chicago shall be carried out in accordance with policies, authorities, and procedures as are or may be established and authorized by TNTC Chicago.

xxxxxx xxxxxx xxxxxx SCHEDULE 3 — FEES & DETERMINATION THEREOF

1. The fees for the Services shall be payable by TNTC Chicago for the Services rendered by NOS for TNTC Chicago.

2. The fees for the Services performed by NOS under the Agreement shall be the Total Service Costs (as defined below) incurred by NOS for rendering the Services plus a mark-up on the Total Service Cost. Mark-up shall be 15% on Total Service Costs for the period of agreement. This shall be revised from time to time depending upon the market conditions and transfer pricing requirements.

xxxxxx xxxxxx xxxxxx" The letter of understanding issued to one of the seconded employees, to the extent it is relevant, reads as follows:

> "LETTER OF UNDERSTANDING August 6, 2012 Dear Brian Ovaert, This letter of agreement between Northern Operating Services Private Limited (NOS) and Brian Ovaert confirms our mutual understanding of the terms and conditions applying to your employment with the Company while on international assignment to Northern Operating Services Pvt. Ltd. in the position of Regional Executive reporting directly to NOS Board of Directors.
>
> xxxxxx xxxxxx xxxxxx
> Duration

The effective date of your international assignment is July 1, 2012, and it is expected that your assignment to and employment with NOS will be 12 months in duration. At its conclusion, repatriation will be in accordance with the Global Mobility Repatriation Policy. Alternatively, by mutual agreement, your assignment to and employment with NOS may be extended. Should this be the case, an extension letter will be entered into between NOS and yourself.

However, you have the right to terminate your employment at any time for any reason and the Company has the same right.

xxxxxx xxxxxx xxxxxx
Vacation/Local Public Holidays

Your annual vacation entitlement is currently 20 days. You will be entitled to all local public holidays observed by NOS. However, you must use vacation days to observe any United States public observed holiday that is not observed in NOS. A list of NOS' public holidays may be found on My Place.

Home Leave During your assignment, you will be provided the following Home Leave Options:

You may elect to receive an annual home leave allowance for each member of your immediate family to Chicago for two home leave trips. This allowance is non-accountable and is intended to cover airfare and ground transportation to and from the airports in your home and at Bangalore, India.

If you prefer, you may book your travel directly through BCD Travel for direct reimbursement according to Northern's Travel Policy. In the final year of your assignment, home leave entitlement will continue if you are on assignment at least six months from your assignment anniversary date. You will be granted an additional 2 travel days (round trip) in any year in which you are entitled to home leave You should plan to address all of your repatriation matters during your final annual home leave visit.

All accommodation and car rental costs during home leave are your personal responsibility.

xxxxxx xxxxxx xxxxxx
Housing
Northern Trust will make arrangements directly with the

landlord/owner of the property of your choice in Bangalore, India. Do not enter into personal agreements. You should aim to identify and select a property that will suit you and your family for the duration of your assignment (taking into account schools/location). The monthly rent of your selected accommodation should be

limited to INR 366,700. In addition, an annual utility allowance of (NR 397,500 will be paid to you. This allowance will cover water, sewer, gas, oil, electricity, basic telephone service, basic satellite/cable TV service and initial set-up for broadband service, but will exclude the cost of monthly premium satellite/cable TV, monthly telephone calls, and monthly broadband service.

Packing/Shipping/Storage A moving firm designated by Northern Trust will ship your household goods via air and ocean freight. Insurance at a reasonable value amount on both of these shipments will also be covered by the Company. Household goods that are not shipped to Bangalore, India will be stored if required for the duration of your assignment and the costs of storage and Insurance premiums will be met. You should note that certain items may be excluded from shipment and storage. You will be advised if this is the case. Your air shipment allotment Is 600 lbs. for you and your spouse.

Furniture Allowance in Lieu of Shipment In lieu of shipping some or all of your current household furnishings via ocean freight to Bangalore, India, you can receive a "furniture allowance" which would be an amount based on country norms. Your furniture allowance is USD $9,000.

xxxxxx xxxxxx xxxxxx

Personal Vehicle Disposal

You will be reimbursed for a loss you incur when selling your personal vehicle(s), upon initial transfer to Bangalore, India up to a maximum of US$5,000 for each car. Details of the car losson-sale policy are described in the Global Mobility Policy.

