आयुक्त का कार्यालय,
केंद्रीय जी. एस. टी. एवं
केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर,
कस्टम हॉउस, प्रथम तल,
नवरंगपुरा ,अहमदाबाद- 380009

OFFICE OF COMMISSIONER
CENTRAL GST & CENTRAL EXCISE,
AHMEDABAD- NORTH
CUSTOM HOUSE, 1ST FLOOR,
NAVRANGPURA, AHMEDABAD-380009

फ़ोन नंबर./ PHONE No.: 079-27544557 फैक्स/ FAX : 079-27544463 E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वरा/By R.P.A.D
फा.सं./F.No. GST/15-72/OA/2023-24

DIN-20231264WT000000DC41
आदेश की तारीख़/Date of Order: - 21.12.2023
जारी करने की तारीख़/Date of Issue :- 21.12.2023

द्वारा पारित/Passed by:- लोकेश डामोर /*Lokesh Damor*
सयुक्त आयुक्त / *Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 51/JC/ LD /GST/2023-24

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।
This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 90 दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप GST-APL-01 में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form GST-APL-01 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within three months from the date of its communication. The appeal should bear a court fee stamp of Rs. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त (अपील) के समक्ष नियमानुसार पूर्व जमा के धनराशी का प्रमाण देना आवश्यक है ।

An appeal against this order shall lie before the Commissioner (Appeal) on giving proof of payment of pre deposit as per rules.

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या GST-APL-01 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केंद्रीय जी. एस. टी. नियमावली ,2017 के नियम 108 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।
(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू .5) 00. पांच रूपये (का न्यायालय शुल्क़ टिकट लगा होना चाहिए।

The appeal should be filed in form GST-APL-01 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 108 of CGST Rules, 2017. It should be accompanied with the following:

(1) Copy of accompanied Appeal.
(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.5.00.

विषयः- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice F.No. DGGI/INV/GST/3005/2022-Gr-I-O/o Pr ADG-DGGI-ZU-Delhi-Part(14) dated 29.09.2023 issued to M/s Suzuki Motors Gujarat Pvt. Ltd., having GSTIN 24AAUCS5797D2ZP, Becharaji, Survey No 293, Block No. 334 335, Village Hansalpur, Taluka Mandal, Ahmedabad, Gujarat-382130.

BRIEF FACTS OF THE CASE :-

M/s Suzuki Motor Gujarat Pvt. Ltd., having office at Becharaji, Survey No 293, Block No 334 335, Village Hansalpur, Taluka Mandal, Ahmedabad, Gujarat, 382130 (hereinafter referred to as "the said taxpayer") is a private limited company and is engaged in manufacturing motor cars and parts and accessories of motor vehicles, Chapter 87 of CTA 1975 and is holding GST Registration 24AAUCS5797D2ZP.

2. EXECUTIVE SUMMARY OF THE CASE :-

2.1 On the basis of intelligence developed by the office of Directorate General of GST Intelligence, Delhi Zonal Unit, New Delhi (hereinafter referred as "DGGI" for sake of brevity), DGGI initiated investigation again certain companies on the issue of payment of Integrated Goods and Service Tax ("hereinafter referred to as IGST") as applicable under Integrated Goods and Service Tax Act, 2017 ("hereinafter referred to as IGST Act" for sake of brevity) under Reverse Charge Mechanism on secondment/deployment of employees by the Overseas Group Entity in the Indian Group Entity. One of such companies included M/s Suzuki Motor Gujarat Pvt. Ltd., (PAN no. AAUCS5797D) having office at Becharaji, Survey No 293, Block No 334 335, Village Hansalpur, Taluka Mandal, Ahmedabad, Gujarat, 382130.

2.2 Three member bench of Honourable Supreme Court of India in the case of " C.C.C.E& S.T.- Bangalore (Adjudication) Etc. Versus M/S Northern Operating Systems Pvt. Ltd." (Civil Appeal No. 2289-2293 of 2021) vide Judgement dated May 19, 2022 has settled the taxability issue of seconded employees during service tax regime. It was 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. Thus, it was decided by the Hon'ble Supreme Court that the transaction of secondment of employees by overseas entity to its entities in India is that of manpower supply by the overseas group company to Indian Entity and hence be subjected to service tax. The Apex Court held that certain tests as equally significant to answer the question of service tax applicability in addition to the long standing test of control and superintendence. This judgement has implication in the GST regime as well, and accordingly investigation was initiated against the said taxpayer.

2.3 On the basis of above intelligence, investigation was initiated against the said taxpayer and Show Cause Notice no. DGGI/INV/GST/3005/2022-Gr I-O/o Pr ADG-DGGI-ZU-Delhi-Part(14) dated 29.09.2023 was issued to the said taxpayer.

3. ACTION TAKEN ON THE INTELLIGENCE GATHERED

3.1 Acting on the above intelligence, letter dated 26.09.2022 was forwarded to the said taxpayer through email dated 27.09.2022 by DGGI, wherein it was requested to intimate internal due diligence in

cases involving secondment of employees to all the entities of the Group in India and its GST implication and certain documents in this regard were sought.

3.2 Vide email dated 01.10.23, the said taxpayer submitted a letter dated 01.10.2022,. wherein they submitted:

- That they have conducted internal due diligence in cases involving secondment of employees and paid GST liability on the same;
- That they had paid GST of Rs.1,73,95,32,774/- vide challans dated 07.09.2022, 08.09.2022 and 20.09.2022 for the period starting July 2017 to August 2022 as detailed below:-

S. No.	Period	Amount of Salaries for Expatriates (aggregate of -(A) Amount remitted to SMC, Japan (equivalent in INR) and (B) Amount paid in India- Salaries and Perquisites)	GST @ 18%	Nature of Service	Challan No. and Date
1	July17 to March18	781,888,467	140,739,924	Manpower Supply Service	HDFC22092400032392 dated 07.09.2022
2	2018-19	1,603,571,583	288,642,885		HDFC22092400032445 dated 07.09.2022
3	2019-20	2,497,294,912	449,513,084		HDFC22092400038144 dated 08.09.2022
4	2020-21	2,138,924,892	385,006,481		HDFC22092400038127 dated 08.09.2022
5	2021-22	2,006,192,023	361,114,564		HDFC22092400032471 dated 07.09.2022
6	April 22-Aug 22	636,199,088	114,515,836		ICIC22092400306148 dated 20.09.2022
	Total	**9,664,070,966**	**1,739,532,774**		

3.3. Further, vide email dated 10.11.2023, the said taxpayer submitted sample copies of invoices related to secondment of employees working with the said taxpayer. Also, vide email dated 14.11.2022, the said taxpayer submitted excel sheet containing invoice wise details of amounts paid in respect of seconded employees

4.1 During the course of investigation, statement of Shri Pramod Gupta, Finance Head, M/s Suzuki Motor Gujarat Pvt. Ltd. was recorded on 24.07.2023, wherein, he inter alia stated that:-

- that the said taxpayer has been receiving Expats from overseas Group Entity M/s Suzuki Motor Corporation, Japan (hereinafter referred to as "SMC" for sake of brevity) since Feb. 2017-18 till date.
- that the seconded employees from overseas company are given Appointment letter by the said taxpayer.
- that he will submit sample copy of appointment letter in 2-3 days by email;
- that he is submitting copy of secondment agreement between SMC and the said taxpayer.
- that as per the agreements, payments to seconded employees are mostly paid by SMC in Japanese currency. However, very few amounts as per

requirements of seconded employee in India, are also paid in Indian Currency by the said taxpayer.

- that SMC raised invoice to the said taxpayer for the full amount (whether paid in Japan or paid in India) and the complete payment is reimbursed by the said taxpayer thereafter.
- that they had already paid an amount of Rs. 162.50 Crore (1,62,50,16,938/-) on 07.09.2022, 08.09.2022 and 20.09.2022 before start of investigation by the office of DGGI, DZU, New Delhi.
- that they had already submitted invoice wise details in excel sheet containing all the payments in respect of such seconded employees.
- that on being asked about payment of interest upon the said tax payment, they submitted as under:-

  1). The overall transaction is a revenue neutral transaction. Input Tax Credit (ITC) is eligible on payment of tax (GST). Hence, if there was clarity on GST payment on this transaction, the said taxpayer must have paid at relevant time and claimed ITC.

  2). These expats are treated as employees of the said taxpayer. There is relation of employer – employee between expats and the said taxpayer. Appointment letter is issued to expats. Income tax as TDS is deducted u/s 192 of Income Tax Act 1961. Form 16 is issued and Income tax return is also filed. Further, Indian Provident Fund provision are also abide similar to that of any other Indian employee. This established that there existed employer – employee relationship.

  3). Before the judgement of Honourable Supreme Court, in case of M/s Northern Operating System, all judgement were in favour of industry, in the sense that expats were not treated as Manpower Supply services provided by foreign company to Indian company. Some of these judgements are (a). Nissin Breaks India Private Limited v CCE Jaipur (b) Volkswagen India Pvt Ltd v CCE Pune .

  4) Previous circulars issued by CBIC also were holding that such salaries payment will not get covered under Manpower supply services. Circular CBIC B1/6/2005-TRU dated 27-7-2005. Also refer master circular 96/7/2007-ST dated 23-08-2007 clarifying that expat will not be treated as manpower supply services and is outside the ambit of payment of Service Tax.

- that on being told that all of the above judgements/circulars etc. are before Supreme Court judgement in M/s Northern Operating decision of which came in May 2022, in response to which he stated that, being a responsible corporate citizen, they analyzed the judgement, calculated GST liability starting from July 2017 and paid to government treasury before starting of investigation by DGGI.
- that about payment of interest upon this self assessed tax liability (already paid by them), as per the reasons are quoted above. Industry as a whole is seeking a mercy from Government of India to issue a circular / notification to condone interest payment on GST because of Hon'ble Supreme Court's Judgement in case of Northern Operating System.
- that he was enclosing a list of 12 bank accounts maintained by the company in different banks. Out of these 12 bank accounts, two major current accounts, in which company receives revenue from operations, are listed at serial no 7 & 8 of statement. These are :

Sr no	Bank	Branch	Account Number	IFSC
1.	HDFC Bank	Ahmedabad	50200023062182	HDFC0004258
2.	Mizuho Bank	Mumbai	H10-792-103143	MHCB0000532

4.2 During recording of statement, the representative of the said taxpayer submitted secondment agreement between the Indian entity and the overseas entity and a list of bank accounts of the Indian entity.

5. The said taxpayer, vide e-mail dated 17.09.2023 forwarded a copy of Form GST Return 3B of August 2022 informing total payment of IGST amounting to Rs. 1,75,14,88738/- including Rs. 1,73,95,32,774/- paid under RCM pertaining to secondment of employees. Vide the above e-mail, they further submitted bifurcation of RCM paid under said return as detailed below:

Particulars	**IGST**	**CGST**	**SGST**
GST liability under RCM declared and paid for secondment of services for period July 2017 to March 2022	1,62,50,16,938	-	-
GST liability under RCM declared and paid for secondment of services for period April 2022 to August 2022	11,45,15,836	-	-
GST liability under RCM declared and paid for other services	1,19,55,964	1,11,780	1,11,780
Total GST RCM liability declared and paid in the month of August 2022	1,75,14,88,738	1,11,780	1,11,780

6. Vide email dated 16.08.2023, DGGI sought from the said taxpayer GSTIN-wise details of all the amounts viz. reimbursements/Gross Salaries/All perquisites/Income Tax/payments made to 3rd parties on behalf of seconded employees. The said taxpayer, vide email dated 19.08.23 and 22.08.23, submitted filled Secondment Proforma containing GSTIN wise amounts (complete payouts including all perquisites and TDS), paid by the Indian Entity in respect of all expatriates. As per the details, total quantum of overall financial outflow (borne by either the said taxpayer or SMC, whether reimbursed or not) in any form- salaries, allowances, perks, TDS deducted, income tax paid or any other form, attributable to persons/individuals directly or through 3rd parties was Rs.1,62,50,16,938/-.

