

- The Hon'ble Supreme Court in the Case of **Northern Operating Systems Private Limited ('NOS') [2022 (5) TMI 967]** confirmed the levy of service tax on secondment of employees by the overseas entity to the Indian entity treating the same as manpower supply services.
- In this regard, the Central Board of Indirect Taxes and Customs ('Board') vide **Instruction No 05/2023 – GST dated 13 December 2023** has highlighted that the Hon'ble Supreme Court took note of various facts such as agreement between NOS and overseas group entities etc., before determining the levy of service tax on the transaction, rather than relying on a singular test.
- The said Instruction further highlights that there may be multiple types of arrangement in relation to secondment of employees with the overseas group entity and tax implication may be different depending upon the specific nature of each contract.
- The Board has accordingly instructed that the decision of Hon'ble Supreme Court in case of NOS should not be mechanically applied in all the cases and that the terms of the contract between Indian entity and overseas group entity should be given a careful consideration before determining the taxability under GST.

- The Board has further instructed that the extended period of limitation under Section 74(1) of CGST Act should not be invoked merely on account of non-payment of GST in such cases unless there is a specific element of fraud, wilful misstatement or suppression of fact to evade tax that can be established by the Department.

Aurtus Comments

The Board's instruction is not a clarification on the leviability of GST on secondment of employees but is a mere directive to the Department to first completely understand the facts involved in each case before applying the ratio of the Supreme Court in NOS. It is relevant to note that the Supreme Court in NOS has given its finding on specific facts of the case viz.:

- the seconded employees continue to be on the payroll of overseas employer and the salary package with allowances, etc., are all expressed in foreign currency,
- the social security benefits are received by such employees in the country of origin,
- on the cessation of the secondment period the seconded employees are repatriated in accordance with a global repatriation policy,
- 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

(e) Secondment is part of the foreign supplier's global policy and is implicit in the overall scheme of things where the overseas employer is merely loaning skilled employees only on a temporary basis.

The directive acknowledges that there is no standardization and that each set of facts will need to be evaluated independently before finally arriving at the taxability of the transactions. This should provide the tax-payers the window to put forward their case instead of being directly saddled with a tax liability without being given an opportunity to bring their legal position on record during the course of investigation / audit.

Relief granted by various Tribunals in case of **BMW India [2017(10) TMI 903]** and **Komatsu India [2022 (67) GSTL 97 (Tri-Chennai)]** may be considered to align the terms of employment agreement and helping tax-payers substantiate their position on non-payment of GST.