R&R Trips You will be provided two (2) R & R trips in a 12 month period for you and your spouse to leave Bangalore, India. These trips are in addition to your two annual home leave trips. The R & R allowance is non- accountable and is intended to assist with hotel and airfare costs. Providing an allowance allows you the flexibility to choose the length and destination of your R & R trips. The allowance per trip for your family size of 2 is USD$2,100.

xxxxxx xxxxxx xxxxxx
Base Salary and Bonus

Effective with your assignment in Bangalore, India your base salary will be USD $330,000.

Mobility Allowance You will be paid a one-time sum of USD $7,500 prior to your departure by deposit to your checking account. The Mobility Allowance is specifically

compensating you for any incidental additional expenses incurred as a result of your assignment.

Hardship Allowance You will be paid a hardship allowance of 20% of your base salary during your assignment to Bangalore, India. This amount may be adjusted during your assignment as independent data is updated. Any changes will be communicated prior to implementation. This amount will be paid semi-monthly along with your normal salary. Servant Allowance While on assignment in Bangalore, India, it may be necessary to have the use of household servants to maintain a household, ship for groceries, perform daily living duties, etc. An allowance of $2,000/yr. will be paid to you by Brookfield Global Relocation Services to facilitate this." Analysis and Conclusions

33. The issue which this court has to decide is whether the overseas group company or companies, with whom the assessee has entered into agreements, provide it manpower services, for the discharge of its functions through seconded employees.

34. The contemporary global economy has witnessed rapid cross-border arrangements for which dynamic mobile workforces are optimal. To leverage talent within a transnational group, employees are frequently seconded to affiliated or group companies based on business considerations. In a typical secondment arrangement, employees of overseas entities are deputed to the host entity (Indian associate) on the latter's request to meet its specific needs and requirements of the Indian associate. During the arrangement, the secondees work under the control and supervision of the Indian company and in relation to the work responsibilities of the Indian affiliate. Social security laws of the home country (of the secondees) and business considerations result in payroll retention and salary payment by the foreign entity, which is claimed as reimbursement from the host entity. The crux of the issue is the taxability of the cross charge, which is primarily based on who should be reckoned as an employer of the secondee. If the Indian company is treated as an employer, the payment would in effect be reimbursement and not chargeable to tax in the hands of the overseas entity. However, in the event the overseas entity is treated as the employer, the arrangement would be treated as service by the overseas entity and taxed.

35. In Director Income Tax v. M/S Morgan Stanley & Co. Inc28 this court had to consider whether an arrangement involving secondment, in the context of liability to income tax. The court had observed:

"17. As regards the question of deputation, we are of the view that an employee of MSCo when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with MSCo. As long as the lien remains with MSCo the said company retains control over the deputationist's terms and employment. The concept of a service PE finds place in the UN Convention. It is

> constituted if the multinational enterprise renders services through its employees in India provided the services are rendered for a specified period. In this case, it extends to two years on the request of MSAS. It is important to note that where the activities of the multinational enterprise entails (2007) 7 SCC 1 it being responsible for the work of deputationists and the employees continue to be on the payroll of the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge.

18. Applying the above tests to the facts of this case we find that on request/requisition from MSAS the applicant deputes its staff. The request comes from MSAS depending upon its requirement. Generally, occasions do arise when MSAS needs the expertise of the staff of MSCo. In such circumstances, generally, MSAS makes a request to MSCo. A deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCo as he retains his lien.."

36. In Eli Lilly (supra) the appellant was incorporated in India under the Companies Act, 1956 and was a joint venture between M/s Eli Lilly, Netherlands B.V. and Ranbaxy Laboratories (Ltd.). The foreign partner had seconded four expatriates to the Indian joint venture. The employees, however, continued to remain on the rolls of the foreign company. They received home salary outside India from the foreign partner. The joint venture company deducted tax under Section 192(1) in respect of the salary paid by it to the expatriates in India, and did not deduct tax in respect of the home salary paid by the foreign company. This court held that the provisions of the tax deduction at source (TDS) under the Income Tax Act, were applicable in relation to the salary paid by the foreign employer.

37. The CESTAT, in this case, relied on its previous rulings in Honeywell Technology Solutions Pvt. Ltd. v. CST, Bangalore29. It held that that the method of disbursement of salary cannot determine the nature of the transaction, based on the ruling in Volkswagen India Pvt. Ltd. v. CCE, Pune-I30 which was affirmed by this court by an order31. Another order, in Computer Sciences Corporation India Pvt. Ltd. v. Commissioner of Service Tax, Noida32 similarly affirmed by this court by another order, was relied on.