7. From the challans provided by the said taxpayer vide letter dated 01.10.23, it appeared that they had paid an amount of 1,62,59,16,938/- (for period of July 2017 to March 2022) and an amount of Rs. 11,45,15,836/- (for April 2022 to August 2022) totally amounting Rs. 1,73,95,32,774/- (for the period July 2017 to August 2022). In the initial reply submitted by them vide letter dated 01.10.2022 also, the said taxpayer had informed payments towards secondment of employees, amounting to Rs. 173,95,32,774/- (for the period July 2017 to August 2022) However, in the invoice wise excel sheet provided by them vide email dated 14.11.2022 in the secondment Proforma and statement recorded under section 70 of CGST Act, 2017, it was found that the said taxpayer had informed payment of Rs. 1,62,59,16,938/- for period of July 2017 to March 2022. Accordingly, on being enquired, the said taxpayer, vide email dated 18.09.23 submitted updated excel sheet containing invoice wise

payments towards seconded employees totally amounting to Rs. 1,73,95,32,774/- for the period July 2017 to August 2022.

8. In view of the above details of gross amounts including reimbursements, gross salaries, perquisites including income tax paid to seconded employees provided vide email dated 18.09.23, in Secondment Proforma and also provided in Statement dated 21.08.23 by the said taxpayer, it appeared that the said taxpayer had availed/imported following value of services in respect of secondment of employees for the period July 2017 to August 2022:-

Description	Value of Service (Rs.)	Applicable IGST (Rs.)	IGST, informed as paid (Rs.)
Amounts attributable to Reimbursements paid to overseas entity/Gross Salaries and Perquisites (including Income Tax)	9,664,070,966	1,73,95,32,774	1,73,95,32,774

9. In view of the above, it appeared that the said taxpayer had already deposited an amount of Rs. 1,73,95,32,774/- towards gross amounts paid to seconded employees in the period of July 2017 to August 2022, however, they had not paid the applicable interest upon the said payment.

10. On the basis of investigation conducted by DGGI, information and records submitted by the said taxpayer and statement tendered by authorized representative of the said taxpayer, it appeared that the said taxpayer had seconded certain employees from its SMC, Japan. The services of such employees have been attributed to The Indian Entity's office having GST registration no. (GSTIN) 24AAUCS5797D2ZP.

11. A secondment is an arrangement, where an employee has a relationship both with the seconding and host Company. As an example, an Overseas Group Company, a multinational may provide an employee on secondment/transfer/deputation to an Indian subsidiary/group company for a fixed period. During the period of secondment, the seconded employee's (who are also called expatriates) status with the Overseas Group company (Home company) is dormant and that with The Indian Entity ('Host Company') is active. The employee may remain on the payrolls of the overseas Group company or The Indian Entity. The Indian Entity or host reimburses the whole or part of the salary of the employee to the Group Company in overseas or may pay the emoluments to such employees in India. For practical purposes, such individuals act as employees of The Indian Entity, are under Indian Entity's control and direction, and are required to comply with The Indian Entity's rules. The seconded employee operates and works under the control and supervision of the host company and on completion of secondment, the employee reverts to the Group Company or is seconded to any other overseas company.

12. In the case of " C.C.C.E & S.T.- Bangalore (Adjudication) Etc. Versus M/S Northern Operating Systems Pvt. Ltd." (Civil Appeal No. 2289-2293 of 2021) vide Judgement dated May 19, 2022, the Apex Court held that certain tests to answer the question of service tax

applicability in addition to the long standing test of control and superintendence. DGGI relied upon the said judgement in issuance of the Show Cause Notice dated 29.09.2023.

14. As per Section 65B(44) of Finance Act 1994, "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. Whereas, as per Section 2 (102) of the Central Goods & Service Tax Act. 2017 CCGST Act') "services" means anything other than goods, money and securities but includes activities 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. However, both regimes exclude from its sweep "a provision of service by an employee to the employer in the course of or in relation to his employment." Whereas Hon'ble Court has dealt in detail and ruled contrary to the argument that the real nature of the relationship between the assessee and the seconded employees, is of employer and employee. The scope-of supply/service has only broadened during GST regime, thus said judgement is well applicable during GST regime and justifies the taxability on services received in the form of seconded employees.

15. Notification No. 10/2017-Integrated Tax (Rate) dated 28th June 2017 provides, that in case of supply of any service supplied by any person who is located in a non-taxable territory (SMC in this case), the supplier of service is the person located in a non-taxable territory and the recipient of service is any person located in the taxable territory (the said taxpayer in this case)other than non-taxable online recipient. Further, in this aforesaid notification it is provided that in case there is supply of the aforesaid service, the recipient of such service shall be liable to pay the whole of integrated tax leviable under Section 5 of the IGST Act, 2017 on reverse charge basis. In the present case the recipient of service is the said assessee and thus is liable to pay applicable IGST for the services it has received from the SMC.

16. As it is clear that if the secondment or deputation is a "supply" under the GST law and the same is liable to GST under reverse charge, the next issue arises as to what will be value of this supply. Here, Section 15(2) (b) of CGST Act reads that value of supply must include, any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both. Thus according to Section 15(2) (b) of the CGST Act, 2017 the amount incurred by Indian companies on Seconded employees in India will also be a part of taxable value. Therefore, amount incurred by Indian Companies for payment of salary, house rent allowance, medical allowance, amount re-imbursed to Oversees Group Companies and Income tax paid on behalf of seconded employee in India (under Income tax law) will become part of taxable value for discharging GST under RCM by the Indian Companies. As per the provisions of ibid Section, any amount that the supplier (SMC in the instant case) is liable to pay in relation to such supply but which has been incurred by

the recipient (the said taxpayer in the instant case) of the supply and not included in the price actually paid or payable (the amounts reimbursed to the Overseas Group Companies) for the services is to be included in the value of supply. Therefore, it appears that the transaction value of supply of manpower service to the noticee shall be the total consideration actually paid or payable by the noticee including expenses incurred in foreign currency as well as in Indian Rupees.

17. It is pertinent to add here that method of disbursement of salary/perquisites etc does not change the nature of supply. Hon'ble Court in the landmark judgement (supra) has also opined that the method of disbursement of salary cannot determine the nature of the transaction. Rather, applicability of GST on a particular supply has to be decided on the basis of nature of transaction irrespective of method of payment for such service. It is pertinent to add here that Hon'ble Court has not subscribed to the view of the CESTAT which emphasized that the assessee had issued the prescribed forms to the seconded employees, in terms of the Income Tax Act. 1961 (hereafter "IT Act"), and those individuals too file income tax returns and contribute to the provident fund. Thus, it is clear that even if the TDS was deducted on the salary paid in India or reimbursed to overseas counter-part, entire amount of remuneration, in whatever form is liable to be included in the value of supply.

18. The said taxpayer's apprehensions made vide different emails/letters/statement, as detailed in para supra, have been well discussed and denied in the Hon'ble Supreme Court's Judgement para supra. Further, vide statement dated 24.07.23 the representative of the said taxpayer submitted a Secondment Agreement executed between Suzuki Motor Corporation, Japan(referred to as 'Suzuki" in the agreement) and the said taxpayer(referred to as the "Company" in the Agreement) for secondment of employees (referred to as the "Personnel") wherein the major terms of the agreement have been detailed as under:-

- SUZUKI shall second the Personnel to the Company so as to enable the Personnel to work as set forth below at the principal office or any factory of the Company as decided by the Company during the terms of this Agreement.
- The scope of the work to be performed by 'the Personnel includes provision of technical inputs, advice, guidance, supervision, execution, etc. in whole or part, as the Company requires, and decision making in case the Personnel is so required and qualified, of the entire areas of corporate operation, including, without limitation, management, techniques, production, marketing, purchasing and administration.
- The Personnel shall work for the Company on a full time basis during their respective tenure of secondment and shall be employed by the Company for that purpose. During the tenure of secondment, a formal letter of employment shall be issued by the Company to seconded Personnel.
- The Company shall pay remuneration to the Personnel; provided, that taking into consideration of the administration and the convenience of the Personnel, part of remuneration of the Personnel shall be paid in Japan in Japanese Yen by SUZUKI on the request of the Company and

reimbursed from the Company to SUZUKI. Detail of the remuneration and welfare provided from the Company to the Personnel shall be set forth in Annexure 1 attached to the agreement.

- The Expenses to be reimbursed by the Company to SUZUKI shall be on cost-to-cost basis and in Japanese Yen.
- The reimbursement of the Expense to SUZUKI shall be made by the Company within sixty days after the end of each six (6) month period ending on September 30 or March 31.
- For such reimbursement, SUZUKI shall, after each six month period, issue to the Company an invoice stating amounts reimbursable by the Company as per the provisions in Article 2B of the agreement.

19. Thus, from, all of the above provisions of secondment agreement executed between the said taxpayer and SMC, Japan, it is abundantly clear that the said taxpayer had received import of manpower services from SMC, Japan, and the same is liable to payment of IGST under the provisions as discussed para supra. Further, as per the said agreement submitted by The Indian Entity, it appears that there is quid pro quo to the said taxpayer (being a recipient of expertise of such expats), thus, IGST is to be demanded as per the provisions para supra. Thus, it appears that the said taxpayer has received supply from its SMC, Japan, as detailed in para supra upon which IGST is to be demanded from the said taxpayer in terms of Section 73(1) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

20. During the course of investigation, the said taxpayer, vide different emails, statements recorded under section 70 of CGST Act, 2017, proforma/details submitted vide email dated 22.08.23, have provided month-wise details of i) amounts reimbursed to the foreign entity along with IGST paid; ii) gross amounts paid to directly to seconded employees and iii) the amounts paid to 3rd parties on behalf of seconded employees. Accordingly, the summary of amounts paid in form of reimbursements, Gross salaries/perquisites including income tax for seconded employees for the period July 2017 to August 2022, is as follows:-

GST No.	State	Description	Value of Service (Rs.)	Applicable IGST (Rs.)	IGST, informed to be paid (Rs.)
24AAUCS5797 D2ZP	Gujarat	Amounts attributable to Reimbursements paid to overseas entity/Gross Salaries and Perquisites (including Income Tax)	9,664,070,966	1,73,95,32,774	1,73,95,32,774
		Total	**9,664,070,966**	**1,73,95,32,774**	**1,73,95,32,774**

21. It appeared from the scrutiny of the documents and analysis of the submissions, that the said taxpayer had contravened the provisions of –

(i) Section 5 of the IGST Act read with Notification No. 10/2017-Integrated Tax (Rate), dated 28.06.2017 in as much as they had failed to pay appropriate IGST on the taxable services received by them from a supplier located in non-taxable territory;

(ii) Section 15 of the CGST Act read with Section 20 of the IGST Act in as much as they failed to compute correct taxable value of the services received by them;

(iii) Section 31(3)(f) of the CGST Act read with Section 20 of the IGST Act in much as they had not issued invoices for receipt of services from a supplier located in non-taxable territory, in the prescribed manner;

(iv) Section 39 of CGST Act read with Section 20 of the IGST Act in as much as they failed to declare the details of taxable services received by them which are liable to reverse charge, in their periodic returns in prescribed time and manner;

(v) Section 59 of the CGST Act read with Section 20 of the IGST Act in as much as they have failed to properly self-assess their GST liability correctly on the taxable services received by them.

