

Case: C.C., C.E. & S.T.-Bangalore Vs. Northern Operating Systems Pvt Ltd. (Supreme Court of India)

Summary:

- The secondment is a part of the global policy where the group company loans the services of employees on a temporary basis and on completion of the secondment period the employees are repatriated in accordance with the global repatriation policy. The Indian company is liable to pay service tax on the amounts reimbursed to the overseas entities, as per the recent view expressed by the Hon'ble Apex Court.

Facts:

- The assessee (M/S Northern Operating Systems Pvt Ltd.) was registered with the Service Tax department, 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.
- The assessee (M/S Northern Operating Systems Pvt Ltd.) was the service recipient for service (of manpower recruitment and supply services) rendered by the overseas entity, in regard to the employees it seconded to the assessee, for the duration of their deputation or secondment.
- The issue which the Hon'ble Supreme Court had to decide was to whether the overseas group company or companies, with whom the assessee has entered into agreements, provided manpower services, for the discharge of its functions through seconded employees or this was mere employment of expat employees in Indian Company and hence, not liable to the Service Tax levy.

Analysis of the Judgement:

- The court held that while deciding whether an arrangement is a contract "of" service or a contract "for" service, the courts do not give primacy to any single determinative factor. It has consistently applied one test: substance over form, requiring a close look at the terms of the contract or the agreements. Hence, whether seconded employees will attract Service Tax under RCM basis or not, will depend upon facts of each case, and terms of agreement, instead of any straight jacket formula.

- The overall effect of the agreements clearly points to the fact that the foreign 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 (deputed) to the Indian entity for use of their skills.
- While the seconded employee, for the duration of secondment, is under the control of the Indian entity and works under its direction, the fact remains that they are on the payrolls of their foreign employer. The secondment is a part of the global policy of the overseas employer loaning their services on a temporary basis. On the cessation of the secondment period, they must be repatriated in accordance with a global policy. The Indian company is liable to pay service tax on the amounts reimbursed to the overseas entities.

Our Comments:

- This is a landmark and important decision wherein employee secondments by overseas group company are held to be manpower supply service. The Supreme Court has examined the agreements in detail to determine the relationship between the parties and nature of the services provided.
- Payment of salaries to overseas group entities instead of employees, is also one of the factors which can lead to the transaction being viewed as manpower supply, rather than simply an employment between expat and Indian entity directly.
- This decision would have far-reaching implications, and the entities who are in similar arrangement, need to review and develop necessary documentation identifying the purpose of secondment and inter-company services agreement, staff secondment agreements in light of this judgment and make necessary compliances in this regard.