2020-TIOL-1277-CESTAT-BANG 2014 (34) S.T.R. 135 (Tri. - Mumbai) Commissioner v. Volkswagen India (Pvt.) Ltd. - 2016 (42) S.T.R. J145 (S.C.).

2014-TIOL-434-CESTAT DEL

38. Questions that have repeatedly arisen, in different contexts, and at different times, is whether the facts of a given case reveal, who is the employer, and whether the relationship between an employee and another, is one of master servant, or whether there is an underlying contract for service, by which the real employer, lends the services of his employee to another. In Dharangadhara Chemical Works Ltd. v. State of Saurashtra33 this court observed as follows:

> "The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at p. 23 in Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd. [(1952) SCR 696, 702] "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question."

39. In D.C. Dewan Mohideen Sahib and Sons v. Secretary, United Beedi Workers' Union34, the court analysed the sample agreement which disclosed the facts of the case before it, and, for the first time, held that the "control" test is not necessarily determinative to discern the real employer:

> "...There is in our opinion little doubt that this system has been evolved to avoid Regulations under the Factories Act. Further there is also no doubt from whatever terms of agreement are available on the record that the so-called independent contractors have really no independence at all. As the appeal court has pointed out they are impecunious persons who could hardly afford to have factories of their own. Some of them are even ex-employees of the Appellants. The contract is practically one-sided in that the proprietor can at his choice supply the raw materials or refuse to do so, the so-called contractor having no right to insist upon the supply of raw materials to him. The so-called independent contractor is even bound not to employ more than nine persons in his so-called factory. The sale of raw materials to the so-called independent contractor and resale by him of the manufactured bidis is also a mere camouflage, the nature of which is apparent from the fact that the so-called contractor never paid for the materials. All that happens is that when the manufactured bidis are delivered by him to the Appellants, amounts due for the so-called sale of raw materials is deducted from the so-called price fixed for the bidis. In effect all that happened is that the so-called independent contractor is supplied with tobacco and leaves and is paid certain amounts for the wages of the workers employed and for his own trouble. We can therefore see no difficulty in holding that the so-called contractor is merely an employee or an agent of the Appellants as held by the appeal court and as such employee or agent he 1957 SCR 158 1964 (7) SCR 646 employs workers to roll bidis on behalf of the Appellants. The work is distributed between a number of so-called independent contractors who are told not to employ more than nine persons at one place to avoid Regulations under the Factories Act."

40. In Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments35 this court remarked how the test of control, or manner of performance of a task, by an employee by another is not conclusive to decide if an employer employee relationship subsists:

> "This distinction (viz., between telling a servant what to do and telling him how to do it) was based upon the social conditions of an earlier age; it assumed that the employer of labour was able to direct and instruct the labourer as to the technical

methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanization) a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the profession of technical knowledge and skill in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer i.e. what to modern eyes appears as an imperfect division of labour. [See Prof. Kahn-Freund in (1951), 14 Modern Law Review, at p. 505]

27. It is, therefore, not surprising that in recent years the control test as traditionally formulated has not been treated as an exclusive test.

28. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction [See Atiyah, PS. "Vicarious Liability in the Law of Torts", pp. 37-38].” 1974 (1) SCR 747

41. The ruling in Silver Jubilee (supra) about the flexibility in regard to deciding the question of whether a contract is one for service or one of service, has been followed in other decisions, such as Indian Banks Association v. Workmen of Syndicate Bank36 and Indian Overseas Bank v. Workmen37. The recent decision in Sushilaben Indravadan (supra) reviewed a large number of previous judgments, and observed that:

“24. A conspectus of all the aforesaid judgments would show that in a society which has moved away from being a simple agrarian society to a complex modern society in the computer age, the earlier simple test of control, whether or not actually exercised, has now yielded more complex tests in order to decide complex matters which would have factors both for and against the contract being a contract of service as against a contract for service. The early 'control of the employer' test in the sense of controlling not just the work that is given but the manner in which it is to be done obviously