22. Section 73 of the CGST Act, 2017 deals with Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful- misstatement or suppression of facts and reads as under. Section 50 of the CGST Act, 2017 deals with interest on delayed payment of tax. Section 75 of the CGST Act stipulates recovery, under Section 79 of the CGST Act, of any amount of interest payable on self assessed tax. Section 122 of the CGST Act stipulates Penalty for certain offenses. Section 125 of the CGST Act, 2017 prescribes that – "Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in the said act.

23. In view of above, it appeared:-

a) that IGST amounting Rs. **1,73,95,32,774** upon taxable value of **Rs. 9,664,070,966/-** is liable to be paid by the said taxpayer (GST No. 24AAUCS5797D2ZP, Gujarat) under section 73(1) of CGST Act, 2017. Interest upon said demand is also liable to be paid under section 50 of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

b) An amount of **Rs. 1,73,95,32,774/-** deposited by The Indian Entity (GST No. 24AAUCS5797D2ZP Gujarat) towards their IGST respectively is liable to be appropriated towards demand above.

c) Interest as applicable should not be demanded and recovered under the provisions of Section 75(12) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

d) The said taxpayer, by their failure to pay the applicable GST and failure to assess the actual value of taxable supplies for the receipt of manpower supply services from its Overseas Group Company (SMC, Japan) have rendered themselves liable for penalty under Section 73 and Section 122(2)(a) of the CGST Act read with Section 20 of IGST Act. It also appeared that the said taxpayer is liable for penalty under Section 125 of the CGST Act read with IGST Act for contravention of the various statutory provisions as discussed above.

24. After completion of investigation, DGGI issued DRC-01A dated 26.09.2023 in respect of GSTIN 24AAUCS5797D2ZP, in response to which vide email/letter dated 27.09.23, the said taxpayer informed that the company had already deposited the IGST liability of Rs. 1,73,95,32,774/-. Regarding payment of interest they have represented the government for waiver of interest and if interest cannot be waived, it should be at least charged from date of Hon'ble Supreme Court Judgement's in NOS case which is 19 May 2022. They also informed that Gujarat State GST office has also issued Show Cause Notice in the instant matter for the period of 2017-18. However,

this office is not in receipt of any communication/copy of Show Cause Notice about issuance of any Show Cause Notice by State GST Gujarat on the instant matter.

25. Accordingly, M/s Suzuki Motor Gujarat Pvt Ltd,, (GST No. 24AAUCS5797D2ZP) having principal place of business at Becharaji, Survey No 293, Block No 334 335, Village Hansalpur, Taluka Mandal, Ahmedabad, Gujarat, 382130, were issued Show Cause Notice F.No.DGGI/INV/GST/3005/2022-Gr-I-O/o Pr ADG-DGGI-ZU-DELHI-Part(14) dated 29.09.2023, asking them to show cause as to why:-

i) IGST of **Rs. 1,73,95,32,774/-(Rupees One Hundred Seventy Three Crore Ninety Five Lakh Thirty Two Thousand Seven Hundred Seventy Four only)** upon taxable value of **Rs. 9,66,40,70,966/- (Nine Hundred Sixty Six Crore Forty Lakh Seventy Thousand Nine Hundred Sixty Six only)** should not be demanded and recovered from them under Section 73(1) of the CGST Act, 2017.

ii) An amount of **Rs. 1,73,95,32,774/-** deposited by them towards IGST should not be appropriated towards demand above.

iii) Interest as applicable should not be demanded and recovered under the provisions of Section 75(12) of the CGST Act, 2017 read with Section 50 of the CGST Act, 2017, both read with Section 20 of the IGST Act, 2017.

iv) Penalty under Section 122(2)(a) and Section 73 of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 should not be imposed upon them.

v) Penalty under Section 125 of the CGST Act, 2017 read with Section 20 of IGST Act, 2017 should not be imposed upon them.

DEFENCE REPLY :-

26. The said taxpayer, vide their letter dated 29.11.2023 and 11.12.2023 submitted their reply to the Show Cause Notice issued to them. Gist of the defence reply is given in following paras.

27. The said taxpayer is inter-alia engaged in manufacture and sale of motor vehicles and is a 100% subsidiary of SMC. They have entered into an Agreement dated 01.04.2016 with SMC for secondment of personnel. Copy of the Secondment Agreement 01.04.2016. In terms of the Secondment Agreement, they have requested SMC to send SMC's employees to be employed by them during the tenure of secondment. The seconded employees will work for the said taxpayer on full time basis during the tenure of secondment and shall be employed by the said taxpayer for the said purpose. The said taxpayer issue an appointment letter to the personnel of SMC who are deputed by them. In the appointment letter, it is clearly stated that during the course of employment, the personnel will work wholly and exclusively for the said taxpayer on the terms and conditions mentioned in the appointment letter including all the internal policies of the company. Thus, it is clear that the expatriates shall work solely for the said taxpayer and will discharge the responsibility and duties as assigned by the them from time to time during the tenure of secondment. After completion of terms of secondment, the personnel of SMC shall return to SMC and would be assigned other projects of SMC. They had also submitted the appointment letters of expats on 29.07.2023, prior to issuance of SCN. The remuneration of the personnel is paid by the

taxpayer taking into account the administration and convenience of the personnel. Further, part of the remuneration is paid in India and remaining part is required to be paid in Japanese Yen ("JPY") by SMC on the request of the said taxpayer. Such amount shall be reimbursed by the said taxpayer to SMC. Part payment of the amount is made in India considering the local expenses. They incur certain expenditure for the personnel on account of shifting expenses, health care, residence etc. They also deduct TDS in terms of Section 192 of the Income Tax Act, 1961, on all expenses including part of remuneration directly paid, paid through SMC in Japan and all perquisites by them to the seconded employees. They also stated that the said taxpayer and SMC qualify as 'associated enterprises' under Section 2(12) of CGST Act/GGST Act, 2017. Further, in terms of CGST Act/GGST Act, 2017, they are entitled to avail full ITC of the supplies they receive from SMC. They were under a bona fide belief that the remuneration paid to seconded employees was not liable to GST since the same was not in the nature of a taxable supply of services as the services rendered by an employee to the employer in the course of his employment were outside the purview of the term "service" even under the Service Tax regime.

28. Under the erstwhile service tax regime, transactions involving secondment of employees by Indian companies from their foreign counterparts was a subject matter of litigation for various assessees. Show cause notices were consistently issued by the Department proposing that by secondment of employees to Indian Companies, the foreign companies were rendering manpower supply and recruitment services, on which service tax was payable on reverse charge basis. Accordingly, salaries paid to the seconded employees, either directly or through the foreign companies, was alleged to be in the nature of 'consideration' for such services. This litigation, in most cases, reached upto the stage of the Appellate Tribunal (CESTAT) where a series of favorable final orders were passed, which were, in some cases, also upheld by the Hon'ble High Courts and Hon'ble Supreme Court. The demands were set aside basis the finding that under secondment arrangements, an employer-employee relationship was formed between the Indian company and the seconded employees, which could not be subjected to service tax. It was also held that neither were the foreign companies engaged in providing 'manpower recruitment or supply agency' service nor was there any consideration paid by the Indian companies against deployment of employees. On these principles, the demands were set aside. On 19.5.2022, a three judge Bench of the Hon'ble Supreme Court, in the case of Commissioner of Customs, Central Excise and Service Tax, Bangalore Vs. Northern Operating Systems Pvt. Ltd. –Civil Appeal No. 2289-2293/2021, (NOS) deliberated on a case where employees were seconded to the Indian Company (Northern Operating Systems Private Limited) pursuant to a Master Service Agreement under which the Indian company as required to perform services for the foreign company. Since the Indian Company was required to render back-end support services to the foreign company, it had requisitioned certain skilled personnel from the foreign company for better execution of its assigned tasks. Agreeing to the request of the Indian Company, the foreign company had issued 'letters of understanding' to its employees who were seconded to India. The employees retained their pay scale and remained on the payrolls of the foreign company. The issue for determination was whether service tax was leviable on reimbursements of salaries and allowances which were paid by the Indian company to the foreign company against such secondment of employees. Hon'ble Supreme Court, in

its judgement, held as under:

a) That the Indian Company (NOS) was performing tasks assigned to it by the overseas group entities in terms of a Master Service Agreement.
b) That the terms of employment of the seconded employees continue to be in accordance with the policy of the overseas company. The jobs assigned to and manner of performance of the seconded employees were also governed by the foreign company.
c) That the seconded employees continued to be on the payroll of the overseas company and continued to enjoy the social security benefits of the country of their origin. The Indian Company (NOS) was bearing the burden of the salaries by way of reimbursement to the overseas company only because the seconded employees were working for the Indian Company (NOS) for the period of secondment.
d) The overseas group company was only loaning its services (highly skilled employees) on temporary basis to the Indian Company (NOS). Upon termination of the secondment agreement, the employees return to the overseas company.
e) The Indian Company (NOS) was deriving economic benefit from the deployment of employees, whose skill and experience resulted in revenue for the Indian Company (NOS). The reimbursement of salary of these employees is the quid pro quo for such deployment.
f) For these reasons, the Indian Company (NOS) was receiving services of manpower recruitment and supply from the overseas company, which was susceptible to service tax.
g) For determining the question of taxability, it was immaterial whether the Indian Company (NOS) was entitled to CENVAT credit of tax paid.

29. Pursuant to the above judgement and after conducting internal due diligence, the said taxpayer discharged IGST at 18% under reverse charge basis on the salaries paid to the seconded employees from SMC (aggregate value of salary and perquisites paid in India + INR equivalent of amount remitted to SMC in Japanese Yen) through PMT-06 challans. The tax liability for F.Y. 2017-18, 2018-19 and 2021-22, were paid through challans dated 07.09.2022, the tax liability for F.Y. 2019-20 and 2020-21 were paid through challans dated 08.09.2022 and tax liability for F.Y. 2022-23 (till August 2022) was paid through challan dated 20.09.2022.

30. Vide Letter dated 26.09.2022, DGGI initiated investigation in respect of secondment of employees pursuant to the judgment of Hon'ble Supreme Court in the case of Northern Operating Systems. They were directed to conduct an internal due diligence in cases involving secondment of employees and the probable GST liability. They were also directed to submit certain documents/details. The said taxpayer submitted the details sought for by DGGI. A statement of Shri Pramod Gupta, Finance Head of the said taxpayer, was also recorded by the DGGI on 24.07.2023, wherein, he inter alia informed that they have already paid the IGST liability under reverse charge basis on receipt of such manpower supply services from SMC, prior to start of any investigation by the DGGI. He further submitted that the entire transaction was revenue neutral in nature since they were eligible to avail ITC on the IGST paid by them under reverse charge basis. In view of the above, they also submitted that no interest shall be required to be paid.