breaks down when it comes to professionals who may be employed. A variety of cases come in between cases which are crystal clear-for example, a master in a school who is employed like other employees of the school and who gives music lessons as part of his employment, as against an independent professional piano player who gives music lessons to persons who visit her premises. Equally, a variety of cases arise between a ship's master, a chauffeur and a staff reporter, as against a ship's pilot, a taxi driver and a contributor to a newspaper, in order to determine whether the person employed could be said to be an employee or an independent professional. The control test, after moving away from actual control of when and how work is to be performed to the right to exercise control, is one in a series of factors which may lead to an answer on the facts of a case slotting such case either as a contract of service or a contract for service. The test as to whether the person employed is integrated into the employer's business or is a mere accessory thereof is another important test in order to determine on which side of the line the contract falls. The three-tier test laid down by some of the English judgments, namely, whether wage or other remuneration is paid by the employer; whether there is a sufficient degree of control by the employer and other factors would be a test elastic enough to apply to a large variety of cases. The test of who owns the assets with which the work is to be done and/or who ultimately makes a profit or a loss so that one may determine whether a business is being run for the employer or on one's own account, is another important test when it comes to work to be performed by independent contractors as against piece-rated labourers. Also, the economic reality test laid down by the U.S. decisions and the test of whether the employer has economic control over the workers' subsistence, skill and continued employment can also be applied when it comes to whether a particular worker works for himself or for his employer. The test laid down by the Privy Council in Lee Ting Sang v. Chung Chi-Keung [1990] 2 A.C. 374, namely, is the person who has engaged himself to perform services performing them as a person in business on his own account, is also an 2001 (1) SCR 1011 (2006) 3 SCC 729 important test, this time from the point of view of the person employed, in order to arrive at the correct solution. No one test of universal application can ever yield the correct result. It is a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight. Ultimately, the Court can only perform a balancing act weighing all relevant factors which point in one direction as against those which point in the opposite direction to arrive at the correct conclusion on the facts of each case."

42. The assessee's contention before the CESTAT, inter alia, was that apart from it having control over the nature of work of the seconded employees, no consideration was charged by the foreign entities from it for providing the supply of manpower as the revenue alleged.

43. A plain reading of the definition of "manpower recruitment agency" (per Section 65 (68) of the unamended Act) requires that to fall within that description,

(a) a person (the expression is not defined; however, by Section 3 (42) of the General Clauses Act, the term includes "any company or association or body of individuals whether incorporated or not");

(b) provides service

(c) directly or indirectly,

(d) in any manner for recruitment or supply of manpower,

(e) temporarily or otherwise

44. The question is what are the services provided to the assessee, and by whom? Do they include the provision of services, through employees, by its overseas group companies or affiliates? After 01.07.2012, the definition of "service" underwent a change. Except listed categories of activities excluded from, or kept out of the fold of the definition, every activity virtually is "service". Now, by Section 65 (44), "service" means

(a) any activity

(b) carried out by a person for another

(c) for consideration, and

(d) includes a declared service (the term "declared service" is defined in Section 66E).

45. Section 65 (44), however, excludes from its sweep [by clause (b)], "a provision of service by an employee to the employer in the course of or in relation to his employment." The assessee contends that the secondment agreement has the effect of placing the overseas employees under its control, so to say, and enables it to require them to perform the tasks for its purposes. It emphasizes that the real nature of the relationship between it and the seconded employees is of employer and employee, and outside the purview of the service tax regime.

46. From the above discussion, it is evident, that prior to July 2012, what had to be seen was whether a (a) person provided service (b) directly or indirectly, (c) in any manner for recruitment or supply of manpower (d) temporarily or otherwise. After the amendment, all activities carried out by one person for another, for a consideration, are deemed services, except certain specified excluded categories. One of the excluded category is the provision of service by an employee to the employer in relation to his employment.

47. One of the cardinal principles of interpretation of documents, is that the nomenclature of any contract, or document, is not decisive of its nature. An overall reading of the document, and its

effect, is to be seen by the courts. Thus, in State of Orissa v. Titaghur Paper Mills Co. Ltd38 it was held as follows:

> "120. It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. These, however, have to be determined from all the terms and clauses of the document and all the rights and results flowing therefrom and not by picking and choosing certain clauses and the ultimate effect or result as the Court did in the Orient Paper Mills case (1977) 2 SCR 149)" .
>
> This principle was reiterated in Prakash Roadlines (P) Ltd. v. Oriental Fire & General Insurance Co. Ltd.39 1985 Supp SCC 280 (2000) 10 SCC 64

48. The task of this court, therefore is to, upon an overall reading of the materials presented by the parties, discern the true nature of the relationship between the seconded employees and the assessee, and the nature of the service provided – in that context - by the overseas group company to the assessee.

49. A co-joint reading of the documents on record show that:

> (i) Attachment 1 to the service agreement ensures that the overseas group company assigns, inter alia, certain tasks to the assessee, including back office operations of a certain kind, in relation to its activities, or that of other group companies or entities;
>
> (ii) The assessee is paid a mark up of 15% of the overall expenditure it incurs, by the overseas company (clause 2, read with attachment 1 of the Service Agreement);
>
> (iii) By the Secondment Agreement, the parties agree that the overseas employee is temporarily loaned to the assessee (Article I read with the Schedule);
>
> (iv) During the period of secondment, the assessee has control over the employee, i.e. it can require the seconded employee to return, and likewise, the employee has the discretion to terminate the relationship (Article II);
>
> (v) The overseas employer (group company) pays the seconded employee, which is reimbursed to the overseas company, by the assessee (Article III);
>
> (vi) The assessee is responsible for the work of the seconded employee, i.e., the overseas employer, during the secondment period, is absolved of any liability for the job or work of its seconded employees (Article VII);
>
> (vii) The secondment is for a specified duration, and the employment with the assessee ceases upon the expiration of that period (Article II of the secondment agreement and the "Duration" clause in the letter of understanding with the seconded

employee);

(viii) The letter of understanding issued to the seconded employee specifies that the tenure with the assessee is an assignment (in one place, the term used is "At its conclusion, repatriation will be in accordance with the Global Mobility Repatriation Policy");

(ix) The terms include the salary payable as well as other allowances, such as hardship allowance, vehicle allowance, servant allowance, paid leave, housing allowance, etc. The nature of salary and other perks underscore the fact that the seconded employees are of a certain skill and possess the expertise, which the assessee requires.

50. The above features show that the assessee had operational or functional control over the seconded employees; it was potentially liable for the performance of the tasks assigned to them. That it paid (through reimbursement) the amounts equivalent to the salaries of the seconded employees – because of the obligation of the overseas employer to maintain them on its payroll, has two consequences: one, that the seconded employees continued on the rolls of the overseas employer; two, since they were not performing jobs in relation to that employer's business, but that of the assessee, the latter had to ultimately bear the burden. There is nothing unusual in this arrangement, given that the seconded employees were performing the tasks relating to the assessee's activities and not in relation to the overseas employer. To put it differently, it would be unnatural to expect the overseas employer to not seek reimbursement of the employees' salaries, since they were, for the duration of secondment, not performing tasks in relation to its activities or business.

51. As discussed previously, there is not one single determinative factor, which the courts give primacy to, while deciding whether an arrangement is a contract of service (as the assessee asserts the arrangement to be) or a contract for service. The general drift of cases which have been decided, are in the context of facts, where the employer usually argues that the person claiming to be the employee is an intermediary. This court has consistently applied one test: substance over form, requiring a close look at the terms of the contract, or the agreements.

52. A vital fact which is to be considered in this case, is that the nature of the overseas group companies business appears to be to secure contracts, which can be performed by its highly trained and skilled personnel. This business is providing certain specialized services (back office, IT, bank related services, inventories, etc.). Taking advantage of the globalized economy, and having regard to locational advantages, the overseas group company enters into agreements with its affiliates or local companies, such as the assessee. The role of the assessee is to optimize the economic edge (be it manpower or other resources availability) to perform the specific tasks given it, by the overseas company. As part of this agreement, a secondment contract is entered into, whereby the overseas company's employee or employees, possessing the specific required skill, are deployed for the duration the task is estimated to be completed in. This court is not concerned with unravelling the nature of relationship between the overseas company and the assessee. However, what it has to

decide, is whether the secondment, for the purpose of completion of the assessee's job, amounts to manpower supply.

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 perhaps 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).

54. The letter of understanding between the assessee and the seconded employee nowhere states that the latter would be treated as the former's employees after the seconded period (which is usually 12-18 months). On the contrary, they revert to their overseas employer and may in fact, be sent elsewhere on secondment. The salary package, with allowances, etc., are all expressed in foreign currency (e.g., US $ 330,000/- per annum in the letter produced before court, extracted above). Furthermore, the allowances include a separate hardship allowance of 20% of the basic salary for working in India. The monthly housing allowance in the specific case was 366,700. In addition, an annual utility allowance of 3,97,500/- is also assured. These are substantial amounts, and could have been only by resorting to a standardized policy, of the overseas employer.

55. The overall effect of the four agreements entered into by the assessee, at various periods, with NTS or other group companies, clearly points to the fact that the overseas company has a pool of highly skilled employees, who are entitled to a certain salary structure- as well as social security benefits. These employees, having regard to their expertise and specialization, are seconded (a term synonymous with the commonly used term in India, deputation) to the concerned local municipal entity (in this case, the assessee) for the use of their skills. Upon the cessation of the term of secondment, they return to their overseas employer, or are deployed on some other secondment.