31. On 26.09.2023, the Noticees were issued with an intimation in Part A of Form DRC-01A by the DGGI, proposing to demand tax of Rs.1,73,95,32,774/-

along with interest under Section 73 read with Section 50 of the CGST/GGST Act, 2017 for the period July 2017 to August 2022, under reverse charge basis on the remuneration paid to seconded employees from SMC. They filed their response to the intimation dated 26.09.2023 on 27.09.2023 inter alia submitting that the amount of tax of Rs. 173, 95,32,774/- was already paid by them out of abundant precaution and that the entire situation was revenue neutral since credit of the amount of tax paid under reverse charge basis was admissible to them. In view of the same, they requested DGGI to withdraw the intimation and drop the proceedings. They also submitted that parallel to the proceedings before the DGGI, on 17.02.2023, they received an e-mail from the Office of the Deputy Commissioner of State Tax, Division-4, Mehsana directing them to pay the interest on delay in payment of GST under reverse charge mechanism on remuneration paid to seconded employees. Subsequently, GST audit of the said taxpayer was conducted for the FY 2017-18, wherein, major audit objection observed by the Department in the Audit Report pertained to payment of GST of Rs. 14,07,39,924/- under reverse charge mechanism on account of secondment of personnel during F.Y. 2017-18. Subsequently, on 26.09.2023, they were issued a show cause notice in Form GST DRC-01 bearing Reference No. ZD2409230305879 proposing the demand and recovery of following amounts towards GST along with interest and penalty under Section 73 of CGST Act, 2017 on account of manpower supply services provided by SMC to the Noticees for the year 2017-18:-

Particulars	**IGST (INR)**	**Total**
Tax	14,07,39,924/-	14,07,39,924/-
Interest	11,56,24,717/-	11,56,24,717/-
Penalty	2,11,10,988/-	2,11,10,988/-
Total	27,74,75,629/-	27,74,75,629/-

32. They were issued the present SCN bearing no. DGGI/INV/GST/3005/2022-Gr I-O/o Pr ADG-DGGI-ZU-Delhi- Part (14) dated 29.09.2023 by DGGI, for the same issue for the period from F.Y. 2017-18 to F.Y. 2022-23 (July 2017 to August 2022).

33. In their reply, the said taxpayer denied all the allegations contained in the show cause notice as incorrect and unsustainable. They also submitted that the proceedings initiated in the show cause notice are liable to be dropped on merits since it has been issued on incorrect facts and legal position. The show cause notice has neither considered statutory provisions and correct legal position before such allegation and has merely gone by the judgment of Hon'ble Supreme Court in the case of Northern Operating without appreciating that the facts and circumstances were different there, inasmuch as the expatriates were working for the foreign entity as well as Indian entity as well, which is not the case in the present case.

34. They also stated that the show cause notice vague and is issued in a rush without examining the facts of case and appreciating the fact that there is no manpower recruitment and supply service and that the transaction is in the nature of services provided by the employee to employer, thus, covered under Schedule III and exempt from GST. Therefore, the Noticees submit that the basis of the show cause notice itself is challengeable. They relied upon the following case laws:-

- RajmalLakhichand v. Commissioner of Customs, 2010 (255) ELT 357

(Bom)

- Royal Oil Field Private Limited v. Union of India, 2006 (194) ELT 385 (Bom)
- Kaur & Singh v. Collector of Central Excise, New Delhi, 1997 (94) E.L.T. 289 (S.C.)
- Royal Oil Filed P. Ltd. v. Union of India, 2006 (194) ELT 385 (Bom.)
- Oryx Fisheries (P) Ltd. v UOI, (2010) 13 SCC 427
- Om Vir Singh v. Union Of India, 2016 (340) E.L.T. 277 (Guj.)
- Vaiyapuri v. Commissioner of Cus. (Seaport), Chennai, 2015 (325) E.L.T. 403 (Tri. - Chennai)

35. The said taxpayer submitted that the impugned SCN was not issued electronically i.e., on the GSTN portal and the same was served physically to the Noticees in accordance with the provisions of Section 73 the CGST Act, 2017 read with Rule 142 of the CGST Rules, 2017. They also referred to Instruction No. 04/2023-GST dated 23.11.2023 issued by CBIC.

36. They also submitted that the SCN has been issued without understanding the nature of the transaction and stated that transaction is in the nature of services provided by employee to employer and hence, covered under Schedule III. The expats are transferred to the said taxpayer for a fixed period of time under a secondment agreement with SMC. The agreement clearly states that during the time period of secondment, the employee shall work on a full time basis for the said taxpayer and shall be employed by the them. A formal letter of employment is also issued by the said taxpayer to these personnel. During this period, the foreign personnel are on the payroll of the said taxpayer and effectively function as employees of the said taxpayer in all aspects. From a perusal of the specific clauses of the Secondment Agreement, it is apparent that the foreign personnel are under the direct supervision, control and management of the said taxpayer during the period of secondment, making them employees of the said taxpayer for the said period. The same is also evidenced inter alia by the fact that the foreign personnel have been granted the same legal rights against the said taxpayer as any other employee of similar status/designation holding Indian nationality. Also, the said taxpayer are discharging income tax on TDS basis on the amounts paid as salary to the said foreign personnel, as is required in terms of the Income Tax, 1961. The said foreign personnel being employees of the said taxpayer based in India are also filing their income tax returns in India for the said period. Thus, it is submitted that the payment made to the said taxpayer has been undisputedly recognized and treated as 'salary' under the laws of this country and thus, it is not a consideration towards any service by SMC to them. Even if the foreign personnel are considered as employees of SMC, then the personnel can be said to be holding dual employment with the said taxpayer and SMC during the period of secondment. The said taxpayer also submitted that even if it is assumed that the foreign personnel are employees of SMC for the purpose of retaining their social security benefits in their home country, the same does not prevent them from being an employee of the said taxpayer as well. Basis the clauses of the agreement, the control of the personnel's functioning as well as the responsibility and risk of the results of the work done by them lies with the said taxpayer alone and they hold the position of the economic employer of the foreign personnel, clearly making the transaction in question in nature of supply by an employee to the employer during the course of employment. The said taxpayer relied upon the following case laws in support of their

contention:-

- Flipkart Internet Private Ltd v. The Deputy commissioner of Income Tax (International Taxation) reported at 2022 (6) TMI 1251
- Alstom Transport India Ltd. v. State of Karnataka2023 (11) TMI 210 - KARNATAKA HIGH COURT

37. The said taxpayer also submitted that judgment in the case of Northern Operating Systems cannot be blindly applied to all cases of secondment of employees and the applicability of the same has to be carefully determined on a case-to-case basis. They also stated that there is no agreement with SMC for any supply of manpower services. The amounts paid by the said taxpayer to SMC are part of salary paid in Japan in Japanese Yen and in the nature of reimbursements for certain amounts paid by SMC to the foreign personnel in Japanese Yen to retain their social security benefits. The whole amount is reimbursed later by the said taxpayer to SMC. They also submitted that the limited transaction is the agreement between SMC and the said taxpayer vide which it is agreed that the foreign personnel shall be an employee of the said taxpayer in India for a limited time frame.

38. The said taxpayer have made reference is made to Section 15(1) of the CGST Act, 2017 and stated that valuation adopted in the SCN is incorrect. They contended that in the instant case the value of supply is to be determined in terms of Section 15(4) of the CGST Act, 2017 read with second proviso to Rule 28 of the CGST Rules, 2017 as the supplier (SMC) and recipient (the said taxpayer) are related. As per the said rule, value of supply of goods or / and services between related persons shall be the open market value of such supply. If such value is not available, the value is to be determined by value of goods or services of like kind and quantity. They submitted that the disputed amounts being in the nature of salaries cannot be considered as the 'Open Market Value' for supply of Manpower Recruitment and Supply service. Consideration should have a reasonable nexus with the supply made. However, the consideration here is nothing but salary paid by the said taxpayer to their expat employees, which is an activity covered under Entry 1 of Scheule III of the CGST Act, 2017. Thus, the said payments made cannot be given the colour of consideration chargeable to IGST. The said taxpayer referred to the second proviso to Rule 28 of the CGST Rules, 2017, wherein, it has been provided that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services. The said taxpayer has also referred to Circular No. 199/11/2023-GST dated 17.07.2023 issued by the CBIC.

39. The said taxpayer contended that decision of Hon'ble Supreme Court in the case of Northern Operating is not applicable to the facts of present case. They stated that in the case of Northern Operating, the expats received their remuneration and other expenses from the overseas group entity directly. Such remuneration expenses incurred on the said expats were thereafter, reimbursed to the overseas group entity by the Indian entity. Further, the expats who were seconded continued to be on the payroll of the overseas entity for the purposes of both - salary as well as social security/retirement benefits. They submitted that in their case, expats are on their payrolls and a part of salary is being directly paid by them to the foreign personnel and a part of the salary is paid by SMC, which is reimbursed by the said taxpayer to SMC. They further stated that in the case of Northern Operating, the Indian company was

required to render back-end support services to the foreign company, and it had thus, requisitioned certain skilled personnel from the foreign company for better execution of certain tasks, in terms of the Master Service Agreement. However, in the present case, the said taxpayer are not performing any services for the foreign entity viz. SMC. In fact, there is no Master Service Agreement in the present case between the said taxpayer and the SMC. They stated that there is no Master Service Agreement pursuant to which the the said taxpayer is required to render any supply to SMC Japan. The said taxpayer is an independent supplier of motor vehicles and parts thereof and is running its operations autonomously. They also stated as per the agreement and the terms and conditions enclosed with the appointment letter issued to secondees (foreign personnel), employees (SMC's employees) had been seconded purely for the business of the said taxpayer in India and the employee would not act as a representative or agent of SMC. They also relied upon case of Collector of Central Excise vs. Alnoori Tobacco Products, 2004 (170) ELT 135 (Supreme Court), wherein it was held that a judicial decision can be applied only when the facts are materially similar.

40. They also stated that while delivering its verdict on the taxability of secondment agreements, the Hon'ble Supreme Court stressed on the requirement of comprehensive reading of the terms and conditions of the contract to decipher the correct nature of the arrangement between the assessee and the foreign company also relied upon the following judgements in this regard:-

- State of Gujarat (Commissioner of Sales Tax. Ahmedabad) vs. M/s Variety Body Builders - (1976) 3 SCC 500.
- Commissioner of Sales Tax vs. Walchandnagar Industries - (1985) 58 STC 89 (Bom.).

41. The said taxpayer also referred to Secondment Agreement and Employment Letter issued to the foreign personnel. They stated that during the tenure of secondment, every aspect of the secondees employment is determined and managed by the said taxpayer. Salaries made to the seconded employees of the were as per the Employment letter issued by the said taxpayer.

42. They further submitted that the principles laid down in the case of Northern Operating were limited to a factual position where the salaries were paid by the foreign company to the seconded employees. Further, the foreign company continued to manage the work profile and payroll of the said employees while their deputation in India. Basis this factual position, the Supreme Court had concluded that there was a direct control of the foreign company over the employees and the Indian Company only suffered a cross charge against the manpower supply services supplied by the foreign company. Therefore, it is submitted that the ratio of the judgment would limitedly apply to situations where seconded employees continue to be paid by their original employers. Cases where the employees are liable to be paid by the Indian company, either fully or partially, the judgement of the Hon'ble Supreme Court will not have any binding value, inasmuch as the fiscal control over the employment of the personnel ceases to be in the hands of the foreign company, which was considered to be the determining factor in the judgement. in the case of Northern Operating (Supra) worthy of being analysed is the parties to the 'secondment arrangement'. As mentioned above, in Northern Operating

(Supra), the employment letter was executed between the foreign company and the employee. The Indian Company was not a party to the said arrangement. They also submitted that from the Agreement with SMC and appointment letters issued to the employees it is clear that the decisions in relation to the position of the expatriate, length or duration of employment and termination of the employment, work profile, etc rest solely with the said taxpayer. This demonstrates that the expatriates are completely under the control and direction of the said taxpayer during the period of expatriation and the right to take any decision in relation to their employment rests solely with them. It is therefore manifest that the expatriate is effectively employed by the said taxpayer and the employment with SMC is inactive for such duration.