56. This court, upon a review of the previous judgment in Sushilaben Indravadan (supra) held that there no one single determinative test, but that what is applicable is "a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight."

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.

58. One of the arguments of the assessee was that arguendo, the arrangement was "manpower supply" (under the unamended Act) and a service [(not falling within exclusion (b) to Section 65 (44)] yet it was not required to pay any consideration to the overseas group company. The mere payment in the form of remittances or amounts, by whatever manner, either for the duration of the secondment, or per employee seconded, is just one method of reckoning if there is consideration. The other way of looking at the arrangement is the economic benefit derived by the assessee, which also secures specific jobs or assignments, from the overseas group companies, which result in its revenues. The quid pro quo for the secondment agreement, where the assessee has the benefit of experts for limited periods, is implicit in the overall scheme of things.

59. As regards the question of revenue neutrality is concerned, the assessee's principal contention was that assuming it is liable, on reverse charge basis, nevertheless, it would be entitled to refund; it is noticeable that the two orders relied on by it (in SRF and Coca Cola) by this court, merely affirmed the rulings of the CESTAT, without any independent reasoning. Their precedential value is of a limited nature. This court has been, in the present case, called upon to adjudicate about the nature of the transaction, and whether the incidence of service tax arises by virtue of provision of secondment services. That a particular rate of tax- or no tax, is payable, or that if and when liability arises, the assessee, can through a certain existing arrangement, claim the whole or part of the duty as refund, is an irrelevant detail. The incidence of taxation, is entirely removed from whether, when and to what extent, Parliament chooses to recover the amount.

60. 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.

61. In view of the above discussion, it is held that the assessee was, for the relevant period, service recipient of the overseas group company concerned, which can be said to have provided manpower supply service, or a taxable service, for the two different periods in question (in relation to which show cause notices were issued).

Invocation of the extended period of limitation

62. The revenue's argument that the assessee had indulged in wilful suppression, in this court's considered view, is insubstantial. The view of a previous three judge ruling, in Cosmic Dye Chemical v. Collector of Central Excise40 - in the context of Section 11A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that:

> "Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this

> Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."

63. This decision was followed in Uniworth Textiles v. Commissioner of Central Excise41 where it was observed that "(t)he conclusion that mere non- payment of duties is equivalent to collusion or willful misstatement or suppression of facts" is "untenable". This view was also followed in Escorts v. Commissioner of Central Excise42, Commissioner of Customs v. Magus Metals43 and other judgments.

(1995) 6 SCC 117 (2013) 9 SCC 753 (2015) 9 SCC 109 (2017) 16 SCC 491

64. The fact that the CESTAT in the present case, relied upon two of its previous orders, which were pressed into service, and also that in the present case itself, the revenue discharged the later two show cause notices, evidences that the view held by the assessee about its liability was neither untenable, nor mala fide. This is sufficient to turn down the revenue's contention about the existence of "wilful suppression" of facts, or deliberate misstatement. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten liability on the assessee.

Conclusions

65. It is held, for the foregoing reasons, that the assessee was the service recipient for service (of manpower recruitment and supply services) by the overseas entity, in regard to the employees it seconded to the assessee, for the duration of their deputation or secondment. Furthermore, in view of the above discussion, the invocation of the extended period of limitation in both cases, by the revenue is not tenable.

66. In light of the above, the revenue's appeals succeed in part; the assessee is liable to pay service tax for the periods spelt out in the SCNs. However, the invocation of the extended period of limitation, in this court's opinion, was unjustified and unreasonable. Resultantly, the assessee is held liable to discharge its service tax liability for the normal period or periods, covered by the four SCNs issued to it. The consequential demands therefore, shall be recovered from the assessee.

67. The impugned common order of the CESTAT is accordingly set aside. The commissioner's orders in original are accordingly restored, except to the extent they seek to recover amounts for the extended period of limitation. The demand against the assessee, for the two separate periods, shall now be modified, excluding any liability for the extended period of limitation.

68. The appeals are partly allowed, to the above extent, with no order on costs.

.....J. [UDAY UMESH LALIT]
...J. [S. RAVINDRA BHAT]

.....J. [PAMIDIGHANTAM SRI NARASIMHA] New Delhi, May 19, 2022.