43. They also contended that once income tax authorities have treated a transaction in a particular manner, a different view cannot be taken by the GST authorities. To support their contention, they relied upon the following case laws:-

- Rent Works India Private Limited vs. Commissioner of Central Excise, Mumbai-V, 2016 (5) TMI 786-CESTAT Mumbai
- Maithan Alloys v. CCE, 2020 (33) GSTL 228 (Tri. Kol)

44. In their submission, the said taxpayer also submitted that that the demand proposed in the show cause notice is liable to be dropped on the ground that the entire exercise is revenue neutral as they would have been entitled to take the ITC of the entire tax paid on reverse charge basis. They relied upon the following case laws in this regard:-

- CCE v. Indeo ABS Limited- 2010 (254) ELT 628 (Guj).
- Mafatlal Industries Ltd v. CCE Daman - 2009 (90) RLT 238 (Tri.), which was upheld by the Hon'ble Supreme Court in 2010 (255) ELT A77 (SC).
- CCE v. Special Steel Limited – 2010-TIOL-1176- CESTAT-MUM = 2015 (329) ELT 449 (Tri.) which has been affirmed by the Hon'ble Supreme Court reported as Commissioner v. Special Steel Ltd. – 2016 (334) ELT A123 (SC).
- Patel Alloys Steel Pvt. Ltd. v. CCE 2013 (293) ELT 264 affirmed by Hon'ble Gujarat High Court in 2014 (305) ELT 476 (Guj.).
- Universal Dredging and Reclamation Corp. Ltd. v. CCE & GST 2020 (6) TMI 619 (Tri.).
- CCE v. Sharda Energy & Minerals Ltd. 2013 (291) ELT 404.
- Cosmo Films Ltd. v. CCE, Aurangabad 20101) ELT 130.

45. The said taxpayer also stated that the SCN has been issued to the said taxpayer by e-mailing the same to their authorized representative of the. The same has not been served in accordance with the provisions of CGST Act, 2017. Section 169 of CGST Act, 2017 prescribes the procedure for service of notice and orders and states that the same has to be served by giving or tendering it directly by a messenger including a courier to the taxable person, or by registered post, or by sending a communication to his e-mail address or by making it available in common portal. The said taxpayer submitted that the SCN has not been served upon them in the manner as prescribed in the CGST Act. They further stated that the SCN is time-barred in terms of Section 73 (2) read with 73 (10) of CGST Act, 2017 and that the SCN was not served within time as prescribed under the Act since the present SCN was served through email which is not prescribed mode of service of notice as per Section 169 of the CGST Act, 2017.

46. The said taxpayer contended that Joint Director, DGGI, DZU is not proper office to issue SCN. The said taxpayer referred to clause (91) of Section 2 of the CGST Act, 2017; Section 168 of the CGST Act, 2017; Circular No. 3/3/2017 - GST dated 05.07.2017 issued by CBIC as amended by Circular No. 31/05/2018-GST dated 09.02.2018; Notification No. 14/2017-Central Tax dated 1.7.2017. They also relied upon the case law in the case of Canon India Private Limited, wherein, it was held by Hon'ble Apex Court that entire proceeding initiated by the Additional Director General of the DRI by issuing show cause notices was invalid and was liable to be set aside as the Additional Director, DRI was not the proper officer to issue the show cause notice issued under Section 28(4) of the Customs Act, 1962. The said taxpayer stated that officers from different departments cannot exercise their powers in the same case. Joint Director, DGGI, DZU, New Delhi, who did not have power to assess the returns under GST law, cannot issue show cause notice under Section 73 of the CGST Act as Board Circular dated 05.07.2017 has vested Superintendent of Central tax with the power of undertaking the scrutiny assessment under Section 61 of the CGST Act. They further stated that there cannot be two different proper officers for the same case as issuance of a notice and adjudication thereof has to be by the same proper officer. They referred to provisions of Section 73(1) and Section 73(9) of the CGST Act, 2017 in this regard. They stated that issuance of a notice and adjudication thereof has to be by the same officer and not by two separate proper officers. They relied upon the case laws in the case of Canon India Private Limited and Consolidated Coffee Ltd. vs. Coffee Board, (1980) 3 SCC 358 in this regard.

47. They stated that SCN wrongly proposes levy of interest on the said taxpayer. They submitted that interest is compensatory in nature and since the IGST is itself not payable on the amount paid to the expats towards salary, the question of interest does not arise. They have been discharging IGST on the reimbursements made to the overseas group entities periodically. There are no belated payments herein for interest to be attracted here. Entire amount of IGST paid shall be available to the them as credit. Thus, the situation is revenue neutral and therefore, does not warrant for the provisions of interest to be attracted. They also submitted that the issue only attained finality by way of the recent decision of the Hon'ble Supreme Court in Northern Operating. They submitted where the demand is not sustainable, interest cannot be levied. They also relied upon the case law of Hon'ble Supreme Court of India in the matter of Pratibha Processors v. Union of India, 1996 (88) E.L.T. 12 (S.C.). They also submitted that the demand in the present case is entirely revenue neutral. Therefore, interest cannot be demanded from them in a case where there is no loss of revenue to the Government. They also made reference to Section 13 of the CGST Act, 2017, which stipulates that the time of supply shall be triggered only when the invoice for such services was raised by the. They stated that the said taxpayer have not raised any invoice till date therefore, there cannot be any interest liability in the present case.

48. The said taxpayer also contended that penalty is not imposable on the them under Section 122(2)(a) of the Act. They stated that penalty can be imposed under Section 122(2)(a) of the CGST Act, 2017 against any registered person who supplies any goods or services or both, however, in the present they have received services and hence the provisions of Section 122(2)(a) of the CGST Act, 2017 cannot be invoked for imposing penalty upon them. They also

stated that till the judgment of the Hon'ble Supreme Court in the case of Northern Operating, the understanding of the said taxpayer was that no tax was payable on the payments made to the expats who have been seconded. The same was an industry-wide issue with widespread ramifications. This is indicative that the issue is interpretational in nature and thus, in view of the settled law, penalty is not imposable. They also contended that once the demand is found to be unsustainable, the question of imposition of penalty does not arise. They relied upon the following case laws in this regard:-

- CCE v. H.M.M. Limited - 1995 (76) ELT 497 (SC)
- CCE, Aurangabad v. Balakrishna Industries - 2006 (201) ELT 325 (SC)
- Hyva India P. Ltd. v. CCE, Bangalore-III, 2008 (226) ELT 264 (Tri-Bang.)
- CCE v. Krishna SahakariSakkareKarkhaneNiyamit - 2013 (288) ELT 513 (Kar.).

49. The said taxpayer also contended that penalty is not imposable on the them under Section 125 of the Act. They stated that penalty can be imposed under Section 125 of the CGST Act, 2017 against any person, who contravenes any of the provisions of CGST/IGST Act or any rules made thereunder for which no penalty is separately provided under the said Act, however, in the present case the SCN has already alleged to impose penalty under Section 122 of Act hence the penalty under Section 125 of the CGST Act, 2017 cannot be invoked.

50. They contended that the SCN mentions the designation of the signatory as Joint Director, DGGI, DZU, New Delhi. Above the said designation, it appears to have a stamp indicating- 'signed by Manish Kumar Chaudhary with the date', however, the link to verification of digital signature certificate is not available and it is not ascertainable whether the Authority named in the SCN has indeed signed it. They also relied upon in the case law in the case of SRK Enterprise vs. Assistant Commissioner (ST)-(2023) 157 taxmann.com 93 (AP HC), wherein it was held that an unsigned order cannot be covered under any mistake, defect or omission, as the issue concerns very signature and consequent validity of the Order.

51. They stated that Section 7 of CGST Act cannot be invoked as there is no consideration which is exchanged between the said taxpayer and SMC. They are only reimbursing the expenses and remuneration on cost-to-cost basis. They also relied upon the case law in the case of Principal Commissioner, CGST, Delhi vs. Boeing India Defense Ltd. . 2023-VIL-396-CESTAT-DEL-ST, wherein it was held that held that the reimbursable expenses cannot be included in the gross value for the purposes of discharging service tax. The said judgment has also been affirmed by Hon'ble Supreme Court vide (2023) 13 Centax 34 (S.C.).

PERSONAL HEARING:

52. Personal Hearing in the matter was granted to the said taxpayer on 11.07.2023. Shri Rajesh Maherchandani, AGM of the said taxpayer, and Shri Jigar Shah, Advocate appeared on behalf of the said tax payer, and reiterated their written submission dated 29.11.23. They further requested to decide the SCN on merit.

DISCUSSION AND FINDINGS :-

53. I have carefully gone through the records of the case, defence reply dated Nil (received on 29.11.2023) and submission made during the course of personalhearing.

54. I find that in the instant case, on basis of intelligence developed, the DGGI had initiated investigation against certain companies on the issue of payment of Integrated Goods and Service Tax ("hereinafter referred to as IGST") as applicable under the provisions of the Integrated Goods and Service Tax Act, 2017 under Reverse Charge Mechanism on secondment/deployment of employees by the Overseas Group Entity (SMC in this case) in the Indian Group Entity (the said taxpayer in this case). One of such companies included M/s Suzuki Motor Gujarat Pvt. Ltd., the said taxpayer. Accordingly, DGGI initiated investigation against them on the above limited issue. During the course of investigation, the taxpayer submitted various documents/details pertaining to seconded employees to DGGI and statement of Shri Pramod Gupta, Finance Head of the said taxpayer, was also recorded on 24.07.2023.

55. The issue to be decided is to whether the said tax payer is liable to pay GST amounting to Rs. 173,95,32,774/- (IGST Rs. 173,95,32,774/-) during the period from July 2017 to August 2022 along with interest and penalty under Section 122(2)(a) and Section 125 of the CGST Act, 2017 under Reverse Charge Mechanism on secondment/deployment of employees by the Overseas Group Entity in the Indian Group Entity. I find that the issue has arisen due to the Hon'ble Supreme Court's judgement in the case of C.C.,C.E. & S.T. – Bangalore (Adjudication) vs M/s. Northern Operating Systems Pvt Ltd. (Civil Appeal No. 2289-2293 OF 2021), wherein the Hon'ble Supreme Court had held that that the M/s. Northern Operating Systems Pvt. Ltd. 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. On the basis of said judgement of Hon'ble Supreme Court, investigation was initiated against the said taxpayer.

56. I now proceed to discuss the reply submitted by the said taxpayer and grounds mentioned therein on merits.

57. The said taxpayer, in their reply, have stated that no clear case is made out by the Department in the show cause notice against them. In this regard, I find that the investigation was initiated against the said taxpayer and other companies by DGGI on the issue of payment of Integrated Goods and Service Tax ("hereinafter referred to as IGST") as applicable under Integrated Goods and Service Tax Act, 2017 ("hereinafter referred to as IGST Act/IGST Act, 2017") under Reverse Charge Mechanism on secondment/deployment of employees by the Overseas Group Entity in the Indian Group Entity. This fact has been categorically specified in the Show Cause Notice dated 29.09.2023 issued to the said taxpayer. There is no confusion as regards the grounds on which the Show Cause Notice was issued. First para itself of the Show Cause Notice makes it clear as to what is the issue regarding which investigation was initiated against the said taxpayer. Further, in the Show Cause Notice facts of the case (secondment agreement, legal provisions, applicability of Hon'ble Supreme Court's judgement in the case of the said taxpayer, details of IGST paid by the said taxpayer on secondment under reverse charge mechanism),

provisions of law, contraventions made by the taxpayer has been specifically mentioned. Also, the said taxpayer has quoted various case laws, however, I find that these case laws do not pertain to GST law and further, the facts of the case are not the same as in the instant case, the Show Cause Notice was issued regarding specific issue pursuant to the judgement of Hon'ble Supreme Court in the case of Northern Operating regarding secondment of employees from foreign entity. Accordingly, I do not find any merit in the said taxpayer's claim that no clear case is made out by the department in the Show Cause Notice.

58. The said taxpayer has contended that IGST is not liable to be paid as there is no supply of Manpower Recruitment and Supply Service. The said taxpayer has stated that the present transaction is in the nature of services provided by employee to employer and hence, covered under Schedule III. They have further stated that:-

- The expats are transferred for a fixed period of time under a secondment agreement with SMC. The agreement clearly states that during the time period of secondment, the employee shall work on a full time basis for the said taxpayer and shall be employed by the said taxpayer. A formal letter of employment is also issued by the said taxpayer to these personnel.
- During this period, the foreign personnel are on the payroll of the said taxpayer and effectively function as employees.
- Foreign personnel are under the direct supervision, control and management of the said taxpayer making them employees of the said taxpayer. Foreign personnel have been granted the same legal rights against the said taxpayer as any other employee.
- The said taxpayer are discharging income tax on TDS basis on the amounts paid as salary to the said foreign personnel, as is required in terms of the Income Tax, 1961. The said foreign personnel being employees of the said taxpayer based in India are also filing their income tax returns in India for the said period.
- Even if it is accepted for the sake of argument and the foreign personnel are considered as employees of SMC, then the personnel can be said to be holding dual employment with the said taxpayer and SMC during the period of secondment.
- They have not entered into any manpower supply service contract with SMC for receipt of manpower recruitment and supply services. There is no consideration which has been agreed to be paid to SMC for the purpose of receipt of manpower supply services.

59. I find that the primary issue to be decided in the matter is whether the transactions in the present case is "service" in terms of Section 2(102) of the CGST Act, 2017 or is in nature of transaction of services provided by employee to employer, as claimed by the said taxpayer. The same issue was decided in the case of M/s. Northern Operating System Pvt Ltd. by Hon'ble Supreme Court. Accordingly, I find that it is pertinent to go through findings of Hon'ble Supreme Court in the said judgement and facts of the case in relation to the said taxpayer and applicability of the said judgement in the case of the said taxpayer. Relevant portion of the judgement of Hon'ble Supreme Court in the case of C.C.,C.E. & S.T. – Bangalore (Adjudication) vs M/s. Northern Operating Systems Pvt Ltd. is reproduced below for ready reference:-

"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

28 (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.

29 2020-TIOL-1277-CESTAT-BANG
30 2014 (34) S.T.R. 135 (Tri. - Mumbai)
31 Commissioner v. Volkswagen India (Pvt.) Ltd. - 2016 (42) S.T.R. J145 (S.C.).
32 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

33 1957 SCR 158
34 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]."

35 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

36 2001 (1) SCR 1011
37 (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

38 1985 Supp SCC 280
39 (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)."

60. In the above judgement, Hon'ble Supreme Court had decided 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. On the basis of the said judgement, the Show Cause Notice was issued to the said taxpayer. In the above judgement, case of Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments (1974 (1) SCR 747) has been referred to, wherein the Hon'ble Apex Court had held that 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. Further, in the said judgement in the matter of Jubilee Tailoring House v. Chief Inspector of Shops & Establishments, the court had also held that there cannot be a single test to tell whether a contract of service from a contract for service will serve any useful purpose and not all of these factors would be relevant in all cases or have the same weight in all cases. The

court also held that no magic formula can be propounded, which factors should in any case be treated as determining ones. The said ruling in the case of Silver Jubilee (supra) about the flexibility in regard to deciding the question of whether a contract is one for service or one of service, was followed in other decisions, such as Indian Banks Association v. Workmen of Syndicate Bank and Indian Overseas Bank v. Workmen. Also, in the case of Sushilaben Indravadan, referred to in the Hon'ble Supreme Court's judgement in the case of M/s. Northern Operating, it was held that all relevant factors are required to be weighed to arrive at correct conclusion on the facts of each case.

61. In the Hon'ble Supreme Court's judgement in the case of M/s. Northern Operating, case of State of Orissa v. Titaghur Paper Mills Co. Ltd. has also referred to, wherein, it was held that nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder and these have to be determined from all the terms and clauses of the document and all the rights and results flowing there from and not by picking and choosing certain clauses. This principle was reiterated in case of Prakash Roadlines (P) Ltd. v. Oriental Fire & General Insurance Co. Ltd.

62. In Para 51 of the said judgement in M/s. Northern Operating, Hon'ble Supreme Court has specified that the Apex Court has consistently applied the test of substance over form which requires taking close look at terms of contract or agreements. The Hon'ble Supreme Court in Para 52 also stated that it was not concerned with unravelling the nature of relationship between the overseas company and the assessee, however, to decide, is whether the secondment, for the purpose of completion of the assessee's job, amounts to manpower supply. Further, the following facts have been highlighted by the Hon'ble Supreme Court regarding the transactions of M/s. Northern Operating with foreign entity:-

- The seconded employee, for the duration of her or his secondment, is under the control of the assessee, and works under its direction. Yet, they are on the pay rolls of their overseas employer.
- 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.
- Salary package, with allowances, etc., are all expressed in foreign currency.
- The allowances include a separate hardship allowance of 20% of the basic salary for working in India.
- The Hon'ble Supreme Court noted that the 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 and it paid the amounts equivalent to the salaries of the seconded employees.
- The Hon'ble Supreme Court also noted that 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 Hon'ble Supreme Court had also discussed issue pertaining to revenue neutrality and held that precedential value of judgements in the case of SRF and Coca Cola is of a limited nature.

- The Hon'ble Supreme Court 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 (for period prior to 01.07.2012), or a taxable service (for period from 01.07.2012), for the two different periods in question.

63. In the judgement, the Hon'ble Supreme Court has held that primacy is not to be given to any single factor while deciding while deciding whether an arrangement is a contract of service (as the assessee asserts the arrangement to be) or a contract for service. The Hon'ble Supreme Court has further stated in the judgement that the court applied test of "substance over form" which requires close look at the terms of the contract, or the agreements, in deciding the issue.

64. I now discuss the relevant facts of agreement for secondment of personnel entered into between the said taxpayer and SMC; and Offer of Appointment issued to seconded employees by the said taxpayer.

65. On going through the agreement entered for secondment of personnel dated 14.01.2016 into between the said taxpayer and SMC, the following facts are noticed:-

- The said taxpayer had requested SMC to second SMC's employees discussed and agreed from time to time so as to be employed by the said taxpayer during the period of secondment and SMC is willing to second the personnel.
- The agreement was for the period of three years from 01.04.2016 and automatically extended for successive period of one year unless either party terminates the agreement by a written notice given to the other party not less than three months before the expiration of the current period.
- The personnel shall work for the said taxpayer on a full time basis during their respective tenure of secondment and shall be employed by the said taxpayer for that purpose. During the tenure of secondment, a formal letter of employment shall be issued by the said taxpayer to seconded personnel.
- The said taxpayer shall pay remuneration to the personnel taking into consideration of the administration and the convenience of the personnel, part of remuneration of the personnel shall be paid in Japan in Japanese Yen by SMC on the request of the said taxpayer and reimbursed from the said taxpayer to SMC. Detail of the remuneration and welfare provided from the said taxpayer to the personnel is also specified in Annexure-I to the agreement and all expenses specified in the said Annexure-I and incurred by SMC on the request of the said taxpayer shall be reimbursed by the said taxpayer to SMC, which shall be on cost-to-cost basis.
- The employee's and employer's portion of social security and income tax in India with the Indian laws applicable and the **employer's portion of social security in Japan** shall be borne by the said taxpayer. The expenses for processing fee related to income tax and income tax after tenure of the personnel in India shall be borne by the said taxpayer.

66. On going through the terms and conditions of offer of appointment

provided by the said taxpayer, the following facts are noticed:-

- During the tenure, the seconded employee will exclusively work for the said taxpayer and discharge responsibility and duties the company directs him to perform from time to time.
- The employee's and employer's portion of social security and income tax in India with the Indian laws applicable to him and the **employer's portion of social security in Japan** shall be borne by the said taxpayer. The expenses for processing fee related to income tax and income tax after tenure of the seconded employee in India shall be borne by the said taxpayer.
- **Remuneration package of the seconded employee is expressed in Japanese Yen. The remuneration is split up in two parts viz portion paid in India in INR and balance paid in JPY in Japan. The seconded employee is given option to decide the amount to be paid in India at his or her discretion which has to be intimated by him/her to the said taxpayer.**
- **All bonuses will be paid twice in a year in JPY in Japan based on the said taxpayer's and seconded employee's performance.**
- The said taxpayer would apply Cost of Living Index (COLI) considering the deference of Purchasing Price Index in Japan and in India and accordingly determine the salary payable to the seconded employee. **COLI would be applied on salary paid by the said taxpayer in India.** COLI and rate of exchange would be adopted based on report of independent entity based in Japan.

67. On the basis of provisions contained in secondment agreement dated 16.04.2016 entered into between the said taxpayer and SMC; and terms and conditions of appointment of seconded employees in the said taxpayer, I find that:-

- The said taxpayer had requested SMC to second SMC's employees discussed and agreed from time to time so as to be employed by the said taxpayer during the period of secondment and SMC is willing to second its employees.
- Either party, the said taxpayer or SMC, can cancel the agreement by a written notice given to the other party not less than three months before the expiration of the current period.
- The employee's and employer's portion of social security and income tax in India with the Indian laws applicable to him and the **employer's portion of social security in Japan** shall be borne by the said taxpayer. The expenses for processing fee related to income tax and income tax after tenure of the seconded employee in India shall be borne by the said taxpayer.
- The seconded employee, for the duration of her or his secondment, is under the control of the said taxpayer, and works under their direction.
- The terms and conditions of appointment of the seconded employee nowhere states that the seconded employee would be treated as the said taxpayer's employees after the seconded period.
- The remuneration, including special allowances, is specified in Japanese Yen and is split up in two parts viz portion paid in India and balance paid in JPY in Japan. The seconded employee is given option to decide the amount to be paid in India at his or her discretion which has to be intimated by him/her to the said taxpayer.

- The remuneration includes special allowance specified in Japanese Yen, which is Yen 399,600 in respect of Mr. Yoshikazu Yamauchi.

56.5 Primary issue in the instant case is deciding whether the arrangement between the said taxpayer is in the nature of "service" as defined in clause (107) of Section 2 of the CGST Act, 2017 or not. Hon'ble Supreme Court in its judgement in the case of M/s. Northern Operating (supra) has specified that the court noted that there is not one single determinative factor, which the courts give primacy to, while deciding whether an arrangement is a contract of service or a contract for service. Accordingly, the issue is required to be examined holistically considering all the facts in the matter and considering the Hon'ble Supreme Court's judgement.

68. In the present case, the said taxpayer requests SMC to second its employees to them and SMC agreed to the same in accordance with the agreement entered into between them on 16.04.2016. Accordingly, employees of SMC were seconded to the said taxpayer pursuant to the said agreement. The agreement also contained a provision that the said agreement can be cancelled by either party by a written notice given to the other party not less than three months before the expiration of the current period. Pursuant to the secondment agreement entered into between the said taxpayer and SMC, employees of SMC to the said taxpayer and subsequently employees were appointed by the said taxpayer and offer of appointment was given to the seconded employees. I find that the employees are seconded to the said taxpayer after SMC agreed to do so and subsequently on 16.04.2016 agreement in this regard was signed between the said taxpayer and SMC. Accordingly, I find that secondment of employees is in accordance with the secondment agreement entered into by the said taxpayer and SMC. If the said agreement is terminated by either of the party as provided in the agreement or due to any event specified in the agreement occurs which leads to termination of the agreement, secondment of employees would come to an end. Also, in clause (5) of the Annexure-I to the secondment agreement it is specified that the said taxpayer would be liable to pay employee's and employer's portion of social security and income tax in India with the Indian laws applicable to him and the **employer's portion of social security in Japan**. Accordingly, as per the said clause, it can be inferred that the seconded employees continue to remain employed in Japan as "**employer's portion of social security in Japan**" is to be paid to them and the same is to be borne by the said taxpayer. Further, as per the terms and conditions of appointment, remuneration (including special allowances of the seconded employees is specified in Japanese Yen and the same is split up in two parts, one portion is paid in India in INR and the balance is paid in Japan in JPY. The option to decide the amount to be paid is at the discretion of seconded employee. Also, bonus payable to seconded employees is also specified in foreign currency JPY. Also, Cost of Living Index is applied to the salary paid in India by the said taxpayer in accordance with the report of independent entity based in Japan. The remuneration payable in Japan in JPY is paid by SMC is reimbursed to them by the said taxpayer.

69. I find that secondment agreement was entered into between the said taxpayer and SMC and offers of appointment were given to seconded employees pursuant to the agreement. Accordingly, offer of appointment is subordinate to the secondment agreement. If secondment agreement is

terminated, the employment of seconded employees with the said taxpayer is also terminated as the employees of SMC are seconded to the said taxpayer only in accordance with the said seconded agreement. Accordingly, I find that SMC is principal employer of such seconded employees and such seconded employees are seconded by SMC to the said taxpayer in accordance with the terms of the seconded agreement. Further, as per the terms of secondment agreement, the said taxpayer is required to pay employer's contribution social security in Japan, thus, it can be inferred that they continue to remain employed with SMC in Japan. Further, after the secondment tenure ends, the seconded employees do not remain employees of the said taxpayer. Though the said taxpayer makes payment of part salary in Indian in INR and makes reimbursement of salary paid in Janan in JPY to SMC, however, merely paying salary and deducting TDS is not determinative of the fact as to whether there is employee-employer relationship. Such arrangement has to be viewed holistically considering the facts of the case and no single factor is determinative of the nature of transaction. Facts in the case are similar to the facts in the case of Northern Operating (supra) in the following ways:-

- The seconded employee, for the duration of her or his secondment, is under the control of the said taxpayer, and works under its direction. Yet, they are on the pay rolls of their overseas employer SMC as employer's contribution of social welfare continues to be paid in Japan and is reimbursed to SMC by the said taxpayer.
- The terms and conditions of appointment between the said taxpayer and the seconded employee nowhere states that the latter would be treated as the former's employees after the seconded period.
- Salary package, with allowances, etc., are all expressed in foreign currency JPY.
- The allowances include special allowances expressed in INR.
- The said taxpayer had operational or functional control over the seconded employees; it was potentially liable for the performance of the tasks assigned to them and it paid the amounts equivalent to the salaries of the seconded employees.

70. Accordingly, considering the facts of the case and the judgement of Hon'ble Supreme Court in the case of Northern Operating (supra), the seconded employees cannot be said to be "employees" of the said taxpayer.

71. It remains to be decided as to whether the transaction between the said taxpayer and SMC is in the nature of "service" in terms of clause (102) of the CGST Act, 2017 and corresponding clause in the Gujarat GST Act, 2017. The said definition is reproduced below for ready reference:-

> *"(102) "services" means anything other than goods, money and securities but includes activities 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;"*

72. Here, SMC agrees to second its employees to the said taxpayer in accordance with the agreement between them. During the secondment period the said taxpayer bears the cost of remuneration of seconded employees, a portion of which is paid by the said taxpayer in India in INR and remaining

portion is paid by SMC in Japan in JPY and reimbursed by the said taxpayer to SMC. Considering the facts of the case, judgement of Hon'ble Supreme Court in the case of M/s. Northern Operating (supra), similarities of the present case with the case of M/s Northern Operating and the definition of "services" given in Section 2(102) of the CGST Act, 2017, I find that the nature of transaction between the said taxpayer and SMC is in nature of "service" in terms of Section 2(102) of the CGST Act, 2017.

73. The said taxpayer has contended that the valuation adopted in the subject SCN is incorrect. The said taxpayer have stated that when the supplier and recipient are related, the value is not to be determined in terms of the provision of Section 15(1) and Section 15(4) of the CGST Act, 2017 is to be referred. The said taxpayer have further stated that IGST has been validly discharged and the credit has been validly availed on the same.

74. I find that the value of Rs. 9,664,070,966/- for levy of GST that has been determined while issuing SCN has been ascertained on the basis of details (of gross amounts including reimbursements, gross salaries, perquisites including income tax paid to seconded employees provided vide email dated 18.09.23, in Secondment Proforma and Statement of GST liability under RCM on service of secondment of employees dated 21.08.23. The said taxpayer had already paid applicable GST on the said value of Rs. 9,664,070,966/- and the same value has been taken as the value of service for issuance of the Show Cause Notice. Further, the said taxpayer are claiming that they have validly discharged IGST liability and validly availed. Thus, one the one hand the taxpayer is claiming that the valuation is wrongly adopted in the Show Cause Notice and on the other hand they are claiming that they have rightly discharged applicable GST. Accordingly, since the said taxpayer claims that they have validly discharged IGST liability, they are implying that the valuation adopted in issuance of Show Cause Notice is appropriate. Further, the valuation has been taken on the basis of details provided by them on which they had already discharged applicable GST liability and had also availed Input Tax Credit of the IGST paid by them. Accordingly, I do not find any merit on the said taxpayer's contention that the valuation adopted is incorrect.

75. The said taxpayer contended that decision of Hon'ble Supreme Court in the case of Northern Operating is not applicable to the facts of present case. The said taxpayer have also quoted various case laws in this regard. I find that in deciding whether the decision of Hon'ble Supreme Court in the case of Northern Operating or not needs to be decided on the basis of facts of the case and Hon'ble Supreme Court in the case of Northern Operating. This issue has already been discussed at length in foregoing paras. Hence, I am not delving on this issue again. Further, this issue reached finality only after Hon'ble Supreme Court in the case of Northern Operating, accordingly, other case laws quoted by the said taxpayer are not relevant in deciding this issue.

76. The said taxpayer have also quoted that the entire exercise is revenue neutral as they are eligible to avail ITC on payment of tax. In this regard, it is important to state that this argument of revenue neutrality was also given before Hon'ble Supreme Court in the case of Northern Operating, wherein the facts were similar to the present case, however, the same was not considered by the Hon'ble Supreme Court. Further, the case laws quoted by the said taxpayer in support of their contention are for the period prior to the Hon'ble

Supreme Court in the case of Northern Operating and are based on different facts and hence are not relevant. Accordingly, I do not find any merit on the taxpayer's contention that the issue is revenue neutral.

77. The said taxpayer have contended that the SCN has not been served in accordance with the procedure prescribed in CGST Act, 2017. They have stated that SCN has been issued to them by e-mailing the same to the authorized representative of the said taxpayer. The said taxpayer contended that provision of Section 169 of the CGST Act, 2017, categorically states that the communication of the order can be send through E-mail however the notice/order cannot be served through email. In this regard, it is pertinent to go through the provisions of Section 169. Relevant portion thereof is reproduced below:-

> *"169. Service of notice in certain circumstances.—(1)* ***Any*** *decision, order, summons,* ***notice*** *or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely:-*
> *(a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or*
> *(b) by registered post or speed post or courier with acknowledgment due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or*
> ***(c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time; or***
> *(d) by making it available on the common portal; or*
> *(e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or*
> *....."*

78. On plain reading of the above, it is evident that the said section provides that any decision, order, summons, notice or communication is covered by the said section. Further, The Show Cause Notice issued to the said taxpayer is a "notice", accordingly, the Show Cause Notice is served in accordance with the provisions of Section 169.

79. The said taxpayer have further claimed that they had received the Show Cause Notice on 04.10.2023 and the Show Cause Notice is barred by limitation. They contended that the extended the time limit for passing of Order under Section 73 (10) of CGST Act by excluding the period from 01.03.2020 to 28.02.2022 vide Notification No. 13/2022-CT dated 05.07.2022 is in contravention of Sections 73 (2) & 73 (10) of CGST Act. I find that the said notification has been issued in exercise of the powers conferred by section 168A of the Central Goods and Services Tax Act, 2017 and accordingly date of

issuance of Order under Section 73(10) and consequently Show Cause Notice under Section 73(2) stood extended. I find that the present Show Cause Notice was issued to the said taxpayer on 29.09.2023, i.e. before the last date of issuance of Show Cause Notice, i.e. 30.09.2023. As per the provisions of Section 73(2) date of issuance is the relevant factor and not the date of receipt. Accordingly, I do not find merit in the said taxpayer's contention that the Show Cause Notice is time-barred.

80. The said taxpayer have contended that the proceedings initiated are without jurisdiction as the Joint Director, DGGI, DZU, New Delhi is not the proper officer to issue SCN. In this regard, I find that provisions of Section 3 are relevant. Section 3 empowers the government to appoint officers as it may deem fit. Accordingly, Notification No. 14/2017 – Central Tax dated 01.07.2017, was issued, which stipulates that "Joint Director, Goods and Services Tax Intelligence or Joint Director, Goods and Services Tax or Joint Director, Audit" is empowered to exercise powers of Joint Commissioner. CBIC has issued Circular No. 3/3/2017 - GST dated 05.07.2017 and regarding proper officer. In view of the above circular and the above Notification, I find that Joint Director, DGGI, DZU, New Delhi, is proper officer for issuance of Show Cause Notice.

81. The said taxpayer contended that officers from different departments cannot exercise their powers in the same case. They have contended that the Joint Director, DGGI, DZU, New Delhi, who did not have power to assess the returns under GST law, cannot issue show cause notice under Section 73 of the CGST Act. They have contended that as per provisions of Section 61, Superintendent of Central tax has the power of undertaking the scrutiny assessment under Section 61 of the CGST Act, 2017. In this regard, I find that the present Show Cause Notice was issued to the said taxpayer under Section 73 of the CGST Act, 2017 pursuant do investigation against the said taxpayer regarding specific issue that had arisen after the Hon'ble Supreme Court's judgement in the case of M/s. Northern Operating. Proceedings under Section 73 and Section 61 are different and independent of each other. As already discussed, Joint Director, DGGI, DZU, New Delhi, is proper officer for issuance of Show Cause Notice under Section 73 and accordingly, the Show Cause Notice is issued in accordance with the provisions of law. I do not find any merit in the said taxpayer's contention in this regard.

82. The said taxpayer has further contended that there cannot be two different proper officers for the same case as issuance of a notice and adjudication thereof has to be by the same proper officer. In this regard, I find that as per Circular No. 3/3/2017 – GST dated 05.07.2017 read with Circular No. 31/05/2018 - GST dated 09.02.2018 issued by CBIC, Joint Commissioner is proper officer for issuance of Show Cause Notice under Section 73(2) and adjudication thereof under Section 73 (9). Further, the Government vide Notification No. 14/2017 – Central Tax dated 1st July, 2017, had empowered officers of in the Directorate General of Goods and Services Tax Intelligence, Directorate General of Goods and Services Tax and Directorate General of Audit to exercise powers of officers specified therein. Accordingly, as per the said notification Joint Director, DGGI, DZU, New Delhi, had exercised powers of Joint Commissioner, who is proper officer for issuance of Show Cause Notice under Section 73 of the CGST Act, 2017. I find that proper officer for issuance and adjudication of Show Cause Notice is Joint Commissioner and Joint

Director, DGGI, DZU, New Delhi, had exercised powers of Joint Commissioner in accordance with the above notification. In view of the above discussion, I find that there is no merit in the said taxpayer's contention.

83. The said taxpayer further contended that SCN wrongly proposes levy of interest under Section 50 of the CGST Act, 2017. They submitted that interest is compensatory in nature and since the IGST is itself not payable on the amount paid to the expats towards salary, the question of interest does not arise. They also stated that is submitted that the entire amount of IGST paid shall be available to them as credit and hence situation is revenue neutral. In this regard, I find that the said taxpayer's claim that IGST is not payable is not correct in view of the facts discussed in the foregoing paras and after the judgement of Northern Operating as discussed in foregoing paras. Further, revenue neutrality is not relevant for deciding levy of interest where tax has not been paid on time. Accordingly, I do not find any merit in the said taxpayer's contention that levy of interest is wrongly proposed in the Show Cause Notice. I find that the said taxpayer had entered into secondment agreement with SMC in April 2016 and SMC had seconded its employees to the said taxpayer in pursuance of the said agreement. However, the said taxpayer did not discharge applicable GST till the judgement of Hon'ble Supreme Court in case of M/s. Northern Operating. The said taxpayer paid applicable GST only after the judgement and not on the due dates. Accordingly, the said taxpayer is liable to pay interest in accordance with the provisions of Section 50 of the CGST Act, 2017.

84. The said taxpayer also contended that penalty is not imposable on the them under Section 122(2)(a) of the CGST Act, 2017. They contended that penalty under Section 122 (2) (a) is leviable only on the supplier of services and not to the recipient of services. In this regard, it is pertinent to discuss provisions of sub-section (3) of Section 5 of the IGST Act, 2017. The said sub-section is reproduced below for ready reference:-

> *(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.*

85. The provisions of above sub-section provide that in respect of the goods or services notified under the above sub-section, all the provisions of IGST Act, 2017, shall apply to recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both. Accordingly, I find that as per the above section, the recipient is treated as person liable to pay GST in relation to supply and all provisions of the IGST Act, 2017, in relation to such supply shall apply as if he is the person liable to pay tax in respect of such supply. Accordingly, I find that penalty has been appropriately demanded in the Show Cause Notice issued to the said taxpayer. The said taxpayer are liable for penalty under Section 122(2)(a) in view of the above provisions as they had not paid applicable GST on secondment of employees from SMC on applicable due dates. Due to this, they have rendered themselves liable for penalty under Section 122(2)(a) of the CGST Act, 2017.

86. The said taxpayer further contended that penalty is not sustainable under Section 122 of the CGST Act, 2017 as the said taxpayer are not liable to pay the IGST on the disputed amounts. The said interpretation stems from a bona fide belief that the decision of Northern Operating, supra is not applicable to the present facts and has not been done with mala fide intention to evade payment of duty. The said taxpayer's view is that they are not liable to pay GST does not have merit in view of detailed discussion in foregoing paras. Further, one's belief regarding applicability of law is not relevant factor is deciding whether law is applicable or not. Accordingly, I do not find any merit in the said taxpayer's contention that penalty is not leviable.

87. The said taxpayer have contended that penalty is not imposable on the them under Section 125 of the CGST Act, 2017 as penalty can be imposed under Section 125 of the CGST Act, 2017 against any person, who contravenes any of the provisions of CGST/IGST Act or any rules made thereunder for which no penalty is separately provided under the said Acts. In this regard, I find that the said taxpayer had contravened the following provisions of the CGST Act, 2017 as detailed in the Show Cause Notice:-

- Section 39 of CGST Act read with Section 20 of the IGST Act in as much as they failed to declare the details of taxable services received by them which are liable to reverse charge, in their periodic returns in prescribed time and manner. There are specific data fields in GSTR-3B Returns for showing value of services/goods liable to reverse charge and tax payable thereon, however, the said taxpayer failed to do so in the returns filed by them;
- Section 59 of the CGST Act read with Section 20 of the IGST Act in as much as they have failed to properly self-assess their GST liability correctly on the taxable services received by them as they did not show consider the correct value of services liable to reverse charged which resulted into incorrect assessment of GST liability.

88. I find that no specific penalties are provided for the above contraventions in the CGST Act, 2017. Accordingly, due to the above mentioned contraventions, the said taxpayer have rendered themselves liable to penalty under Section 125 of the CGST Act, 2017.

89. The said taxpayer further contended that show cause notice is not validly signed inasmuch as the digital signatures are not identifiable as to whether the Ld. Joint Director, DGGI, DZU, New Delhi has signed the same. In this regard, I find that the Show Cause Notice was digitally signed by the Joint Director, DGGI, DZU, New Delhi, in e-office and the file number from which the Show Cause Notice was issued is also specified in the Show Cause Notice. Also, signatory's certificate can also be viewed in software which has such functionality where any document is digitally signed. Accordingly, I do not find any merit in the said taxpayer's contention that the Show Cause Notice is not validly signed.

90. Every registered taxable person is required to assess the taxes, interest and penalty payable and furnish a return for each tax period. This means GST continues to promote self-assessment just like the Excise, VAT and Service Tax under current tax regime. Accordingly, measures like self-assessments

etc., based on mutual trust and confidence are in place. All these operate on the basis of honesty of the tax payer; therefore, the governing statutory provisions create an absolute liability, when any provision is contravened or there is a breach of trust, on the part of service tax assessee, no matter how innocently. Had the investigation not been initiated by DGGI, interest payable by them under Section 70 and penalty payable by them under Section 122(2)(a) and Section 125 would not have come to the notice of the department and would have remained undetected. Therefore, IGST amounting to **Rs. 1,73,95,32,774 /-** is required to be recovered from them under the provisions of Section 73(1) of the CGST Act, 2017 read with the Section 73(1) of the Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 and the amount of Rs. 1,73,95,32,774/- deposited by them towards IGST should not be appropriated against the above.

91. Further, as per Section 50(1) of the CGST Act, 2017 read with Gujarat GST Act, 2017, every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed is liable to pay the interest at the applicable rate of interest. Since the said taxpayer had failed to pay their GST liabilities in the prescribed time limit, I find that the saidtax payer are liable to pay the said amount along with applicable interest in accordance with the provisions of Section 50(1) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017. Thus, the said taxpayer is liable to pay interest under Section 50(1) of the CGST Act, 2017 read with Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017 due to late payment of IGST.

92. As far as imposition of penalty under Section 122(2)(a) and 125 of the CGST Act, 2017 read with Gujarat GST Act, 2017 and Section 20 of the IGST Act, 2017, is concerned, on perusal of the facts of the case and in view of the above discussion, I find that this is a fit case to levy penalty under 122(2)(a) and Section 125 of the CGST Act, 2017 read with Gujarat GST Act, 2017 and Section 20 of the CGST Act, 2017 in view of the foregoing discussions.

93 In view of the above discussion and findings, I pass the following order :-

O R D E R

(i) I confirm the demand of GST amount of **Rs. 1,73,95,32,774/-** (IGST 1,73,95,32,774) (Rupees One Hundred Seventy Three Crore Ninety Five Lakh Thirty Two Thousand Seven Hundred Seventy Four only) under the provisions of Section 73(1) of the CGST Act, 2017 read with the Section 73(1) of the Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017;

(ii) I order to appropriate the GST amount of **Rs. 1,73,95,32,774/-** (IGST 1,73,95,32,774) (Rupees One Hundred Seventy Three Crore Ninety Five Lakh Thirty Two Thousand Seven Hundred Seventy Four only) paid by the said taxpayer against the demand of GST liability as per para (i) above;

(iii) I order to demand and recover Interest at the appropriate rate and order to recover the same from them under Section 50 (1) of the CGST Act,

2017 read with Section 50 (1) of the Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017.

(iv) I impose a penalty of **Rs. 17,39,53,277/-** (Rupees Seventeen Crore Thirty Nine Lakh Fifty Three Thousand Two Hundred Seventy Seven only) under Section 122(2)(a) of the CGST Act, 2017 read with the Section 122(2)(a) of the Gujarat GST Act, 2017 and Section 20 of IGST Act, 2017.

(v) I impose a penalty of **Rs. 50,000/-** (Rs.25,000/- under CGST + Rs.25,000/- under SGST, Rupees Fifty Thousand only) under Section 125 of the CGST Act, 2017 read with the Section 125 of the Gujarat GST Act, 2017 and Section 20 of IGST Act, 2017.

94. Accordingly the Show Cause Notice no. DGGI/INV/GST/3005/2022-Gr I-O/o Pr ADG-DGGI-ZU-Delhi-Part(14) dated 29.09.2023is disposed off.

(Lokesh Damor)
Joint Commissioner,
Central GST & CE.,
Ahmedabad North.

BY RPAD/MAIL
F.No. GST/15-72/OA/2023-24 Dt.21.12.2023

To,
M/s Suzuki Motor Gujarat Pvt Ltd,
(GST No. 24AAUCS5797D2ZP)
Becharaji, Survey No 293, Block No 334 335,
Village Hansalpur, Taluka Mandal,
Ahmedabad, Gujarat - 382130

Copy to:

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. The DC/AC, Central GST & Central Excise, Division-III (Sanand) Ahmedabad North.
3. The Superintendent, Range-II, Division-III, Central GST & Central Excise, Ahmedabad North.
4. State Tax Officer, Ghatak 12 (Ahmedabad), Range – 3, Division – 1, Commercial Tax Office, 3rd Floor, Taluka Seva Sadan, Near Gandhi Hospital, Mandal Road, Viramgam, **with a request to create Form GST DRC-07 electronically in terms of DSR Advisory no.01/2018 dated 26.10.2018 of the ADG, Systems & Data Management, Bengaluru.**
5. Joint Director, Directorate General of GST Intelligence, Delhi Zonal Unit, MTNL Building, Sector 6, Dwarka, New Delhi – 110075.
6. The Superintendent (System), Central GST & Central Excise Ahmedabad North for uploading the order on website.
7. Guard File.